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Order F12-08

BC CORONERS SERVICE

Jay Fedorak, Adjudicator

April 27, 2012

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Summary: The University of British Columbia Law Innocence Project applied for copies of an autopsy report and forensic laboratory report relating to a homicide. BCCS withheld the record under s. 22(1) on the grounds that disclosure of the victim's medical information would be an unreasonable invasion of her privacy. UBCLIP argued that it required the Reports in order for its contracted forensic expert to complete a full and proper review of the autopsy and form an expert opinion as to whether the conclusions of the Coroner were flawed. It submitted that this circumstance rebutted the presumption that disclosure would be an unreasonable invasion of privacy. The adjudicator found that s. 22(1) applied to the information and ordered BCCS to withhold the Reports.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(c), 22(2)(e), 22(2)(h), 22(3)(c), and 22(3)(i).

Authorities Considered: **B.C.:** Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 01-07, [2001] B.C.I.P.D. No. 7; Order 01-52, [2001] B.C.I.P.D. No. 55; Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22; Order F07-21, [2007] B.C.I.P.D. No. 35; Order 02-03, [2002] B.C.I.P.D. No. 3; Order No. 58-1995, [1995] B.C.I.P.D. No. 31; Order F07-20, [2007] B.C.I.P.C.D. No. 34. **Alta.:** Order 2000-012, [2000] A.I.P.C.D. No. 30. **Ont.:** Order P-362, [1992] O.I.P.C. No. 153; Order PO-2715, [2008] O.I.P.C. No. 177.

Cases Considered: *Hamalainen (Committee of) v. Sippola*, (1991), 62 B.C.L.R. (2d) 254.

INTRODUCTION

[1] This case involves the University of British Columbia Law Innocence Project (“UBCLIP”) challenging a decision of the BC Coroners Service (“BCCS”) to withhold a copy of an autopsy report and forensic laboratory report (“Reports”). The UBCLIP is reviewing the details of a murder conviction to determine whether there was a miscarriage of justice. BCCS withheld the Reports on the grounds that disclosure would constitute an unreasonable invasion of the personal privacy of the deceased victim under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”).

ISSUE

[2] The question I must decide is whether s. 22(1) of FIPPA requires the BCCS to withhold the personal information of the third party because disclosure of the Reports would be an unreasonable invasion of their personal privacy.

DISCUSSION

[3] **Background**—UBCLIP is a for-credit student program within the UBC Faculty of Law, which investigates claims of wrongful conviction and identifies potential miscarriages of justice. It assists those it believes to be wrongly convicted in applying to the federal Minister of Justice for post-conviction review pursuant to s. 696.1 of the *Criminal Code*.

[4] UBCLIP received an application from the individual convicted in the case and discussed his case with him. It has reviewed witness testimony and compared that testimony with statements made to police. It has also hired a forensic pathologist to review available documentation. The forensic pathologist states that he has found “weaknesses and anomalies” in the documentation and wants access to all of the material from the original examining pathologist.

[5] At some point, UBCLIP contacted the Criminal Justice Branch (“Crown Counsel”) seeking records relevant to the case. After the inquiry closed, Crown Counsel agreed to grant UBCLIP access to its file for the case. As a result of reviewing this material, UBCLIP obtained access to forensic photographs of the victim, but the case file did not include copies of the Reports. UBCLIP agreed to narrow the scope of the inquiry to exclude the photographs.

[6] **Records in Issue**—There are two records now at issue that I have collectively referred to as the Reports: an autopsy report and forensic laboratory report containing information about the body of the victim. The autopsy report contains descriptions of the findings of an external and internal examination. The forensic laboratory report contains the results of tests, including toxicology tests, conducted on the victim’s body and bodily fluids.

[7] **Preliminary Issues**—BCCS raised the preliminary issue whether the Office of the Information and Privacy Commissioner (“OIPC”) should invite third parties to participate in this inquiry. BCCS suggested that, as the privacy interests of the victim were at issue in the inquiry, it would be appropriate to invite her nearest relative or personal representative. BCCS also asserted that comments made about the pathologist’s autopsy report put the pathologist’s reputation in question, and it would be appropriate to invite the pathologist as a third party.

[8] UBCLIP objected to the participation of a representative of the victim in the inquiry, on the grounds that they did not want to upset them unnecessarily. I merely observe at this juncture that this position supports the conclusion, discussed further below, that UBCLIP has not yet decided whether it will in fact support an application to the Minister.

[9] The Senior Adjudicator dismissed the BCCS request to invite the pathologist on the grounds that it was the victim’s personal privacy that was at issue, rather than the pathologist’s. He noted that BCCS could provide evidence from the pathologist in its own submission. On the issue of inviting the participation of a representative of the victim, he deferred a decision until after the OIPC could review the initial submissions of the parties.

[10] I have reviewed the submissions. For the reasons that follow, it is my determination that the answer is clear that the Reports must be withheld under s. 22(1). As such, it is not necessary for me to invite submissions from a personal representative of the victim.

[11] **Would Disclosure be an Unreasonable Invasion of the Deceased’s Privacy?**—FIPPA requires public bodies to withhold personal information where its disclosure would be an unreasonable invasion of a third party’s personal privacy. The test for determining whether disclosure would be an unreasonable invasion of privacy is contained in s. 22 of FIPPA.

[12] Numerous orders have considered the proper analytical approach to s. 22, for example, Order 01-53.¹ First, the public body must determine if the information in dispute is personal information. If so, it must consider whether any of the information meets the criteria identified in s. 22(4), in which case disclosure would not be an unreasonable invasion of third-party personal privacy and s. 22(1) would not apply. If s. 22(4) does not apply, the third step for the public body is to determine whether disclosure of the information falls within s. 22(3), in which case it would be *presumed* to be an unreasonable invasion of third-party privacy. If the presumption applies, it is necessary to consider whether or not the presumption has been rebutted by considering all relevant

¹ [2001] B.C.I.P.C.D. No. 56.

circumstances, including those listed in s. 22(2). As noted in Order 01-53 (para. 24), discussing this stage of the analysis:

According to s. 22(2), the public body then must consider all relevant circumstances in determining whether disclosure would unreasonably invade personal privacy, including the circumstances set out in s. 22(2). The relevant circumstances may or may not rebut any presumed unreasonable invasion of privacy under s. 22(3) or lead to the conclusion that disclosure would not otherwise cause an unreasonable invasion of personal privacy.

[13] I adopt this analytical approach here.

Is it personal information?

[14] The first step in applying s. 22(1) of FIPPA is to determine whether the requested information is personal information. The Reports UBCLIP has requested contain information about the body of the victim. The information is recorded information about an identifiable individual other than contact information. Under FIPPA, an identifiable individual includes a person who is deceased, as made clear by s. 22(2)(i), discussed further below. Therefore, the Reports constitute personal information.²

Section 22(4) – Not an unreasonable invasion of privacy

[15] The next step in applying s. 22 is to determine whether any of the provisions of s. 22(4) apply to the Reports. None of the parties have identified any that apply. I am unable to identify any that apply.

[16] I therefore proceed to consider the provisions of s. 22(3) of FIPPA.

Section 22(3) – Presumed unreasonable invasion of privacy

[17] If information falls within any of the listed categories in s. 22(3), disclosure would be presumed to be an unreasonable invasion of a third party's personal privacy.

[18] In my view, s. 22(3)(a) of FIPPA clearly applies. The information in the Reports is the medical information of the victim. Therefore, I find that the information constitutes the medical history of the victim in accordance with s. 22(3)(a) of FIPPA. This is consistent with findings in similar cases in Alberta and Ontario.³ UBCLIP does not contest this conclusion.

² See also Ontario Order PO-2715, [2008] O.I.P.C. No. 177; Order F07-20, [2007] B.C.I.P.C.D. No. 34.

³ Alberta Order 2000-012, [2000] A.I.P.C.D. No. 30; Ontario Order P-362, [1992] O.I.P.C. No. 153.

[19] Also in my view, s. 22(3)(i) applies, since the autopsy report indicates the victim's racial origin, a category listed in s. 22(3)(i) of FIPPA.

[20] Given the absence of submissions on the following point and my conclusions here and below, it is not necessary for me to go further and determine whether the Reports in this case also fall within s. 22(3)(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." I merely note that, given the connection between the function of a coroner in producing autopsy and toxicology reports in suspicious circumstances and the criminal investigation process, there is a strong argument that the Reports also fall within s. 22(3)(b).⁴

[21] Since under s. 22(3) the disclosure of the information is presumed to be an unreasonable invasion of the victim's personal privacy, the final step in the analysis is to review the relevant circumstances to determine whether they rebut the presumption of unreasonable invasion of privacy.

Section 22(2) - Relevant circumstances

[22] UBCLIP submits that disclosure is relevant to a fair determination of the rights of the convicted person, a factor listed in s. 22(2)(c) of FIPPA.

[23] UBCLIP claims that its client has a right to liberty and to seek relief from the federal Minister of Justice on the grounds that his conviction constituted a miscarriage of justice. It believes that its client should be able to investigate potential shortcomings in the forensic evidence in order to bring forward new evidence that might prove his innocence. It submits that this rebuts the presumption that disclosure would be an unreasonable invasion of privacy.

[24] In Order 01-07,⁵ former Commissioner Loukidelis articulated the following test for determining whether s. 22(2)(c) applies in a given case. Following Ontario Order P-651,⁶ he found that it would apply only where *all* of the following circumstances exist:

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;

⁴ See Goudge, *Inquiry into Pediatric Forensic Pathology in Ontario* (September 2008), Executive Summary, pp. 8-9: http://www.attorneygeneral.jus.gov.on.ca/inquiries/goudge/report/v1_en_pdf/Vol_1_Eng.pdf.

⁵ [2001] B.C.I.P.C.D. No. 7.

⁶ [1994] O.I.P.C. No. 104.

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; and
4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.

[25] No rights of the applicant, UBCLIP, are implicated in this matter. UBCLIP is seeking the information to assist in a potential application for a post-conviction review. For purposes of this inquiry, I am prepared to proceed on the basis that UBCLIP can assert the rights of the convicted person whose case it is examining.

[26] There is no such review currently under way. While UBCLIP has indicated that it will apply for a review, if it finds that there are sufficient grounds to warrant a review, UBCLIP has not determined whether a factual claim of wrongful conviction can be supported. It has not determined whether it will request a post-conviction review.

[27] UBCLIP wants to view the Reports, so that it can take them into account, along with other information, in deciding whether to proceed with an application to the Minister. UBCLIP has made it clear that it does not know whether this case warrants an application for a post-conviction review. It states that, if it can determine that the conclusions of the pathologist were erroneous, its client plans to apply for relief, under s. 696.1 of the *Criminal Code*, on the basis of a miscarriage of justice.

[28] Based on the submissions in this case, it is clear that UBCLIP has not yet decided whether it will apply for a post-conviction review.

[29] Section 22(2)(c) clearly applies to existing legal proceedings, and it has been interpreted so as to apply to contemplated proceedings.⁷ It seems to me, however, that “contemplated proceedings” must necessarily refer to situations where a decision has been made to commence legal proceedings, even where they have not yet been formally initiated. In the absence of such a limitation, s. 22(2)(c) would be too open-ended—it would mean that any time any incident took place that caused someone to *consider* commencing legal proceedings, s. 22(2)(c) would apply.

⁷ Order 01-07.

[30] UBCLIP may well require the information before it can determine whether a proceeding will be initiated, but that does not meet the test in the section. To accept that s. 22(2)(c) applies whenever a person is seeking information with a view to determining *whether* to commence legal proceedings, gives the section too broad a reach.

[31] It is one thing for a party considering whether to commence legal proceedings to make a FIPPA request with a view to obtaining information that might be helpful in deciding whether or not proceedings should be commenced. That sort of “fishing” or “pre-litigation discovery” process takes place regularly under FIPPA. If a party *otherwise* has a right of access to personal information under FIPPA, it can obtain the information for whatever purpose it wishes, including to help decide whether to commence legal proceedings. Subject only to a few exceptions, the motive for an access request is irrelevant, if a person otherwise has a right of access.

[32] However, that is different from arguing that a possible litigation purpose is, itself, a basis for disclosure under s. 22(2)(c), and a basis for potentially overriding presumptive privacy rights. While “fishing” is permitted under FIPPA, where the access provisions in FIPPA otherwise apply, fishing is not itself a basis for granting access under s. 22(2)(c) where no decision has been made to commence legal proceedings. I do not accept that s. 22(2)(c) applies whenever an applicant wants a third party’s personal medical information for the purpose of deciding *whether* to commence a legal proceeding. This would turn the carefully framed statutory factor into a broad loophole capable of overriding profoundly important privacy rights. Neither the text of the subsection nor by its purpose as a factor relevant to the proper balancing and assessment of privacy rights supports such an overbroad construction of the section.

[33] Even if I were to take a broader view of the section, I note that the forensic consultant indicated that he required access to all of the following for him to be able to conduct an independent review of the pathologist’s findings: the photographs of the victim; the notes of the pathologist; and any physical evidence and samples from the body. UBCLIP has already received copies of the photographs of the victim. The Reports are the only records at issue in the inquiry, and they do not contain any notes of the pathologist. Physical evidence and samples from the body are not in themselves records for the purpose of FIPPA. Therefore, the records at issue fall short of meeting the needs of the forensic consultant.

[34] UBCLIP has also raised additional circumstances that it considers to favour disclosure.

[35] One is to emphasize that the Crown has, in the criminal law context, a duty of continuing disclosure. While that may be true, this inquiry concerns an access request under FIPPA. If UBCLIP believes the Crown has failed in that duty, it has legal remedies for that purpose. As noted in ss. 2(2) and 3(2) of FIPPA:

- 2(2) This Act does not replace other procedures for access to information or limit in any way access to information that is not personal information and is available to the public.
- 3(2) This Act does not limit the information available by law to a party to a proceeding.

[36] In my view, it would be inappropriate for the OIPC, rather than the Court, to be the arbiter of whether the Crown has fulfilled its *Charter* duty of continuing disclosure. I would add that, based on the information before me, Crown Counsel has attempted to assist UBCLIP in this case by making information in its possession available, including the requested photographs.

[37] I do not consider the Crown's obligations with respect to continuous disclosure as part of the criminal prosecutions process to be a relevant circumstance for the purpose of responding to a request under FIPPA.

[38] In a related submission, UBCLIP suggests the fact that the information was disclosed to the defence at trial mitigates against the victim's privacy rights. While it is regrettable that UBCLIP has apparently not been successful in obtaining those records from the convicted person, his defence counsel, the Crown or presumably, the Court (had these Reports been filed as exhibits), the disclosure of records in the criminal process does not diminish a third party's privacy rights for FIPPA purposes. The disclosure of records in a criminal trial is subject to the implied undertaking of confidentiality precisely to protect the privacy rights that otherwise inhere in those records.⁸ It would be incongruous if the disclosure of a victim's medical records in a criminal process gave rise to the further insult that the victim's private information could be disclosed again in a FIPPA request.

[39] As BCCS points out, the fact that a party might have had access to personal information in past proceedings does not mean that they have a right of access under FIPPA at a later date. For example, former Commissioner Flaherty held that personal information in witness statements disclosed in court did not have to be disclosed in response to a FIPPA request more than fifteen years later.⁹ I agree with BCCS that the same applies to personal medical information

⁸ See *R. v. Basi*, [2011] B.C.J. No. 420 (S.C.).

⁹ Order No. 58-1995, [1995] B.C.I.P.C.D. No. 31.

involving a victim of crime. Therefore, I find that previous disclosure of the information to the defence is not a relevant circumstance in this case.

[40] UBCLIP submits that the fact that the victim has been dead for 18 years is another relevant circumstance favouring disclosure. For its part, BCCS acknowledges that a recent amendment to FIPPA that specifies that in the case of information about a deceased person, the amount of time the individual has been deceased is a relevant consideration.¹⁰ Nevertheless, BCCS argues that, as this provision was not in force at the time of its decision to apply s. 22(1) to the Reports, I should not consider it now.

[41] I note, however, that even under our previous orders, it was held that the invasion of privacy from disclosure of information about a deceased might lessen over time.¹¹

[42] The precise test in s. 22(2)(i) is important. It is not a simple matter of the numbers of years, as it is in other jurisdictions.¹² Instead, it requires an assessment as to 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. In the case of information that is otherwise protected under s. 22(3), the question must become whether the length of time is so significant as to override the presumption of a breach of the reasonable expectation of privacy.

[43] For the purposes of considering this factor, it is worth pointing out that, if it applies (*i.e.*, if privacy rights have “expired”), this conclusion applies to a request for the Reports from anyone who wants the information. Viewed in that light, it is my view that the length of time alone in this case is not sufficient to override the presumption. The information is extremely personal medical information, collected as a result of a suspicious death. In my view, the passage of time has not in this case overridden the presumption in s. 22(3) with regard to this information.

[44] This point is reinforced when one considers an additional factor emphasized by BCCS—namely, that disclosure could cause mental distress to members of the victim's family, under s. 22(2)(e) of FIPPA. While I am not certain that this consideration is, strictly speaking, a s. 22(2)(e) consideration—s. 22(2)(e) refers to “*the third party*” the information concerns

¹⁰ Section 22(2)(i).

¹¹ Order No. 96-1996, [1996] B.C.I.P.C.D. No. 22; Order F07-21, [2007] B.C.I.P.D. No. 35, para. 28.

¹² See for example the Alberta *Freedom of Information and Protection of Privacy Act*, R.S.A. 200, c. F-25, s. 17(2)(i): A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if ... the personal information is about an individual who has been dead for 25 years or more.”

(in this case, the victim)—it is clearly, in this case, a relevant consideration under s. 22(2).

[45] As noted earlier in this decision, UBCLIP itself implicitly acknowledges the potentially serious adverse impact of disclosure on the victim's family. UBCLIP's concern was sufficiently significant that it opposed the family even being notified of this application to spare them unnecessary emotional pain.

[46] Despite UBCLIP's assurances of maintaining the confidentiality of the Reports, were it to receive them, BCCS correctly states, as noted above, that disclosure under FIPPA on this ground must be treated as disclosure to the world.¹³ My review of the Reports leads me to agree with BCCS that the disclosure of some of the information in the Reports could cause mental distress to the victim's family.

[47] While it is possible that some of the information came out during the trial, I have no evidence of that before me. Even if it did come out at the trial, disclosing again could still cause harm to the victim's family. Therefore, I find that disclosure could cause harm to third parties, and this circumstance weighs in favour of withholding the information.

Conclusion

[48] I have found that the information at issue is the victim's medical information, meaning that disclosure is presumed to be an unreasonable invasion of her privacy. In reviewing the relevant circumstances, I found that disclosure could cause harm to other third parties. These circumstances argue in favour of withholding the information. I have found that the length of time the victim has been deceased is a relevant circumstance favouring disclosure, but does not override the presumption, particularly given that medical information is the most sensitive personal information about an individual. Taking all of the relevant circumstances into account, I find that UBCLIP has failed to rebut the presumption that disclosure of the victim's medical information would be an unreasonable invasion of her privacy.

[49] I close by reiterating a point I made earlier—that FIPPA is an entirely separate information regime from that which governs criminal and civil processes, and that courts provide their own avenues of access to information relevant to court proceedings. Given the purpose for which UBCLIP seeks the Reports, it appears to me that the courts may well be the appropriate avenue for pursuing the information at issue in these proceedings.

¹³ [2001] B.C.I.P.D. No. 55, para. 73.

CONCLUSION

[50] For the reasons given above, under s. 58 of FIPPA, I require the BCCS to withhold the requested information, under s. 22(1) of FIPPA.

April 27, 2012

ORIGINAL SIGNED BY

Jay Fedorak
Adjudicator

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