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Order F16-44

## BC CORONERS SERVICE

Celia Francis  
Adjudicator

September 21, 2016

CanLII Cite: 2016 BCIPC 48  
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 48

**Summary:** An applicant requested access to records of communications between a named physician and the BC Coroners Service (“BCCS”). The adjudicator found that s. 22(1) (harm to third-party privacy) applied to the withheld information, as it consisted of personal opinions of or about the physician. The adjudicator ordered BCCS to withhold the information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), (22)(3)(d)

**Authorities Considered: B.C.:** Order 01-53, 2015 BCIPC 3 (CanLII); Order 01-07, 2001 CanLII 21561 (BC IPC); Order F15-54, 2015 BCIPC 57 (CanLII); Order F07-22, 2008 CanLII 57358 (BC IPC); Order F05-18, 2005 CanLII 24734 (BC IPC).

## INTRODUCTION

[1] This order arises out of an October 2014 request under the *Freedom of Information and Protection of Privacy Act* (“FIPPA”) to the BC Coroners Service (“BCCS”) for records of communications between a named physician and BCCS related to the death or autopsy of the applicant’s common-law wife. BCCS responded by stating that the requested records were outside the scope of FIPPA under s. 64(2)(a) of the *Coroners Act*.<sup>1</sup> The applicant requested a review by the Office of the Information and Privacy Commissioner (“OIPC”) of BCCS’s

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<sup>1</sup> Section 64(2)(a) of the *Coroners Act* states that FIPPA does not apply to a draft report of a coroner, including any personal note or communication made in relation to the draft report.

decision. Mediation by the OIPC did not resolve the matter and the applicant requested that it proceed to inquiry.

[2] After the OIPC issued the Notice of Inquiry, BCCS reconsidered its decision. It decided to abandon s. 64(2)(a) of the *Coroners Act* and rely on s. 22 of FIPPA instead. In January 2016, BCCS disclosed a copy of the responsive record, severing some information under s. 22(1) of FIPPA (disclosure harmful to third-party privacy). The applicant was not satisfied with the severed record and asked that the inquiry proceed. Accordingly, the OIPC issued a revised Notice of Inquiry stating that the issue to be determined was BCCS's decision under s. 22 of FIPPA to refuse access to information in the record.

## ISSUE

[3] The issue before me is whether BCCS is required by s. 22 of FIPPA to deny the applicant access to information. Under s. 57(2), it is up to the applicant to prove that disclosure of the information in dispute would not be an unreasonable invasion of third-party privacy.

## DISCUSSION

### ***Background***

[4] BCCS is responsible for the investigation of all sudden and unexpected, or unexplained or unattended deaths.<sup>2</sup> BCCS said that, in 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 and must determine the identity of the deceased and how, when and where the deceased died. The coroner then classifies the death as natural, accidental, suicide, homicide or undetermined.<sup>3</sup>

[5] BCCS said that the physician in whose communications the applicant is interested is a pathologist whom the RCMP called to the scene of a homicide.<sup>4</sup> The material before me indicates that the applicant was convicted of murder in the case and remains in custody.

### ***Record in dispute***

[6] The record in dispute consists of three pages of notes of conversations between an unnamed BCCS employee and the physician. BCCS disclosed the

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<sup>2</sup> Section 2, *Coroners Act*.

<sup>3</sup> The BCCS's initial submission, paras. 4.01-4.03.

<sup>4</sup> The BCCS's initial submission, paras. 4.09-4.10. BCCS said that it decided to have another pathologist perform the autopsy.

notes, withholding some information under s. 22(1) of FIPPA.<sup>5</sup> The withheld information is the information in dispute.

***Approach to applying s. 22(1)***

[7] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03:

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.<sup>6</sup>

[8] I have taken the same approach in considering the s. 22 issues here.

*Is the information “personal information”?*

[9] FIPPA defines “personal information” as recorded information about an identifiable individual, other than contact information.<sup>7</sup> BCCS argued that the withheld information is recorded information about the physician and thus his personal information.<sup>8</sup> The applicant argued that there is no indication in the severed notes that they contain any “personal information” of the physician, such as medical information or information that would affect the physician’s family or living circumstances.<sup>9</sup>

[10] The physician is identified by name in the record and most of the withheld information consists of what he told the unidentified BCCS employee who was taking the notes. This withheld information is a record of the physician’s personal

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<sup>5</sup> There are two pages of typed notes (containing approximately 24 lines of text) and one page of handwritten notes.

<sup>6</sup> 2015 BCIPC 3 (CanLII), at para. 58.

<sup>7</sup> Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.” See Schedule 1 of FIPPA for these definitions.

<sup>8</sup> The BCCS’s initial submission, para. 4.17.

<sup>9</sup> Applicant’s submission of March 14, 2016.

opinions and observations about his interactions with BCCS. I find that it is his personal information.

[11] The withheld information also includes the BCCS employee's opinions about the physician. These opinions are "about" the physician and I find that they are the physician's personal information.

*Does s. 22(4) apply?*

[12] Section 22(4) of FIPPA sets out a number of situations in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The parties did not address s. 22(4). I see no basis for the application of s. 22(4) here and find it does not apply.

*Presumed unreasonable invasion of third-party privacy – s. 22(3)*

[13] The next step is to consider whether disclosure of the information in issue is presumed to be an unreasonable invasion of a third party's personal privacy. The relevant provision reads as follows:

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(d) the personal information relates to employment, occupational or educational history,

...

[14] BCCS argued that the withheld information includes the physician's personal opinions and statements he made to the BCCS employee, as well as the BCCS employee's personal opinions of the physician. As such, BCCS argued, the information relates to the physician's occupational history and falls under s. 22(3)(d) of FIPPA.<sup>10</sup> The applicant disagreed, arguing that the information consists of the physician's professional opinions, acting in his capacity as a pathologist.<sup>11</sup>

[15] Much of the information is the physician's personal comments or views about the personal element of his relationship and interactions — in a purely administrative and organizational sense — with BCCS and his feelings about such matters. His comments are not about the particulars of any case-related medical pathology work he may have done. He was not, in my view, acting in his professional capacity as a pathologist in expressing these views but rather speaking from a personal perspective. The rest of the information consists of the BCCS employee's opinions of the physician's demeanour during their

<sup>10</sup> The BCCS's initial submission, paras. 4.17, 4.19.

<sup>11</sup> Applicant's submission of March 14, 2016.

discussions. I am satisfied that all of the information in issue relates to the physician's occupational history and that s. 22(3)(d) applies to it.<sup>12</sup> Its disclosure is therefore presumed to be an unreasonable invasion of the physician's privacy.

*Relevant circumstances – s. 22(2)*

[16] In determining whether disclosure of personal information is an unreasonable invasion of third-party personal privacy under s. 22(1) or 22(3), a public body must consider all the relevant circumstances, including those set out in s. 22(2). At this point, the presumption that disclosure of the withheld information would be an unreasonable invasion of personal privacy may be rebutted. The parties raised the following provisions:

- 22 (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,
  - ...
  - (c) the personal information is relevant to a fair determination of the applicant's rights,
  - ...

[17] **Public scrutiny** — BCCS said that, in its view, disclosure of the information in dispute is not desirable for the purpose of subjecting BCCS to public scrutiny.<sup>13</sup>

[18] The applicant suggested that the BC government is “protecting” the physician who, he argued, was not a qualified forensic pathologist and yet testified against him at his trial, “greatly assisting Crown Counsel with a conviction”. He argued that BCCS is hiding “crucial information” from him, “in all likelihood to disadvantage [him] in future Court proceedings”.<sup>14</sup> The applicant concluded that “the public interest and the integrity of the B.C.C.S. far outweigh” any intrusion on the physician's privacy, particularly if it is shown that BCCS “hid information relative to a murder conviction” that could have assisted the accused.<sup>15</sup>

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<sup>12</sup> This finding is consistent with previous orders which have found that comments by members of self-regulated professions about their conduct were their “occupational history”. See, for example, Order F07-22, 2008 CanLII 57358 (BC IPC), and Order F05-18, 2005 CanLII 24734 (BC IPC).

<sup>13</sup> The BCCS's initial submission, para. 4.20.

<sup>14</sup> Applicant's submission of January 29, 2016. The BCCS disputed these allegations in its reply submission at para. 7.

<sup>15</sup> Applicant's submissions of March 14 and 30, 2016.

[19] BCCS has, in my view, already disclosed information that might shed light on its activities in this case, such as its concerns over the physician's qualifications and reasons for its decision to have another pathologist carry out the autopsy. The withheld information would not, in my view, add anything meaningful to the public's understanding of BCCS's actions in this case. I find that s. 22(2)(a) does not apply to the information in dispute.

[20] **Applicant's rights** — The applicant argued that full disclosure of the notes is "required under 'Stinchcombe' ie: full disclosure to allow full answer and defence."<sup>16</sup> He said that "this evidence may quite possibly be relevant to an unlawful conviction".<sup>17</sup> BCCS countered that this was a matter for the courts to determine, not the OIPC, and that it was in any case not a factor.<sup>18</sup>

[21] Previous orders have held that s. 22(2)(c) only applies if all of the following circumstances are met:

1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds.
2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed.
3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question.
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.<sup>19</sup>

[22] The applicant did not say if he was or would be involved in any proceeding, nor how the withheld information in the record might have any bearing on, or significance to, any such proceeding. Nor did he explain how it would be necessary for any hearing in connection with such a proceeding. These things are also not obvious from the information itself. I find that s. 22(2)(c) does not apply in this case.

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<sup>16</sup> Applicant's submission of March 14, 2016.

<sup>17</sup> Applicant's submission of March 30, 2016.

<sup>18</sup> BCCS's reply submission, paras. 1, 6.

<sup>19</sup> See, for example, Order 01-07, 2001 CanLII 21561 (BC IPC) and Order F15-54, 2015 BCIPC 57 (CanLII).

*Conclusion on s. 22(1)*

[23] I found above that the s. 22(3)(d) presumption applies to the third-party personal information in issue in this case. I also found that no relevant factors favouring its disclosure under s. 22(2) apply.

[24] I find the applicant has not met his burden of proof in this case and the s. 22(3)(d) presumption is not rebutted. I find that s. 22(1) requires that the personal information in dispute be withheld.

**CONCLUSION**

[25] For reasons set out above, under s. 58(2)(c), I require the Ministry to withhold the information it withheld under s. 22(1) of FIPPA.

September 21, 2016

**ORIGINAL SIGNED BY**

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Celia Francis, Adjudicator

OIPC File No.: F14-60108