



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
— for —  
British Columbia

Decision F07-10

**MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL**

Michael McEvoy, Adjudicator

December 13, 2007

Quicklaw Cite: [2007] B.C.I.P.C.D. No. 40

Document URL: <http://www.oipc.bc.ca/orders/section56/DecisionF07-10.pdf>

**Summary:** The Office of the Chief Coroner's request that an inquiry under Part 5 not be held is denied. Any party making an application under s. 56 must do more than simply assert that an exception applies. It must clearly demonstrate that its case meets the criteria established in previous orders. A mere belief that one's case is strong is not the basis for a s. 56 application.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b), 22(1), 56; *Freedom of Information and Protection of Privacy Act, Regulation*, ss. 3, 6(b).

**Authority Considered: B.C.:** Decision F07-02, [2007] B.C.I.P.C.D. No. 4.

## 1.0 INTRODUCTION

[1] The Office of the Chief Coroner ("OCC")<sup>1</sup> has made an application under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") that an inquiry under Part 5 of FIPPA not be held with respect to an access to information request the respondent made.

[2] I have considered the submissions of the parties and, for the reasons that follow, I have readily decided to deny the OCC's application. This matter will be reconvened and proceed to an inquiry under Part 5 of FIPPA.

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<sup>1</sup> The OCC is an office within the Ministry of Public Safety and Solicitor General, which is therefore the public body involved here.

## 2.0 DISCUSSION

### *The access request*

[3] The respondent requested records from the OCC relating to its investigation of her father's death. The OCC responded by giving access to some records and refusing access to others. The OCC said it was withholding those records because they were excepted from disclosure under s. 3(1)(b) of FIPPA. Section 3(1)(b) states that FIPPA does not apply to a personal note or a communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity.<sup>2</sup>

[4] The respondent asked this Office to review the OCC's refusal to release three of those records. During the mediation process, the OCC provided severed versions of the three records while continuing to withhold the remaining information based on s. 3(1)(b) of FIPPA. The OCC then added that, even if s. 3(1)(b) did not apply, the information would still be severed under s. 22(1), because its disclosure would unreasonably invade the personal privacy of a third party.

[5] As the matter was not resolved in mediation, an inquiry was convened under Part 5 of FIPPA. Shortly thereafter, the OCC applied under s. 56, requesting that the Information and Privacy Commissioner exercise his discretion not to proceed with the inquiry. The inquiry was adjourned to consider the OCC's application.

### *Parties' arguments*

[6] In giving notice to this Office that it intended to apply under s. 56, the OCC argued that it was plain and obvious the respondent would not receive any further information through an inquiry.<sup>3</sup> The OCC said if s. 3(1)(b) applied then the Commissioner would not have jurisdiction to order the release of the records. Alternatively, if s. 3(1)(b) did not apply, then s. 22(1) would, thereby resulting in the same outcome.

[7] The emphasis of the OCC's submission<sup>4</sup> was significantly different than that which it set out in its notice. The OCC's submission conceded that it is not settled law that s. 3(1)(b) applies to the records in dispute. In fact, the OCC's submission does not provide any argument as to how or why s. 3(1)(b) applies to the records at all. However, it maintains that s. 22(1) of FIPPA required the records to be severed and third-party personal information withheld. The OCC

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<sup>2</sup> The OCC referred the respondent to other agencies concerning the remaining records though the OCC noted parenthetically that these documents would be withheld under ss.16 and 22(f) of FIPPA.

<sup>3</sup> OCC's notice letter, August 9, 2007.

<sup>4</sup> OCC's submission, August 24, 2007.

says some of the records reveal the deceased's medical history and, pursuant to s. 22(3)(a) of FIPPA, disclosure of this type of information is presumed to be an unreasonable disclosure of the deceased's personal privacy. The OCC also notes that it is "well settled" that the dead continue to have privacy interests.

[8] As for the balance of the severed records, the OCC argues that other circumstances weigh against their disclosure, including allegations contained within them that are likely to be unreliable (s. 22(2)(g)), and that these allegations if disclosed might unfairly damage the reputation of those involved (s. 22(2)(h)). The OCC says it knows of no circumstances which weigh in favour of disclosure.

[9] The respondent says that the severed information appears to concern the discovery and investigation of her father's death, and that disclosing this to a family member would not be an unreasonable invasion of his privacy. She also says that her father would want her to seek answers concerning the circumstances of his demise and would therefore have wished for her to make this application on his behalf under s. 3 of the *Freedom of Information and Protection of Privacy Act, Regulation* ("FIPPA regulation").

[10] The respondent also says she is not interested in nor does she require the names or addresses of any persons contacted by the OCC for information during the course of its investigation. The one exception to this is any information about her mother. To this end, the respondent provided a signed consent from her mother authorizing the release of her information.

[11] The respondent states that any amount of information, however small, would help unravel the puzzle of her father's death. Losing her father, she says, in such strange and tragic circumstances, and with many unanswered questions, is very traumatic. The respondent says she wishes to obtain as much information as possible to piece together the circumstances of her father's death in order to obtain closure.

[12] The OCC responds that s. 3 of the FIPPA regulation only permits application on behalf of the deceased person. The OCC says that the fact that the respondent seeks the records in order to obtain closure is evidence that she is doing so on her own behalf and not on behalf of the deceased.

[13] With respect to the consent letter from the respondent's mother, the OCC says that it is willing to release information based on properly constituted consent. However, in this instance it does not consider the consent provided to be in technical compliance with s. 6(b) of the FIPPA Regulation. The OCC does not elaborate on its reasons for this assertion, but I infer its argument to be that the respondent's mother has failed to specify to whom her personal information can be released. The OCC says if the respondent provides a new consent, it is willing to release any portions of the records that refer to the respondent's mother.

## **Discussion**

[14] Section 56(1) of FIPPA reads as follows:

56(1) If the matter is not referred to a mediator or is not settled under section 55, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[15] Section 56 confers discretion as to whether to hold a Part 5 inquiry respecting a request for review. The OCC acknowledges that, as the party asking that an inquiry not be held, it bears the burden of demonstrating why its application should be granted.

[16] As was noted in Decision F07-02<sup>5</sup>, there are a variety of reasons why the discretion under s. 56 might be exercised in favour of not holding an inquiry:<sup>6</sup>

...These include circumstances where the principles of abuse of process, *res judicata* or issue estoppel clearly apply. Other circumstances are where it is plain and obvious that the records in dispute are subject to an exception to disclosure or that they fall outside FIPPA's scope. In each case, however, it must be clear that there is no arguable issue which merits adjudication in an inquiry.

[17] Without expressing any views or make any findings on the merits of this case, the material provided to me falls significantly short of what is required under a s. 56 application.

[18] First, it is not at all plain and obvious that s. 3(1)(b) applies here. Indeed, after asserting this section as its primary argument throughout its dealings with the respondent and this Office,<sup>7</sup> the OCC abruptly changed course by conceding in its s. 56 submission that is not settled law that s. 3(1)(b) applies to its records. The OCC did not say it was abandoning this argument, but neither did it bother to make any submission about how s. 3(1)(b) applies to the records in dispute.<sup>8</sup>

[19] Second, assuming that s. 3(1)(b) does not apply here, it is also not plain and obvious that s. 22(1) applies to all of the severed material concerning the deceased. While it is correct to state that privacy rights may extend to deceased persons, the application of this principle depends on the facts in each case. Here, the OCC's arguments on s. 22 are arguments on the merits of that issue and those arguments ought to be made in an inquiry, not this s. 56(1) application by the OCC.

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<sup>5</sup> Decision F07-02, [2007] B.C.I.P.C.D. No.4.

<sup>6</sup> At para. 9.

<sup>7</sup> OCC letter to respondent, July 11, 2006, OCC's notice letter, August 9, 2007.

<sup>8</sup> OCC's reply submission, August 24, 2007.

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[20] Third, there is an arguable issue as to whether the respondent may request access to the records on behalf of her father under s. 3 of the FIPPA Regulation. This is a distinct issue from the question of whether and how s. 22(1) applies to the records in dispute, and must be dealt with by the parties as such. If s. 3 of the Regulation applies, there is no need to consider the application of s. 22(1) to most of the records.

[21] Fourth, in light of the consent now proffered by the respondent's mother, there also remains a question about whether other portions of the severed records might be released to her.

[22] When a s. 56 application is made, it consumes time and resources. A party making an application under that section must do more than simply assert that an exception applies. It must clearly demonstrate that its case meets the criteria established in previous orders. A mere belief that one's case is strong is not the basis for a s. 56 application.

[23] Finally, in light of the consent that the applicant submitted, and what I have said above, I encourage the parties to make further efforts to resolve this matter short of a Part 5 inquiry.

### **3.0 CONCLUSION**

[24] For the reasons given above, the OCC's request is denied and the inquiry will proceed.

December 13, 2007

#### **ORIGINAL SIGNED BY**

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Michael McEvoy  
Adjudicator