



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

Order F10-12

**MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL**

Jay Fedorak, Adjudicator

April 26, 2010

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**Summary:** An applicant requested his personal information in a file relating to a coroner's inquest. The Ministry applied s. 3(1)(b) of FIPPA to the only responsive records, which were the handwritten notes of jurors, on the grounds that the records were created by individuals acting in a quasi judicial capacity. The Ministry also argued the records were subject to s. 64(2)(c) of the *Coroners Act*, as the notes of a coroner. Section 64(2)(c) of the *Coroners Act* does not apply, as the notes or jurors are not the notes of a coroner. However s 3(1)(b) of FIPPA applies to the records as they are the personal notes of individuals acting in a quasi judicial capacity.

**Statutes Considered:** *Coroners Act* [SBC 2007], s. 64(2)(c); *Freedom of Information and Protection of Privacy Act*, s. 3(1)(b).

**Authorities Considered: B.C.:** Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 00-16, [2000] B.C.I.P.C.D. No. 16; F05-13, [2005] B.C.I.P.C.D. No.14; F10-09, [2010] B.C.I.P.C.D. No.14.

**Cases Considered:** *British Columbia (Ministry of Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597, [2004] B.C.J. No. 2534 (B.C.S.C.); *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495; *Evans et al. and Milton et al.* (1979), 24 O.R. (2d) 181 (Ont. C.A.).

**Authors Considered:** Paul Knapman and Michael J. Powers, *The Law and Practice on Coroners*, (Chichester: Thurston's Coronership: 3<sup>rd</sup> edition, 1985), para. 15.36.

## 1.0 INTRODUCTION

[1] This inquiry arises from a request by an applicant to the Office of the Chief Coroner, an agency of the Ministry of Public Safety and Solicitor General ("Ministry"), for any notes containing his personal information in a case file relating to a 1993 coroner's inquest. The applicant, who conducts research on euthanasia, testified at the inquest, which was adjourned before the jury reached a verdict. The Ministry identified the personal handwritten notes of jury members containing information about the applicant as the only records responsive to the request. The Ministry responded by withholding the records on the grounds that they were outside the scope of *Freedom of Information and Protection of Privacy Act* ("FIPPA") in accordance with s. 3(1)(b), as they consisted of the personal notes of persons acting in a quasi judicial capacity. The applicant was dissatisfied with this response and submitted a request for review to the Office of the Information and Privacy Commissioner ("OIPC").

[2] During mediation, the Ministry informed the applicant that it would also rely on s. 64(2)(c) of the *Coroners Act* in support of its position that FIPPA did not apply to the notes. It also advised the applicant that, in the event that FIPPA did apply to the notes, s. 22(1) required that the Ministry withhold the information.

[3] As mediation was unsuccessful in resolving the matter, a written inquiry was held under Part 5 of FIPPA.

## 2.0 ISSUE

[4] The Notice of Inquiry states that the issues are:

1. Whether the requested records fall outside the scope of FIPPA as outlined in s. 3(1)(b).
2. Whether s. 64(2)(c) of the *Coroners Act* applies to the records.
3. Whether the Ministry is required to refuse access under s. 22(1) of FIPPA.

[5] The Ministry in its initial submission attempted to raise a new issue with respect to the application of s. 64(1)(b) of the *Coroners Act*, which authorizes the coroner to refuse to disclose any information collected in the course of an investigation or inquest until the inquest is completed. Where a public body attempts to raise a new exception or issue after the OIPC has issued the notice of hearing, the OIPC normally considers, as a preliminary matter, whether to permit the public body to do so. However, in this case, given my finding below that s. 3(1)(b) applies, I do not need to decide whether to permit the Ministry to raise s. 64(1)(c) of the *Coroners Act* at this stage.

[6] Section 57 of FIPPA is silent about the burden of proof respecting matters related to the application of s. 3(1)(b) of FIPPA and s. 64(2)(c) of the

*Coroners Act*. As a practical matter, it is up to each of the parties to present arguments and evidence to justify their position in the matter.

[7] In the event the requested records were within FIPPA's scope, under s. 57(2) of FIPPA, the applicant would have the burden of proving that disclosure of a third parties' personal information would not be an unreasonable invasion of the third parties' privacy.

### 3.0 DISCUSSION

[8] **3.1 Background**—An unnamed man told three journalists and a researcher that he had witnessed the suicide of an unnamed woman in 1991 and provided details of his actions and observations. A series of newspaper articles related to the woman's alleged death followed. In response, the coroner held an inquest in 1993 concerning the alleged suicide and whether it may have been assisted. At the inquest, the coroner subpoenaed the journalists to reveal the name of the man who attended the death, but they refused. The coroner eventually suspended the inquest, owing to his inability to identify the deceased or to confirm that a death had actually taken place. The inquest file included copies of handwritten notes several jurors took while listening to testimony. The Ministry states that it is not normal practice for the Coroners Service to retain the personal notes of jurors from inquests, but it did so in this case, because, the Coroners Service believed at the time, that the inquest might resume in future in front of the same jurors.<sup>1</sup>

[9] **3.2 Records in Dispute**—The records consist of copies of handwritten notes unidentified jurors took during the inquest. The subject matter of the notes is the testimony of witnesses at the inquest.

[10] **3.3 Application of s. 64(2)(c) of the *Coroners Act***—I shall deal with the issue of the application of the *Coroners Act* first, because if it applies, FIPPA does not.

[11] The relevant provision of the *Coroners Act* is:

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: ...

(c) a personal note, communication or draft report of a coroner, made in the exercise of any power under Part 4 [*Inquests*] ...

[12] As government repealed the *Coroners Act* [RSBC 1996] and replaced it with the new *Coroners Act* [SBC 2007] in 2007, s. 64(2)(c) applies only to access

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<sup>1</sup> Ministry's initial submission, para. 4.44.

requests that the Ministry received after the new *Coroners Act* came into effect. While the records at issue date from 1993, the applicant made his request in 2008. Therefore, the *Coroners Act* [SBC 2007] applies to this request.

[13] The Ministry submits that the notes of the jurors constitute personal notes of the coroner. It offers as evidence the notes themselves. It states further:

The Jurors' Notes were made in the course of powers exercised in relation to an inquest. In addition, they were made by jurors in furtherance of their role as fact finders in a coroner's inquest. On that basis, the [Coroners] Service submits that they constitute the "personal notes" of a coroner made in the exercise of powers under part 4 of the *Coroners Act* and are therefore not subject to FOIPPA by virtue of section 64(2)(c) of the *Coroners Act*.<sup>2</sup>

[14] The applicant argues that s. 64(2)(c) of the *Coroners Act* applies only to the notes of the coroner, not to the notes of jurors.<sup>3</sup>

[15] I agree with the applicant. I do not see how s. 64(2)(c) of the *Coroners Act* can be read to equate the notes of jurors with those of the coroner. The Ministry has not made a case as to why the notes of jurors are, in this context, the notes of the coroner. It has not cited any case law on the subject, and I have been unable to find any relevant cases. There is nothing in the *Coroners Act* to suggest that it intends all records relating to an inquest to be considered as records of the coroner. On the contrary, the *Coroners Act* contemplates a distinction between the coroner and jurors: s. 64(2)(d) makes explicit reference to draft jury verdicts to which it states that FIPPA does not apply. The wording in the *Coroners Act* indicates to me that the legislature did not intend to capture jurors' notes within the meaning of "a personal note of a coroner". Therefore, I find that s. 64(2)(c) of the *Coroners Act* does not apply to the records at issue.

[16] As I have found that s. 64(2)(c) of the *Coroners Act* does not apply, I will now turn to the question of whether s. 3(1)(b) of FIPPA applies.

[17] **3.4 Application of s. 3(1)(b) of FIPPA**—The relevant provision of FIPPA is as follows:

- 3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following: ...
  - (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi judicial capacity;

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<sup>2</sup> Ministry's initial submission, paras. 4.25-4.27

<sup>3</sup> Applicant's initial submission, p. 3.

[18] In determining whether s. 3(1)(b) applies to the records, it is necessary to establish whether the jurors were acting in a quasi judicial capacity when they were sitting on the jury and whether the records in dispute are personal notes.

[19] Numerous Orders and court decisions have considered the question of whether individuals were acting in a quasi judicial capacity when they created certain records and the principles these cases have applied are well established.<sup>4</sup> Senior Adjudicator Francis explored these cases in detail in Order F10-09.<sup>5</sup> Her decision, following previous cases, referenced the Supreme Court of Canada decision in *Minister of National Revenue v. Coopers and Lybrand* that established the standard test. This test asks the following questions:

- (1) Is there anything in the language in which the function is conferred or in the general context in which it is exercised which suggests that a hearing is contemplated before a decision is reached?
- (2) Does the decision or order directly or indirectly affect the rights and obligations of persons?
- (3) Is the adversary process involved?
- (4) Is there an obligation to apply substantive rules to many individual cases rather than, for example, the obligation to implement social and economic policy in a broad sense?<sup>6</sup>

[20] The court stated these are not exhaustive criteria and there is no requirement that a function meet each of the individual aspects to be considered quasi judicial.

[21] Senior Adjudicator Francis found that coroners function in a quasi judicial capacity in presiding over inquests for the following reasons:

In my view, the *Coroners Act* provided for “procedures, functions and happenings approximating those of a court” in the conduct of an inquest. I conclude, taking account of the above case law, the *Coroners Act* and the evidence in this case that a coroner’s functions related to presiding over an inquest meet the criteria set out in *Coopers and Lybrand*. I therefore find that a coroner is acting in a quasi judicial capacity when carrying out these inquest-related functions. I reach this decision because:

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<sup>4</sup> See for example Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 00-16, [2000] B.C.I.P.C.D. No. 16; F05-13, [2005] B.C.I.P.C.D. No.14; *British Columbia (Ministry of Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597, [2004] B.C.J. No. 2534 (B.C.S.C.); *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495.

<sup>5</sup> F10-09, [2010] B.C.I.P.C.D. No.14, paras. 47-62.

<sup>6</sup> *M.N.R. v. Coopers and Lybrand*, p. 8.

- the *Coroners Act* expressly requires a hearing, an inquest, in which witnesses testify and are cross-examined under oath and exhibits are introduced, in a process similar to that of a court
- while a coroner does not adjudicate a dispute between parties and the coroner's jury cannot make findings of guilt, individual rights may be affected at an inquest, for example, by a coroner's rulings granting standing or on admissibility of evidence or weight to be given to evidence; there is also no doubt that the outcome of an inquest may adversely affect an individual's reputation
- while an inquest is considered inquisitorial and not adversarial and there is no charge, accused or *lis inter partes* [dispute between parties], individuals with conflicting interests may present contradictory versions of the facts at the inquest
- there is an obligation to apply standards to specific cases in that the coroner and jury must consider the issues, facts and evidence in a given case and arrive at findings pertaining to the particular death.

In addition, the case law is clear that when presiding over an inquiry a coroner acts in a quasi judicial capacity.<sup>7</sup>

[22] While Senior Adjudicator Francis was considering the previous *Coroners Act* [RSBC 1996], her comments about the functions of coroners remain valid with respect to the revised *Coroners Act* [SBC 2007].

[23] In the present case, the Ministry argues the functions of the jurors in a coroner's inquest also qualify as quasi judicial under the *Coopers and Lybrand* test. It takes arguments supporting the position that coroners exercise a quasi judicial function and applies them to the role of the jury in the process. The Ministry argues that it is the jury that makes the decision during the hearing; the jury's decision can directly or indirectly affect the rights of individuals;<sup>8</sup> and the inquest is often adversarial with the various parties asserting various positions.<sup>9</sup> On the final question, the Ministry asserts that juries deliberate on evidence and the rules of administrative fairness apply.<sup>10</sup>

[24] The Ministry also cites the legal text "*The Law and Practice on Coroners*", by Paul Knapman and Michael J. Powers, as an authority on the function of a coroners' jury:

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<sup>7</sup> F10-09, paras. 67-68.

<sup>8</sup> Ministry's reply submission, para. 7.

<sup>9</sup> Ministry's reply submission, para. 8.

<sup>10</sup> *Evans et al. and Milton et al.* (1979), 24 O.R. (2d) 181 (Ont. C.A.).

The principal purpose of the jury is to make the findings as to fact on the evidence they hear in order that they can properly complete the inquisition.<sup>11</sup>

[25] By extension, the Ministry argues, the jury also performs a quasi judicial function in deliberating on the evidence and making findings of fact:

As such, the Service submits that it must necessarily be the case that jurors, as the finders of fact, act in a quasi judicial manner in an inquest.<sup>12</sup>

[26] The applicant's main argument is that jurors do not exercise a quasi judicial function because "the Coroner's jury is a fact-finding, not a fault-finding body."<sup>13</sup>

[27] I disagree with the applicant. While the coroner's jury decides matters of fact, such as the identity of the deceased, it also makes other findings, such as whether or not the death was a homicide. The jury does not just establish the facts; it evaluates them in the process of deciding into which legal category the cause of death falls. This decision can have important consequences. The fact that the jury does not find fault (*i.e.*, who committed the homicide) does not mean that it is not required to act in a quasi judicial manner.

[28] Order F10-09 establishes that a coroner acts in a quasi judicial capacity when presiding over inquests, because the characteristics of the inquest meet the *Coopers and Lybrand* test. The role of the jury at a coroner's inquest is to deliberate on evidence presented at the hearing to determine the identity of the deceased and the cause of death. Jurors hear all witness testimony as to the matters at issue, weigh evidence, draw conclusions and make findings. The jury is afforded deliberative secrecy to render a verdict, in a manner similar to juries in court processes. Consequently, I agree with the Ministry that the jurors at the coroner's inquest in question were acting in a quasi judicial capacity.

[29] The parties agree that the records at issue were personal notes of the jurors. The subject matter of the notes appears to be the testimony of witnesses at the inquest. Therefore, I find that the notes in question are the personal notes of individuals acting in a quasi judicial capacity, in accordance with s. 3(1)(b) of FIPPA. As a result, they are outside the scope of FIPPA, and the Ministry is not required to process them under FIPPA.

[30] Given my finding with respect to s. 3(1)(b) of FIPPA, I do not need to deliberate on the application of s. 22(1).

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<sup>11</sup> Paul Knapman and Michael J. Powers, *The Law and Practice on Coroners*, (Chichester: Thurston's Coronership: 3<sup>rd</sup> edition, 1985), para. 15.36, as quoted in Ministry's initial submission, para. 4.34.

<sup>12</sup> Ministry's initial submission, para. 4.39.

<sup>13</sup> Applicant's initial submission, p. 1.

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#### **4.0 CONCLUSION**

[31] For the reasons given above, I confirm that s. 3(1)(b) of FIPPA excludes the requested records from the application of FIPPA. Therefore, no order is necessary.

April 26, 2010

#### **ORIGINAL SIGNED BY**

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Jay Fedorak  
Adjudicator

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