



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2807

Appeal PA08-4

Office of the Public Guardian and Trustee



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NATURE OF THE APPEAL:

The Office of the Public Guardian and Trustee (the OPGT or PGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from a heir tracing company for information relating to a named deceased individual and her spouse.

The OPGT located the responsive records and granted the appellant partial access. The OPGT claimed that disclosure of the withheld information would constitute an unjustified invasion of privacy under the mandatory exemption in section 21(1) of the *Act*.

The requester, now the appellant, appealed the OPGT's decision to this office. The parties were unable to resolve the appeal during mediation and it was transferred to adjudication where an inquiry is conducted to address the appeal.

I decided to commence this inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal to the OPGT, initially. The OPGT provided representations, which were shared in their entirety with the appellant. The OPGT's representations indicate that some of the information contained in the records at issue is non-responsive to the request. Accordingly, this issue was added to the appeal.

The appellant provided representations in response, which were provided to the OPGT. The OPGT was given an opportunity to provide reply representations. The OPGT's reply representations were provided to the appellant, who provided sur-reply representations in response.

RECORDS AT ISSUE:

Record	Description of Record	Withheld Information
1	Proof of Death Certificate	<ul style="list-style-type: none">name, address, logo of the funeral director and name and signature of an employee
2	Document entitled "Heirship Information"	<ul style="list-style-type: none">OPGT's file numberestimated net value of estatedeceased's social insurance number
4	Family tree	<ul style="list-style-type: none">names of individuals who, the OPGT indicate may be the deceased's maternal grandmother or sibling(s) of the deceased's birth motherdate and place of the deceased's burialcitizenship and ethnic information about the deceased's former spouse
5	Document (unnamed)	<ul style="list-style-type: none">information, including names, the OPGT advises is about individuals who may be related to the deceased but whose family connection is unknownname of individual the deceased's mail was delivered in "care of" upon her arrival in Canadaname, residential addresses and occupations including work addresses of an individual the OPGT advises wrote to the deceased

7	Document (unnamed)	• information, including names, the OPGT advises is about individuals who may be related to the deceased but whose family connection is unknown
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DISCUSSION:

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

As mentioned above, the OPGT takes the position that some of the information contained in the records are non-responsive to the request. The OPGT submits that the appellant did not request the entire file, but rather requested specific information. The request states:

Under the [Act] and pursuant to Orders PO-2298 and PO-2590-R please be so kind as to provide us with copies of the Heirship Information and/or other documents (while avoiding duplication) that contain the name, addresses, occupation, place of death and date of death, date of birth, place of birth, age, marital status and the name of the of the parents of [named individual], who passed away on or about [date] without a known will or with a will that is no longer effective because the beneficiaries of the residue of the estate have either pre-deceased the deceased or their whereabouts are unknown and remains unknown as of the date of your response; and where the whereabouts of the closest next-of-kin of the deceased is unknown.

We are also seeking copies of the Heirship Information and/or other documents (while avoiding duplication) that contain the name, addresses, occupation, place of death and date of death, date of birth, place of birth, age, marital status and the name of the parents of the spouse of the above named deceased, if known or presumed to deceased for more than one year from the date of your response.

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

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

assistance in reformulating the request so as to comply with subsection (1).

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

The OPGT's representations state:

The record which was disclosed consists of seven pages from the OPGT's file for the deceased individual's estate. The Appellant did not request the entire file but requested specific information items, 'while avoiding duplication'. This was understood by the OPGT to indicate that one record responsive to each item from the list of information requested, would be sufficient.

The OPGT submits that it located records responsive to the appellant's request for the deceased's name, addresses (at death and throughout the deceased's life), occupation, place of death, date and place of birth, age, marital status, parents' names and spouse's name.

The OPGT also submits that no responsive records were located containing the names, addresses, occupations, place and date of death, place and date of birth, age and marital status of the deceased's spouse's parents.

The OPGT argues that the following information, contained in Records 1, 2, 4, 5, and 7 is not responsive to the request:

- name, address, logo of the funeral director and name and signature of the funeral director's agent contained in Record 1
- OPGT's file number, estimated value of the estate and deceased's social insurance number contained in Record 2
- names of individuals the OPGT indicates may be the deceased's maternal grandmother, siblings and siblings of birth mother, date and place of the deceased's burial and citizenship and ethnic information about the deceased's former spouse contained in Record 4
- information, including names, about individuals who may be related to the deceased but whose family connection is unknown contained in Records 5 and 7.

The appellant argues that the request should be interpreted broadly. The appellant's representations state:

The scope of the request extended to copies of [h]eirship information and/or documents which contained the specific pieces of information. The request was not limited to the specific pieces of information requested but extended to the documents which contained this information as well as any additional [h]eirship information.

...

Essential information was not disclosed to the [the appellant] by the OPGT. In particular, Records 4, 5 and 7 contain important [h]eirship information which is necessary for a Determination of Rights.

The OPGT reply representations submit that interpreting the request broadly, in the circumstances of this appeal, would entitle the appellant "to the entire content of any documents which contained even one piece of other information generally relevant to heirship."

Decision and Analysis

In my view, the request seeks access to specific and general information. On one hand, the request seeks access to specific information relating to the deceased and the deceased's spouse's parents, such as addresses, occupations, place and date of death, age and marital status. However, the request also seeks access to "Heirship Information and/or other documents", thereby potentially broadening the scope of the request.

The OPGT advises that it understood that a search for records responsive to "each item from the list of information requested, would be sufficient." However, the OPGT did not inform the appellant that it felt that its request was ambiguous or contained any other defect regarding the manner in which it was worded, as contemplated in section 24.

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

Having regard to the above principles, I find that most of the information the OPGT has identified as non-responsive, reasonably relates to the request. I find that this information is responsive to the portion of the appellant's request which seeks access to general information, such as "heirship information and other documents". In particular, I am satisfied that the information contained in the records about the funeral director, estimated value of the estate, deceased's social insurance number and the names and other information about individuals who may have a family connection with the deceased reasonably relates to the appellant's request.

The only information I find is non-responsive to the request is the OPGT's file number. In my view, this information does not reasonably relate to the appellant's request for information relating to the OPGT's efforts to locate beneficiaries. Accordingly, this information which is contained on Record 2 is not responsive and may be withheld from the appellant.

I will go on to determine whether disclosure of the remaining information at issue constitutes an unjustified invasion of personal privacy.

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates.

OPGT argues and the appellant agrees that the withheld information contains "personal information".

The OPGT's representations state:

In this appeal, the request was for information about a specific individual who is deceased, and about that person's spouse. Accordingly, all of the records at issue qualify as personal information under the definition in section 2(1)(h), since all of the records contain information about the deceased or spouse, and each record is identified with the name of the deceased or of another person.

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

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

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

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. The request relating to this appeal was filed after April 1, 2007. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity.

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

Decision and Analysis

The term “personal information” is defined in section 2(1). I am satisfied that all of the records contain information which qualifies as the personal information of the deceased and other identifiable individuals. In particular, the records contain information relating to the race, national or ethnic origin, colour, religion, age, sex, or marital or family status of the deceased and other individuals, as defined in section 2(1)(a). The records also contain information relating to the education, medical or employment history of other individuals or information relating to financial transactions in which the deceased has been involved as defined in section 2(1)(b). I am also satisfied that the deceased’s social insurance number constitutes her personal information as defined in section 2(1)(c) of the definition of that term because it is an indentifying number assigned to an identifiable individual. The information relating to the residential addresses withheld pertaining to one individual in Record 5 constitutes this individual’s personal information as defined in section 2(1)(d). Finally, the records include the names of other individuals appearing with other information, such as the time and place of their births and deaths, as well as information speculating about possible family connections to the deceased. I am satisfied that this information qualifies as personal information as defined in section 2(1)(h).

I am satisfied that the above-referenced information constitutes the “personal information” of the deceased and other identifiable individuals.

However, I am not satisfied that the name, address, logo of the funeral director along with the name and signature of an employee contained on Record 1 qualifies as “personal information”. Record 1 is the Proof of Death Certificate prepared by the funeral director. In my view, the withheld information contained in this record solely relates to the funeral director’s business, professional or official capacity. I also find that section 2(2), which provides that personal information does not include information about an individual who has been dead for more than thirty years, applies to information relating to one individual referred to in the records. This information is contained in Record 5 and indicates that the individual died in the 1940’s. In my view, this information cannot be described as constituting “personal information” as over 30 years has passed since this individual’s death. Accordingly, the exemption at section 21(1) cannot apply to this information as it does not constitute “personal information” as described in the definition of that term in section 2(1). As the OPGT has not claimed that any other exemption applies to this information, I will order the OPGT to disclose the above-referenced portions of Record 1 and 5 to the appellant.

I will now go on to determine whether the information I found constitutes the “personal information” of the deceased and other individuals is exempt under section 21(1).

PERSONAL PRIVACY

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.

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

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

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

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

Once a presumed unjustified invasion of personal privacy is established under section 21(3), it cannot be rebutted by one or more factors or circumstances under section 21(2) [*John Doe*, cited above]. If no section 21(3) presumption applies, section 21(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy [Order P-239].

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

Section 21(3) presumptions

The OPGT claims that disclosure of the information contained in the records about the deceased’s social insurance number, the net value of the estate, and the citizenship/ethnic origin of the deceased’s spouse is presumed to be an unjustified invasion of personal privacy under sections 21(3)(e), (f) and (h). In my view, it appears that the presumption at section 21(3)(d) could also apply to certain employment information about an individual referred to in the records. These sections state:

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

- (e) was obtained on a tax return or gathered for the purpose of collecting a tax;
- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- (h) indicates the individual's racial or ethnic origin, sexual orientation or religious or political beliefs or associations.

The appellant did not provide representations addressing the issue of whether the presumptions at sections 21(3)(e), (f) and (h) apply to the information identified by the OPGT.

I have carefully reviewed the information at issue and am satisfied that information relating to the net value of the deceased's estate falls within the section 21(3)(f) presumption [Order PO-2298]. I am also satisfied that the information describing the deceased's spouse's racial or ethnic origin falls within the section 21(3)(h) presumption. Though the OPGT did not raise the possible application of the presumption at section 21(3)(d), I find that this presumption applies to the information contained in Record 5 which identifies the occupations and places of employment of the individual who wrote to the deceased. The information relating to this individual describes his employment history for a period of approximately ten years.

In my view, disclosure of the above-referenced information is presumed to be an unjustified invasion of personal privacy. Accordingly, the information qualifies for exemption under section 21(1).

It is not necessary that I determine whether the presumption at section 21(1)(e) applies to the deceased's social insurance number on Record 2, as I find that this information is exempt under section 21(2).

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

- deceased's social insurance number in Record 2;
- names of individuals who may be the deceased's maternal grandmother, siblings and siblings of birth mother in Record 4
- date and place of the deceased's burial contained in Record 4

- information, including names, about individuals who may be related to the deceased but whose family connection is unknown in Record 5 and 7
- name of an individual to whom the deceased's mail was delivered upon her arrival in Canada in Record 5
- name and residential addresses of individual who wrote to the deceased in Record 5

Section 21(2)

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

The OPGT claims that the factors favouring non-disclosure at sections 21(2)(e) and (g) apply and the appellant claims that the factors favouring disclosure at sections 21(2)(a) and (c) apply. These sections state:

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

- (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Ontario and its agencies to public scrutiny;
- (c) access to the personal information will promote informed choice in the purchase of goods and services;
- (e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;
- (g) the personal information is unlikely to be accurate or reliable;

Both parties also claim that unlisted factors weighing for and against disclosure apply in the circumstances of this appeal.

21(2)(a): public scrutiny

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

The disclosure of information with respect to estates under the OPGT's administration permits the public to monitor its efficiency in dealing with these important matters. More specifically, it permits the public to judge whether

government resources (tax dollars) are being used efficiently and effectively. The criticism of the OPGT's performance contained in the 1999 Report of the Provincial Auditor provides ample evidence that such public scrutiny is necessary and desirable. Beneficiaries are assisted when the prompt, efficient distribution of estates is promoted. The public interest is served when the OPGT is motivated by public scrutiny to minimize the inefficient use of public resources.

In response, the OPGT argues "that there has not been any public interest or recent controversy about either the OPGT's effectiveness in general or the administration of this particular estate. The Auditor General continues to have authority to review the OPGT's performance and does so on an annual basis".

Decision and Analysis

Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purposes outlined in section 21(2)(a) [Order P-256].

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

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

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

21(2)(c): purchase of goods and services

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

Much of the OPGT’s submission suggests that there is something inherently less desirable about a private, for-profit organization assisting beneficiaries of estates than a government agency. What [the appellant] provides, however, is a choice for beneficiaries. Beneficiaries contacted by [the appellant] are free to engage the services of [the appellant], and pay a mutually acceptable fee for such services, or to decline the offer of assistance.

The OPGT submits that this factor does not apply to the circumstances of this appeal.

Decision and Analysis

The appellant made the same argument in Orders PO-2260 and PO-2298. In those Orders, Adjudicator Frank DeVries found that section 21(2)(c) had no application as the “benefits to unknown heirs” unlisted factor already addresses the same concerns raised by the appellant. Adjudicator DeVries also found that the appellant’s evidence that disclosure would provide them with information which would allow them to locate beneficiaries and provide their services failed to demonstrate that disclosure of the personal information at issue will promote an informed choice in the purchase of goods and services.

I adopt Adjudicator’s DeVries approach in this order and find that this section has no application in the circumstances of this appeal. In making my decision, I considered the appellant’s representations and am not satisfied that the appellant’s evidence demonstrates that disclosure will promote informed choice in the purchase of heir tracing services. In any event, I also share Adjudicator DeVries view that the unlisted factor “Benefit to unknown heirs”, which has also been raised in this appeal, addresses the appellant’s concerns.

21(2)(e): pecuniary or other harm

The OPGT takes the position that disclosure of the information contained in Records 4 and 5 may serve to identify the deceased’s siblings or the deceased’s mother’s siblings and that disclosure would unfairly expose these individuals to pecuniary or other harm. The harm the OPGT contemplates is the potential heir tracing fee the appellant may charge the beneficiaries of the deceased’s estate.

The appellant submits that the OPGT’s position has already been rejected in previous decisions from this office. In particular, the appellant’s representations refer to Adjudicator David Goodis’ finding in Order PO-1790-R:

In my view, the PGT has not established that disclosure in accordance with my Order PO-1736 will cause pecuniary or other harm to potential heirs for the purpose of section 21(2)(e) or otherwise under section 21. The PGT admits that “because the [PGT] has legitimate access to the personal papers of the deceased and to various sources of pertinent information, we are in most cases able to locate the heirs and assist them with their documentation, far more quickly than would an heir tracer”. This statement undermines the PGT’s submission that if the information is disclosed in accordance with the order, heir tracers such as the appellant will be able to locate potential heirs sooner than the PGT would, thus resulting in the heirs being charged a greater fee. Further, the PGT indicates that while it had difficulties in the past locating heirs, its “skills and ability to search [for potential heirs] have greatly increased even in the past two years...” I am not persuaded based on the material before me that there is a serious risk of Order PO-1736 resulting in a substantial number of heirs being located by heir tracers who otherwise might have been located first by the PGT.

In addition, the PGT has not satisfied me that the circumstance of an heir tracer locating and seeking a contractual arrangement with a potential heir would constitute pecuniary or other harm. I accept the appellant’s submission that potential heirs are free to either reach an agreement with an heir tracer, or not.

Decision and Analysis

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

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

Having regard to the previous decisions referenced above, I find that section 21(2)(e) has no application in this appeal. In making my decision, I also considered the representations of the parties and am not satisfied that the OPGT’s evidence demonstrates that disclosure of the

information at issue in Records 4 and 5 would unfairly expose the individuals in question to pecuniary or other harm.

21(2)(g): inaccurate or unreliable

The OPGT claims that the factor favouring non-disclosure at section 21(2)(g) applies to the first paragraph of Record 5. Section 21(2)(g) provides that institutions, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether, the personal information is unlikely to be accurate or reliable.

The only evidence the OPGT provides in support of its claim that section 21(2)(g) applies to the information at issue is its statement that the information is “unlikely to be accurate or reliable”.

The appellant submits that this factor does not apply to the circumstances of this appeal.

Decision and Analysis

I find that section 21(2)(g) does not apply in the circumstances of this appeal. In my view, the OPGT’s evidence fails to demonstrate that the first paragraph of Record 5 contains information that is unlikely to be accurate or reliable. Further, I have carefully reviewed the information and find that the information itself does not suggest that it is likely to be inaccurate or unreliable.

Unlisted factors/relevant circumstances

The list of factors under section 21(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 21(2) [Order P-99].

As a preliminary matter, two of the unlisted factors raised by the parties do not apply in the circumstances of this appeal. These factors are the “Protection of privacy as a primary consideration” raised by the OPGT and “Discretion to disclose” raised by the appellant.

With respect to the “Protection of privacy as a primary consideration” factor, the OPGT submits that the purposes of the *Act* as outlined in section 1 weigh in favour of non-disclosure of the information at issue. The specific statutory reference the OPGT relies on is section 1(b). However, the relevant provision of the *Act* highlights that there are competing interests in the disclosure of information and protection of privacy. Section 1, in its entirety, states:

1. The purposes of this Act are,
 - (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,

- (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
- (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Clearly, the *Act* embodies two competing interests - access to information and privacy protection. The purpose provisions contained in the *Act* do not state that privacy protection is more important than access to information, in such a way to override it.

Here, the OPGT claimed that the mandatory exemption at section 21(1) applies to the withheld information. As a result, the issue of whether or not disclosure of the information at issue would constitute an unjustified invasion of personal privacy is an issue in this appeal. In my view, it is not necessary to consider the protection of privacy as an unlisted factor under section 21(2) as the protection of privacy of individuals is already addressed by the mandatory exemption under section 21(1). Accordingly, I will not address this factor further in this order.

With respect to the “Discretion to Disclose” factor, the appellant argues that the OPGT could disclose the withheld information to them, if it chooses. The appellant made two arguments in support of this position.

The appellant’s first argument is that disclosure of the information is permissible under section 42 of the *Act*. However, section 42 does not state that disclosure of the information at issue is permissible. Rather, section 42 provides that generally institutions shall not disclose personal information, except in the specified situations listed in paragraphs (a) to (o). One of the situations contemplated in section 42 is whether or not disclosure would be in accordance with Part II of the *Act*, which includes an analysis as to whether or not disclosure of the personal information would constitute an unjustified invasion of personal privacy under section 21(1). In my view, it is not necessary to consider the possible application of all of the situations in section 42 as the OPGT has already claimed that the information at issue is exempt under section 21(1). Accordingly, I will not discuss the application of section 42 further in this order.

The appellant’s second argument is that the *Public Guardian and Trustee Act* and the *Crown Administration of Estates Act* permits the OPGT to disclose the information at issue to them outside the *Act*. However, this office does not have the authority to order the OPGT to disclose information outside the *Act*. In my view, the fact that the OPGT could potentially disclose the information pursuant to its governing legislation has no relevancy to whether there are factors favouring the disclosure of the same information under the *Act*. As a result, I will not address the appellant’s argument further in this order.

I will now go on to determine whether the unlisted factors “Application of the *Personal Information Protection and Electronic Documents Act*” and “Objection to the disclosure by the Estate Trustee” raised by the OPGT weigh in favour of non-disclosure. I will also determine whether the unlisted factors “Diminished privacy interest after death” and “Benefit to unknown heirs” raised by the appellant weigh in favour of disclosure apply.

Application of the *Personal Information Protection and Electronic Documents Act (PIPEDA)*

The OPGT’s representations state:

The OPGT respectfully submits that the federal *Personal Information Protection and Electronic Documents Act* (*PIPEDA*) which binds the Appellant, should be considered as an “unlisted factor” under section 21(2) ... such that the disclosure of the record would amount to an unjustified invasion of privacy.

Before the coming into force of *PIPEDA*, there were no restrictions on the right of private-sector organizations to collect personal information. *PIPEDA* has now set legislative restrictions on this previously open field. Therefore it is now relevant to consider whether a requester is authorized under *PIPEDA* to collect such personal information. This would be a key factor favouring privacy protection and consideration of such a legislative factor would clearly outweigh disclosure of the records. In this case, the Appellant does not have the consent of the individual or the deceased’s personal representative. None of the other exceptions under section 7(1) of *PIPEDA* apply. Accordingly, the Appellant is prohibited under *PIPEDA* from collecting the requested information.

The appellant does not dispute that it is subject to the disclosure rules under *PIPEDA*. In fact, the appellant argues disclosure of the personal information to it is not equivalent to a disclosure to the public generally, as it is governed by the prohibitions to disclosure of any personal information in its custody under *PIPEDA*.

The appellant provided lengthy representations in support of its position that the application of *PIPEDA* does not apply to the circumstances of this appeal. In the alternative, the appellant argues that disclosure of the records to it would not violate the provisions of *PIPEDA*.

Decision and Analysis

This office has already considered the issue as to whether the existence of *PIPEDA* should be considered as a relevant circumstances under section 21(2). In Reconsideration Order PO-2590-R, Adjudicator DeVries stated:

Although the enactment of *PIPEDA* and its possible application to the appellant may have significant impact on the appellant and the manner in which the appellant conducts its business when dealing with the personal information of

identifiable individuals, the existence of *PIPEDA* is not a relevant unlisted factor or circumstance for me to consider in the context of this appeal.

The PGT submits that this office is required to conduct a review of the possible application of *PIPEDA*, including its application and the possible existence of any exceptions to its application, in circumstances where the requester is a corporate entity. Conversely, the PGT argues that, at a minimum the application of *PIPEDA* is to be reviewed by this office where the “the [appellant’s] ability to collect the personal information is challenged on the grounds of *PIPEDA*”. Once this occurs, the PGT argues that the onus to show that *PIPEDA* does not apply, or that various exceptions apply to the appellant, shifts to the appellant. I do not accept this argument.

In the first place, the provisions of *PIPEDA* provide a comprehensive procedure to determine the application of that legislation in particular instances, and also provides remedies for breaches of the legislation. The Attorney General of Ontario, in its representations on the preliminary issues set out above, confirms that there is no constitutional conflict or overlap between *PIPEDA* and the *Act* in cases where requests for information are made by corporate entities. The legislative schemes are separate, and apply to separate bodies. In addition, the oversight bodies are different, and different remedies apply in circumstances where breaches of the legislative provisions occur.

...

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

In the alternative, if the existence and possible application of *PIPEDA* were to be a relevant factor to consider in the circumstances of this appeal, based on the PGT’s own alternative arguments, I would find that the existence of *PIPEDA* would be a factor favouring disclosure of the requested information to the appellant.

I agree and adopt Adjudicator DeVries’ approach and find that the possible application of *PIPEDA* to the information at issue is not a relevant factor weighing in favour of non-disclosure.

I also agree with Adjudicator DeVries' comments that if this office found that the existence and possible application of *PIPEDA* were to be a relevant factor, it appears that it would be a factor favouring disclosure, taking into consideration that the appellant would be limited in the manner it could deal with any personal information obtained under the *Act*.

Having regard to the above, I find that this factor has no application in the circumstances of this appeal.

Objection to the disclosure by the Estate Trustee

Section 21(1)(a) states:

A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access

The OPGT submits that it acts as the personal representative of the estate as contemplated in section 66(a). This section states:

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

Previous decisions from this office have found that if the requester meets the requirements of section 66(a), then he or she is entitled to have the same access to the personal information of the deceased as the deceased would have had. Accordingly, in those cases the request for access to the personal information of the deceased will be treated as though the request came from the deceased him or herself [Orders M-927 and MO-1315]. Adjudicator DeVries, in Reconsideration Order PO-2590-R points out that these decisions reflect the fact that, in most instances, section 66(a) is relied on by individuals seeking access and, in contrast, the OPGT seeks to rely on it to refuse disclosure.

The OPGT advises that it, as the personal representative of the estate, has decided against providing consent under section 21(1)(a). In other words, the OPGT advises that it is not prepared to consent to the disclosure of any of the deceased's personal information at issue to the appellant. The only information remaining at issue which relates to the deceased is her social insurance number and the place and date of her burial. The OPGT submits that its legal and fiduciary duties to the estate require it to protect the financial interests of the estate and heirs. As a result, it must object to the disclosure of the personal information at issue to the appellant, who may in turn charge fees, payable by the estate, for its services.

The appellant's position is that section 66(a) has no application to the circumstances of its appeal as this section cannot be relied upon to refuse consent. In the alternative, the appellant argues

that disclosure of the personal information at issue would not result in a breach of the OPGT's duties to the estate as it is in the estate's best interest to locate heirs as quickly as possible.

Decision and Analysis

The OPGT also made a number of arguments regarding the applicability of section 66(a) in its reconsideration request of Order PO-2298, which Adjudicator DeVries addressed in Reconsideration Order PO-2590-R. In that Reconsideration Order, Adjudicator DeVries found that the OPGT's position failed for a number of reasons. One of the reasons relates to the determination I am to make in this appeal - whether the OPGT's objection to the disclosure of the deceased's personal information to the appellant is a relevant factor weighing against disclosure. The relevant portion of Adjudicator's DeVries finding in Reconsideration Order PO-2590-R stated:

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

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

I agree with Adjudicator DeVries' conclusion that the OPGT's refusal to grant access to the personal information at issue relates to its role as an institution under the *Act*. Accordingly, I find that this factor has no application to this appeal. In any event, my view is that section 66(a) does not confer on an individual the right to consent to the disclosure of his or her information. Rather, section 66(a) operates to treat requests from personal representatives as though the request came from the deceased him or herself. In other words, section 66(a) confers a right of access to personal representatives. The issue in this appeal is not whether the personal representative should have access to the deceased's personal information. The issue is whether a third party, like the appellant, should have access to the personal information at issue. In my view, the "Objection to the disclosure by the Estate Trustee" factor raised by the OPGT has no application to the circumstances of this appeal as the OPGT's decision to deny the appellant access relates to its role as an institution and does not relate to the administration of the deceased's estate.

Diminished Privacy Interest After Death

Previous decisions from this office have found that this factor is relevant and where more than one year has passed since the date of death, the factor should be attributed moderate weight (See for example Orders PO-1717, PO-1936, PO-2240, PO-2260, PO-2298 and PO-2802-I). In Order PO-2240, Adjudicator DeVries stated:

Assistant Commissioner Mitchinson recently considered whether the “diminished privacy interest after death” factor applies where an individual had been dead for less than 12 months. In Order PO-2240, he first reviewed his findings that there existed a diminished privacy interest after death in PO-1717 and PO-1936. He then stated:

In the current appeal, the deceased died on December 3, 2002, less than four months before the appellant submitted his request to the [PGT] under the *Act*. Although I accept that an individual’s privacy interests begin to diminish at the time of death, four months is too short a period of time for any meaningful diminishment to have occurred. As identified in Order PO-1936, this unlisted factor must be applied with care, taking into account the fact that section 2(2) establishes some degree of privacy interest until 30 years following death. While each case must be assessed on its own facts, and the weight accorded to this unlisted factor will vary according to the length of time an individual has been dead, in my view, it would be inconsistent with the policy intent of section 2(2) to attribute any significant weight to this unlisted factor for at least the first year following death.

I accept the approach taken by Assistant Commissioner Mitchinson in applying the unlisted factor of a “diminished privacy interest after death.” As established in Order PO-2240, I do not attribute any significant weight to this unlisted factor for at least the first year following death.

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

Based on the previous orders of this office, and on the representations of the parties, it is my view that the unlisted factor of a “diminished privacy interest after death” is a factor that applies upon the death of the individual to whom the information relates. However, I find that it is not to be attributed any significant

weight for the first year following death, but that after that time, it should be accorded moderate weight.

The deceased, in this case, passed away in 2006. Accordingly, more than two years have passed since the day of her death. In fact, more than one year had passed since the date of her death at the time the OPGT received the appellant's access request.

The OPGT does not submit that previous orders applying the factor "Diminished privacy after death" are incorrect. Instead, the OPGT acknowledges that the factor has been applied to appeals where the deceased has been dead for over a year but argues that the factor should only apply in exceptional circumstances and that the circumstances of this appeal do not warrant its application. In support of its position, the OPGT states:

... that the 'unlisted' factor of "diminished privacy interest after death" as recently applied by the IPC in Orders PO-2298 and PO-2590-R is clearly distinguishable from the circumstances of this Appeal and those previous Orders cannot reasonably be applied to personal information of an individual who has been dead for only a short period of time. To disclose personal information even further than what has been ordered by Orders P-945, PO-1790-R, PO-2298 and PO-2590-R would be an unreasonable loss of the protection of personal information of deceased persons, and contrary to the clear wording of section 2(2) of the *Act*.

The Public Guardian and Trustee supports the statement of former Assistant Commissioner Irwin Glasberg in Order P-568 in reference to subsection 2(2):

"In my view the wording of [sub]section 2(2) is clear. Personal information will only lose this designation where it pertains to an individual who has been dead for more than 30 years. Where an individual has been dead for less than this time period, any personal information about the individual retains this status."

The appellant submits that it is requesting the disclosure of information that is not highly sensitive and in circumstances where, it has been consistently held, there is a reduction in the privacy interest of the deceased individual. The appellant advised that its position is not that privacy rights are eliminated, but rather diminished. The appellant states that the factor is "merely a factor to be weighed in the determination as to whether disclosure would constitute an unjustified invasion of personal privacy".

Decision and Analysis

In my view, the factor "diminished privacy after death" is a relevant factor favouring disclosure of the deceased's personal information at issue. The only personal information at issue relating to the deceased is her social insurance number and the date and place of her burial. Having regard to the representations of the parties and previous decisions from this office, I find that this

factor should be attributed moderate weight for the date and place of the deceased's burial and no weight to the deceased's social insurance number.

In making my decision, I took into consideration prior decisions from this office that found that this unlisted factor is relevant and should be attributed moderate weight where more than one year has passed since the date of the deceased's death [Orders PO-1717, PO-1936, PO-2240, PO-2260 and PO-2298]. However, I also considered that this office has previously found that an individual's social insurance number is highly sensitive and could lead to the identification of confidential employment and financial personal information [Order PO-2636-I]. I also took into consideration that in Orders PO-1717, PO-2298 and PO-2802-I this office found that disclosure of a deceased's individual's social insurance number would constitute an unjustified invasion of personal privacy.

Given my decision, it is not necessary that I also consider whether the unlisted factor "Benefit to unknown heirs" also applies to the deceased's social insurance number or the date and place of her burial.

Benefit to Unknown Heirs

Previous decisions from this office have found that the unlisted factor "Benefit to unknown heirs" is a consideration weighing in favour of disclosure [See for example: Orders P-1493, PO-1717, PO-1736, PO-2012-R, PO-2260 and PO-2298]

The OPGT does not dispute that the "Benefit to unknown factor" has been previously applied in a section 21(2) analysis. Rather, the OPGT's position is that this office cannot simply "accept an assertion that disclosure of personal information for commercial purposes, *one year after death*, will be of benefit to unknown heirs, without receiving clear evidence in support of that position and ensuring close scrutiny of the truth of the assertions made by the appellant." The OPGT's representations go on to state:

The [Information Privacy Commissioner/Ontario] cannot assume in every case that personal information which otherwise would remain private and confidential, should be disclosed simply because in each case, the appellant asserts that there is a *possibility* of locating rightful heirs. First, that argument assumes that unless the information is disclosed, the heirs would not be found by the OPGT in a timely way. This is incorrect. The early disclosure requested by the Appellant placed the OPGT in a race with a commercial heir tracer to locate the heirs to the estate. However, it is obvious that there is a clear benefit to the estate (and heirs) in only paying \$5,000 or \$10,000 for genealogical research and being found in 18 months, than perhaps being found in 13 months after the deceased's death but paying 50 or 60 percent of a significant estate. In addition, the OPGT's searching services are payable out of the estate, regardless of whether additional costs are payable by a beneficiary who has contracted with an heir tracer.

Secondly, it is unreliable to “apply similar reasoning” of previous Orders to the facts of this case, as the records of the deceased estate vary significantly in each request. Each access request must be considered on its merits and the OPGT is requesting the opportunity to comment on the appellant’s representations in this regard.

The appellant argues that the OPGT’s position is based on its view that it, not heir tracers, should have a first chance to locate heirs. The appellant states that this rationale behind the OPGT’s argument is that the involvement of heir tracers results in “loss and harm to the estate, because of the fee for its services”. The appellant provided extensive evidence, including affidavit evidence, challenging the OPGT’s position. The affidavit evidence provided by the appellant asserts that it has been successful in generating a financial gain for heirs and on numerous occasions has located the rightful heir prior to the OPGT and within two years of the date of death.

The appellant’s representations and affidavit was provided to the OPGT. The OPGT responded that the factor “Benefit to an unknown heir” no longer applies to the circumstances of this appeal as it is now in contact “with the next-of-kin who would appear to be the legal heirs to this estate, subject to documentation completion”.

The appellant responded:

Once again, the OPGT makes an unsubstantiated allegation without details. Having acknowledged that incorrect next of kin are sometimes identified, the OPGT here effectively submits that no such error is possible. In any event the OPGT is not in fact in contact with the correct claimants, the heirs remain unknown and consideration of benefit to those unknown heirs remain unknown and consideration of benefit to those unknown heirs remains a relevant factor.

Decision and Analysis

The OPGT argues that this factor should not apply unless the appellant provides “clear evidence” that disclosure of the information will be a benefit to unknown heirs. In my view, the OPGT is correct, the circumstances of each appeal should be considered on its merits before this office applies similar reasoning applied in other appeals.

After a careful review of the party’s representations along with prior decisions from this office, I am satisfied that the possibility that disclosure of the information may result in rightful heirs being identified and located is a relevant factor favoring disclosure. In making my decision, I took into account the appellant’s evidence that it has in the past successfully located heirs to unclaimed estates. I also took into consideration the OPGT’s evidence that the appellant operates a business in competition with it. Finally, I considered the OPGT’s evidence that the possible application of this factor in this appeal is moot on the basis that it may have located the deceased’s next-of-kin. Not only has the OPGT failed to substantiate this claim, it also failed to demonstrate how it is relevant in the circumstances of this appeal. In my view, evidence that the

OPGT may have located one of the deceased's next-of-kin, does not demonstrate that all of the rightful heirs have been located or that disclosure of the personal information at issue would not result in a benefit to an unknown heir. In any event, at the time the OPGT processed the appellant's request, no next-of-kin had been located and as a result, the OPGT should have considered the possible application of this factor. Having regard to the above, I am satisfied that disclosure of the information at issue might result in individuals successfully proving their entitlement to assets of the estate, and thus is a relevant factor in the circumstances of this appeal.

Turning to the question of weight, as identified in a number of previous orders, the weight of the "benefit to unknown heirs" factor varies according to the extent to which a particular item of personal information assists in the identification of potential heirs (Order PO-2298). In my view, personal information, including the names, about individuals who may have a family connection with the deceased could reasonably be expected to assist in the identification of potential heirs. Accordingly, I attribute high weight to this information. With respect to the remaining information at issue relating to other individuals - the name of the individual whose the deceased's mail was delivered in "care of" and the names and residential address information of an individual who wrote to the deceased, I attribute no weight as I am not satisfied that disclosure of this information would assist the successful location of heirs. In making my decision, I note that neither of the parties provided evidence suggesting that this information would assist the location of the deceased's next of kin. I also took into consideration that this information at issue is over 45 years old and appears that the individuals to whom the information relates were not related to the deceased.

Summary of Findings and Balancing of the Section 21(2) Factors

I found that the listed factors at sections 21(2)(a), (c), (e) and (g) did not apply to the circumstances of this appeal.

With respect to the unlisted factors raised by the parties I found that the factors "Objection to the disclosure by the Estate Trustee" and "Application of the *Personal Information Protection and Electronic Documents Act*" raised by the OPGT have no application to this appeal. However, I found that the factors "Diminished privacy after death" and "Benefit to unknown heirs" applied in the circumstances of this appeal. Taking into consideration the representations of the parties and previous decisions from this office, I attributed the following weight to the unlisted factors I found apply:

- *Diminished privacy interest after death* - favours disclosure - moderate weight for personal information relating to the deceased's place and date of burial; no weight for the deceased's social insurance number
- *Benefit to unknown heirs* - favours disclosure - high weight for personal information about individuals who have or may have a family connection to the deceased; no weight for personal information relating to the name of the

individual whose the deceased's mail was delivered in "care of" and the name and residential address information of an individual who wrote to the deceased

As I found that none of the listed or unlisted factors weighing in favour of privacy protection raised by the OPGT apply, I find that disclosure of the information I attributed high or moderate weight would not constitute an unjustified invasion of the privacy of the deceased or other individuals who may be related to the deceased within the meaning of section 21(1)(f). Accordingly, this information is not exempt under section 21(1) and should be disclosed to the appellant.

However, I find that disclosure of the deceased's social insurance number, name of the individual whose the deceased's mail was delivered "in care of" and the name and residential address information of an individual who wrote to the deceased would constitute an unjustified invasion of personal privacy under section 21(1) and thus qualifies for exemption.

I also found that disclosure of information describing the net value of the deceased's estate, her spouse's racial or ethnic origin or information describing another individual's employment history is presumed to constitute an unjustified invasion of personal privacy under sections 21(3)(a), (f) and (h). As a result, this information also qualifies for exemption under section 21(1).

ORDER:

1. I order the OPGT to disclose the portions of the records that are not exempt under the *Act* by **September 1, 2009** but not before **August 27, 2009**. For the sake of clarity, I have highlighted the portions of the records that should **not** be disclosed in the copy of the records enclosed with this Order to the OPGT.
2. I uphold the OPGT's decision to withhold the remaining portions of the records.
3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by the OPGT pursuant to order provision 1 to be provided to me.

Original Signed by: _____
Jennifer James
Adjudicator

July 24, 2009