Order F21-44

MINISTRY OF CHILDREN AND FAMILY DEVELOPMENT

Ian C. Davis
Adjudicator

September 10, 2021

CanLII Cite: 2021 BCIPC 52
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 52

Summary: The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Children and Family Development (Ministry) for access to records relating to her deceased son. The Ministry responded by saying that the applicant had not met the requirements of s. 5(1)(b) of FIPPA and s. 5 of the *Freedom of Information and Protection of Privacy Regulation* (Regulation). These two sections set out who may make an access request on behalf of a deceased individual. The adjudicator confirmed the Ministry's decision that the applicant is not making the access request on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the Regulation.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 5(1)(b); *Freedom of Information and Protection of Privacy Regulation*, s. 5; *Child, Family and Community Service Act*, ss. 49(5), 50(1)(a), 53(1), 53(2) and 74-79.

INTRODUCTION

[1] The applicant made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to the Ministry of Children and Family Development (Ministry) for access to records relating to her deceased son (deceased). The applicant identifies herself and the deceased as Indigenous. At the time of the deceased's death, he was 17 years old and in the Ministry's care. I accept and acknowledge that the circumstances of the deceased's death were especially tragic.[1]

[2] The Ministry responded to the access request by saying that the applicant had not met the requirements of s. 5(1)(b) of FIPPA and s. 5 of the *Freedom of*

[1] The information in this paragraph is based on the Applicant's access request letter to the Ministry dated November 11, 2020 and Affidavit #1 of a named guardianship social worker (Social Worker) at paras. 2-3, which I accept.

Information and Protection of Privacy Regulation (Regulation). Together, these two sections set out who may make an access request on behalf of a deceased individual.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the Ministry's decision. Mediation did not resolve the matter and it proceeded to inquiry. The applicant and the Ministry both made submissions through legal counsel.

[4] To be clear at the outset, this order only addresses whether the applicant is making her access request on her own behalf or on behalf of the deceased as if the deceased were making the access request himself. This order is not about whether the applicant is entitled under FIPPA to access to the records and information she requested. The Ministry has not yet decided that issue.

PRELIMINARY MATTER

[5] In its inquiry submissions, the Ministry relies on s. 76(2) of the *Child, Family and Community Service Act*[2] (CFCSA). However, the inquiry issues as stated in the investigator's fact report and the notice of inquiry do not refer to any provisions of the CFCSA. Also, as I discuss below, it is not clear to me that s. 76(2) of the CFCSA applies here.

[6] Section 76(2) of the CFCSA states:

> A person, other than a director, who has legal care of a child 12 years of age or older may, on behalf of the child, exercise the child's rights under [FIPPA]
>
> (a) to be given access to information about the child in a record, …
>
> if the child is incapable of exercising those rights.

[7] Section 74(1) of the CFCSA says that ss. 74-79 of that Act apply despite FIPPA.

[8] Section 79 of FIPPA says that if a provision of FIPPA is inconsistent or in conflict with a provision of another Act, the FIPPA provision prevails unless the other Act expressly provides that it, or a provision of it, applies despite FIPPA.

[9] The Ministry submits that s. 76(2) of the CFCSA applies despite s. 5(1)(b) of FIPPA and s. 5 of the Regulation, by operation of s. 79 of FIPPA and s. 74(1) of the CFCSA.[3] In other words, the Ministry argues that the CFCSA, not FIPPA or

[2] R.S.B.C. 1996, c. 46 [CFCSA].
[3] Ministry's initial submissions at paras. 7-8 and 11-23.

the Regulation, determines whether the applicant is making the access request on behalf of the deceased.

[10] In my view, whether s. 76(2) of the CFCSA applies to the applicant's access request is not the issue in this inquiry. First, as mentioned above, the OIPC investigator's fact report and the notice of inquiry do not list any provision of the CFCSA as an issue in this inquiry. The OIPC will generally not consider a new issue at inquiry unless a party seeks, and the OIPC grants, permission to add the issue.[4] No such permission was sought or granted in this case to add s. 76(2) of the CFCSA to this inquiry. Further, the Ministry never even referred to the CFCSA in its response to the applicant's access request, which is the decision currently under review.[5]

[11] Second, it is not clear to me that s. 76(2) of the CFCSA is engaged in the circumstances of this case.[6] I do not read s. 76(2) as applying to deceased individuals and the Ministry does not cite any authority to establish that it does. I do not understand, and the Ministry does not explain, how a person could have legal care of a child of a particular age, within the meaning of s. 76(2), if the child in question is deceased. Accordingly, I am not satisfied that s. 76(2) is engaged here and I do not need to determine whether there is an inconsistency or conflict between s. 76(2) of the CFCSA and the relevant provisions of FIPPA and the Regulation. I conclude that s. 5(1)(b) of FIPPA and s. 5 of the Regulation govern in this case.

[12] This conclusion is consistent with Order F18-38.[7] In that case, the applicant made an access request to the Ministry for records relating to his deceased son. The same issue arose as to whether the applicant was making the request on behalf of the deceased. The adjudicator resolved the issue on the basis of FIPPA and the Regulation, not the CFCSA. I take the same approach here.

ISSUE AND BURDEN OF PROOF

[13] The only issue to be decided in this inquiry is whether the applicant is making the access request on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the Regulation.

[14] As noted in Order F18-08, FIPPA does not specify who has the burden of proof regarding whether an access applicant is acting on behalf of another individual.[8]

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[4] See, for example, Order F19-01, 2019 BCIPC 1 (CanLII) at para. 5.
[5] Letter from the Ministry to the applicant's lawyer dated November 19, 2020.
[6] The applicant questions whether the CFCSA provisions apply and the Ministry says they "plainly on their face apply": Applicant's submissions at para. 4; Ministry's reply submissions at para. 2.
[7] Order F18-38, 2018 BCIPC 41 (CanLII).
[8] Order F18-08, 2018 BCIPC 10 (CanLII) at para. 7.

[15] The applicant submits that "it is incumbent on the public body, especially in the context of an Indigenous deceased child and an application by his mother, to provide some basis for arguing" that the applicant is not acting on her son's behalf.[9]

[16] The Ministry notes that previous orders say that in cases such as this each party is responsible for submitting arguments and evidence to support their positions.[10]

[17] In my view, the parties do not raise any persuasive reason to depart from the approach taken in past orders. I accept that, for the purposes of this inquiry, the parties are both responsible for providing evidence and argument to support their positions.

OVERVIEW OF THE PARTIES' POSITIONS

[18] The parties made submissions about the details of the relevant statutory provisions. I discuss those below. At this stage, the parties' overall positions can be summarized as follows.

[19] The Ministry submits that the applicant is not making the access request on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the Regulation. The Ministry says it made its decision with "considerable empathy" for the applicant's situation, but its decision is based on its understanding of existing OIPC orders interpreting the relevant provisions of FIPPA and the Regulation.[11]

[20] The applicant submits that the "analysis of this particular request requires cultural awareness of lived experience, in support of an interpretation of law and statute that is responsive when an Indigenous child and an Indigenous mother are at the centre of an inquiry."[12] The applicant cites the Truth and Reconciliation Calls to Action and various statutes relating to Indigenous peoples to support her position that the records she requested should be disclosed.[13]

[21] The applicant says she can be entrusted with respecting the deceased's privacy and that she, her family and her community have a right to the information in the requested records. The applicant says she wants to "meet her duties as a parent and attend to [the deceased's] well-being according to her responsibilities."[14] She also says that the records should be disclosed to ensure accountability of the Ministry, particularly since "[i]ssues relating to Indigenous

[9] Applicant's submissions at para. 10.
[10] Ministry's initial submissions at para. 9.
[11] Ministry's initial submissions at para. 10.
[12] Applicant's submissions at para. 41.
[13] Applicant's submissions at paras. 42-47.
[14] Applicant's submissions at para. 76.

children who die in the care of the Ministry are sadly a reality for the public in British Columbia."[15]

ACTING ON BEHALF OF A DECEASED INDIVIDUAL

[22] Section 5(1)(b) of FIPPA states:

> (1) To obtain access to a record, the applicant must make a written request that
>
> …
>
> (b) provides written proof of the authority of the applicant to make the request, if the applicant is acting on behalf of another person in accordance with the regulations, ….

[23] Section 5(2) of the Regulation says that, if an individual is deceased, an "appropriate person" may act for the deceased in relation to making an access request under s. 5 of FIPPA.

[24] An "appropriate person", in respect of a deceased minor, which the deceased was at the time of his death,[16] is defined in s. 5(1)(b) of the Regulation as one of the following:

> (i) the personal representative of the deceased;
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> (ii) if there is no personal representative of the deceased, a guardian of the deceased immediately before the date of death;
>
> (iii) if there is no personal representative or guardian of the deceased, the nearest relative of the deceased[.]

[25] In Order F18-38, the adjudicator considered the above provisions and structured the analysis based on two questions: (1) whether the applicant is an "appropriate person" under s. 5(1)(b) of the Regulation; and (2) whether the applicant was acting "on behalf of" the deceased individual under s. 5(1) of FIPPA.[17] I will take the same approach here.

Is the applicant an "appropriate person"?

[26] The Ministry submits that the applicant is not an appropriate person under s. 5(1)(b) of the Regulation.[18] The Ministry says this is because the deceased

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[15] Applicant's submissions at para. 40.
[16] See *Interpretation Act*, R.S.B.C. 1996, c. 238 at s. 29, definition of "minor"; *Age of Majority Act*, R.S.B.C. 1996, c. 7 at s. 1.
[17] Order F18-38, 2018 BCIPC 41 (CanLII) at para. 9.
[18] Ministry's initial submissions at paras. 24-27.

has no personal representative and his sole guardian immediately before the date of his death was the Director of Child and Family Services (Director).

[27] The applicant takes issue with the Ministry's evidence to support its position that she was not the deceased's guardian. The applicant submits that she was the deceased's legal or *de facto* guardian up to and following his death.[19] She says she was in constant contact with the deceased prior to his death and she assumed all parenting duties and responsibilities. She says she was the one to take active steps to find the deceased when he went missing and to find out what happened to him.

[28] The first question under s. 5(1)(b) of the Regulation is whether the applicant is the deceased's personal representative. The term "personal representative" is defined in the *Interpretation Act* as including "an executor of a will and an administrator with or without will annexed of an estate, and, if a personal representative is also a trustee of part or all of the estate, includes the personal representative and trustee".[20]

[29] The Ministry says that, as far as it is aware, "the deceased did not appoint a personal representative (executor)."[21] The applicant did not argue, and I see no persuasive evidence, that she is the deceased's personal representative.

[30] As a result, the next question under s. 5(1)(b) is whether the applicant was a "guardian" of the deceased immediately before the date of his death.[22]

[31] The Ministry provided evidence from the deceased's former social worker that, prior to his death, the deceased was subject to a continuing custody order granted by a provincial court judge in 2004.[23] The Court ordered that the deceased "be placed in the continuing custody of the Director" pursuant to s. 49(5) of the CFCSA.[24] The social worker deposed that the continuing custody order "was never cancelled."[25] The social worker stated that a child under such an order may have access to family, but that access does not impact legal guardianship as long as the custody order remains in effect.

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[19] Applicant's submissions at paras. 48-57.
[20] *Interpretation Act*, *supra* note 16, definition of "personal representative".
[21] Ministry's initial submissions at para. 26.
[22] Neither FIPPA, the Regulation nor the *Interpretation Act* define the term "guardian". Section 1(1) of the CFCSA provides that "guardianship" includes "all the rights, duties and responsibilities of a parent".
[23] Affidavit #1 of the Social Worker at paras. 2-3.
[24] Affidavit #1 of the Social Worker at Exhibit "A".
[25] Affidavit #1 of the Social Worker at para. 3.

[32] The Ministry also relies on several sections of the CFCSA to establish that the applicant was not the deceased's guardian immediately before the date of his death.[26]

[33] Section 50(1)(a) of the CFCSA states that when an order is made placing a child in the continuing custody of a director, the director becomes the "sole personal guardian of the child" and may consent to the child's adoption.

[34] Section 53(1) of the CFCSA states that a continuing custody order terminates when:

> (a) the child reaches 19 years of age,
>
> (b) the child is adopted,
>
> (c) the child marries,
>
> (d) the court cancels the continuing custody order, or
>
> (e) custody of the child is transferred under s. 54.1.

[35] Section 53(2) of the CFCSA states that when the continuing custody order terminates, the director ceases to be the child's personal guardian.

[36] The Ministry submits that the continuing custody order was never cancelled, so the Director was the deceased's sole personal guardian immediately before the date of his death pursuant to s. 50(1)(a) of the CFCSA.[27]

[37] I accept the social worker's evidence that the deceased was subject to the continuing custody order at the time of his death. I also accept the social worker's evidence that the continuing custody order was never "cancelled". I understand that to mean the order was never terminated within the meaning of s. 53(1) of the CFCSA. I do not see any indication in the material before me that any of the circumstances in s. 53(1) of the CFCSA applied to the deceased.

[38] Accordingly, I find, as a result of s. 50(1)(a) of the CFCSA, that the Director was the deceased's "sole personal guardian" immediately before the date of his death. In my view, the clear and unambiguous language of a *sole* personal guardian precludes the possibility of another guardian other than the Director, including a *de facto* one, as the applicant argued. It follows that the applicant was not a guardian of the deceased immediately before the date of his death, so the applicant does not qualify as an appropriate person under s. 5(1)(b)(ii) of the Regulation.

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[26] Ministry's initial submissions at paras. 22 and 26; Ministry's reply submissions at paras. 10-11.
[27] Ministry's reply submissions at paras. 8-21.

[39] To be clear, this does not mean that I reject the applicant's submissions about her connection to, and relationship with, the deceased. I accept, for example, that the applicant was in constant contact with the deceased prior to his death, took active steps to find him when he went missing, and wants to meet her duties as a parent. However, I also do not see how these factors in any way alter the clear statutory language set out above, which I must apply and cannot ignore.

[40] I have also considered s. 5(1)(b) (iii) of the Regulation. That subsection says that a nearest relative of the deceased can be an appropriate person if there is no personal representative or guardian of the deceased. Here, however, the deceased had a sole guardian immediately before the date of his death—the Director. Accordingly, even if the applicant is the deceased's nearest relative, she is not an "appropriate person" under s. 5(1)(b)(iii) of the Regulation.

[41] I conclude that the applicant does not qualify as an "appropriate person" under s. 5(1)(b) of the Regulation. Therefore, the applicant is not authorized under s. 5(2) of the Regulation to act for the deceased in making an access request under s. 5 of FIPPA. As a result, the applicant also has not met the requirements of s. 5(1)(b) of FIPPA because she is not acting on behalf of the deceased "in accordance with the regulations".

Conclusion regarding acting on behalf of a deceased individual

[42] For the reasons provided above, I conclude that the applicant is not making the access request on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the Regulation.[28]

[43] In my view, the law compels this decision and constrains my ability to give full effect to the "cultural awareness of lived experience" that the applicant says this case requires. The Ministry says it made its decision with "considerable empathy"[29] for the applicant and I have as well.

[44] I think it is also important to recognize precisely what this decision means. It only means that the applicant's access request cannot be treated as if the deceased himself were requesting access to records relating to him. This decision does *not* mean that the applicant is not entitled to request the records on her own behalf. The Ministry has not yet decided what access she is entitled

[28] Even if the burden had been entirely on the Ministry, I would have found that it had discharged that burden on the evidence before me. Also, as noted above, I recognize that the applicant referred to the Truth and Reconciliation Calls to Action and various statutes relating to Indigenous peoples. However, in my view, those sources do not alter the application of FIPPA and the Regulation in this inquiry. I agree in general with the Ministry's reply submissions at paras. 26-29. In my view, the sources the applicant relies upon relate to whether she should ultimately be granted access to the requested records, which is a decision that has not yet been made and is not at issue here.

[29] Ministry's initial submissions at para. 10.

to on that basis. When it does, I expect it will contend with the relevant context and considerations the applicant has raised.

CONCLUSION

[45] For the reasons given above, I confirm the Ministry's decision that the applicant is not making the access request on behalf of the deceased in accordance with s. 5(1)(b) of FIPPA and s. 5 of the Regulation.[30]

September 10, 2021

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F20-84763

[30] To be clear, I understand my authority to make this decision as flowing from the Commissioner's jurisdiction over preliminary issues regarding access requests. See, for example, Decisions F09-05, F09-01 and F08-02, available online: https://www.oipc.bc.ca/rulings/decisions/.