Protecting privacy. Promoting transparency.

Order F15-01

B.C. CORONERS SERVICE

Ross Alexander
Adjudicator

January 8, 2015

CanLII Cite: 2015 BCIPC 1
Quicklaw Cite: [2015] B.C.I.P.C.D. No. 1

Summary: An applicant requested a record confirming whether a post-mortem or toxicology examination was conducted in relation to the death of a specified individual. The B.C. Coroners Service refused to confirm or deny the existence of a responsive record pursuant to s. 8(2) of FIPPA. The adjudicator determined that confirming or denying the existence of certain types of records – or confirming that no responsive records exist – would convey personal information of the deceased. The adjudicator determined that the Coroner is authorized to refuse to confirm or deny the existence of these types of records because disclosure would be an unreasonable invasion of the deceased's personal privacy (s. 8(2)(b)). Section 8(2)(b) did not apply to types of records that would not convey personal information. The adjudicator also determined that disclosure of the mere existence or non-existence of a requested record needs to convey information described in s. 15 of FIPPA (information harmful to law enforcement) for s. 8(2)(a) to apply. Section 8(2)(a) did not apply to the remaining records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 8(2)(a) and s. 8(2)(b).

Authorities Considered: B.C.: Order 260-1998, 1998 CanLII 3617 (BC IPC); Order F07-09, 2007 CanLII 30394 (BC IPC); Order No. 316-1999, 1999 CanLII 1369 (BC IPC); Order 02-35, 2002 CanLII 42469 (BC IPC); Order F14-43, 2014 BCIPC 46 (CanLII). **AB:** Order F2009-029, 2010 CanLII 98649 (AB OIPC); Order F2006-012, 2006 CanLII 80870 (AB OIPC); Order F2014-06, [2014] A.I.P.C.D. No. 6 (AB OIPC).

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* 2004 CanLII 43693 (ON CA); *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36.

INTRODUCTION

[1] This inquiry relates to an applicant's request to the B.C. Coroners Service ("Coroner") for records confirming whether a post-mortem or toxicology examination was conducted in relation to the death of a specified individual ("deceased"). The deceased committed suicide and was the subject of some publicity because the deceased used the suicide to advocate for a change in the law with respect to assisted suicide.

[2] The applicant made a request for records to the Coroner under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for a coroner's report, media briefing notes and a record confirming whether a post-mortem or toxicology examination was conducted in relation to the death of the deceased. The Coroner responded by providing the coroner's report,[1] but stated that it could neither confirm nor deny the existence of records that would reveal if post-mortem or toxicology examinations occurred pursuant to ss. 64 and 69 of the *Coroners Act*.

[3] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Coroner's decision to rely on ss. 64 and 69 of the *Coroners Act*. The Coroner subsequently amended its decision, and it is now relying exclusively on s. 8(2) of FIPPA to refuse to confirm or deny the existence of records that might reveal whether post-mortem or toxicology examinations took place.

[4] OIPC mediation did not resolve the issue between the parties, and the applicant requested that this matter proceed to inquiry under Part 5 of FIPPA.

ISSUES

[5] The issue in this inquiry is whether the Coroner is authorized to refuse to confirm or deny the existence of:

a) records containing information described in s. 15 (information harmful to law enforcement) pursuant to s. 8(2)(a) of FIPPA; or

b) records containing personal information of a third party if disclosure of the existence of the information would be an unreasonable

[1] The Coroner also confirmed that it did not create media briefing reports regarding this death.

> invasion of that party's personal privacy pursuant to s. 8(2)(b) of FIPPA.

Burden of Proof

[6] Section 57 of FIPPA sets out the burden of proof for many inquiries held under Part 5 of FIPPA. However, s. 57 does not apply here because the issue in this inquiry is the Coroner's decision to refuse to confirm or deny the existence of a record, not a decision to refuse access to a record as set out in s. 57.

[7] The Coroner acknowledges that previous decisions have established that the public body is in the best position to discharge the burden of proof regarding s. 8(2).[2] However, it also refers to Order F07-09, which states that in cases where s. 57 does not set out the burden of proof, as a practical matter it is in the interests of each party to present evidence as to whether the provision in issue applies.[3]

[8] It is in both parties' interests to provide evidence and argument for the inquiry. However, the Coroner is in the best position to explain why it has refused to confirm or deny the existence of a record requested by the applicant. This is particularly the case when s. 8(2) is at issue, since public bodies often submit and rely on *in camera* evidence and argument that the applicant does not have access to (thus is not able to fully respond to) when this provision is at issue.[4]

DISCUSSION

Background

[9] The Coroner has independent oversight of all deaths in British Columbia pursuant to the *Coroners Act*. The deputy chief coroner describes the role of coroners in British Columbia as follows:

> In British Columbia, coroners are medical-legal death investigators and independent quasi judicial officials appointed by the Chief Coroner. Coroners combine investigative, legal, and medical expertise in the performance of their functions.[5]

[10] The Coroner is responsible for ascertaining the facts surrounding a death and must determine: the identity of the deceased; and how, when, where, and by

---

[2] For example, see Order 260-1998, 1998 CanLII 3617 (BC IPC).
[3] Order F07-09, 2007 CanLII 30394 (BC IPC) at para. 5.
[4] Alberta Order F2009-029, 2010 CanLII 98649 (AB OIPC) at paras. 9 to 14; Order No. 316-1999, 1999 CanLII 1369 at p. 2.
[5] Affidavit of V. Stancato at para. 5.

what means the deceased died. Deaths are classified as natural, accidental, suicide, homicide or undetermined.

[11] The applicant in this case has an interest in death investigations, and he teaches and publishes articles in the areas of criminology, assisted suicide and euthanasia.

[12] The applicant is requesting information about a deceased who committed suicide, and was the subject of some publicity because the deceased used the suicide to advocate for a change to Canadian law with respect to assisted suicide. The deceased was a member of a right to die foundation, of which the applicant is a founding director.[6] The Coroner provided the applicant with the coroner's report about the deceased in response to the applicant's request for records, so the applicant already knows the cause of death of the deceased.

Section 8(2)

[13] Section 8(2) of FIPPA authorizes public bodies to refuse to confirm or deny the existence of a record in certain circumstances, stating:

> (2) the head of a public body may refuse in a response to confirm or deny the existence of
>
> (a) a record containing information described in section 15 (information harmful to law enforcement), or
>
> (b) a record containing personal information of a third party if disclosure of the existence of the information would be an unreasonable invasion of that party's personal privacy.

[14] The Coroner submits that it is authorized to refuse to confirm or deny the existence of the requested records pursuant to each of ss. 8(2)(a) and (b). The applicant submits that neither provision applies. I will first address s. 8(2)(b), before turning to s. 8(2)(a).

Section 8(2)(b)

[15] Section 8(2)(b) of FIPPA authorizes public bodies to refuse to confirm or deny the existence of a record if the disclosure of the existence of the information would be an unreasonable invasion of a third party's personal privacy. As set out in Order 02-35, for s. 8(2)(b) to apply, a public body must first establish that disclosure of the mere existence or non-existence of the requested records would convey third party personal information.[7] It must then establish that

[6] Exhibit 9 of the applicant's reply submissions.
[7] Order 02-35, 2002 CanLII 42469 (BC IPC).

disclosure of the existence or non-existence of that information would itself be an unreasonable invasion of that third party's personal privacy.

[16] As stated in Order 02-35, s. 22 of FIPPA is relevant in determining what constitutes an unreasonable invasion of personal privacy for the purposes of s. 8(2)(b).[8] However, the particular issue for me to consider under s. 8(2)(b) is what information would be conveyed simply by disclosing the mere existence or non-existence of the requested records, and whether this disclosure would itself be an unreasonable invasion of that third party's personal privacy. This is somewhat different than determining whether disclosure of the contents of any records that may exist would be an unreasonable invasion of personal privacy under s. 22 of FIPPA.

What information will confirming or denying the existence of requested records convey?

[17] In order to rely on s. 8(2)(b), a public body must first establish that personal information would be disclosed by confirming or denying the existence of the requested records. Schedule 1 of FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information".

[18] The portion of the applicant's request that is at issue in this inquiry is for "a record confirming whether or not a post-mortem or toxicology examination was conducted" about the deceased. Since this request relates to medical examinations or tests that may or may not have been conducted on the deceased, disclosing whether these examinations or tests were performed would clearly disclose his or her personal information. Neither party disputes that such information would be the deceased's personal information.

[19] The first issue before me is to determine whether personal information would be disclosed by confirming the existence or non-existence of records.

[20] In my view, confirmation about whether certain responsive records exist would disclose whether there were post-mortem or toxicology examinations. For example, confirmation that there is a toxicology report would disclose that there was a toxicology examination. Conversely, confirmation that there are no responsive records to the applicant's request would disclose that there were no post-mortem or toxicology examinations.

[21] However, it is also possible in my view that there could be other records such as medical reports or notes where the content of the record discloses whether there was a post-mortem or toxicology examination, but confirming the existence of the record would not disclose whether these examinations occurred.

[8] Order 02-35, 2002 CanLII 42469 (BC IPC).

For example, the applicant provided a document entitled Judgment of Inquiry into the death of a specified person (not the deceased).[9] This record is a filled out form document from mid-2007 that states in one part: "Toxicology Examination: □ Yes □ No". By merely knowing that this Judgment of Inquiry record exists, a person would not know the content of that record or what it reveals about whether the toxicology examination was conducted. A person would not know whether a toxicology examination occurred unless the actual content of this record was disclosed to them, showing whether the coroner had marked the "yes" box or the "no" box. Therefore, it is possible that there are records in the custody or control of the Coroner that are responsive to the applicant's request in which the existence of the responsive record could be confirmed without disclosing whether a post-mortem or toxicology examination took place.[10]

[22] I find that the Coroner is not authorized to refuse to confirm the existence of the types of records where confirming the existence of that record would not disclose whether a post-mortem or toxicology examination occurred. I will consider that type of record in more detail below in the analysis of s. 8(2)(a).

[23] However, there is another type of responsive record – for example a toxicology or a post-mortem report – which by the very fact that it exists (or not) would reveal the personal information the applicant requested. Therefore, I will next determine whether the potential disclosure of the requested personal information (i.e., whether a post-mortem or toxicology examination was performed) would be an unreasonable invasion of a third party's personal privacy.

Analysis

[24] When determining what constitutes an unreasonable invasion of personal privacy for the purposes of s. 8(2)(b), s. 22 of FIPPA is a relevant provision to consider.[11]

[25] Section 22 requires public bodies to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. Section 22(4) lists circumstances where disclosure is not unreasonable. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, public bodies must consider all relevant

[9] Exhibit 4 of the applicant's initial submissions.
[10] I note the Coroner states that it made changes to its public report forms in December 2007 to remove certain personal information, including removing the autopsy and toxicology checkboxes from its coroner's reports. However, there could be other records containing a reference to whether a post-mortem or toxicology examination was performed that do not by their mere existence disclose whether these examinations occurred.
[11] Order 02-35, 2002 CanLII 42469 (BC IPC) at para. 33.

circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.

[26] There are, however, differences between ss. 8(2)(b) and 22 in determining whether disclosure would be an unreasonable invasion of personal privacy. Former Commissioner Loukidelis explained the relationship and differences between these provisions in Order 02-35 as follows:

> [39] First, the privacy analysis under s. 8(2)(b) deals with the impact of disclosure of the existence of personal information. Section 22(2) focusses, by contrast, on the impact of disclosure of the personal information itself, not the fact that it exists. The s. 22(2) analysis may, under s. 22(2)(a), entail an assessment, in a case where disclosure of the personal information itself is in issue, of whether disclosure is desirable in order to subject a public body's activities to public scrutiny. But disclosure of the fact that personal information exists does not necessarily raise the same public scrutiny issues under s. 22(2)(a). The s. 22 analysis looks to the impact of disclosure of the personal information itself, while the s. 8(2)(b) analysis in a sense will, in many cases, not mirror the in-depth examination under s. 22.
>
> [40] A second difference between ss. 8(2)(b) and 22, of course, is the fact that the first section is discretionary and the second is mandatory. If s. 22(1) applies to personal information, a public body must refuse to disclose it. Under s. 8(2)(b), however, a public body has the discretion to confirm the existence of personal information even if the public body has decided that the confirmation would unreasonably invade a third party's personal privacy…[12]

[27] I will consider s. 22 of FIPPA in the context of s. 8(2)(b) to help determine whether confirming the existence or non-existence of records that would disclose whether post-mortem or toxicology examinations were conducted on the deceased would be an unreasonable invasion of the deceased's personal privacy under s. 8(2)(b).

Section 22(4)

[28] Section 22(4) of FIPPA sets out circumstances where disclosing personal information is not an unreasonable invasion of personal privacy. Neither party expressly submits that any of the provisions in s. 22(4) apply in this case, but two provisions warrant consideration.

[29] Section 22(4)(a) states that disclosure of personal information is not an unreasonable invasion of an individual's personal privacy if the individual has consented to disclosure in writing. While the deceased and the deceased's sons have sought publicity in relation to the deceased's suicide by contacting or giving

[12] Order 02-35, 2002 CanLII 42469 (BC IPC) at paras. 39 and 40.

interviews to the media,[13] in my view this does not necessarily mean that the deceased wanted his or her post-death medical information to be disclosed. Further, there is no evidence that the deceased provided written consent for disclosure of his or her personal information.

[30] Section 22(4)(d) states that disclosure of personal information is not an unreasonable invasion of an individual's personal privacy if the disclosure is for a research or statistical purpose, and is in accordance with s. 35 of FIPPA.[14] In this case, the applicant wants the withheld information for academic reasons, but there is no suggestion that s. 35 applies.[15] Therefore s. 22(4)(d) does not apply.

[31] In conclusion, I find that none of the provisions in s. 22(4) apply in this case.

Section 22(3)

[32] Section 22(3) of FIPPA lists a number of circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy. One of these factors is s. 22(3)(a), which states:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

[33] The Coroner submits that s. 22(3)(a) applies because the existence or non-existence of a post-mortem or toxicology examination is about the deceased's medical history or evaluations. The applicant submits that the Coroner is arbitrarily relying on s. 22(3)(a) because it has previously proactively released very personal information about other deceased persons, including about health issues and the state of organs and toxins in their bodies at the time of death.

[34] Considering s. 22(3) is one step in determining whether disclosure of personal information would be an unreasonable invasion of personal privacy. The applicant's submission that disclosure is not unreasonable because the Coroner has proactively disclosed similar information in the past may be an argument for why disclosure would not be unreasonable. However, it does not speak to whether the information relates to a medical history, diagnosis,

[13] This is apparent from the newspaper articles the applicant provided in this inquiry.
[14] Section 35 of FIPPA states that a public body may disclose personal information in its custody or under its control for a research purpose, including statistical research, if a list of preconditions are met.
[15] Even if the conditions for s. 35 were met, this provision grants the Coroner the discretion – but not the obligation – to disclose personal information.

condition, treatment or evaluation under s. 22(3)(a). In my view, whether the deceased received post-mortem or toxicology examinations relates to his or her medical history or evaluations. Therefore, I find that s. 22(3)(a) applies and that there is a presumption that disclosure of this information would be unreasonable invasion of personal privacy.

Section 22(2)

[35] The presumption created under s. 22(3) can be rebutted. Section 22(2) requires that all relevant circumstances, including those specified in s. 22(2), be considered in determining whether the information can be disclosed without unreasonably invading a third party's personal privacy. This provision states in part:

> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

Public Scrutiny

[36] Section 22(2)(a) of FIPPA relates to whether disclosure of personal information is desirable for the purpose of subjecting the activities of a public body to public scrutiny. In the context of s. 8(2)(b), the question is whether disclosing the personal information that would be conveyed by disclosing the existence or non-existence of records is desirable for subjecting the activities of a public body to public scrutiny.[16]

[37] The applicant does not specifically refer to s. 22(2)(a), but he submits that disclosure of whether post-mortem or toxicology examinations were conducted on deceased persons is in the public interest. He submits that these examinations are invasive acts performed by government, and as such they are an exercise of power that demands public accountability. He states that these examinations should only be performed when there is a clear policy rationale for

[16] Order 02-35, 2002 CanLII 42469 (BC IPC) at para. 39.

them, and that disclosing whether these examinations are conducted is needed to ensure accountability.

[38] The Coroner submits there is no evidence to suggest that confirming or denying the existence of an autopsy or toxicology examination is desirable for the purpose of subjecting it to public scrutiny. It states that it has a policy in place with respect to when these examinations are ordered, and coroners are required to follow this policy when conducting investigations. It further states that it provides the public with the numbers of the autopsy or toxicology examinations it performs – in aggregate – in its annual report, in addition to other performance indicators for public accountability purposes.

[39] In my view, disclosing the frequency and circumstances in which the Coroner conducts post-mortem or toxicology examinations is to some degree desirable for subjecting the activities of the Coroner to public scrutiny. There is a societal interest in the appropriate treatment of deceased persons, which is reflected in the laws of British Columbia[17] and Canada.[18] Moreover, the request for records in this case relates to a deceased who publicized his or her suicide, and whose family publicly disclosed that the deceased committed suicide by taking a lethal dose of a particular drug purchased outside of Canada. Given this public disclosure and discourse, disclosing whether the coroner conducted post-mortem or toxicology examinations in this case may give some indication about whether the Coroner conducts these examinations in suicides of this nature. To this end, disclosure may contribute to the public discourse that has already taken place and subject the Coroner to public scrutiny with respect to whether it exercises its discretion to conduct post-mortem or toxicology examinations for these types of deaths.

[40] Notwithstanding the paragraph above, this case only relates to one deceased person. Disclosure of records confirming whether post-mortem or toxicology examinations were conducted on the deceased would only confirm whether the Coroner conducted examinations of the deceased in this particular case. If certain examinations were or were not conducted in this case, it would not necessarily mean that those same examinations occur or do not occur in other cases involving suicides in similar circumstances.[19] Further, in my view there are no other reasons why disclosure of the information in this case is desirable for the purpose of subjecting the activities of the Coroner to public scrutiny.

---

[17] For example, the *Cremation, Interment and Funeral Services Act* and regulation, the *Human Tissue Gift Act*, and the *Anatomy Act*.
[18] For example, s. 182 of the *Criminal Code*.
[19] I note that the Coroner already discloses the aggregate number of autopsy and toxicology examinations it performs in its annual report.

[41] I find that disclosing whether the Coroner conducted post-mortem or toxicology examinations on the deceased is desirable for the purpose of subjecting the activities of the Coroner to public scrutiny under s. 22(2)(a), but that this is not a significant factor in this case.

Information about a Deceased Person — s. 22(2)(i)

[42] Section 22(2)(i) requires that public bodies consider whether the length of time a person has been deceased indicates that disclosure of his or her personal information would not be an unreasonable invasion of privacy.

[43] The Coroner submits that s. 22(2)(i) does not apply because the deceased's death occurred only a short period of time before the applicant made his request for records in this case. The applicant does not specifically address s. 22(2)(i).

[44] Section 22(2)(i) was recently considered in Order F14-43, in which s. 22(2)(i) was found not to be a factor because the applicant was requesting records about his deceased father who had died approximately two years earlier.[20] In this case, it has been a similar relatively short period of time since the deceased passed away. Therefore, I find that s. 22(2)(i) is not a factor that weighs in favour of disclosing the information.

Other Factors

[45] Factors other than those listed in s. 22(2) may be relevant when determining whether disclosure of information would be an unreasonable invasion of personal privacy. I will consider these arguments here.

Similar information disclosed for other deceased persons

[46] The applicant submits that disclosure would not be unreasonable in this case because the Coroner has a practice of posting coroner reports of deceased persons on its website, and that these reports often disclose whether a post-mortem or toxicology examination was conducted. In support of this, the applicant provides coroner's reports of three deceased individuals: a celebrity; a person whose death related to drugs purchased on the Internet; and a person whose suicide has been frequently mentioned in the media. In the applicant's view, it is inconsistent or "arbitrary" for the Coroner to refuse to confirm whether there were post-mortem or toxicology examinations of the deceased in this case when the Coroner has disclosed similar information about other people.

[47] The Coroner replies that it considers coroners reports to be a public document, and information about autopsy or toxicology examinations to be

[20] Order F14-43, 2014 BCIPC 46 (CanLII) at paras. 40 and 41.

private documents. It states that it rarely posts coroners reports on its website, but that it has the authority to do so under s. 69 of the *Coroners Act*. It states that in this case the Coroner considered that it would be an invasion of the deceased's personal privacy to confirm whether an autopsy or toxicology examination was performed.

[48] In my view, the fact that the Coroner has previously disclosed information about whether it conducted post-mortem or toxicology examinations of other deceased persons does not weigh in favour of disclosure in this case. The facts of every case are different, and whether the disclosure of personal information would be an unreasonable invasion of personal privacy can differ with the context. Further, the fact that a public body generally releases certain types of personal information does not necessarily mean that it is correctly interpreting and applying s. 22 of FIPPA. Moreover, and importantly, the Coroner has the authority to disclose personal information in certain cases pursuant to s. 69 of the *Coroners Act*, regardless of whether disclosure would otherwise be an unreasonable invasion of personal privacy under s. 22 of FIPPA. Section 69 of the *Coroners Act* states:

> (1) Subject to subsection (2), the chief coroner may disclose any report, or part of a report, made to the chief coroner under section 16 *[report after investigation]*, 39 *[report of jury's verdict]* or 51 *[report of review]* to
>
> (a) the public, or
>
> (b) a person who, in the opinion of the chief coroner, has a valid interest in the findings and recommendations contained in the report.
>
> (2) In determining whether or not to disclose personal information from a report, the chief coroner must consider
>
> (a) whether the disclosure is necessary to support the findings and recommendations contained in the report, and
>
> (b) whether the public interest in the disclosure outweighs the personal privacy of the individual whose personal information is disclosed in the report.

[49] The considerations about whether the Coroner may disclose personal information under s. 69 of the *Coroners Act* are different than those under FIPPA. One of these differences is that the *Coroners Act* requires the chief coroner to weigh the public interest against personal privacy, while the question in s. 22 of FIPPA is whether disclosure would be an unreasonable invasion of the personal privacy of an individual regardless of a general public interest.[21] The public interest factor enumerated in s. 22(2)(a) of FIPPA is only one of many factors to

[21] I note that s. 25 of FIPPA overrides s. 22 of FIPPA, and information must be disclosed without delay if disclosure is clearly in the public interest.

be considered under s. 22. Further, s. 22(2)(a) relates to disclosure that is desirable for subjecting the activities of public bodies to public scrutiny, not a general public interest consideration as set out in s. 69 of the *Coroners Act*. Moreover, the types of reports contemplated by s. 69 of the *Coroners Act* ordinarily contain medical information, which is presumed to be unreasonable invasion of personal privacy under s. 22(3)(a) FIPPA.

[50] Given the differences between s. 69 of the *Coroners Act* and s. 22 of FIPPA, there may be situations where the Coroner is authorized to disclose personal information under the *Coroners Act* even though the disclosure would otherwise be an unreasonable invasion of personal privacy under s. 22 of FIPPA. However, this is not a conflict between these statutes because s. 22(4)(c) of FIPPA states that "disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if an enactment of British Columbia or Canada authorizes the disclosure", and s. 69 of the *Coroners Act* is an enactment of British Columbia that may authorize the disclosure.

[51] In summary, in my view the fact that the Coroner has previously disclosed personal information about other deceased individuals similar to what is at issue here does not favour a finding that disclosure would not be an unreasonable invasion of personal privacy of the deceased person.

Information already known to applicant

[52] The applicant submits disclosure would not be an unreasonable invasion of the deceased's personal privacy because he already has the deceased's coroner's report, which discloses the deceased's cause of death. He states that the scientific conclusion reached to determine the cause of death suggests that a toxicology examination was performed to verify the type of drug used, as well as its lethality and toxicity. The applicant also provided newspaper articles about the deceased's suicide, including a published letter to the editor of a newspaper in which the deceased's son says he did not get to spend time with the deceased's body for a final goodbye because it was seized by the coroner and subjected to an unnecessary autopsy.[22]

[53] I agree with the applicant that confirming whether the requested records exist would not be an unreasonable invasion of personal privacy of the deceased, if it was already known and publicly available from an authoritative source whether post-mortem and toxicology examinations were conducted on the deceased. However, I am not satisfied that is the case here.

[54] The Coroner states that the coroner's report, including the reference to the cause of death, does not confirm or deny that a toxicology examination was

[22] The evidence before me is a printout of what appears to be an online version of this published letter: Exhibit 10 of the applicant's reply submissions.

conducted. The Coroner states that the conclusions with respect to the cause of death could have been obtained either from a toxicology examination or from medical records of the deceased where the hospital performed an ante-mortem blood test on the deceased.

[55] Based on the Coroner's evidence that it can make a determination that an individual died from the deceased's cause of death without conducting a toxicology examination, I find that the coroner's report does not disclose whether the Coroner conducted a post-mortem or toxicology examination.

[56] I also find that the published letter to the editor from the deceased's son does not confirm whether post-mortem or toxicology examinations were conducted.[23] While this letter states that an autopsy was completed, it does not state whether a toxicology report was completed. Further, this letter is critical of the coroner's involvement in euthanasia-type deaths, and in my view it is possible that the son used the term "autopsy" to help advocate for the deceased's viewpoint in relation to assisted suicide without precisely knowing what – if any – examinations the Coroner completed on the deceased.[24]

[57] In summary, while the applicant points to evidence that suggests to him that the Coroner conducted post-mortem or toxicology examinations of the deceased, I am not satisfied based on the materials before me that the applicant actually knows whether these examinations took place. Therefore, I do not accept that the Coroner is not authorized to refuse to confirm or deny the existence of records on the basis that the information is already known to the applicant.

Conclusions regarding s. 8(2)(b)

[58] In summary, I find that confirming or denying the existence or non-existence of certain records (or confirming that there are no responsive records) would convey whether or not the Coroner conducted post-mortem or toxicology examinations of the deceased. I also find that it is possible that there could be records responsive to the applicant's request that would not convey this

[23] Exhibit 10 of the applicant's reply submissions.

[24] I also note that the deceased's son's reference to an autopsy is in the context of not getting to spend time with his mother's body after death. However, another newspaper article, in which the deceased's sons were interviewed, casts some doubt about the accuracy of accounts about the deceased's suicide, stating: "[n]obody is willing to admit being with [the deceased] at the end for fear of criminal prosecution for aiding a suicide": Exhibit 9 of the applicant's reply submissions. In my view, this statement recognizes that the deceased's son may have a significant incentive to be untruthful about the precise circumstances of the deceased's death, particularly in providing an unsworn description of what happened to a journalist. In my view, the deceased's son's statement in the newspaper article that an autopsy was completed on the deceased is unreliable information as to the truth of the statement.

information, and that the Coroner may not rely on s. 8(2)(b) for those types of records (if any exist).

[59] I have considered whether it would be an unreasonable invasion of a third party's personal privacy to disclose the existence or non-existence of records that would convey whether the Coroner conducted post-mortem or toxicology examinations of the deceased. In doing so, I considered the factors in s. 22 of FIPPA to help with this determination. I concluded that there is a presumption that disclosure would be an unreasonable invasion of personal privacy because the personal information relates to the deceased's medical history or evaluations pursuant to s. 22(3)(a) of FIPPA, but also that s. 22(2)(a) favours disclosure because it would serve to subject the Coroner to public scrutiny. After considering all relevant factors, I find the factors that favour disclosure of the information are insufficient to rebut the presumption that disclosure would be an unreasonable invasion of the personal privacy of the deceased. Therefore, I find that it would be an unreasonable invasion of the deceased's personal privacy to confirm or deny the existence of the requested records pursuant to s. 8(2)(b) of FIPPA.

[60] The applicant requested records that confirm whether there were post-mortem or toxicology examinations in relation to the deceased. I have determined that s. 8(2)(b) applies to the types of records where confirming or denying the existence of the record would convey that requested information. Therefore, it is unnecessary for me to consider whether s. 8(2)(a) also applies to these types of records. However, it is possible that there are records that the Coroner is refusing to acknowledge that would not convey the requested information. In other words, there may be records whose existence could be confirmed without disclosing whether a post-mortem or toxicology examination took place. I already found that s. 8(2)(b) would not apply to such records, but I will now consider whether s. 8(2)(a) applies.

Section 8(2)(a)

[61] Section 8(2)(a) of FIPPA states that:

> … the head of a public body may refuse in a response to confirm or deny the existence of
>
> (a) a record containing information described in section 15 (information harmful to law enforcement)…

[62] As for how to interpret s. 8(2)(a), the Supreme Court of Canada has stated on numerous occasions that the modern approach to statutory interpretation requires the words of an Act to be read in their entire context and in their

grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of the legislators.[25]

[63] To my knowledge, s. 8(2)(a) of FIPPA has only been interpreted on one occasion. In Order No. 260-1998, former Commissioner Flaherty stated that disclosure of the existence of a record does not need to harm law enforcement for s. 8(2)(a) to apply. In his view, a record only needs to contain information described in s. 15 (information harmful to law enforcement) for s. 8(2)(a) to apply.[26] The Coroner agrees with this interpretation.

[64] While s. 8(2)(a) of FIPPA has rarely been considered, there are other jurisdictions in Canada that have similar provisions in their access to information and protection of privacy legislation.[27] In particular, decisions in Alberta and Ontario have rejected the interpretation that public bodies may confirm or deny the existence of a record without first establishing that doing so would convey the same type of information that is exempted from disclosure. These decisions state that enabling public bodies to confirm or deny the existence of a record where this confirmation would not result in harm to law enforcement (or an unreasonable invasion of personal privacy) would not lead to "sensible" results[28] or balance the fundamental purposes of legislation designed to advance public access to information and protection of individual privacy.[29] As former Alberta Commissioner Frank Work stated with respect to the interpretation of Alberta's equivalent of ss. 8(2)(a) and (b) of FIPPA:

> …The sensible purpose for both provisions [Alberta's equivalent to ss. 8(2)(a) and (b)] is that it is to prevent requestors from obtaining information from a request indirectly that they cannot obtain directly. Requestors are denied access to information if access would cause harm to law enforcement, or [be an] unreasonable invasion of privacy. They should be denied information as to whether a record exists for the same reason, but not otherwise.[30]

[65] Section 8(2)(b) of FIPPA uses permissive language (i.e., a public body "may" refuse to confirm or deny the existence of records), which signals that a public body must exercise its discretion when making a decision whether to apply this provision. This is a common feature with other jurisdictions that have

---

[25] For example, see *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 at para. 64 citing *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[26] However, s. 8(2)(a) did not apply in that case because former Commissioner Flaherty determined that the public body had not demonstrated that the record at issue contained information harmful to law enforcement.

[27] For example: s. 12(2) of the Alberta *Freedom of Information and Protection of Privacy Act*; ss. 14(3) and 21(5) of the Ontario *Freedom of Information and Protection of Privacy Act*.

[28] Alberta Order F2006-012, 2006 CanLII 80870 (AB OIPC) at para. 21

[29] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* 2004 CanLII 43693 (ON CA), leave to appeal to the Supreme Court of Canada dismissed.

[30] Alberta Order F2006-012, 2006 CanLII 80870 (AB OIPC) at para. 21.

a similar statutory provision. Alberta and Ontario orders have held that in order to properly exercise discretion regarding their provisions that are equivalent to s. 8(2)(a) of BC's FIPPA, a public body must demonstrate that confirming or denying the existence of a record actually protects the interest that would be protected if the relevant exemption applied (i.e., harm to law enforcement or personal privacy).

[66] In *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*[31], the Ontario Court of Appeal reviewed a decision of the Office of the Information and Privacy Commissioner of Ontario. In that case, the Ontario Assistant Information and Privacy Commissioner had determined that public bodies must establish that the information conveyed by disclosing the existence of a record must itself constitute an unjustified invasion of personal privacy before they can rely on the Ontario equivalent to s. 8(2)(b) of BC's FIPPA. The wording of this provision of Ontario's legislation, like s. 8(2)(a) of BC's FIPPA – in contrast to BC's s. 8(2)(b) – does not state that confirming or denying the existence of a record must actually protect the same interest that would be protected if the relevant exemption applied (i.e., harm to law enforcement or personal privacy). In upholding this interpretation, the Ontario Court of Appeal stated:

> The Commissioner reads the discretion given by the subsection to be constrained in this way in reflection of the Act's fundamental purposes and the balance required to be struck between them. In my view this is a reasonable interpretation particularly given that the Act itself uses the same concept to define the threshold for disclosure of personal information contained in a report. To balance the fundamental purposes of the Act this way where the information concerned is the fact of the existence of such a report cannot be said to be an unreasonable reading of the subsection. It is a reasonable constraint on the Minister's discretion in light of the scheme of the Act and its purposes.[32]

[67] In Ontario, orders interpret and apply the Ontario equivalents to ss. 8(2)(a) and (b) in a same manner. However, while these Ontario provisions contain the same language, ss. 8(2)(a) and (b) of BC's FIPPA – and the Alberta equivalent – contain different wording. This could arguably be interpreted to mean ss. 8(2)(a) and (b) should be interpreted differently in BC (and in Alberta for its equivalent provisions). However, despite the differences in wording, Alberta orders have interpreted the two provisions similarly. For example, in Alberta Order F2006-012, former Commissioner Work stated:

> Despite the difference in wording between [Alberta's equivalent to ss. 8(2)(a) and (b) of BC's FIPPA], this restriction makes the same sense for both sections;

---

[31] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* 2004 CanLII 43693 (ON CA) at para. 46.

[32] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, leave to appeal to the Supreme Court of Canada dismissed.

> therefore, in my view, it was intended for both, and I interpret [the equivalent of s. 8(2)(a)] as implicitly containing it. The discretion to refuse to confirm or deny is available only if the condition is met that it is being used to protect the same interest as non-disclosure of information.[33]

[68] For similar reasons, in my view it is consistent with the purposes, provisions and administration of FIPPA to interpret and apply s. 8(2)(a) so that public bodies may only exercise their discretion and rely on s. 8(2)(a) if the information conveyed by confirming or denying the record's existence would itself be exempt under s. 15. The purposes of FIPPA, as stated in s. 2, are to make public bodies more accountable to the public and to protect personal privacy by giving the public a right of access to records and specifying limited exceptions to the rights of access, among other things. As the Supreme Court of Canada recently stated in *John Doe v. Ontario (Finance)*:

> Access to information legislation serves an important public interest: accountability of government to the citizenry. An open and democratic society requires public access to government information to enable public debate on the conduct of government institutions.
>
> However, as with all rights recognized in law, the right of access to information is not unbounded. All Canadian access to information statutes balance access to government information with the protection of other interests that would be adversely affected by otherwise unbridled disclosure of such information.[34]

[69] In my view, it may undermine the purposes and statutory scheme of FIPPA to interpret s. 8(2)(a) in a way that enables public bodies to confirm or deny the existence of any record that contains information described in s. 15 of FIPPA (information harmful to law enforcement) without regard to whether there is any harm under s. 15 arising from confirming or denying the existence of the record.

[70] If public bodies were authorized to rely on s. 8(2)(a) without regard to related harm under s. 15, it may be problematic from an administrative law and natural justice perspective because it may result in multiple inquiries for the same request for records (in circumstances where records exist). This could occur because a public body could rely on s. 8(2)(a) at a first inquiry on the basis that it contains information described in s. 15. Then, if the public body did not succeed at this first inquiry, it could withhold the information under s. 15 and attempt to bolster its evidence at a second inquiry. This would result in additional time, costs and delays, in addition to prejudicing the applicant by giving the public body two opportunities to withhold the same information for the same reason (i.e. that s. 15 applies).

---

[33] Alberta Order F2006-012, 2006 CanLII 80870 (AB OIPC) at para. 21. Also see Alberta Order F2014-06, [2014] A.I.P.C.D. No. 6.

[34] *John Doe v. Ontario (Minister of Finance)*, 2014 SCC 36 at paras. 1 and 2.

[71] Further, this interpretation of s. 8(2)(a) may hamper the obligation to sever records under s. 4(2) of FIPPA and result in information being withheld from applicants that public bodies would otherwise be required disclosed to them. Section 4(2) provides that if information excepted from disclosure can reasonably be severed from a record, an applicant has the right of access to the remainder of the record. For example, there could be one sentence in a record that is exempt from disclosure under s. 15 that could reasonably be severed from the remainder of the record. In that instance, the public body would ordinarily be authorized to withhold the one sentence under s. 15 and required to disclose the remainder of the record to the applicant. However, applying s. 8(2) prevents the operation of this obligation to sever records under s. 4(2). This is because s. 8(2) relates to denying applicants knowledge of whether a record exists, but severing information under s. 4(2) confirms that the record exists. Since severing under s. 4(2) cannot operate in conjunction with s. 8(2)(a) because it would confirm the existence of a record, applying s. 8(2)(a) would result in the entire record being withheld from the applicant rather than just the information that is exempt from disclosure under s. 15.

[72] For the reasons given above, considering the wording of s. 8(2)(a) in its grammatical and ordinary sense in its entire context, together with the scheme and object of FIPPA and the intention of the legislators, I agree with the interpretation relied on in Alberta and Ontario. Specifically, in order to properly exercise its discretion and rely on s. 8(2)(a), a public body must establish that confirming whether or not a record exists would reveal information that would qualify for exemption from disclosure under s. 15 of FIPPA.

Application

[73] Based on the interpretation above, for s. 8(2)(a) of FIPPA to apply in this case, the Coroner must establish that disclosure of the existence or non-existence of the requested records would convey information that would be exempt from disclosure under s. 15 of FIPPA.

[74] In this case, the applicant requested records that confirm whether or not a post-mortem or toxicology examination was conducted in relation to the deceased. I have already determined that s. 8(2)(b) applies to the types of records whose existence (or lack thereof) would convey this requested information. However, as stated above in the s. 8(2)(b) analysis, there could possibly be some types of records whose existence or non-existence could be confirmed without disclosing whether a post-mortem or toxicology examination took place. I already found that s. 8(2)(b) would not apply to such records. I have considered what the Coroner said about how confirming the existence or non-existence could be harmful to law enforcement, but the Coroner has not satisfied me that s. 8(2)(a) would apply to such records either. I therefore find

that s. 8(2)(a) does not apply to these types of records, in the event that any exist.

CONCLUSION

[75] For the reasons given above, I order that the Coroner is:

(a) authorized under s. 8(2)(b) to refuse to confirm or deny the existence of requested records, subject to (b) below;

(b) not authorized under s. 8(2)(a) or (b) to refuse to confirm or deny the existence of responsive records where confirmation of the existence or non-existence of the record would not disclose whether there was a post-mortem or toxicology examination of the deceased. If such records exist, the Coroner must process the applicant's request with respect to these records by February 20, 2015.

January 8, 2015

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F13-54106