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

ORDER PO-2011

Appeal PA-010283-1

Public Guardian and Trustee

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BACKGROUND:

The Office of the Public Guardian and Trustee (PGT) is responsible for, among other things, dealing with the assets of corporations that have been dissolved. When an Ontario corporation is dissolved and owns assets on the date it ceases to exist, the company's assets are forfeited to the Crown. Persons having a claim to these assets can apply for relief from forfeiture, pursuant to the *Escheats Act*.

In the circumstances of this appeal, the company, at the time of its dissolution, had shareholders that it could not locate. The assets to which these shareholders were entitled were paid to the PGT and held in trust for them.

Certain individuals and organizations are in the business of identifying and locating persons having a claim to the assets of dissolved corporations whose assets have forfeited to the Crown. They do so, in part, by seeking information held by the PGT.

NATURE OF THE APPEAL:

The PGT received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information held by the PGT about the shareholders of a company that had been dissolved. The request included information about:

1. The names of the 38 shareholders whose whereabouts has not been determined;
2. The number of shares outstanding in total for these 38 shareholders;
3. The average number of shares outstanding for each of these 38 shareholders;
4. A list of those shareholders, of the 38 shareholders whose whereabouts has not been determined, who own more than the average number of shares;
5. A list of those shareholders, of the 38 shareholders whose whereabouts has not been determined, who own more than twice the average number of shares;
6. A list of those shareholders, of the 38 shareholders whose whereabouts has not been determined, who own more than three times the average number of shares;
7. A list of those shareholders, of the 38 shareholders whose whereabouts has not been determined, who own more than four times the average number of shares;
8. A list of those shareholders, of the 38 shareholders whose whereabouts has not been determined, who own more than 5 times the average number of shares, and so on and so forth until such a list only contains the name of one remaining shareholder.

The PGT identified one record as responsive to the request and denied access to it, relying on section 21(1) of the *Act* (invasion of privacy). The requester, now the appellant, appealed this decision.

During the mediation stage of the appeal, the appellant agreed to limit the scope of his request to the names of the 38 shareholders (item 1).

I initially sent a Notice of Inquiry setting out the issues in this appeal to the PGT and received representations in response. I then sent a Notice together with the PGT's representations to the appellant who also provided submissions.

DISCUSSION:

PERSONAL INFORMATION

Introduction

Under section 2(1) of the *Act*, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including 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 (paragraph (h)).

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

Submissions of the PGT

The PGT submits that "disclosure of any name [from the record] would reveal that that individual holds at least one share of a certain now-dissolved Ontario corporation" and would reveal "personal information … about that individual's finances, financial activities, assets and financial history".

Regarding section 2(2), the PGT submits that "it is not known if any of the 38 shareholders whose names appear in the record are alive or dead, or if dead, have been deceased for less than thirty years".

The PGT also submits that there is no evidence that any of the named shareholders were employees or officers of the organization and were acting in a business or professional capacity or that the shareholders were holding the share in trust for a corporate entity and the information could be categorized as "corporate information" rather than "personal information".

Submissions of the appellant

The appellant disagrees with the PGT that the shareholders' names meet the definition of personal information under subsection 2(1) of the *Act* since the "information does not reveal any tangible fact associated with the name as we have not been provided with the value of one share; thus no financial information is being revealed, nor the total value of outstanding shares".

With respect to the provision in subsection 2(2) referred to above, the appellant submits that "given that the company for which names of missing shareholders are being sought was founded in 1928, it is likely that the shareholders on the six-page list, being held by the [PGT], have been deceased for a period of more than thirty years". He further contends that "if the [PGT] is asserting that the record should not be disclosed, it should be required to ascertain with proof that the shareholders have been dead for a period of less than thirty years".

The appellant also refers to Order P-427 where the information requested was "in each individual's professional or business capacity" and therefore ordered disclosed and Order P-257 where "corporate officers' names … were more accurately described as 'corporate information' and were released".

Analysis

Three entries in the list of shareholders are names of corporations and not individuals. Information relating to these three corporate shareholders does not relate to any identifiable individuals and therefore cannot qualify as "personal information" under the section 2(1) definition. Therefore, this information cannot be exempt under section 21. As no other exemptions have been claimed for this information, it should be disclosed to the appellant.

However, I am satisfied that the remaining individuals named in the record hold shares in the company in a personal capacity. In addition, I am persuaded that disclosure of these names in the circumstances would reveal information "about" these individuals, within the meaning of paragraph (h) of the definition of "personal information". Specifically, disclosure of the individuals' names would reveal the fact that, in the PGT's words, they hold at least one share of a certain now-dissolved Ontario corporation.

As noted, the appellant submits that the PGT is required to prove that the individuals named in the record have *not* been deceased for more than thirty years. Section 53 speaks to the burden of proof under the *Act*, and reads:

> Where a head [of an institution] refuses access to a record or part of a record, the burden of proof that the record or part falls within one of the specified exemptions in this Act lies upon the head [of the institution].

The PGT operates within the Ministry of the Attorney General's Family Justice Services Division. In this case, section 53 places the burden of proving the application of an exemption on the head, the Attorney General for Ontario.

One of the constituent elements of the exemption at section 21(1) of the *Act* is that the information must be "personal information". On this basis, it might appear that the appellant's submission on this issue is well-founded, but the law of evidence indicates otherwise. The burden on the prosecution in a criminal case is even more onerous and all-encompassing than the onus in section 53, given the presumption of innocence and the Crown's obligation to prove guilt beyond a reasonable doubt. But even in that arena, the Crown is not required to disprove

exceptions that may provide a defence. This point is clarified in *Evidence in the Litigation Process* (Master ed.) by Stanley Schiff (Toronto: Carswell, 1993), as follows (at page 1583):

> While the Crown at common law bears the burden throughout of persuading the trier of fact that the accused person is guilty of the offence charged, this burden does not require that to obtain a conviction the Crown must persuade the trier of the non-existence of all facts underlying all possible legal justifications even absent evidence concerning one or more of them.

While this provides a sufficient basis for rejecting the appellant's submission on section 2(2), further authority is found in the judicial interpretation of onus with respect to the elements of the "personal privacy" exemption in the federal *Access to Information Act*. That exemption, as well as the definition of "personal information" and the section assigning "onus" to the institution, are quite similar to the corresponding provisions in the *Act*. In *Canadian Jewish Congress v. Canada (Minister of Employment and Immigration)*, [1996] 1 F.C. 268 (T.D.), Heald D.J. states:

> As section 48 of the Act clearly puts the onus on the party who is refusing to disclose information to establish that he/she is authorized to do so, the burden is thus on the [Minister] to establish that the information requested falls within the definition of "personal information" set out in section 3 of the *Privacy Act*.
>
> . . . . .
>
> *If the [Minister] is successful in establishing that the information requested is personal information, and if the [requester] has not established that the information is excepted from this definition, then pursuant to subsection 19(1), the Minister shall refuse to disclose the information.* [emphasis added]

Based on these authorities, I have concluded that the appellant bears the onus of proving an exception to the definition of personal information, which has not been met in this case. I therefore find that section 2(2) does not apply, and the names of individuals that are at issue qualify as their personal information under section (h) of the definition in section 2(1).

INVASION OF PRIVACY

Introduction

When it has been determined that a record contains personal information of individuals other than the appellant, section 21(1) of the *Act* prohibits the disclosure of this information unless one of the exceptions in paragraphs 21(a) through (f) applies. Specifically, section 21(1)(f) states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 21(2) provides some criteria for the institution to consider in making this determination; section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy; and section 21(4) refers to certain types of information the disclosure of which does not constitute an unjustified invasion of personal privacy. The Divisional Court has stated that once a presumption against disclosure has been established, it cannot be rebutted by either one or a combination of the factors set out in 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767).

Section 21(3)(f) presumption

The PGT relies on the presumption in section 21(3)(f) which states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy where the personal information,
>
> > describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The PGT submits:

> Disclosure of the personal information sought by the appellant is presumed to constitute an unjustified invasion of personal privacy as the personal information describes an individual's finances, assets, net worth, financial history or activities, as contemplated in clause 21(3)(f) of the *Act*. In particular, knowing that the request involves a certain dissolved corporation and missing shareholders of that corporation, the disclosure of the name of one such shareholder reveals that that person is or was, if now deceased, a shareholder of that particular now-dissolved corporation, and that he or she engaged in a certain financial activity, and that he or she now has a certain financial history, i.e. having acquired at least one share of the now-dissolved corporation.

The appellant submits:

> The information does not reveal any tangible fact associated with the name as we have not been provided with the value of one share; thus no financial information is being revealed, nor the total value of outstanding shares.

As I found above, disclosure of individuals' names would reveal the fact that each individual holds at least one share of a certain now-dissolved Ontario corporation. While I accept that, generally speaking, this information relates to an asset of the individual, it is too vague and generalized to qualify as a "description" of the individual's assets, finances, financial history or activities. In my view, to qualify under this section, the information must be more specific, and must reveal, for example, the dollar value or size (in this case number of shares) of the asset in

question. In the circumstances of this appeal, the appellant would have no way of determining whether the individual's shares are worth a few cents, or many thousands of dollars, or some amount in between. Therefore, I find that section 21(3)(f) does not apply.

Section 21(2) factors

The PGT relies on the following factors weighing against disclosure:

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

The appellant believes the following factors apply and weigh in favour of disclosure:

> (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;
>
> (g) the personal information is unlikely to be accurate or reliable;

In addition, the appellant believes that the following unlisted factor applies and weighs in favour of disclosure: "benefit to unlocated shareholders or unknown heirs".

Unlisted factor – benefit to unlocated shareholders or unknown heirs

The appellant submits:

> [The appellant] was formed in 1993 for the sole purpose of assisting beneficiaries with the recovery of unclaimed property. The company has assisted beneficiaries throughout the world with the recovery of unclaimed bank balances; estates; expropriated land and buildings taken from victims of the Holocaust; Nazi looted art and other assets seized by various governments during WWII and other times of political upheaval.

The Assistant Commissioner in Order PO-1717 stated the following in the context of a request to the PGT by an heir tracer for information to assist in locating heirs to estates:

> The appellant identifies another unlisted factor. He submits that disclosure of the requested information pertaining to the deceased's estate will help unknown heirs recover funds that they would otherwise be unlikely to receive. I considered this factor in Order P-1493, involving a request by an heir tracer to the Ministry of

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

Senior Adjudicator David Goodis adopted this reasoning, in similar circumstances, in his Order 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.).]

I adopt the approach taken by the Assistant Commissioner and the Senior Adjudicator in the above orders, and similarly find that the potential for disclosure of the information at issue to lead to individuals (either the shareholders or their heirs) being located and claiming entitlement to shares of the dissolved company is a factor of moderate to high weight in favour of disclosure.

Section 21(2)(e) – unfair exposure to pecuniary or other harm

The PGT submits that disclosure might result in pecuniary harm to the shareholders since the appellant will charge a percentage fee for his services, while the PGT does not charge fees for redemptions unless specifically authorized by the trust agreement or otherwise by law.

The appellant argues that it provides a valuable service to its clients that results in shareholders or heirs receiving their rightful share of unclaimed property and that it is the non-disclosure of information that will "subject the shareholders or their heirs to pecuniary harm".

In Order PO-1790-R (a reconsideration of Order PO-1736, cited above), Senior Adjudicator David Goodis was faced with a similar argument in similar circumstances. He held, in part, as follows:

> . . . 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. While it may be that in some cases heir tracers have been known to mislead potential heirs during the course of contractual discussions, I do not have sufficient material before me on which to reach a conclusion that this is a significant risk. In any event, potential heirs who contract with heir tracers based on, for example, duress or misrepresentation, may seek remedies in the courts based on contract law.

I agree with this reasoning, and given the similarity between an heir tracer being paid for locating heirs so they can claim an inheritance, and the appellant's business of locating shareholders in dissolved corporations so they can receive their share of the assets, I have decided it applies in the circumstances of this appeal. [Order PO-1790-R was upheld by the court in the same judgment respecting Order PO-1736, cited above.]

In light of the above, and based on the material before me, I do not accept that the section 21(2)(e) factor is applicable to the information at issue.

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

The PGT submits that an expectation of confidentiality can be inferred from the applicability of section 18 of the *Public Guardian and Trustee Act* at the time the private trust agreement was entered into, while the appellant states that there is no evidence to indicate that the information was supplied in confidence.

To satisfy the requirements for this section, the information has to be supplied to the institution by the individual to whom the information relates. In this appeal, the shareholders did not supply the information at issue to the PGT. The PGT obtained the information from another branch of the government through a process that was mandated by statute. In the circumstances, I find that section 21(2)(h) does not apply.

Analysis of factors

I have found that none of the listed factors that the PGT relies on applies, and that the unlisted factor, "benefit to unlocated shareholders or unknown heirs" is a relevant consideration favouring disclosure, and I assigned it a moderate to high weight.

In the circumstances of this appeal, disclosure of the names of the shareholders will reveal nothing more than the fact that a particular individual is a shareholder in a dissolved Ontario corporation. Accordingly, I find that the privacy interest inherent in this information is low (Orders 71, P-1187, PO-1736). It is also significant to note that, unlike in the previous orders involving estates, it may well be that the individual whose privacy is at stake may also stand to benefit from being located, a fact which further diminishes the privacy concern. Overall, I find that the factor favouring disclosure in these circumstances outweighs the relatively low privacy interest and, therefore, I conclude that disclosure of the names would not constitute an unjustified invasion of personal privacy under section 21(1)(f) of the *Act*. Therefore, the names are not exempt under section 21. In the circumstances, it is not necessary for me to consider the applicability of the additional factors the appellant relies on in favour of disclosure.

ORDER:

1. I order the PGT to disclose the names of the shareholders listed in the record to the appellant no later than **May 29, 2002**, but not earlier than **May 24, 2002**.

2. In order to verify compliance with this order, I reserve the right to require the PGT to provide me with a copy of the material disclosed to the appellant in accordance with provision 2 of this order.

Original signed by:_____ April 24, 2002
Dawn Maruno
Adjudicator