



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

# **FINAL ORDER PO-2841-F**

**Appeal PA07-307**

**Office of the Public Guardian and Trustee**



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## **NATURE OF THE APPEAL:**

This Final Order disposes of the remaining issues in Appeal Number PA07-307. It follows my Interim Order PO-2802-I in this same appeal, issued on July 3, 2009.

## **BACKGROUND AND NATURE OF THE APPEAL:**

The Office of the Public Guardian and Trustee (the PGT) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the copy of a file related to the estate of an identified deceased individual. The request was filed by an individual on behalf of his grandmother, the sister of the deceased individual, pursuant to a Power of Attorney.

In order to effectively process the appeal, I divided the records into two categories. The first category (Category One) was records that contained the personal information of the deceased and other identifiable individuals, but did not contain the personal information of the appellant or his grandmother. The second category (Category Two) consisted of records that contained the personal information of the deceased and/or other identifiable individuals, as well as the appellant or his grandmother. Included in this category are letters to and from counsel that was acting for the appellant's grandmother. I further divided all the records into a variety of sub-categories as set out in my interim order.

After conducting an inquiry and receiving representations from the PGT and the appellant, I issued Interim Order PO-2802-I. I found that certain information the PGT withheld did not qualify for exemption and I ordered the PGT to disclose this information. I also upheld the PGT's decision to withhold access to certain other information.

As set out in my interim order, I was not persuaded that the PGT had adequately exercised its discretion in applying the section 49(a) or (b) exemptions to the Category Two records that I did not order to be disclosed to the appellant. Accordingly, I included a provision in my interim order requiring the PGT to exercise its discretion with respect to those records.

In addition, I advised the parties that I would also await the results of the PGT's exercise of discretion before making a determination on the application of the "absurd result principle" to certain records, addressed in more detail below. I also indicated that before I rendered my final decision on the issue, I may decide to ask the parties for further submissions.

## **RECORDS STILL REMAINING AT ISSUE**

After Interim Order PO-2802-I was issued, the PGT decided that, in light of certain of my determinations in the interim order, further information could be disclosed to the appellant. In particular, as set out in its supplementary decision letter, the PGT decided that pages 126 and 175 would be released in a severed version and pages 127, 172, 176, 258, 261, 262, 263, 266, 267, 269, 270, 341 to 343, 513 to 524, 561 and 565, would be disclosed in full.

As a result of my interim order and the PGT's supplementary decision letter, only the withheld portions of the following Category Two records still remain at issue in the appeal: pages 20

(duplicated by 159 and 335), 40 (duplicated by 121 and 297), 41 (duplicated by 120 and 296), 126 (duplicated by 302), 175 (duplicated by 187, 349 and 361) and 241.

## **FURTHER REPRESENTATIONS SOUGHT**

In accordance with the provisions of Interim Order PO-2082-I, I sent a letter to the parties inviting their further representations on the issue of whether the absurd result principle should be applied to the withheld portions of pages 20 (duplicated by 159 and 335), 40 (duplicated by 121 and 297) and 41 (duplicated by 120 and 296), which are letters from the PGT to a solicitor acting for the appellant's grandmother.

In the letter I drew the parties' attention to the decision of then Inquiry Officer John Higgins in Order M-371, where in the context of addressing an issue pertaining to an institution's custody and control of a record, he wrote:

In my view, records in the custody of a solicitor which are the property of a client may be said to be under the client's control for the purposes of the *Act* (Order M-315). Several legal authorities are relevant to the issue of ownership of client records in the custody of solicitors.

For instance, section 6(6) of the *Solicitors' Act*, R.S.O. 1990, c. S15, indicates that, in proceedings relating to solicitors' accounts, documents which belong to the client must be dealt with as the client instructs, upon payment of all outstanding fees. That section states as follows:

Upon payment by the client or other person of what, if anything, appears to be due to the solicitor, or if nothing is found to be due to the solicitor, the solicitor, if required, **shall** deliver to the client or other person, or as the client or other person directs, all deeds, books, papers and writings in the solicitor's possession, custody or power **belonging** to the client. (emphasis added in original)

In addition, this issue is addressed in a more general way in *Aggio v. Rosenberg et al.* (1981) C.P.C. 7, where the court quotes with approval from a text entitled *The Law Relating to Solicitors* (6th edition) by Cordery [now appearing in substantially the same form at pages 89 to 90 of the 8<sup>th</sup> edition].

The court reproduced the following excerpts from that textbook relating to ownership of solicitors' records:

Documents in existence before the retainer commences and sent to the solicitor by the client or by a third party during the currency of the retainer present no difficulty since their ownership must be readily apparent. The solicitor holds them as agent

for and on behalf of the client or third party, and on the termination of the retainer must dispose of them (subject to any lien he may have for unpaid costs ...) as the client or third party may direct.

Documents which only come into existence during the currency of the retainer and for the purpose of business transacted by the solicitor pursuant to the retainer, fall into four broad categories:

(i) Documents prepared by the solicitor for the benefit of the client and which may be said to have been paid for [by] the client, **belong to the client.**

(ii) Documents prepared by the solicitor for his own benefit or protection, the preparation of which is not regarded as an item chargeable against the client, belong to the solicitor.

(iii) Documents sent by the client to the solicitor during the course of the retainer, the property in which was intended at the date of despatch to pass from the client to the solicitor, e.g., letters, belong to the solicitor.

(iv) Documents prepared by a third party during the course of the retainer and sent to the solicitor (other than at the solicitor's expense), e.g., letters, **belong to the client.** [emphasis added in original quote]

Based upon the evidence presented to me, I find that, in the circumstances of this appeal, it is the principles enunciated in the *Aggio* case, above, rather than the “policy” formulated by the solicitor's firm, which determines ownership of records in the solicitor's custody. Accordingly, it will be necessary to assess the responsive records in the solicitor's custody to determine whether, in view of the foregoing criteria, they belong to the Village. Records which belong to the Village are under its control for the purposes of section 4(1) of the [*Municipal Freedom of Information and Protection of Privacy*] Act.

I pointed out that the excerpt from *Cordery* has been consistently referred to and applied in Ontario [See in that regard, *Re Canadian Triton International Ltd.*, 1998 CanLii 14902 (Ont. S.C.), *Grillo v. D'Angela*, 2009 CanLii 7 (Ont. S.C.) and Order MO-2150-I] and posed the following question:

As the withheld information is found in letters to the solicitor for the appellant's grandmother, in all the circumstances, would it be absurd to withhold it from the appellant, who is entitled to exercise the rights of access of his grandmother under section 66(b) of the *Act*?

Both the PGT and the appellant provided responding representations.

## **THE REPRESENTATIONS OF THE PGT AND THE APPELLANT**

### ***Representations on the Exercise of Discretion***

#### *The PGT's Initial Representations*

In the course of the adjudication leading up to the issuance of the interim order, the PGT made the following submissions on the exercise of its discretion:

- it has responded to additional specific questions posed by the appellant, in an effort to address any concerns about how the estate was administered;
- it properly exercised its discretion in its many attempts to accommodate the appellant and his grandmother's concerns about the administration of the estate, as "it appeared that they did not have confidence in the legal advice they received from their original legal counsel in Ontario";
- the only information that remains withheld relates to private information about the deceased which is irrelevant to any concerns about possible wrong-doing by the PGT, or personal information about a third party individual whose privacy must be protected.

#### *The PGT's Decision Letter Following the Interim Order*

In the supplementary decision letter provided by the PGT to this office after my interim order was issued, it advised that in exercising its discretion to disclose the records, in whole or in part, it considered that:

- information about the requester's counsel was considered to be information about the requester;
- the requester's authority to act on behalf of the estate has been clarified;
- a considerable amount of similar or identical information about the administration of the estate has either been voluntarily disclosed by the PGT or has been ordered disclosed in my interim order;
- the disclosed information is not otherwise subject to exemption by any other provision of section 49 of the *Act*;

- that much, if not all of the information, could be accessed by an heir in a passing of estate accounts before the court.

The PGT further submitted that in exercising its discretion to withhold portions of Records 126 and 175, it considered the following:

- the names of the designated beneficiaries of a life insurance policy and a RIF were ordered withheld in the interim Order, upholding the PGT's argument that disclosure would constitute an unjustified invasion of another individual's personal privacy;
- disclosure of the information may cause "significant personal distress" to that third party, and that this factor was considered relevant by the Adjudicator (at pages 25 and 26 of the Interim Order).

*The PGT's Supplementary Representations Following the Interim Order*

In response to my request for further submissions following my Interim Order, the PGT submitted that it incorporated the considerations referenced above with respect to the withheld portions of Records 126 and 175, when exercising its discretion to withhold portions of pages 20 (duplicated by 159 and 335), 40 (duplicated by 121 and 297) and 41 (duplicated by 120 and 296). The PGT also listed certain other considerations, but asked that they remain confidential.

***Representations on Absurd Result***

With respect to the application of the "absurd result" principle, the PGT submitted that:

The issue is whether it would be an "absurd result" to sever the names of the two individuals if in fact the names have been disclosed to the solicitor acting for the beneficiary of the estate, who is represented by the appellant/requester under a Power of Attorney.

In support of its position that the "absurd result" principle did not apply, the PGT makes the following non-confidential submissions:

- the letters at issue refer to two individuals: one who was a beneficiary of a small insurance policy and the other the beneficiary of a registered retirement fund. Both assets fell outside the estate.
- the identity of the named individual is not a matter of public record.
- as estate trustee, the PGT was not required to disclose the detailed information about them. However as estate trustee, the PGT had discretion to disclose the information which was provided in good faith in order to support a full explanation for the reduction in the value of the estate.

- the provisions of the *Act* do not relieve the PGT from the obligation to fully account for the estate trustee's activities.
- it was "in the interests of communications and the administration of the estate that the heir's legal counsel be able to advise his client that he was satisfied with the reason provided." It was not contemplated that there could be possible distress to the named beneficiaries caused by the disclosure of the information.

The PGT also refers to other considerations, but asks that they remain confidential.

### *The Appellant's Representations*

In response to my invitation for submissions on the application of the "absurd result" principle, the appellant submits:

The main purpose of my appeal was to get all available and full information with regard to the estate of my relative. I did not get, in my opinion, that information, and I know that some facts were withheld from me from the beginning.

As indicated in your letter, on page 3, if "...*the withheld information is found in letters to the solicitor for the appellant's grandmother...*", would it be reasonable to withhold this information from the appellant (my self), ... "*who is entitled to exercise the rights of access of his grandmother under section 66(b) of the Act?*". I am entitled to get the information that was withheld from me, and I am entitled to know why that information was withheld and for what purpose. [emphasis in original]

### **THE EXERCISE OF DISCRETION**

Despite a finding that some information falls within the scope of sections 49(a) or 49(b) of the *Act*, the PGT must exercise its discretion in deciding whether or not to disclose the information. This involves a weighing of the appellant and his grandmother's rights of access to their own personal information against any other individual's right to protection of their privacy. On appeal, the Commissioner may determine whether the PGT failed to do so.

In addition, the Commissioner may find that the PGT erred in exercising its discretion where, for example,

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

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

### *Analysis and Findings*

Having reviewed the rationale provided by the PGT for exercising its discretion against disclosure of the withheld information remaining at issue, I am satisfied that the PGT has taken into account all of the relevant circumstances of this case, and I find that there is nothing improper in the manner in which it exercised its discretion not to disclose the withheld information remaining at issue.

### **ABSURD RESULT**

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622].

The absurd result principle has been applied where, for example:

- the requester sought access to his or her own witness statement [Orders M-444 and M-451]
- the requester was present when the information was provided to the institution [Orders M-444, P-1414 and MO-2266]
- the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755 and MO-2257-I]

If disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester's knowledge [Orders MO-1323, PO-2622 and PO-2642].

### *Analysis and Finding*

As set out above, I am considering the application of the "absurd result" principle to the withheld portions of pages 20 (duplicated by 159 and 335), 40 (duplicated by 121 and 297) and 41 (duplicated by 120 and 296), which are letters from the PGT to a solicitor acting for the appellant's grandmother.

In previous orders, this office has emphasized that the absurd result principle ought not to be applied beyond the clearest of cases. Furthermore, the principle is typically applied where the requester originally supplied the information, or the requester is otherwise aware of it [Orders M-444, M-451, M-613, MO-1323, PO-2498 and PO-2622]. That said, all of the circumstances of a



particular case must be considered before concluding that withholding information to which an exemption would otherwise apply would lead to an absurd result.

In Order MO-1323, Adjudicator Laurel Cropley refused to apply the “absurd result” principle to the contents of a cassette tape from an answering machine, which the appellant in that appeal had turned over to the Police. Although the appellant in that appeal owned the answering machine and could access the messages, she did not know herself what was on the cassette tape. Adjudicator Cropley wrote:

Turning to the facts of this case, I find that, based on the evidence and argument presented and outlined above, I am not persuaded that this is one of those “clear cases”. I accept that the appellant had possession of the cassette tape and that she provided it to the Police. I agree with the position taken by the Police that the fact that an individual may have had possession of a record is not, in and of itself, sufficient to engage the “absurd result” principle.

The appellant argues, however, that she did not merely have possession of the tape but that she knows what it contains. In my view, having indirect knowledge about the contents of the cassette tape is very different from having listened to it first hand. Although the appellant may have a general idea of what is on the tape, I am not convinced that she knows everything, including the identities of all of the callers, the specific language they used or the tone of the delivery. All of this is part of what renders the information as personal and it is not information to which the appellant is privy. In these circumstances, I am not prepared to find that withholding the record would result in an absurdity.

I agree. In my view, any right or ability to obtain information from a source outside the PGT does not automatically lead to a conclusion that withholding the information in the hands of the PGT would lead to an “absurd result.” In my opinion, having a right or ability to obtain information from a source outside the PGT is very different from having first hand knowledge of its contents. In this appeal, it is clear that the appellant and his grandmother are not aware of the withheld information, being the names of the two individuals, nor did they supply this information to the PGT. This is the very information that they seek.

Furthermore, if disclosure is inconsistent with the purpose of the exemption, the absurd result principle may not apply, even if the information was supplied by the requester or is within the requester’s knowledge [Orders MO-1323, PO-2622 and PO-2642]. In my Interim Order in this appeal, I determined that releasing the identities of the beneficiary of the insurance policy and the beneficiary of a RIF, could reasonably be expected to cause them “significant personal distress.” In my view, owing to the unique circumstances of this appeal, disclosing the information in the severed portion of pages 20 (duplicated by 159 and 335), 40 (duplicated by 121 and 297) and 41 (duplicated by 120 and 296) would be inconsistent with the purpose of the personal privacy exemption in section 49(b).

In all the circumstances, I find that the absurd result principle does not apply.

**ORDER:**

I uphold the decision of the PGT to deny access to the withheld portions of pages 20 (duplicated by 159 and 335), 40 (duplicated by 121 and 297), 41 (duplicated by 120 and 296), 126 (duplicated by 302), 175 (duplicated by 187, 349 and 361) and 241.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_ November 9, 2009