



Information and Privacy
Commissioner/Ontario

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

INTERIM ORDER PO-1778-I

Appeal PA-990347-1

Office of the Public Guardian & Trustee



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NATURE OF THE APPEAL:

The appellant made a request to the Office of the Public Guardian and Trustee (the PGT) under the Freedom of Information and Protection of Privacy Act (the Act) for all documentation held by its offices pertaining to the estate of his father and the appellant's role as executor of the estate.

The PGT issued three separate decisions to the appellant granting access to some records and denying access to other records pursuant to sections 14(2)(a), 19, 21, 49(a) and 49(b) of the Act.

The appellant appealed the PGT's denial of access.

During mediation, sections 66(a) and 24 were raised as issues in this appeal.

I sent a Notice of Inquiry initially to the PGT and to one individual referred to in the records (the affected person) as she may have an interest in the appeal. In response, only the PGT submitted representations to this office.

ISSUE:

The PGT's submissions consisted of two documents entitled "Public Submissions" and "Confidential Facts and Evidence". The PGT consented to the first document being shared with the appellant, but asked me to withhold the second document from him. The purpose of this interim order is to rule on the PGT's request to withhold its "Confidential Facts and Evidence".

DISCUSSION:

Sharing of representations procedure

In the Notice of Inquiry cover letter to the PGT, I stated:

The representations you provide to this office may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

The *Inquiry Procedure* document states:

In its representations, the first party must indicate clearly, and in detail:

- which information in its representations, if any, the party wishes the Adjudicator to withhold from the second party; and
- its reasons for this request (see confidentiality criteria below).

The document later sets out the criteria for withholding representations, as follows:

The Adjudicator may withhold information contained in a party's representations where:

- (a) disclosure of the information would reveal the substance of a record claimed to be exempt or excluded;
- (b) the information would be exempt if contained in a record subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*; or
- (c) the information should not be disclosed to the other party for another reason.

For the purposes of paragraph (c) above, the Adjudicator will apply the following test:

- (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party; and
- (ii) confidentiality must be essential to the full and satisfactory maintenance of the relation between the IPC and the party; and
- (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
- (iv) the injury to the relation that would result from the disclosure of the information would be greater than the benefit thereby gained for the correct disposal of the litigation.

The PGT's confidentiality request

The PGT addressed the confidentiality of representations issue with respect to the document entitled "Confidential Facts and Evidence" as follows:

The enclosed submission of "Confidential Facts and Evidence" is for the Information and Privacy Commissioner's (hereinafter IPC) use only and in accordance with Subsection 55(1) of the *Freedom of Information and Protection of Privacy Act*, may not be disclosed to the appellant or affected parties. If, however, the IPC nevertheless intends to disclose part of or all of the enclosed, despite Subsection 55(1), the Public Guardian and Trustee hereby requires that notice be given to her prior to that disclosure, and that she be given a reasonable opportunity to make submissions as to why it should not be disclosed.

Findings

Based on the *Inquiry Procedure* document, parties are not permitted a further opportunity to make submissions on the sharing of representations issue, barring exceptional circumstances. The opportunity to do so is provided at the time the original representations are made. There are no exceptional circumstances which would take this case outside the norm. As a result, this interim order shall constitute my decision on this issue, and I will not be providing the PGT with an additional opportunity to make submissions in this regard.

Having reviewed the representations in their entirety and the confidentiality request as set out above, I find that with one exception, the information in the "Confidential Facts and Evidence" document does not fit within any of the confidentiality criteria.

The PGT's generalized claim of confidentiality is insufficient to establish a basis for my withholding these portions of the representations. The PGT has not provided any information which would support the application of the criteria in paragraphs (a), (b) or (c), and the representations do not on their face contain any indication that the portions of the "Confidential Facts and Evidence" which are not highlighted on the copies of these documents that I have attached to the PGT's copy of this interim order would disclose or reveal the substance of a record, would be exempt or would be otherwise confidential in nature. Further, much of the information in the representations is already within the knowledge of the appellant, for example, the background information in the "Confidential Facts and Evidence", which describe the role of the PGT, its involvement with the appellant's father as well as the involvement of the appellant in this matter.

I find that much of the information which I have decided to disclose to the appellant consists of generalized references to the records at issue that do not go so far as to reveal the substance of the records claimed to be exempt. The remainder of the information to be disclosed is either in the nature of additional background information which on its face is of a non-confidential nature or which consists of submissions of law and/or argument.

In comparing the "Confidential Facts and Evidence" and the "Public Submissions", I note that large amounts of information from the Public Submissions have been replicated in identical or similar form in the Confidential submissions. In order to provide for the continuity of the arguments and to facilitate reading comprehension of the Confidential portions of the representations which I am disclosing, I have decided to disclose these portions of the Confidential representations as well as they clearly do not fit within any of the confidentiality criteria.

In its "Public Submissions", the PGT refers to the individuals involved in the matter as "appellant" and "deceased". In its "Confidential Facts and Evidence", however, it refers to these individuals by their names. I have decided to withhold all references to the names of individuals referred to in the "Confidential Facts and Evidence" even though the identities of all of these individuals are already known to the appellant since to disclose this information may constitute an unjustified invasion of personal privacy if it were contained in a record.

In the future, I would encourage the PGT to use pseudonyms whenever possible when referring to individuals in both its confidential and non-confidential representations.

To the extent that the PGT's position appears to be based on the Commissioner's lack of authority to make a decision to share the representations of one party with another, I would draw the PGT's attention to the reasons of Mr. Justice Cosgrove in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, 1999), Toronto Doc. 103/98 (Ont. Div. Ct.) in an order granting the Commissioner's sealing order as asked. In refusing to extend the sealing order to the Ministry's non-confidential representations in that case (and four others heard at the same time), Mr. Justice Cosgrove said:

I have engaged counsel in discussions on sections 52(13) and [55(1)] of the Act. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the Act does not warrant the sealing of the representations.

....

This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.

It is clear that the Divisional Court does not consider that section 55(1) has the effect on the confidentiality of the representations in the matter before me as advanced in the PGT's submissions, and that the court agreed that decisions on the confidentiality of representations should be made by the Commissioner.

For the above reasons, I have decided that the portions of the PGT's "Confidential Facts and Evidence" which have not been highlighted should be shared with the appellant. The portions of the "Confidential Facts and Evidence" which I have highlighted in yellow on the copies that I am providing to the PGT with a copy of this interim order will not be shared with the appellant due to confidentiality concerns.

Procedure

I have attached to the copy of this interim order which is being sent to the PGT's Freedom of Information and Privacy Co-ordinator, a copy of the "Confidential Facts and Evidence" in the form in which they will be sent to the appellant. I intend to send the non-highlighted material to the appellant as well as its "Public Submissions", together with a Notice of Inquiry, no earlier than **May 18, 2000**.

Original signed by: _____
Laurel Cropley

_____ May 4, 2000

Adjudicator