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Order F11-13

BC CORONERS SERVICE

Jay Fedorak, Adjudicator

May 11, 2011

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Summary: An applicant requested policy manuals from the BC Coroners Service. The BCCS responded by providing two documents, while withholding some information under ss. 13 and 15 of FIPPA. The BCCS subsequently released all the information it withheld under s. 13 but continued to withhold some information under s. 15, on the grounds that disclosure would harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement. Coroner's investigations found to constitute law enforcement where they form part of a criminal investigation. It was reasonable to expect that disclosure of some of the information currently used, or likely to be used, in Coroner's investigations would harm the effectiveness of investigative techniques. BCCS authorized to withhold the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(c).

Authorities Considered: B.C.: Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order F10-09, [2010] B.C.I.P.C.D. No. 14; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order F05-18, [2005] B.C.I.P.C.D. No. 26; Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23; Order No. 125-1996, [1996] B.C.I.P.C.D. No. 52; Order No. 71-1995, [1995] B.C.I.P.C.D. No. 44; Order No. 83-1996, [1996] B.C.I.P.C.D. No. 9; Order No. 116-1996, [1996] B.C.I.P.C.D. No. 43; Order No. 39-1995, [1995] B.C.I.P.C.D. No. 12; Order No. 163-1997, [1997] B.C.I.P.C.D. No. 21; Order No. 263-1998, [1998] B.C.I.P.C.D. No. 58; Order F07-04, [2007] B.C.I.P.C.D. No. 6; Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5; Order F11-04, [2011] B.C.I.P.C.D. No. 4. **Ont.:** Order P-1027, [1995] O.I.P.C. No. 408; Order M-749, [1996] O.I.P.C. No. 141.

1.0 INTRODUCTION

[1] The applicant requested the *Investigative Services Policy Manual* and a list of all policy manuals from the BC Coroners Service ("BCCS"). The BCCS responded by providing copies of the *Investigative Services Policy Manual*, the *Guide to Completing a Judgement of Inquiry* and the *Coroner's Human Resource Manual*. It withheld some information from the *Investigative Services Policy Manual* and the *Guide to Completing a Judgement of Inquiry* under ss. 13 and 15 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The applicant was dissatisfied with the response and requested a review from the Office of the Information and Privacy Commissioner ("OIPC").

[2] Mediation was not successful in resolving these issues and the matter proceeded to an inquiry under Part 5 of FIPPA. Prior to the close of submissions to the inquiry, the BCCS disclosed the remainder of the *Guide to Completing a Judgement of Inquiry*. In its initial submission, the BCCS indicated that it would release all of the information in the *Investigative Services Policy Manual* ("the Manual") that it had withheld under s. 13 of FIPPA and subsequently did so. Therefore, the only remaining matter at issue is the application of s. 15(1)(c) to passages in the Manual.

2.0 ISSUE

[3] The issue before me is whether s. 15(1)(c) of FIPPA authorizes the BCCS to withhold information from the Manual. Under s. 57(1) of FIPPA, the BCCS has the burden of proof respecting s. 15.

3.0 DISCUSSION

[4] **3.1 Record in Dispute**—The Manual comprises policies and procedures issued under the authority of the *Coroners Act* that governs the BCCS. The BCCS is responsible for the investigation of all sudden and unexpected, unexplained or unattended deaths. The BCCS describes coroners as medical-legal death investigators who are responsible for determining the identity of the deceased and how, when, where and by what means the deceased died. The coroner then classifies the death as natural, accidental, suicide, homicide or undetermined.¹

[5] **3.2 Preliminary Issue**—Prior to the deadline for initial submissions, the BCCS requested permission from the OIPC to apply s. 19(1)(a) of FIPPA to the information withheld. The BCCS justified its late request on the grounds of public safety considerations in the case. The OIPC declined the request on the grounds that the BCCS had not indicated that the failure to apply s. 19(1)(a)

¹ The BCCS's initial submission, paras. 4.01, 4.03, and 4.04.

earlier was an oversight or that there were recently discovered new facts that were not known at the time the BCCS made its initial decision.

[6] **3.3 Harm to Law Enforcement**— Section 15(1)(c) of FIPPA reads as follows:

- 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to ...
- (c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

[7] FIPPA defines “law enforcement” as

- (a) policing, including criminal intelligence operations,
- (b) investigations that lead or could lead to a penalty or sanction being imposed, or
- (c) proceedings that lead or could lead to a penalty or sanction being imposed;

[8] In Order 00-01,² Commissioner Loukidelis outlined the threshold for harms-based tests, such as that set out in s. 15(1):

...a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived.³

[9] I take the same approach here.

[10] In order for s. 15(1)(c) to apply to the information at issue, I must decide whether coroners’ investigations constitute “law enforcement”. If I find that they do, I must then decide whether the information at issue relates to “investigative techniques or procedures currently used or likely to be used in law enforcement”. If I find that they do, then I must decide whether disclosure of the information could reasonably be expected to cause harm to the effectiveness of these techniques.

² [2000] B.C.I.P.C.D. No. 1.

³ At p. 5.

Do coroners' investigations constitute law enforcement?

[11] The BCCS submits that, although coroners do not exercise a policing function, their investigations provide information and evidence to police and Crown Counsel. This can lead to prosecutions under the *Criminal Code* and the imposition of penalties and sanctions.⁴ The BCCS argues that police departments rely on coroners' investigations for information that is critical to some criminal investigations. The Acting Chief Coroner deposes:

At the scene of a potential suspicious/wrongful death, the police and coroner work together to investigate the circumstances. The police and coroner will ensure that all aspects of the scene are examined and documented. The coroner will take charge of the body and be responsible for the medical examination. Any successful prosecution of someone relating to a wrongful death will depend, in part, on the coroner's medical examination of the deceased. The police and Crown Counsel will rely on the Service and its forensic pathologist for evidence concerning the medical and/or toxicological cause of the death in any potential prosecution.⁵

[12] According to the BCCS, a coroner often has greater expertise than the police in determining the manner and cause of death and whether it was natural. In the absence of the police, if a coroner believes a death is suspicious, she or he will call the police and recommend an investigation.⁶

[13] The applicant denies that the investigations that coroners conduct constitute law enforcement. He points out that the *Coroners Act* does not assign any law enforcement functions.⁷ He also submits that the BCCS is "a fact-finding, not a fault-finding agency" that is not an agent of the police and has no law enforcement mandate.⁸ He asserts that coroners' investigations are "independent from law enforcement agencies".⁹

[14] The applicant takes the position that coroners' investigations do not constitute law enforcement. The BCCS submits that some coroners' investigations become connected to police investigations under the *Criminal Code*, which constitute "law enforcement".

⁴ BCCS's initial submission, paras. 4.30-31.

⁵ BCCS's initial submission, affidavit of Acting Chief Coroner, para. 13.

⁶ BCCS's initial submission, paras. 4.33-34.

⁷ Applicant's initial submission, para. 14.

⁸ Applicant's initial submission, para. 15.

⁹ Applicant's reply submission, para. 21.

[15] Previous orders have interpreted “law enforcement” under FIPPA to require that a public body have a “law enforcement mandate”.¹⁰ Whether coroners’ investigations meet the definition of “law enforcement” has not been the subject of an order in British Columbia.

[16] There are some orders from Ontario that have addressed this issue. Collectively, they have found that, on their own, coroners’ investigations do not constitute law enforcement, because coroners are not empowered to impose penalties or sanctions.¹¹ In one case, however, the adjudicator found that, while the coroner’s investigation on its own did not constitute “law enforcement”, in combination with the police investigations, it did constitute “law enforcement”.¹² As Senior Adjudicator Francis observed in Order F10-09, the coroner’s role and legislation in Ontario is similar to that of British Columbia.¹³ In addition, the definition of “law enforcement” in FIPPA and the Ontario *Freedom of Information and Protection of Privacy Act* are substantially similar. It is clear from the definition of “law enforcement” that it includes criminal investigations conducted by the police.

[17] Therefore, I find that, in cases where a coroner’s investigation forms part of, or leads to, a criminal investigation by police, it qualifies as “law enforcement”. Now I will turn to whether the information at issue relates to investigative “techniques or procedures” used or likely to be used in investigations that could form part of law enforcement.

Does the information relate to investigative techniques and procedures?

[18] The BCCS characterizes the information that it has withheld under s. 15(1)(c) of FIPPA as investigative techniques and procedures that coroners use in order to determine the cause and manner of a death.¹⁴ FIPPA does not define the term “investigative techniques and procedures”. Previous orders on s. 15(1)(c) have provided some general guidance on interpreting it. Some orders have determined that activities, such as covert police surveillance techniques constitute “investigative techniques”,¹⁵ while others, such as confidential interviews¹⁶ or accepting complaints or 911 calls,¹⁷ do not.

¹⁰ See for example, Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; F05-18, [2005] B.C.I.P.C.D. No. 26.

¹¹ See, for example, Ontario Orders P-1027, [1995] O.I.P.C. No. 408, p. 4 and Order M-749, [1996] O.I.P.C. No. 141, para. 15.

¹² Order M-749, para. 16.

¹³ [2010] B.C.I.P.C.D. No. 14, para. 54

¹⁴ BCCS’s initial submission, paras. 4.35-36.

¹⁵ Order No. 50-1995, [1995] B.C.I.P.C.D. No. 23; Order No. 125-1996, [1996] B.C.I.P.C.D. No. 52.

¹⁶ Order No. 71-1995, [1995] B.C.I.P.C.D. No. 44; Order No. 83-1996, [1996] B.C.I.P.C.D. No. 9; Order No. 116-1996, [1996] B.C.I.P.C.D. No. 43; Order 00-08, [2000] B.C.I.P.C.D. No. 8.

[19] Commissioner Loukidelis observed in Order 00-08, that the term “investigative techniques and procedures” applies to “technologies and technical processes used in law enforcement”.¹⁸ The government’s *Policy and Procedures Manual* that provides useful guidance to public bodies, defines this term as:

the methods or processes by which examinations, enquiries or observations are carried out. The meaning of this phrase includes the equipment and technology employed to conduct these examinations, or observations.

[20] The standard definition in the Oxford English dictionary of “technique” is: “a means of achieving one’s purpose, especially skilfully”. Taking these forms of guidance into account, I find that, in the context of coroners’ investigations, “investigative techniques and procedures” would constitute the practices, methods and technologies that coroners employ when conducting investigations.

[21] I am constrained from discussing these techniques in detail, as they relate to the information withheld, and much of the BCCS’s description of these techniques was *in camera*. In the open parts of its submission, the BCCS describes the information as “procedures and/or techniques employed by the Service at the scene of a death to determine the cause and manner of a person’s death, including whether or not it should be classified as natural, accidental, suicide, homicide or undetermined”.¹⁹ The BCCS also describes some of the information as relating to techniques it uses in identifying the deceased.²⁰ Other passages explain how a coroner determines whether:

1. to order an autopsy or toxicology examination;
2. a death was suicide; and
3. the death of a child is related to Sudden Infant Death Syndrome.

[22] Because the BCCS submitted them *in camera*, I am unable to discuss the BCCS’s descriptions of other investigative techniques and procedures, other than to say that they are scientific approaches and specific activities tailored to elicit certain information. In general, the information at issue explains how coroners treat the evidence at the scene and the basic set of assumptions that they draw based on that evidence in determining the cause of death. In other words, it reveals what coroners look for and what they conclude when they find certain evidence. I am satisfied that these activities and approaches to interpreting evidence constitute “investigative techniques and procedures”.

¹⁷ Order No. 39-1995, [1995] B.C.I.P.C.D. No. 12; Order No. 163-1997, [1997] B.C.I.P.C.D. No. 21; Order No. 263-1998, [1998] B.C.I.P.C.D. No. 58; Order F07-04, [2007] B.C.I.P.C.D. No. 6.

¹⁸ Order 00-08.

¹⁹ BCCS’s initial submission, affidavit of Acting Chief Coroner, para. 29

²⁰ BCCS’s initial submission, affidavit of Acting Chief Coroner, para. 34.

[23] Now I will turn to whether disclosure of the information meets the threshold for harms-based exceptions that Commissioner Loukidelis established.

Would disclosure result in harm?

[24] The BCCS argues that the disclosure of the information could harm the effectiveness of its investigative techniques, in that it could assist someone planning to cause a death to avoid detection, thereby rendering the investigative techniques and procedures ineffective.²¹ If someone planning to cause a death were aware of the information and evidence that coroners use for determining cause of death, that person would have an opportunity to take actions that could influence a coroner to determine that a death was natural or accidental as opposed to a homicide.²²

[25] The BCCS's submission includes an affidavit from the Acting Chief Coroner, who is also a former police officer. He identifies the passages that the BCCS has withheld under s. 15(1)(c) of FIPPA and provides an explanation of the possible harm that could result from the disclosure of each particular passage, in particular how individuals could manipulate the evidence to increase the likelihood that a coroner's investigation could lead to erroneous conclusions.²³

[26] The applicant dismisses these concerns, speculating that all of the investigative techniques that the BCCS is trying to protect are commonly known already. He suggests that these techniques are:

widely documented in books, forensic journals, documentary videos, and popular television programmes (e.g. *DaVinci's Inquest* broadcast 7 seasons and 91 episodes depicting coroner investigative techniques and procedures). The same procedures and techniques are available to the general public on the Internet and in public libraries. Universities teach many of these techniques in forensic anthropology, criminology, biology, chemistry, and various justice studies courses.²⁴

[27] He submits that, far from facilitating crime, the disclosure of these techniques would reduce crime. He argues that "the certainty of detection and punishment is a powerful deterrent to crime".²⁵ Greater awareness of these techniques and "the certainty of being caught" would deter incidents of wrongful death and increase public safety.²⁶

²¹ BCCS's initial submission, para. 4.37.

²² BCCS's initial submission, para. 4.38.

²³ BCCS's initial submission, affidavit of Deputy Chief Coroner, para. 41.

²⁴ Applicant's initial submission, para. 10.

²⁵ Applicant's initial submission, para. 13.

²⁶ Applicant's initial submission, para. 13.

[28] The BCCS acknowledges that there is information about death investigations that is widely available. It points out, however, that

The information referred to by the Applicant in his initial submissions as being in the public domain (i.e. techniques used in the television show *DaVinci's Inquest*) is not that [*sic*] the same as the information at issue in this inquiry. The information referred to by the Applicant in his initial submissions as being in the public domain consists of investigative techniques or processes used or recommended by others, not the Service. The information at issue in this inquiry consists of investigative techniques or processes used by the Service. If the information at issue in this inquiry were to be released to the Applicant he would have the following information that he does not currently have:

- Confirmation as to which investigative techniques and processes are used by the Service, and
- Confirmation as to which investigative techniques and processes are not used by the Service.

The Applicant has failed to refer in his submission to any specific instances where any of the information at issue in this inquiry is currently found in the public domain. As such, the Service submits that this is not a relevant consideration in this case.²⁷

[29] The BCCS also denies that disclosure of the BCCS's investigative techniques would deter crime. In the BCCS's words:

Clearly, if providing access to any and all law enforcement investigative processes and techniques would provide for certainty that all crime could be detected, there would have been no reason for the Legislature to enact section 15(1)(c) of the Act. Although the Applicant's position at paragraph 13 is a nice objective to wish for, it is, unfortunately, not consistent with the real world of law enforcement.²⁸

[30] Generally, the fact that information withheld is already in the public domain is a factor in applying an exception,²⁹ but it is not determinative. In any event, I am unable to determine whether the information that is available publicly is indeed the same as that at issue here, because the applicant has only submitted small samples of the material (e.g., the home page of a website, the table of contents of one book, a chapter from another book).

²⁷ BCCS's reply submission, para. 1. The underlining is the BCCS's.

²⁸ BCCS's reply submission, para. 2.

²⁹ See Order No. 5-1994, [1994] B.C.I.P.C.D. No. 5; Order F11-04 [2011] B.C.I.P.C.D. No. 4, para. 24.

[31] Moreover, the applicant merely speculates that the information in the record is likely to be similar to information available in books, in television programs and on websites in different jurisdictions. While there might be some overlap between the investigative techniques and procedures used by the BCCS and those available publicly, I agree with the BCCS that it is not possible to determine, from the public sources the applicant has submitted, which techniques and procedures the BCCS actually employs. Therefore, I find that the fact that there might be some similar information available in the public domain does not mean that s. 15(1)(c) cannot apply to the information at issue.

[32] The Acting Chief Coroner's evidence was that disclosure of the information could harm the investigative techniques and procedures used in a coroner's investigation that forms part of a larger criminal investigation. It does not matter, for the purposes of FIPPA, that some coroners' investigations form part of larger criminal investigations and others do not, because the techniques that coroners employ are the same. In addition, at the time any coroner's investigation commences, there is the possibility that it could form part of a criminal investigation. The passages of the Manual at issue all relate to investigative techniques used to identify the deceased and to determine whether death was natural, accidental, suicide or homicide. The affidavit also provides a detailed description of how someone could use the information at issue and take specific actions that could lead a coroner to conclude that a homicide was a natural death, accident or suicide, all of which could lead to the termination of a criminal investigation without arrest in a case where a crime was committed. I cannot explain how, without revealing information that the BCCS provided *in camera*. However, I can say that the affidavit testimony persuades me that these scenarios are reasonable, credible and realistic.

[33] I commend the BCCS for providing this level of detail in support of its decision to withhold each passage. It enabled me clearly to comprehend its arguments and understand how they applied to each passage of information in the record. The BCCS has satisfied me that there is a logical connection between the disclosure of the information at issue and the harm contemplated. I also note that, after the BCCS completed its latest disclosure, it had released most of the pages of the Manual in their entirety. Where it has withheld information, I am satisfied that it is the minimum amount of information required to prevent the contemplated harm.

[34] Therefore, I find that the BCCS has established that there is a reasonable expectation that disclosure of the information at issue would cause the harm contemplated.

Conclusion

[35] I have concluded that, in cases where a coroner's investigation forms part of a larger criminal investigation, it meets the definition of "law enforcement" under FIPPA. I have also determined that the information that the BCCS has withheld relates to investigative techniques and procedures currently used, or likely to be used, by coroners during investigations, and coroners use the same techniques in all cases. Finally, I have found that disclosure of those investigative techniques and procedures could reasonably be expected to harm their effectiveness. Therefore, I find that s. 15(1)(c) applies to the withheld information.

4.0 CONCLUSION

[36] For the reasons given above, I confirm that s. 15(1)(c) of FIPPA authorizes the BCCS to withhold the information at issue.

May 11, 2011

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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