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Order F15-14

BC CORONERS SERVICE

Celia Francis
Adjudicator

March 19, 2015

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Summary: The applicant requested the BC Coroners Service file on its investigation into the death of a named individual. The Coroners Service disclosed some records but denied access to others under ss. 64(1)(a) and 64(2)(a) of the *Coroners Act* and s. 22 of FIPPA. The adjudicator found that ss. 64(1)(a) or 64(2)(a) of the *Coroners Act* apply to most of the records. The adjudicator also found that s. 22 of FIPPA applies to a number of records, with the exception of three records that were provided to the Coroners Service by the applicant. The adjudicator ordered the Coroners Service to disclose those three records to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), 22(2)(b), 22(2)(f), 22(2)(i), 22(3)(a), 22(3)(b), 22(4)(a); *Coroners Act*, ss. 64(1)(a) and 64(2)(a).

Authorities Considered: B.C.: Order F10-09, 2010 BCIPC 14 (CanLII); Order F10-12, 2010 BCIPC 20 (CanLII); Order F15-03, 2015 BCIPC 3 (CanLII); Order 04-12, 2004 34268 BC IPC (CanLII); Order P11-02, 2011 BCIPC No. 16 (CanLII); Order F12-08, 2012 BCIPC 12 (CanLII); Order F14-32, 2014 BCIPC 35 (CanLII); Order F14-09, 2014 BCIPC 11 (CanLII); Order 03-24, 2005 CanLII 11964 (BC IPC); Order F10-41, 2010 BCIPC No. 61. **Ontario**: Order PO-1878, 2001 26079 ONIPC (CanLII).

INTRODUCTION

[1] The applicant in this case is a teacher and researcher in the criminology field. His areas of academic interest include suicide and assisted suicide and he

has published a number of peer-reviewed articles on these subjects.[1] In late May 2013, he submitted a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the BC Coroners Service ("Coroner") for its investigation case file on the death of a named individual ("the deceased"). The request included 26 specified records, such as Coroner's reports, toxicology record, post-mortem record, coroner order to seize, opinions about the deceased and the applicant and all other related correspondence. The applicant attached a consent for disclosure of personal information, which the deceased had signed shortly before her death.

[2] In late August 2013, the Coroner responded to the request. It disclosed a number of records to the applicant, including a coroner's report,[2] and told him it was withholding some information and records under s. 22 (disclosure harmful to third party privacy) and s. 16 (disclosure harmful to intergovernmental relations) of FIPPA. The Coroner also said it was not disclosing some information because of ss. 63 and 64 of the *Coroners Act*.

[3] The applicant asked that the Office of the Information and Privacy Commissioner ("OIPC") review the Coroner's decision to deny access to information. Mediation by the OIPC resulted in the disclosure of more records in January 2014. The Coroner also told the applicant that it was adding s. 15(1)(c) of FIPPA (disclosure harmful to investigative techniques) to the information it was withholding. The Coroner later withdrew its application of s. 16 of FIPPA and s. 63 of the *Coroners Act*. Mediation was not otherwise successful and the applicant asked that this matter proceed to an inquiry. The OIPC received inquiry submissions from the applicant and the Coroner.

ISSUES

[4] The issues in this case are whether:

1. the Coroner is required to refuse access under s. 22 of FIPPA;
2. the Coroner is authorized to refuse access under s. 15(1)(c) of FIPPA; and
3. the provisions of FIPPA do not apply because s. 64 of *Coroners Act* applies.

[5] Under s. 57(2) of FIPPA, the applicant has the burden of proof respecting personal information (*i.e.*, s. 22). Under s. 57(1), the Coroner has the burden of proving that s. 15(1)(c) of FIPPA applies.

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[1] Paragraph 1.02, applicant's initial submission.

[2] The Coroner has issued two coroner's reports on this case. I understand from the material before me that this one was the coroner's report of May 1, 2013. See also Background below.

[6] Section 57 of FIPPA is silent on the burden of proof regarding whether a record is excluded from the scope of FIPPA under s. 64 of the *Coroners Act*. Past orders have held that, in such cases, it is in the interests of both parties to provide argument and evidence in support of their positions on these issues.[3]

DISCUSSION

Background

Coroners Service

[7] The Coroner in BC is responsible for the inquiry into and investigation of all unnatural, sudden and unexpected, unexplained or unattended deaths. It must ensure that the death of any person in BC is not overlooked, concealed or ignored. BC coroners are medical-legal death investigators and independent quasi judicial officials appointed by the Chief Coroner. A coroner is responsible for ascertaining the facts surrounding a death. He or she must determine the identity of the deceased and how, when, where and by what means the deceased died. A coroner may classify a death as natural, accidental, suicide, homicide or undetermined.[4]

Events leading up to the access request

[8] The deceased in this case was an elderly woman who died in April 2012. A coroner investigated the death and issued a coroner's report on September 15, 2012. A different coroner issued a second coroner's report on the death on May 1, 2013. Both reports classified the deceased's death as suicide. The investigation into the death was re-opened in late May 2013 and appears to have been active at the time of this inquiry.[5]

Records in dispute

[9] The records in dispute consist of an RCMP Occurrence Report, some correspondence, a variety of records containing the medical information of the deceased, the coroners' investigation notes and other records related to their investigations.

Section 64 of the Coroners Act

[10] According to the Coroner's inventory of records, the Coroner relies on s. 64(1)(a) or s. 64(2)(a) of the *Coroners Act*, or both, as the authority for refusing access to a number of records, sometimes in combination with s. 22 of FIPPA.

[3] See Order F10-09, 2010 BCIPC 14 (CanLII) and Order F10-12, 2010 BCIPC 20 (CanLII).
[4] Paragraphs 4.06—4.09, Coroner's initial submission; paras. 6-10, Stancato Affidavit.
[5] This information is drawn from the parties' submissions and the disclosed records.

Section 64(1) of the *Coroners Act* gives the Coroner discretion to refuse access to information in certain circumstances, despite FIPPA. Section 64(2) of the *Coroners Act* excludes certain types of records from the scope of FIPPA.

Section 64(2)(a) of the Coroners Act

[11] If s. 64(2)(a) of the *Coroners Act* applies to some records, it is not necessary, in my view, to consider if s. 64(1)(a) of the *Coroners Act* also applies to them. Accordingly, I will first consider s. 64(2)(a) of the *Coroners Act*, which reads as follows:

> 64 (2) The *Freedom of Information and Protection of Privacy Act*, other than section 44 (1) (b), (2), (2.1) and (3) *[powers of commissioner in conducting investigations, audits or inquiries]*, does not apply to any of the following:
>
> (a) a draft report of a coroner, made under Division 3 of Part 3 *[Report to Chief Coroner]*, including any personal note or communication made in relation to the draft report;
>
> …

Purpose of s. 64(2)(a)

[12] The Coroner did not provide me with any submissions on the purpose of s. 64(2)(a) of the *Coroners Act* and did not refer me to any relevant orders on this provision. The debates in Hansard on Bill 8-2007, the new *Coroners Act,* show that, not only was the Act being updated, it also reflected government's intention that a coroner's investigation not be "fettered by concerns around disclosure of information".[6]

[13] I conclude that, in passing Bill 8-2007, the Legislature considered it appropriate for a coroner to be free from excessive public scrutiny while engaged in the investigations and determinations leading to the drafting of her or his report. Thus, in my view, the purpose of s. 64(2)(a) of the *Coroners Act* is to protect a coroner's processes in relation to drafting his or her report, capturing the draft report itself and any personal note or communication a coroner makes in relation to drafting that report.

[14] What then do the words "made in relation to" a draft [coroner's] report mean? The Coroner said that the personal notes and communications in question were "made in the course of powers exercised in relation to [a] draft report of a coroner".[7] The Deputy Coroner's evidence was that the personal notes and communications a coroner makes are all for the investigation and

[6] See Hansard at https://www.leg.bc.ca/hansard/38th3rd/H70417a.htm#bill08-C.
[7] There is no draft coroner's report among the responsive records before me.

ultimately for drafting the coroner's report.[8] These statements suggest that s. 64(2)(a) of the *Coroners Act* could potentially cover a broad range of records created in the course of a coroner's activities leading up to the coroner's report. This submission comes close, in my view, to suggesting that s. 64(2)(a) protects all of the records arising out of a coroner's activities during an investigation.

[15] I do not think s. 64(2)(a) of the *Coroners Act* was intended to be this broad. It clearly protects only specific types of records, not all records a coroner creates or collects during an investigation. There must nevertheless be a connection between the making of the personal note or communication and the drafting of the coroner's report. To engage protection of a coroner's processes as they relate to drafting a coroner's report, the words "in relation to" mean, in my view, that it should be evident that the personal note or communication reveals something about the actual determinations that took place during the drafting of the coroner's report. With these considerations and criteria in mind, I will now consider whether s. 64(2)(a) of the *Coroners Act* applies to some of the records.

Parties' submissions

[16] The Coroner said that some of the records were personal notes and communications "made in the course of powers exercised in relation to [a] draft report of a coroner" and that s. 64(2)(a) therefore applies to these records.[9] The Coroner elaborated on this as follows:

> In ascertaining the facts surrounding a death, a coroner's purpose is to consider the circumstances and provide a report to the chief coroner. The actions taken and the documents developed by the coroner with respect to a death are all geared towards ascertaining the facts surrounding the death and subsequently drafting a coroner's report.
>
> A coroner's investigative notes and all other records related to the death are made by the coroner in relation to the investigation and in view of creating final report to the chief coroner.[10]

[17] The Coroner concluded by arguing that, because s. 64(2)(a) applies to some of the records, I do not have jurisdiction to review its decision not to release them.[11] The Coroner did not, however, explain how it believes s. 64(2)(a) of the *Coroners Act* applies to each of the records in question. The applicant did not address s. 64(2)(a) in his submissions.

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[8] Paragraphs 4.97-4.99, Coroner's initial submission; paras. 66-68, Stancato Affidavit.
[9] Paragraph 4.98, Coroner's initial submission.
[10] Paragraphs 67-68, Stancato Affidavit; see also para. 4.97, Coroner's initial submission.
[11] Paragraph 4.99, Coroner's initial submission.

Analysis

[18] I will first consider whether each record is a "personal note" or a "communication" of a coroner and then whether it was "made in relation to the draft report" of a coroner.[12] The inventory of records indicates that the Coroner believes that s. 64(2)(a) applies to the following records:

- Coroner's investigation notes (pp. 7-13, 14-23, 29-30, 32-35)
- emails (pp. 24-28 and 31)
- Coroners Service protocol (pp. 38-45)
- Coroners Service Investigation Worksheet (p. 49)
- Kimble report prepared for the Ministry of Justice (p. 50)
- record containing medical information of the deceased (p. 51)

[19] The Coroner's investigation notes contain handwritten and typed notes of the two coroners involved in the investigation of the death of the deceased. They contain information the coroners collected during their investigation and include notes of communications with the RCMP and the deceased's next of kin, among others. The coroners' reports also reflect information collected during the investigation and findings about what was collected. It is thus reasonable to conclude that the coroners relied on or drew from the investigation notes in drafting their coroners' reports, or that the coroner will do so, in the case of investigation notes that post-date the second coroner's report. I am therefore satisfied that the Coroner's investigation notes are personal notes and communications of a coroner made in relation to a draft coroner's report.

[20] Pages 24-28 and 31 (emails) are "communications" of a coroner. They are similar in character to the coroner's investigation notes. I am satisfied that they are a coroner's communications made in relation to the drafting of a coroner's report.

[21] The Coroner's Service Protocol (pp. 38-45) is a template questionnaire that the coroner fills in, answering questions about the circumstances surrounding an individual's death. The Coroner did not explain the purpose of this record. However, it appears to be designed to assist a coroner in arriving at his or her determinations respecting the death of an individual. I am satisfied that it contains the personal notes of a coroner made in relation to a draft coroner's report.

[12] See Order F10-09, where I considered whether s. 3(1)(b) of FIPPA applies to coroners' investigation notes made leading up to an inquest. I said there, at para. 52, that it was necessary to show that a record was a personal note or communication *and* that it was created in the exercise of quasi judicial functions, in that case, the conduct of an inquest.

[22] The Coroner's Service Investigation Worksheet (p. 49) contains handwritten notes by one of the coroners. The notes are similar in nature to the coroners' investigation notes. I am satisfied that the Worksheet is a personal note of a coroner made in relation to the drafting of a coroner's report.

[23] The Kimble report (p. 50) is dated September 16, 2012, the day following the first coroner's report. It appears to be a status report to the Ministry of Justice summarizing the coroner's investigation into the deceased's death. It is thus not a personal note or communication of a coroner made in relation to drafting a coroner's report.

[24] As for p. 51, I am satisfied that it is a communication of a coroner made in relation to a draft report. It contains medical information of the deceased and reflects a decision one of the coroners made during his investigation, the results of which he evidently relied on in drafting his report.

Conclusion on s. 64(2)(a) of the Coroners Act

[25] For reasons discussed above, I find s. 64(2)(a) of the *Coroners Act* applies to the following records, so they are excluded from the scope of FIPPA and I do not have jurisdiction to consider the Coroner's decision not to release them:

- Coroner's investigation notes (pp. 7-13, 14-23, 29-30, 32-35)
- emails (pp. 24-28 and 31)
- Coroner's Service Protocol (pp. 38-45)
- Coroner's Service Investigation Worksheet (p. 49)
- record containing medical information of the deceased (p. 51)

[26] For reasons I discuss above, I find that s. 64(2)(a) of the *Coroners Act* does not apply to the Kimble report (p. 50).

Section 64(1)(a) of the Coroners Act

[27] The Coroner argued that s. 64(1)(a) applied to some of the records. This section reads as follows:

> **64** (1) Despite the *Freedom of Information and Protection of Privacy Act*,
>
> (a) if no inquest is held, a coroner may refuse to disclose any information collected in the course of an investigation until the investigation is completed,

…

Purpose of section 64(1)(a)of the Coroners Act

[28] The Coroner did not provide me with any submissions on the purpose of s. 64(1)(a) of the *Coroners Act*. It also did not point to any relevant orders on these provisions and I could find none.

[29] My reading of s. 64(1)(a) of the *Coroners Act* suggests that it could potentially capture a broad range of information, although it is limited to the period when an investigation is underway. In my view, its purpose is to allow a coroner to carry out an investigation, pursuing various avenues of inquiry and collecting information and evidence, free of excessive scrutiny by the public. However, once an investigation is over, this extensive protection is no longer necessary and the provisions of FIPPA apply.

[30] In my view, in order for s. 64(1)(a) of the *Coroners Act* to apply to information, three elements must be present:

- no inquest was held or is pending,
- the investigation was still underway at the time of the access request and
- the information was collected in the course of the investigation

[31] With these considerations and criteria in mind, I will now consider whether s. 64(1)(a) of the *Coroners Act* applies to some of the information.

[32] As noted above, the Coroner relied on both ss. 64(2)(a) and 64(1)(a) of the *Coroners Act* as its authority to refuse access to some records. I found above that s. 64(2)(a) of the *Coroners Act* applies to some of these records, so I do not need to consider them further.

[33] I will now consider below whether s. 64(1)(a) of the *Coroners Act* applies to the following:

- the Kimble Report (p. 50)[13]
- records containing the deceased's medical information, including photos (pp. 52-55, 58-82 and unnumbered records)
- a fax coversheet and a seizure order (pp. 56-57)

[13] The inventory of records lists only s. 64(2)(a) of the *Coroners Act* for this record. However, the "Reasons" column includes an explanation which is the same as those for other records withheld under s. 64(1)(a) of the *Coroners Act*. I have therefore included p. 50 in my consideration of s. 64(1)(a) records.

- email, fax cover sheets with attachments, letters (pp. 83-93)
- BC Coroners Service Document Control Sheet Section II Short Term (p. 96)
- BC Coroners Service Document Control Sheet Section I Long Term (p. 97)
- Summary Release of Information (p. 98)

Parties' submissions

[34] The Coroner acknowledged that it had issued a Coroner's Report respecting the deceased's death in this case.[14] However, it said, further information provided to the Coroner had led to the re-opening of the investigation. The Coroner said it has not yet issued a revised Coroner's report, the investigation into the deceased's death has not yet been completed and the case remains open. Depending on what further information comes out of the investigation, the Coroner said that the classification of the deceased's death may or may not remain the same. The Coroner argued that, under s. 64(1)(a) of the *Coroners Act* and, despite FIPPA, it has discretion to refuse to disclose any information collected in the course of the investigation, until it has been completed.[15]

[35] The applicant acknowledged that the Coroner had re-opened the investigation of the deceased's death and that therefore s. 64(1)(a) "would seem to preclude release of records until completion of the investigation". He said however that there have been two coroner's reports on the deceased's death and there is no reason to believe that the facts of this case are in question. He also said " … the ongoing investigation appears independent from the Coroners Service jurisdiction".[16]

Analysis

[36] There is no indication in the material before me that there has been or will be an inquest in this case. This satisfies the first part of the s. 64(1)(a) test.

[37] The Coroner provided affidavit evidence stating that the investigation was re-opened and that it is still open. Indeed, I note that the Coroner's investigation included an interview with the applicant as recently as November 2014.[17] The applicant himself acknowledged that the investigation is still open and

[14] It appears to mean the May 2013 report.
[15] Paragraphs 4.95-4.96, Coroner's initial submission; paras. 60-65, Stancato Affidavit; para. 11, Coroner's reply submission.
[16] Paragraphs. 6.01-6.03, applicant's initial submission.
[17] Paragraphs 60 & 63-64, Stancato affidavit; para. 4, applicant's reply submission.

seemed to accept that s. 64(1)(a) would therefore apply. If, however, the applicant is also suggesting that the current phase of the investigation is somehow separate from the earlier one, I reject such a notion. The earlier phase of the investigation is clearly informing the current phase and all phases of the investigation form a continuum, in my view. I am satisfied that the second part of the s. 64(1)(a) test is met.

[38] I am also satisfied that the third part of the test is met in that the records in question all contain information the Coroner has collected in the course of its investigation into the death of the deceased.

Conclusion on s. 64(1)(a) of the Coroners Act

[39] I am satisfied that, in these circumstances, the Coroner has exercised its discretion appropriately in refusing to disclose information it has collected in the course of its investigation. I therefore find that the Coroner is authorized under s. 64(1)(a) of the *Coroners Act*, despite FIPPA, to refuse access to the information in the following records:

- Ministry of Justice Kimble Report (p. 50)
- records containing medical information of the deceased (pp. 52-55, 58-82 and unnumbered records)
- fax cover and order to seize (pp. 56-57)
- email, fax cover sheets with attachments, letters (pp. 83-93)
- BC Coroners Service Document Control Sheet Section II Short Term (p. 96)
- BC Coroners Service Document Control Sheet Section I Long Term (p. 97)
- Summary Release of Information (p. 98)

Harm to third-party privacy

[40] Section 22 of FIPPA requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of third-party privacy. The Coroner argued that s. 22 applies to many of the records in issue here.[18] In other cases, the Coroner relied on both s. 22 of FIPPA and s. 64 of the *Coroners Act* to refuse access. It is not necessary for me to consider whether s. 22 applies to the records which I found are excluded from the scope of FIPPA under s. 64(2)(a) of the *Coroners Act*.[19] However, s. 64(1)(a) of the *Coroners Act*

[18] Pages. 12-14, 32, 33, 1, 2, 88, 36-37.
[19] Pages. 38-45, 49, 51.

applies only until the investigation is complete. For completeness, I will consider whether s. 22 of FIPPA also applies to information to which I found s. 64(1)(a) of the *Coroners Act* applies.[20]

[41] The records containing information withheld under s. 22 are these:

- three letters from or about the deceased (pp. 12-14)
- RCMP Occurrence (sudden death) Report (pp. 32 & 33)
- Ministry of Health Registration of Death, unsigned (p. 1)
- Coroner's Medical Certification of Death (pp. 2 & 88)
- records containing the deceased's medical information, including photos (pp. 3-6, 36-37, 52-55, 58-82 and unnumbered records)
- Kimble Report (p. 50)

Application of s. 22

[42] The relevant parts of s. 22 read as follows:

> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (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,
>
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment,
>
> …
>
> (f) the personal information has been supplied in confidence,
>
> …
>
> (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.

[20] Pages. 50, 52-55, 58-82 and unnumbered records, including photos.

> (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,
>
> (b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation,
>
> …
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> (a) the third party has, in writing, consented to or requested the disclosure,
>
> …

[43] Many previous orders have set out the proper approach to applying s. 22, for example, Order F15-03:[21]

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. 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, the public body must consider all relevant 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.

Is the information "personal information"?

[44] The Coroner argued that the information in issue is about identifiable individuals and is therefore "personal information". The Coroner added that some of the information is third-party personal information, as it is about individuals other than the applicant. [22] The applicant did not address this issue specifically but he did refer to the information as the deceased's personal information.[23]

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[21] 2015 BCIPC 3 (CanLII), at para. 58.
[22] Paragraphs 4.41-4.42, Coroner's initial submission.
[23] See, for example, para. 3.11, applicant's initial submission.

[45] The information in question is information about identifiable individuals – primarily the deceased. I therefore find that it is personal information.

Did the deceased give informed consent under s. 22(4)(a)?

[46] The applicant said that it is standard practice for researchers to obtain "free, informed and voluntary" consent. He said he established a "researcher-participant relationship" with the deceased in the months before her death. The applicant said that the deceased gave her informed consent for the disclosure of her personal information to him and that she "willed" him her personal information for an academic research purpose. The applicant also described the "careful steps" he took and the conversations he had with the deceased to ensure she understood the purpose of his research and the potential risks and benefits to her. The applicant added that the deceased was well informed as to the nature and extent of personal information that public bodies might collect in a death investigation and that the applicant might access as a result of a request under FIPPA.[24] The applicant's submissions did not, however, explain how he proposed to use the information, beyond saying he would use it for academic research. He also did not explain whether he needed all of the requested information to carry out his research.

[47] The Coroner acknowledged that the applicant had provided a letter from the deceased, signed and dated just before her death, which authorized the applicant to have access, pursuant to FIPPA, to records about the deceased in the custody of the BC Coroners Service.[25] The Coroner agreed that, under s. 22(4)(a) of FIPPA, it is not an unreasonable invasion of third-party privacy where an individual has consented, in writing, to disclosure of her or his personal information. In the Coroner's view, however, it must be apparent that the individual gave informed consent to disclosure and that, where this is not apparent, s. 22(4)(a) of FIPPA does not apply.[26]

[48] The Coroner referred to the Black's Law Dictionary definition of "informed consent": "a person's agreement to allow something to happen, made with full knowledge of the risks involved and the alternatives." It also referred to OIPC and government guidelines and policies on informed consent for use and routine release of personal information and to the requirements for consent under Part 3 of FIPPA in s. 11 of the FIPPA Regulation. In the Coroner's view, the elements of informed consent under Part 3 drawn from these sources are equally apt in the context of s. 22(4)(a).[27]

[24] Paragraphs 2.03-3.11, applicant's initial submission; paras. 5-10, applicant's reply submission.
[25] Exhibit D, Stancato affidavit.
[26] Paragraphs 4.44-4.46, Coroner's initial submission.
[27] Paragraphs 4.47-4.53, Coroner's initial submission.

[49] The Coroner argued that it is not apparent in this case that the deceased gave informed, meaningful consent. In its view, the deceased's letter does not indicate that she had an understanding of the nature and extent of the personal information about her in the Coroner's files. The Coroner referred, *in camera*, to examples of personal information in the records that the deceased might not have understood would be disclosed. It added that the consent is indefinite and there is also no indication of the purpose of disclosure. Moreover, the Coroner said, it had no information on the deceased's state of mind at the time she signed the consent. It added that, given certain other information in the records, which it also described *in camera*, it was concerned the deceased may not have had the mental capacity to understand the consent. The Coroner also said that, if the applicant is arguing that s. 22(4)(d) of FIPPA applies, it does not have a research agreement with the applicant.[28] The Coroner argued that no other provisions in s. 22(4) apply either.[29]

[50] I could find no FIPPA orders dealing with the elements of "informed consent". However, Order P11-02[30], under the *Personal Information Protection Act* ("PIPA"), considered whether a complainant had given meaningful consent to credit scoring when buying insurance. The adjudicator commented that:

> [63] …The consent must be voluntary and the individual must know the nature and scope of the request so that "customers know specifically what they are consenting to and how that consent will be used."

[51] Guidelines for online consent on the OIPC website similarly stress the importance of obtaining meaningful consent from individuals. Individuals should be able to understand the risks and benefits of sharing their personal information with a business and be able to decide freely whether to do so. The Guidelines say that individuals must receive sufficient information to be able to understand what they are consenting to and should include the following:

- what information is being collected, especially if the information is not coming directly from them;
- why information is being collected;
- what the information will be used for;
- who will have access to the information;
- how the information will be safeguarded;

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[28] This provision states that it is not an unreasonable invasion of third-party privacy to disclosure personal information for research purposes. It also requires a research agreement under s. 35 of FIPPA.

[29] Paragraphs 4.54-4.64, Coroner's initial submission; paras. 34-35, Stancato affidavit; paras. 3 & 5, Coroner's reply submission.

[30] 2011 BCIPC No. 16 (CanLII).

- how long the information will be retained; and
- if information is being shared with third parties:
    - what types of third parties;
    - what will the third parties be doing with the information; and
    - whether the third parties are located in a foreign jurisdiction and potentially subject to other laws[31]

[52] These Guidelines are aimed at private sector businesses which, in BC, are covered by PIPA. Unlike FIPPA, PIPA requires that businesses have deemed or express consent to collect an individual's personal information. The Guidelines are, however, helpful in considering what informed consent under s. 22(4)(a) of FIPPA should comprise.

[53] The consent the deceased signed is short. While it is dated and states to whom the personal information may be disclosed, it is missing several elements that I consider necessary for informed consent in this case, for example:

- the purpose of the disclosure
- the proposed new use of the personal information
- the specific elements of personal information to be disclosed
- that the consent was voluntary
- the potential impact of consent on the deceased
- the expiry date of the consent

[54] I acknowledge that the applicant said he discussed informed consent with the deceased and believed that she understood what personal information would be disclosed and how he would use it. The difficulty is that these things are not clear from the consent. Given the brevity of the consent, it is not, for example, evident that the deceased was aware of the type or extent of extremely sensitive medical information about her that the Coroner would collect in the course of investigating her death. For the reasons the Coroner cites, I also accept that the Coroner had concerns over the deceased's state of mind in the days leading up to her death. Based on the *in camera* information the Coroner provided, I have similar concerns.

[55] For these reasons, I am not persuaded that the deceased gave informed consent to the disclosure of her personal information to the applicant. I therefore

[31] https://www.oipc.bc.ca/guidance-documents/1638

find that s. 22(4)(a) of FIPPA does not apply in this case. There is also no reason to consider that any other parts of s. 22(4) apply here.

Presumed unreasonable invasion of privacy

[56] I will now consider if any of the personal information falls under s. 22(3) of FIPPA.

[57] **Medical information –** The Coroner said that, given a coroner's role in investigating a death and determining the circumstances of the death, many of the records relate to a medical diagnosis or evaluation of the deceased, before and after death. Disclosure of this information is therefore presumed to be an unreasonable invasion of privacy, it said. The Coroner referred to relevant BC and Ontario Orders[32] where the adjudicators found that medical information in a coroner's records fell under s. 22(3)(a) of FIPPA or its Ontario equivalent.[33] The applicant did not specifically address the s. 22(3)(a) issue.

[58] The information in issue is in medical centre records about the deceased and in a number of other records the Coroner created or collected as part of its investigation of the deceased's death. I agree with the Coroner's characterization of the information in question. I find that this personal information is the deceased's personal medical information and that it falls squarely under s. 22(3)(a).

[59] **Compiled as part of an investigation –** The Coroner argued that some of the information in records the RCMP provided, or which relates to the RCMP's investigations, falls under s. 22(3)(b). It referred to BC and Ontario Orders in support of this position.[34] The applicant questioned whether there was a "law enforcement matter under investigation".[35]

[60] Some of the information in issue (address and telephone number of the deceased's next of kin and of the individual who last saw the deceased) appears in the RCMP Occurrence (sudden death) Report (pp. 32-33) which the Coroner disclosed to the applicant in severed form. The Coroner also argued that s. 22(3)(b) applies to the deceased's medical information in another record (pp. 36-37), which it withheld in full.

[61] The material before me indicates that the RCMP investigated the deceased's death.[36] I am satisfied that the information in issue on pages 32-33

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[32] Order 04-12, 2004 34268 BC IPC (CanLII); Order PO-1878, 2001 26079 ONIPC (CanLII).
[33] Paragraphs 4.66-4.72, Coroner's initial submission.
[34] Paragraphs 4.73-4.77, Coroner's initial submission.
[35] Paragraph 1, applicant's reply submission, in response to the Coroner's s. 15(1)(c) submission.
[36] See, for example, the second coroner's report and p. 8 of the Coroner's investigation notes, which I found above fall under s. 64(2)(a) of the *Coroners Act*.

and 36-37 was compiled and is identifiable as part of an investigation into a possible violation of law, for the purposes of s. 22(3)(b).

Conclusion on s. 22(3)

[62] I have found that the personal information in issue falls under ss. 22(3)(a) or (b), or both. Its disclosure is therefore presumed to be an unreasonable invasion of third-party privacy.

Relevant circumstances

[63] I will now consider the relevant circumstances under s. 22(2) and whether they favour withholding or disclosing this information.

[64] **Public scrutiny** – The applicant argued that it is in the public interest to know, among other things, why the Coroner did not respect the deceased's wishes regarding certain matters surrounding her death and how the Coroner collected certain "bad information".[37] The applicant also believes that some of the withheld information is in records he himself provided to the Coroner, including some notes the deceased and her physicians signed.[38]

[65] The Coroner disputed the applicant's public interest argument. It does not consider that disclosure of the withheld information is desirable for the purpose of subjecting the Coroner's activities to scrutiny under s. 22(2)(a).[39]

[66] The applicant has not persuaded me that disclosure of the deceased's extremely sensitive medical information is desirable for subjecting the Coroner to public scrutiny. The coroner's report of May 1, 2013 (a copy of which the Coroner disclosed to the applicant) provides details of the coroner's investigative findings and explains how the coroner arrived at his conclusions. In my view, it suffices for demonstrating to the public how the Coroner conducted its investigation into the deceased's death. The withheld personal information would not, in my view, add anything meaningful to the coroner's report. I also agree with the Coroner that the applicant's objections to certain actions the Coroner took relate to investigative decisions the Coroner made and are not properly issues in this inquiry.[40] I find that s. 22(2)(a) is not relevant here.

[67] **Public health or safety –** The Coroner argued that disclosure would not promote public health or safety under s. 22(2)(b).[41] The applicant did not

[37] Paragraphs 4.01-4.06, applicant's initial submission.
[38] Paragraph 3, applicant's reply submission.
[39] Paragraphs 4.80-4.81, Coroner's initial submission.
[40] Paragraph 7, Coroner's reply submission.
[41] Paragraph 4.80, Coroner's initial submission.

specifically address s. 22(2)(b). I agree with the Coroner that there is no reason to believe this provision is relevant here.

[68] **Supplied in confidence –** The Coroner said that s. 22(2)(f) favours withholding the information, as much of the information was generated – and inherently provided in confidence – by medical professionals providing medical services to the deceased. The Coroner referred to a number of Orders in support of this argument. It also argued that the s. 22(3)(b) information "would have, at the very least, been supplied implicitly in confidence".[42] The applicant did not address this provision.

[69] For the reasons the Coroner gave and from my review of the records, I am satisfied that most of the withheld personal information is the type of information that past orders have concluded was inherently supplied in confidence.[43] I find that s. 22(2)(f) applies here and favours withholding the information in issue. As an exception, I find that s. 22(2)(f) does not apply to three letters on pages 12-14 because the applicant himself provided these letters to the Coroner.

[70] **Length of time since death –** The Coroner said the deceased in this case died relatively recently – about 2 ½ years before this inquiry – and that the passage of time has not diminished the deceased's right to privacy, for the purposes of s. 22(2)(i).[44]

[71] Past orders have said that the deceased have privacy rights, although such rights may diminish with time.[45] I agree with the Coroner that, in this case, the relatively short period of time since the deceased died does not favour disclosing the deceased's personal information, particularly given its sensitivity. I find that s. 22(2)(i) does not apply here. I note that the adjudicator in Order F12-08 arrived at a similar conclusion regarding s. 22(2)(i).

[72] **Applicant's awareness of personal information –** Previous orders have found that a relevant circumstance under s. 22(2) is the fact that an applicant is aware of the personal information in issue. It may or may not favour disclosure, depending on the case.[46]

[73] The Coroner did not refer to this factor. The applicant said that the withheld records included three letters from or about the deceased (pp. 12-14). He said that the deceased had given him these letters and that he "compiled [them] for" the Coroner. He attached copies of the letters to his reply submission.

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[42] Paragraphs 4.84-4.86, Coroner's initial submission; para. 6, Coroner's reply submission.
[43] See, for example, Order F14-32, 2014 BCIPC 35 (CanLII) at para. 32.
[44] Paragraphs 4.82-4.83, Coroner's initial submission.
[45] See, for example, Order F12-08, 2012 BCIPC 12 (CanLII) and Order F14-09, 2014 BCIPC 11 (CanLII).
[46] See, for example, Order 03-24, 2005 CanLII 11964 (BC IPC), and Order F10-41, 2010 BCIPC No. 61.

[74] The material before me indicates that the applicant provided these letters to the Coroner as part of a package. The applicant's awareness and possession of the personal information in these records weighs heavily in favour of their disclosure.

Conclusion on s. 22

[75] I found above that ss. 22(3)(a) and (b) apply to the information in issue. I also found that ss. 22(2)(a), (b) and (i) do not apply and that s. 22(2)(f) favours withholding all but the information on pages 12-14. No relevant factors rebut the s. 22(3) presumptions, except with regard to the information on pages 12-14. The applicant's awareness and possession of pages 12-14 rebuts the s. 22(3)(a) presumption regarding these records and he is entitled to have access to them.

[76] For reasons given above, I find that, with the exception of pages 12-14, s. 22(1) applies to all of the withheld or severed information in issue, as follows:

- RCMP Occurrence (sudden death) Report (pp. 32 & 33)
- Ministry of Health Registration of Death, unsigned (p. 1)
- Coroner's Medical Certification of Death (pp. 2 & 88)
- records containing the deceased's medical information, including photos (pp. 3-6, 36-37, 52-55, 58-82 and unnumbered records)
- Kimble Report (p. 50)

Is it reasonable to sever the records?

[77] The Coroner argued that it is not reasonable under s. 4(2) of FIPPA to sever the fully withheld records, as this would result in disclosure of "disconnected snippets", "worthless", "meaningless" or "misleading information". It referred me to a number of relevant orders on this issue.[47] The applicant did not refer to this issue.

[78] For the same reasons, I agree that it would not be reasonable in this case to sever the records to which I have found s. 22 applies.

Harm to investigative techniques

[79] The Coroner argued that s. 15(1)(c) applied to pp. 3-6 and 36-37. I found above that s. 22(1) applies to these records. It is therefore not necessary for me to consider whether s. 15(1)(c) also applies to them.

[47] Paragraphs 4.87-4.91, Coroner's initial submission.

CONCLUSION

[80] For reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to paragraphs 2 and 3 below, I require the BC Coroners Service to refuse the applicant access to all of the information it withheld under s. 22(1) of FIPPA, including that to which I found s. 64(1)(a) of the *Coroners Act* also applies.

2. I require the BC Coroners Service to disclose pp. 12-14 to the applicant.

3. I require the BC Coroners Service to give the applicant access to pages 12-14 by May 2, 2015. The BC Coroners Service must concurrently copy the Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

[81] Given my finding that s. 64(1)(a) and s. 64(2)(a) of the *Coroners Act* apply to some records and information, no order is necessary respecting these sections.

March 19, 2015

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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