OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

Order F10-09

MINISTRY OF PUBLIC SAFETY AND SOLICITOR GENERAL

Celia Francis, Senior Adjudicator

March 8, 2010

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Summary: The applicant requested certain records in the inquest files of two dozen individuals. The Ministry disclosed the Verdict at Coroner's Inquest in each case, together with correspondence on the juries' recommendations. It withheld a number of records on the basis that they were excluded from the scope of FIPPA under s. 64(2)(c) of the 2007 *Coroners Act* or, alternatively, under s. 3(1)(b) of FIPPA. It withheld the rest of the records under ss. 15, 16(1)(b) and 22(1). Section 64(2)(c) of the 2007 *Coroners Act* does not apply as it was not in effect at the time of the requests or Ministry's decision on access. Section 3(1)(b) applies to records related to coroners' inquest-related functions but not to other records, including those reflecting administrative activities. Section 3(1)(c) applies to a handful of records, although Ministry did not claim it. Ministry ordered to reconsider its decision to apply s. 16(1)(b) on the grounds that it failed to exercise discretion. It was not necessary to consider s. 15. Section 22(1) found to apply to many but not all other records. Ministry ordered to disclose certain records to which ss. 3(1)(b) and 22(1) do not apply.

Statutes Considered: 2007 *Coroners Act*, s. 64(2)(c)*; Freedom of Information and Protection of Privacy Act*, ss. 3(1)(b) & (c), 16(1)(b), 22(1), 22(2)(a) & (d), 22(3)(a), (b) & (d).

Authorities Considered: **B.C.:** Decision F07-03, [2007] B.C.I.P.C.D. No. 14; Decision F08-02, [2008] B.C.I.P.C.D. No. 4; Order 01-10, [2001] B.C.I.P.C.D. No. 11; Order 02-38, [2002] B.C.I.P.C.D. No. 38; Order 01-20, [2001] B.C.I.P.C.D. No. 21; Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34; Order 00-16, [2000] B.C.I.P.C.D. No. 19; Order 02-01, [2002] B.C.I.P.C.D. No. 1; Order 03-24, [2003] B.C.I.P.C.D. No. 24; Order F09-07, [2009] B.C.I.P.C.D. No. 10; Order 02-12, [2002] B.C.I.P.C.D. No. 12; Order 02-34, [2002] B.C.I.P.C.D. No. 34; Order F05-13, [2005] B.C.I.P.C.D. No. 14;

Decision F07-10, [2007] B.C.I.P.C.D. No. 40; Order F05-31, [2005] B.C.I.P.C.D. No. 42; Order 01-43, [2001] B.C.I.P.C.D. No. 45; Order 02-19, [2002] B.C.I.P.C.D. No. 19; Order F09-18, [2009] B.C.I.P.C.D. No. 24; Order F09-19, [2009] B.C.I.P.C.D. No. 19; Order F09-20, [2009] B.C.I.P.C.D. No. 20; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order 02-56, [2002] B.C.I.P.C.D. No. 58; Order F09-24, [2009] B.C.I.P.C.D. No. 30. **Ont.:** Interim Order M-796, [1996] O.I.P.C. No. 248. **N.L.:** Report 2005-007, *Intergovernmental Affairs Secretariat*, 2005 CanLII 44153 (N.L.I.P.C.).

Cases Considered: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271; *M.N.R.* v. *Coopers and Lybrand* (1978), 92 D.L.R. (3d) 1 (S.C.C.); *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)*, [1996] 3 S.C.R. 919; *Faber v. The Queen,* [1976] 2 S.C.R. 9; *R. v. McDonald* (1968), 2 D.L.R. (3rd) 298; *Wolfe v. Robinson* (1961), 27 D. L. R. (2d) 98; *Re Brown et al. and Patterson*, [1974] O.J. No. 2189; *Evans et al. and Milton et al.,* [1979] O.J. No. 4171; *Toronto (Metropolitan) Police Services Board v. Young,* [1997] O.J. No. 1076; *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597; *MacKenzie v. MacArthur,* [1980] B.C.J. No. 2174.

1.0 INTRODUCTION

[1] This Order arises out of the applicant's request for records of the British Columbia Coroners Service, which is part of the Ministry of Public Safety and Solicitor General ("Ministry"), related to inquests into the deaths of 24 named individuals. He stated that he was making the request as a matter of public interest and wanted the records "for possible use in a documentary to be aired on CBC". The Ministry responded by disclosing copies of the Judgement of Inquiry and Verdicts at Coroner's Inquest related to the deceased individuals, with some information severed under s. 22 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). It withheld the rest of the records in their entirety under ss. 15, 16 and 22 of FIPPA. The applicant's request for review to this Office ("OIPC") of the Ministry's decision to deny access to the records did not settle in mediation. The matter proceeded to an inquiry under Part 5 of FIPPA.

2.0 ISSUES

[2] The notice for this inquiry stated that the issues were these:

- Whether the Ministry was authorized by ss. 15 and 16 to withhold information

- Whether the Ministry was required by s. 22 to withhold information

[3] After the OIPC had issued the notice for this inquiry, the Ministry said it would rely on s. 64 of the *Coroners Act* in withholding some records. The OIPC agreed this issue would form part of the inquiry. In its initial submission, the Ministry said that, in the alternative to s. 64 of the *Coroners Act*, it would argue

that s. 3(1)(b) of FIPPA applied. The latter provision relates to my jurisdiction to consider the records (as does s. 64 of the *Coroners Act*) and so I will consider the Ministry's arguments on s. 3(1)(b).

[4] Although the Ministry did not cite s. 14 in its decision letters and it is not listed as an issue in the notice for this inquiry, the Ministry said in its initial submission that s. 14 was one of the issues in this inquiry.[1] It also provided some argument on s. 14[2] and the first inventory of records[3] lists two items as withheld under s. 14. However, this inventory also classified these two records as not responsive to the request and so, for reasons I discuss below, I do not need to consider s. 14 here.

[5] The inventories of records list some records as excluded under s. 3(1)(c), although the Ministry's decision letters and submissions do not mention this section. I also noted instances where the Ministry did not apply s. 3(1)(c), where in my view this provision applies. As s. 3(1)(c) also relates to my jurisdiction, I have considered it below.

Burden of proof

[6] Section 57 of FIPPA sets out the burden of proof in inquiries. Under s. 57(1), the Ministry has the burden of proof regarding ss. 15 and 16. Under s. 57(2), the applicant has the burden of showing that the disclosure of third-party personal information would not be an unreasonable invasion of third-party privacy.

[7] Section 57 is silent regarding the issue of whether records are excluded from the scope of FIPPA, such as under ss. 3(1)(b) and (c) of FIPPA or s. 64 of the *Coroners Act*. Past orders have stated that in such cases it is in the interests of the parties to provide argument and evidence to support their positions on these issues.

3.0 DISCUSSION

[8] **3.1 Preliminary Matters**—I will begin with a number of preliminary issues which arose during this inquiry.

Ministry's objection to applicant's reply

[9] The Ministry objected to what it called "extensive submissions" in the applicant's reply, which it said were on new issues or expanded on arguments he had already made. The Ministry reminded me that the OIPC's policies and

[1] At para. 3.01. Section 14 permits public bodies to withhold information that is subject to solicitor-client privilege.
[2] Paras. 4.26-4.34, initial submission.
[3] Exhibit "A", Sidhu affidavit #1.

procedures on inquiries state that parties may not raise new issues in their replies.[4] It did not specify which parts of the applicant's reply it considered objectionable.

[10] The applicant argued that the majority of his reply responded to the Ministry's arguments on ss. 15 and 16.[5] I agree with him and I have considered the relevant passages. The applicant did however also raise some new issues which I discuss below.

Late raising of section 25

[11] In his initial submission, the applicant argued that s. 25 applies in this case.[6] The Ministry did not object to the applicant's attempt to introduce s. 25 at this stage but argued that it does not apply here.[7]

[12] The applicant's request for records and request for review do not mention s. 25. There is no indication that s. 25 arose as an issue during mediation and it is not listed as an issue in the notice for this inquiry.

[13] It is clear from previous decisions of the OIPC that a party cannot introduce a new issue at the inquiry stage unless permitted to do so. These decisions note among other things that one of the purposes of mediation is to crystallize the issues in dispute and to allow applicants to raise issues that they wish included in an inquiry.[8]

[14] I have decided not to permit the applicant to introduce s. 25 as an issue at this late stage. The applicant could have raised s. 25 at any point in the mediation period but apparently chose not to. He gave no explanation as to why he waited until his initial submission to introduce s. 25. Section 25 overrides all other sections in FIPPA and it is not appropriate to raise it at this late date without warning.

[15] Even if I were to consider the applicant's arguments, however, I would be inclined to reject them. I accept that the public might be interested in having access to some of the withheld records. There may also be a public interest in further disclosure of the records. These are not the tests for s. 25, however. The records range in date from 1971 to 2004. There is nothing in them to suggest plausibly that, in view of the tests for s. 25, there are any imminent risks

[4] Letter of September 30, 2008.
[5] Email of October 6, 2008.
[6] Last page, initial submission. Section 25 places a duty on public bodies to disclose information in certain circumstances, whether or not an access request has been made. The applicant also mentioned s. 25 briefly at p. 25 of his reply.
[7] Paras. 9-18, reply submission.
[8] See for example Decision F07-03, [2007] B.C.I.P.C.D. No. 14, Decision F08-02, [2008] B.C.I.P.C.D. No. 4, Order 01-10, [2001] B.C.I.P.C.D. No. 11.

to the health or safety of the public or other similar urgent and compelling reasons requiring immediate disclosure.[9]

Late raising of Charter Argument

[16] The applicant made passing references to s. 2(b) of the *Canadian Charter of Rights and Freedoms* and what he called the "open court principle".[10] I take him to mean he believes they are applicable here. The Ministry objected to the applicant raising this issue, saying he had not shown that he had provided the requisite notice of his claim under the *Constitutional Questions Act*.[11]

[17] The applicant raised this issue for the first time in his submissions and provided no argument on it. It is not listed as an issue in the notice for this inquiry. Nor, as the Ministry pointed out, has the applicant shown that he gave the required notice under the *Constitutional Questions Act*. For all these reasons, I decline to consider this issue here.

Are some records not responsive?

[18] The inventories of records indicate that the Ministry classified certain records as "not responsive" to the request. The applicant complained that some, if not all, of the records the Ministry had identified this way "are in fact the very documents I wanted". He asked that I include them in this inquiry so as not to burden everyone with going through this process again.[12] The applicant did not say which "non-responsive" records he considered to be responsive or why.

[19] Again, this is a new issue. It was not listed in the notice for this inquiry and there is no indication that the applicant raised it during mediation, although this could be because he had not seen the inventory of records until the inquiry and thus did not know what other records existed.

[20] I observe, however, that the applicant did not request the entire coroner's inquest file on each deceased individual, but rather chose to request these specific types of records:

- "Coroner's Inquest"[13]
- witness statements
- investigation worksheet

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[9] See Order 02-38, [2002] B.C.I.P.C.D. No. 38, and Order 01-20, [2001] B.C.I.P.C.D. No. 21, for similar findings.

[10] Last page of initial submission and page 5 of reply submission. Section 2(b) of the *Charter* says this: 2. Everyone has the following fundamental freedoms … (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;… .

[11] Para. 20, reply submission.

[12] Page 1, reply submission.

[13] I take this to mean the Verdict at Coroner's Inquest.

- preliminary investigation report
- final post mortem report
- toxicology report
- registration of death
- coroner's medical certificate of death
- other agency reports including the police and ambulance
- hospital records
- photos
- investigation notes
- medical investigation or behavioural report, if available
- case investigation completion plan, if available
- all correspondence with external agencies, if available

[21] The applicant did not address this issue with enough specificity to allow me to make a ruling on whether any of the so-called non-responsive records are in fact responsive to his request. I also do not have the Ministry's submissions on this point. Moreover, for the most part, the Ministry has not made a decision under FIPPA as to whether it believes an exception or exclusion applies to the so-called non-responsive records. For all these reasons, I decline to consider this matter here.

[22] However, if the applicant wishes to provide me with specifics as to which of the "non-responsive" records he believes are responsive to his request and why, he may do so. I will then allow the Ministry an opportunity to comment before I decide whether or not any of the "non-responsive" records are responsive to the request.

Ministry's late retrieval of additional records

[23] After the inquiry had taken place and as I was nearing the end of my deliberations, the Ministry informed the OIPC that it had just located additional records on five of the individuals in question. The Ministry said it was willing to include the newly located records in this inquiry. The applicant confirmed that he wanted the Ministry to process the newly located records, but said he did not want them included in this inquiry, as he thought it would delay my order.

[24] The applicant's preferred way of proceeding raised the possibility of a second review and inquiry on records and issues likely to be substantially similar to those I was dealing with in this inquiry. I told the applicant that, after considering the circumstances, I had decided that the most expeditious way of handling matters would be to deal with all of the responsive records and issues together in the current inquiry. I said I believed this would not lead to an inordinate delay in issuing my order.

[25] I then allowed the Ministry time to issue a decision on the additional records. It told the applicant it was denying access to all of them except a few pages. The Ministry also provided me with the records themselves, together with an additional submission it wished to make on the new records. The applicant submitted a brief reply. Accordingly, I have considered both the original and additional responsive records here.

[26] **3.2 Mandate of the Coroners Service**—The Ministry said the Coroners Service is responsible for "the inquiry into and investigation of unnatural, unexpected, unexplained or unattended deaths".[14] A Coroner is "a medical-legal death investigator appointed by the Lieutenant Governor in Council upon the recommendation of the Attorney General". The *Coroners Act* requires that certain types of deaths be reported to the chief coroner and that a coroner investigate such deaths.[15] The coroner is responsible for ascertaining the facts surrounding the death and must determine these things: the identity of the deceased and "How, when, where and by what means the deceased died". The death is then classified as "natural", "accidental", "suicide", "homicide" or "undetermined". A coroner may:

> … make recommendations for the purpose of preventing similar loss of life in the future. The Coroner does not assign fault or blame but rather conducts a fact-finding investigation.[16]

[27] A public inquest is mandatory if the death occurred in the custody of peace officers. An inquest may be held for other reasons, for example, if the chief coroner believes the public has an interest in being informed of the circumstances surrounding the death.[17] The Ministry said the chief coroner orders the inquest, the local coroner usually conducts the initial investigation and another coroner presides over the inquest. The Ministry described an inquest as "a quasi-judicial hearing" and said it is normally held in an open forum where witnesses are subpœnaed to testify under oath before a jury. It described the inquest stage as follows:

> 4.13 Every inquest must be held with a jury. The inquest is presided over by a coroner. After hearing the evidence, the jury must certify in writing, so far it has been proved to them, any findings of fact

[14] The information on the coroner's mandate comes from paras. 4.01-4.15 of the Ministry's initial submission and the Leibel affidavit.

[15] These include deaths that occur in the following situations: violence, accident, negligence, misconduct or malpractice; a self-inflicted illness or injury; suddenly and unexpectedly, when the person was apparently in good health and not under the care of a medical practitioner; from disease, sickness or unknown cause, for which the person was not treated by a medical practitioner; during pregnancy, or following pregnancy in circumstances that might reasonably be attributable to pregnancy.

[16] Para. 4.08, Ministry's initial submission.

[17] Paras. 4.09-4.12. The Ministry also referred here to ss. 18(2) and (3) and 19(1) of the *Coroners Act*.

> respecting how, when, where and by what means the deceased died.
>
> 4.14 A jury is permitted to make recommendations about any matter arising out of the inquest. Juries cannot make, and the coroner cannot accept, any finding of legal responsibility or express any conclusions of law.

[28] **3.3 Records in Dispute**—The Ministry disclosed the Judgement of Inquiry or Verdict at Coroner's Inquest for each case, with minor severing under s. 22. After the OIPC had issued the notice for this inquiry, the Ministry also disclosed correspondence to and from the Coroners Service relating to the jury's recommendations from each of the inquests, again with minor s. 22 severing. The severed portions of these records are thus in dispute.

[29] The Ministry continued to withhold all the other responsive records in their entirety under various provisions. It described the fully withheld records in dispute as follows (the exceptions or exclusions it said are in issue are in parentheses):

- Post mortem records (ss. 16 and/or 22 of FIPPA)
- Toxicology records (ss. 16 and/or 22)
- Medical charts (s. 22)
- Coroner's notes (including "Investigation Notes") (excluded from scope of FIPPA under s. 3(1)(b) of FIPPA or s. 64(2)(c) of the *Coroners Act*)
- Pathology reports (ss. 16 and/or 22)
- Correspondence from the RCMP and other police forces (including police reports), with the exception of responses to recommendations (ss. 15 and/or 16 and/or 22)
- Medical Certification of Death (s. 22)
- Registrations of Death (s. 22)
- Photos of deceased and the death scene (ss. 16 and/or 22)
- Preliminary Investigation Reports (s. 22)
- Funeral documents (s. 22)
- Forensic Laboratory Results (s. 22)

[30] The Ministry provided the actual inquest files to me for this inquiry, as well as two inventories of records listing the records in each file, their origin, whether or not they were "responsive" to the request, whether they were disclosed to the applicant and any exceptions or exclusions the Ministry applied. The inventories

list over 2,700 records, several hundred of which, mainly the "non-responsive" records, are not numbered.[18]

[31] I noted some inconsistencies in the inventories. For example, the entries for some records list exceptions but also state the records were disclosed to the applicant.[19] I discuss other inconsistencies below.

[32] The material before me indicates that the applicant requested records on the inquests into the deaths of 24 individuals. The inventories contain entries on 26 deceased individuals (which largely overlap with the 24 whose inquest records the applicant requested) and the Ministry provided me with the original inquest files on the same 26 individuals.[20] Neither the Ministry nor the applicant commented on this apparent discrepancy. As there appears to be no dispute about this and the issues in the 26 cases are the same, I have considered the records for all 26 individuals listed in the inventories as the records in dispute.

[33] **3.4 Are some records excluded from the scope of FIPPA?**—The Ministry said that "all of the records were obtained, compiled or created for the purpose of conducting an inquest into the deaths of the third parties". It argued that some of these, "personal notes or communications of a coroner", "made in the course of powers exercised in relation to an inquest", are excluded from the scope of FIPPA under s. 64(2)(c) of the 2007 *Coroners Act* or, alternatively, under s. 3(1)(b) of FIPPA.

[34] The inventories do not reflect this argument. Rather, the entries for these "coroner's notes" generally list s. 3(1)(b) of FIPPA as the only exclusion. Some entries add s. 64(2)(c) of the *Coroners Act*, some add s. 22 of FIPPA "in the alternative" and some list both provisions. Other entries for "coroners' notes" list only s. 22, while still others list no exception or exclusion at all. However, the Ministry's initial submission indicates that it argues as follows regarding "coroner's notes":

- first, that s. 64(2)(c) of the 2007 *Coroners Act* excludes these records from the scope of FIPPA
- in the alternative, the records are excluded from the scope of FIPPA under s. 3(1)(b) of FIPPA

[18] The Ministry's second inventory (Exhibit "A" to the Sidhu affidavit #2) used separate numbering systems for the additional records. The Ministry also did not always number each record in the second inventory and did not always list an individual exception or exclusion for each record, as it had with the first inventory. For convenience, I have re-numbered the entries in the second inventory, taking up where the numbering in the first inventory left off. I have also provided a copy of the annotated second inventory to the Ministry for its use in complying with my orders below.

[19] Record 64 is one such example.

[20] The Ministry also provided me with a file on a 27th individual and a file of correspondence, but this appears to have been an oversight.

- if I find that neither exclusion applies, the records are excepted from disclosure under s. 22 of FIPPA

[35] I have therefore considered the Ministry's arguments on "coroner's notes" in that order.

Does section 64(2)(c) of the 2007 Coroners Act apply?

[36] Section 64(2)(c) of the 2007 *Coroners Act* says this:

> **Application of *Freedom of Information and Protection of Privacy Act***
>
> 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]*; ….

[37] The Ministry said that, effective September 26, 2007, the *Coroners Act* of 2007 repealed and replaced the previous version of the *Coroners Act*. It argued that s. 64(2)(c) of the 2007 *Coroners Act* applies to the records in question, even though s. 64(2)(c) was not in force when the Ministry responded to the applicant's requests. As a result, in its view, I do not have jurisdiction to review its decision not to release these records.[21]

[38] The Ministry continued as follows:

> 4.20 Section 36(1)(c) of the *Interpretation Act* provides that if an enactment (the "former enactment") is repealed and another enactment (the "new enactment") is substituted for it, the procedure established by the new enactment must be followed as far as it can be adapted in the recovery or enforcement of penalties and forfeitures incurred under the former enactment, in the enforcement of rights existing or accruing under the former enactment, and in a proceeding relating to matters that happened before the repeal (emphasis added). Section 36 of the *Interpretation Act* requires that the new *Coroners Act* be applied as far as it can be adapted. Since there were inquests under the old *Coroners Act* and inquests under the new Act, there is no reason as to why the new *Coroners Act* cannot be adapted to cover records created under the old *Coroners Act*. Also, the Applicant had no "vested" rights to access the personal notes and communications of a coroner prior to the passage of the new *Coroners Act* in light of s. 3(1)(b) of the *Freedom of Information and Protection of Privacy Act*. As such, the

[21] Para. 4.18, initial submission.

> Service submits that it is immaterial that the Records were created under the old *Coroners Act*. [underlining is Ministry's]
>
> 4.21 Section 64(2)(c) of the new *Coroners Act* operates to limit the Commissioner's jurisdiction in relation to records of the Coroner in this inquiry. It also restricts what records the Applicant has a right of access to under the Act. The coroner's notes and communications in the Records that were made in the course of inquest powers have been identified in the Inventory of Records. The Service submits that those records are not subject to the Act by virtue of Section 64(2)(c) of the new *Coroners Act*.

[39] The applicant argued the Ministry's application of s. 64 is "kinda scarey [*sic*] and must be rejected". He also pointed to s. 69 of the *Coroners Act* which empowers the chief coroner to disclose reports to the public or others with an interest in the matter and suggested that the release of the records would promote the goals of the Coroners Service.

[40] The effect of the Ministry's arguments on s. 64(2)(c) of the *Coroners Act*, if correct, is that the 2007 *Coroners Act* would apply retroactively to exclude certain records from the scope of FIPPA, although the Ministry does not explicitly argue this. The general presumption in statutory interpretation however is that a statute does not apply retroactively.[22] The applicant made his requests in May 2007 and the Ministry responded in August 2007. The new *Coroners Act* took effect in September 2007. Thus, although the inquiry on this matter did not take place until September 2008, the request and decision both pre-date the existence of s. 64(2)(c) of the 2007 *Coroners Act.* The dates of the request and the decision on access determine whether the old or new *Coroners Act* applies. The date the records were created is immaterial in this case. I therefore conclude that s. 64(2)(c) of the 2007 *Coroners Act* does not apply to the records in question.

[41] I find support for this finding in Ontario Interim Order M-796[23] in which Adjudicator Big Canoe considered whether amendments to the Ontario *Freedom of Information and Protection of Privacy Act*, which occurred after the request was made, excluded certain kinds of records from the scope of that Act. She noted that the courts have said that amendments to statutes are presumed not to apply retroactively and that amendments affecting the jurisdiction of courts and administrative tribunals do not apply to pending cases. She concluded that, because the request in issue occurred before the amendments to the Ontario Act, it was appropriate to deal with the request under the provisions of that Act as they were at that time.

[42] Moreover, while an inquest may be a "proceeding" for the purposes of s. 36(1)(c) of the *Interpretation Act*, I do not consider that the exclusion from FIPPA set out in s. 64(2)(c) of the 2007 *Coroners Act* is a "procedure established

[22] *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271.
[23] [1996] O.I.P.C. No. 248, at paras. 14-23.

by the new" *Coroners Act*. Rather, s. 64(2)(c) acts to affect the substantive rights of access under FIPPA to certain types of records by excluding them from the scope of FIPPA. The request for review in this matter was "pending" at the time the new *Coroners Act* came into effect and, as noted in Ontario Interim Order M-796, amendments such as s. 64(2)(c) do not apply to pending cases such as the one I am considering here.[24]

[43] It is therefore appropriate to consider this matter under the terms of the previous version of the *Coroners Act*. Except where noted, references below to the *Coroners Act* are to this previous version.

Does section 3(1)(b) apply ?

[44] The Ministry argued that, if s. 64(2)(c) of the 2007 *Coroners Act* does not apply to exclude coroner's personal notes and communications from the scope of FIPPA, s. 3(1)(b) of FIPPA does. Section 3(1)(b) says this:

> **Scope of this Act**
>
> 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; …

[45] This is the Ministry's entire argument on s. 3(1)(b):

> 4.23 The Supreme Court of Canada, in *Canada (Minister of National Defence for Naval Services) v. Pantelidis*, [1942] B.C.J. No. 40, held that a coroner's court is quasi-judicial. Similarly, the Supreme Court of Canada, in *R. v. Colarusso*, [1994] 1 S.C.R. 20, held that the coroner is a quasi-judicial officer with limited powers to inspect and to seize items which he has reasonable grounds to believe are material to the purposes of an investigation. Moreover, the court held that the coroner is a quasi-judicial officer who presides at inquests. In light of such case law, the Service submits that it is clear that the Act does not apply to the personal notes and communications of coroners. Many of the records requested by the Applicant consist of such records. The Service refers the Commissioner to the Inventory of Records which indicates which records qualify as the personal notes or communications of a coroner. [footnote omitted]

[24] The previous *Coroners Act* contained this provision: "**50** Despite the *Freedom of Information and Protection of Privacy Act*, before an inquiry or inquest is completed the coroner may refuse to disclose any information collected in the course of fulfilling the coroner's duties with respect to the inquiry or inquest." The Ministry did not argue that s. 50 applied here. I can see no basis for considering it as all the inquests and the inquiry in these cases are long since over.

[46] Of course, the issue here is not whether "a coroner's court is quasi-judicial" or "a coroner is a quasi-judicial officer" but whether the coroners were "acting in a quasi judicial capacity" when creating the records in question. A number of orders have considered the criteria the Supreme Court of Canada articulated in *M.N.R.* v. *Coopers and Lybrand* (1978)[25] for determining whether someone is acting in a judicial or quasi judicial capacity for the purposes of s. 3(1)(b).[26] The relevant passage from *Coopers and Lybrand* reads as follows:

> It is possible, I think, to formulate several criteria for determining whether a decision or order is one required by law to be made on a judicial or quasi-judicial basis. The list is not intended to be exhaustive.
>
> (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?
>
> These are all factors to be weighed and evaluated, no one of which is necessarily determinative. Thus, as to (1), the absence of express language mandating a hearing does not necessarily preclude a duty to afford a hearing at common law. As to (2), the nature and severity of the manner, if any, in which individual rights are affected, and whether or not the decision or order is final, will be important, but the fact that rights are affected does not necessarily carry with it an obligation to act judicially. In *Howarth* v. *National Parole Board* [[1976] 1 S.C.R. 453.], a majority of this Court rejected the notion of a right to natural justice in a parole suspension and revocation situation. See also *Martineau and Butlers* v. *Matsqui Institution Inmate Disciplinary Board* [[1978] 1 S.C.R. 118.].
>
> In more general terms, one must have regard to the subject matter of the power, the nature of the issue to be decided, and the importance of the determination upon those directly or indirectly affected thereby: see *Durayappah* v. *Fernando* [[1967] 2 A.C. 337 (P.C.).]. The more important the issue and the more serious the sanctions, the stronger the claim that the power be subject in its exercise to judicial or quasi-judicial process.

[25] 92 D.L.R. (3d) 1 (S.C.C.).

[26] See for example, Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, Order 00-16, [2000] B.C.I.P.C.D. No. 19, Order 02-01, [2002] B.C.I.P.C.D. No. 1, Order 03-24, [2003] B.C.I.P.C.D. No. 24, and Order F09-07, [2009] B.C.I.P.C.D. No. 10. Order F09-07 is the subject of a judicial review which has not yet been heard.

> The existence of something in the nature of a *lis inter partes* and the presence of procedures, functions and happenings approximating those of a court add weight to (3). But, again, the absence of procedural rules analogous to those of courts will not be fatal to the presence of a duty to act judicially.[27]

Previous orders on section 3(1)(b)

[47] Noting that the purpose of s. 3(1)(b) is to protect deliberative secrecy, Commissioner Flaherty found that, although a Crown prosecutor has investigative and administrative functions which are not judicial in nature, the exercise of prosecutorial discretion under the *Crown Counsel Act* was judicial, "albeit not of an *adjudicative* quality".[28]

[48] Other orders on s. 3(1)(b) have generally concerned administrative tribunals or bodies performing an adjudicative or decision-making function. In Order 00-16,[29] Commissioner Loukidelis accepted that it is appropriate to apply the *Coopers and Lybrand* criteria in deciding whether someone is acting in a quasi judicial capacity. He applied those criteria in concluding that Labour Relations Board panel members were acting in a quasi judicial capacity when they were actually considering, deliberating on and disposing of an application of some kind under the *Labour Relations Code*. He also said "employees of public bodies – including members of administrative tribunals – may discharge multiple functions, only some of which could be termed functions of a judicial or quasi judicial nature". He found that certain records (*e.g.*, panel members' comments and thoughts about issues raised in the application or their comments on the evidence before them) fell under s. 3(1)(b) and that certain other communications (*e.g.*, concerning the scheduling of meetings and the constitution of the panel) did not, because they "did not engage the deliberative processes that are protected by s. 3(1)(b)".[30] Commissioner Loukidelis also applied *Coopers and Lybrand* in arriving at similar findings in other cases.[31]

[49] In Order F09-07, I considered whether an investigator was acting in a quasi judicial capacity while carrying out her investigation. I concluded she was not. I noted that the distinction between administrative and quasi judicial functions had become less important over time as the duty to be fair in administrative decision-making emerged:

> [61]… as the Supreme Court of Canada has stated, that Court has "gradually abandoned that rigid classification by establishing that the

[27] At pp. 5-6.
[28] Order No. 321-1999, [1999] B.C.I.P.C.D. No. 24, at p. 9.
[29] [2000] B.C.I.P.C.D. No. 19.
[30] Order 00-16, at pp. 7-10.
[31] See as examples, Order 02-01, [2002] B.C.I.P.C.D. No. 1, Order 02-12, [2002] B.C.I.P.C.D. No. 12, and Order 02-34, [2002] B.C.I.P.C.D. No. 34. I also considered them in Order F09-07.

> content of the rules a tribunal must follow depends on all the circumstances in which it operates, and not on a characterization of its functions."[32] …

[50] The Newfoundland and Labrador Information and Privacy Commissioner has held that investigative powers would not trigger an exemption in that province's legislation which has much the same wording as s. 3(1)(b):

> I believe it to be clear from the Supreme Court of Canada and the textual descriptions that a judicial or quasi-judicial proceeding involves significant judicial power, including the power to make a finding of guilt or innocence, to impose sanctions or to award remedies. Key to this process is the ability to render a decision or an order. Such a process is to be distinguished from a proceeding with a mandate to investigate or to inquire into a matter and to issue recommendations in response to this investigation or inquiry. This latter process is more administrative in nature as opposed to judicial.[33]

[51] I take from these cases that, while individuals may act in many capacities, some of which may be quasi judicial, an individual is not acting in a quasi judicial capacity when performing investigative or administrative functions. The records an individual creates for these purposes do not "engage the deliberative processes that are protected by s. 3(1)(b)" and therefore do not fall into s. 3(1)(b).

[52] Finally, past orders also decide that it is necessary to show first that the record at issue consists of the personal notes, communications or draft decision of a person who is acting in a quasi judicial capacity.[34] It is not sufficient if the record is simply created in the course of exercising a quasi judicial power, if it is not a personal note, communication or draft decision.

Case law on coroners

[53] The leading case on the role of the coroner is *Faber v. The Queen*.[35] The Supreme Court of Canada adopted the conclusions of Ontario and British Columbia court decisions stating that, at a coroner's inquest, there is no *lis* [dispute], no accused and no charge. The function of the coroner in Canada, the court stated, is to investigate many other matters than murder or manslaughter and coroners are required to hold inquests in many cases where there is no suggestion or suspicion of wrongdoing.[36]

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[32] I referred here to *2747-3174 Québec Inc. v. Québec (Régie des permis d'alcool)* [1996] 3 S.C.R. 919, para. 22.
[33] 2005 CanLII 44153 (N.L.I.P.C.), Report 2005-007, *Intergovernmental Affairs Secretariat*, para. 25.
[34] Order F05-13, [2005] B.C.I.P.C.D. No. 14.
[35] [1976] 2 S.C.R. 9.
[36] *R. v. McDonald* (1968), 2 D.L.R. (3rd) 298, and *Wolfe v. Robinson* (1961), 27 D. L. R. (2d) 98.

[54] In Ontario (where the coroner's role and legislation are similar to this province's), the Court in *Re Brown et al. and Patterson* also considered the role of the coroner:

> [7] Regardless of the nature of a coroner's inquest, which is fundamentally a process of inquiry and reporting, rather than the determination of rights and liability, when a person applies for standing under s. 33, the coroner must embark upon an inquiry and make a finding whether or not the applicant has such an interest. In so doing, the Coroner is required to act judicially in the sense of that expression as it denotes a standard of conduct. He must therefore afford the applicant full opportunity to be heard. … He nevertheless must make a finding on the basis of a fair hearing which he may conduct in his own way. …[37]

[55] As noted above, the Ministry in this case relied on two cases. *Pantelidis* concerned a Greek seaman who allegedly deserted his ship in wartime. The issues included whether it was proper for a Board of Inquiry (which the Court considered to be an administrative not a judicial tribunal) to have interrogated the seaman. In the course of its deliberations, the Court referred in passing to a coroner's court as being "at least quasi judicial".[38]

[56] *Colarusso* was an appeal of an Ontario Court of Appeal decision affirming the conviction of a driver on a number of counts, including impaired driving and criminal negligence causing death. The Supreme Court of Canada considered whether the coroner's seizure of the driver's urine and blood samples and their subsequent use as evidence at the driver's trial violated the driver's *Charter* rights. Four judges of the Court described the coroner as a "quasi-judicial officer." At paragraph 35, they described the coroner's role in this manner:

> The coroner's role is to investigate deaths and to determine whether an inquest is required: s. 15. If an inquest is held, its purpose is to determine the identity of the deceased, how the deceased came to his or her death including when, where and by what means: s. 31(1). The determination of these matters is, of course, for the jury at the inquest, which is expressly prohibited from making any finding of legal responsibility: s. 31(2). The coroner has both investigative and quasi-judicial duties. He or she is required not only to investigate the death but also to preside at the inquest. …

[57] In this passage, the judgement recognizes a distinction between the investigative and quasi judicial functions carried out by coroners.

[58] The Ontario Court of Appeal referred to *Coopers and Lybrand* in *Evans et al. and Milton et al*.[39] It said the inquest procedure in Ontario's *Coroners Act* "has

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[37] *Re Brown et al. and Patterson*, [1974] O.J. No. 2189.
[38] At para. 28.
[39] [1979] O.J. No. 4171.

the trappings of a trial and it is implicit that the principles of natural justice govern". In *Evans*, the court was considering decisions the coroner made prior to the commencement of an inquest. These included the choice of constable who selected the jury, the assignment of Crown counsel to the coroner and the direction of the investigative force. The majority in the lower court had held that none of these matters involved the coroner acting in a quasi judicial manner and that therefore they were not reviewable on the basis of an allegation of reasonable apprehension of bias.

[59] On appeal, Dubin J.A. stated:

> Subject to one minor exception which does not apply in this case, it was the view of the majority of the Divisional Court that a coroner's inquest is immune from the supervisory jurisdiction of a superior Court and, indeed, that the applicants had no status to bring the application. Reid J. took the opposite view and appears to have held that every step taken and every ruling made in the convening of the inquest are subject to be quashed by judicial review.
>
> With respect, I do not agree with either of those opposite views. In my opinion, proceedings before a coroner's inquest are not entirely immune from the supervisory jurisdiction of a superior court. On the other hand, I do not agree that every step taken in the convening of an inquest, or every ruling made in its preliminary stages, or at the inquest itself, are subject to review. What first must be determined is the nature of the complaint made.[40]

[60] Thus, the quasi judicial functions of a coroner may include some of those which are undertaken prior to the commencement of an inquest.

[61] In *Toronto (Metropolitan) Police Services Board v. Young*, Sharpe J. considered the "reconciliation of the coroner's investigative and quasi-judicial roles", again in the context of an allegation of bias.[41] He noted that the coroner's considerable investigative powers extend into the period after the inquest has commenced. In that case, the question was whether the coroner's participation in the pre-inquest investigative stage gave rise to a reasonable apprehension of bias on the coroner in his role of presiding over the inquest. Sharpe J. held that the duty of impartiality had to be interpreted in light of the fact that it was inevitable that the coroner, having performed an investigation, may come to the inquest with tentative views.

[62] These cases recognize that coroners perform both investigative and quasi judicial functions. Some of those quasi judicial functions may occur prior to the commencement of the inquest itself. Information gathered during the

[40] At paras. 152-153.
[41] [1997] O.J. No. 1076, at paras. 76 and 79. Although Sharpe J. was writing in dissent, the Court of Appeal agreed with his reasons at [1998] O.J. No. 4736.

investigation may influence the coroner who conducts the inquest. Similarly, at least where the investigating and presiding coroner are the same, the coroner may be deliberating on matters relevant to her or his quasi judicial functions even during the investigation stage.

Analysis

[63] The Ministry did not address the *Coopers and Lybrand* criteria. Apart from stating that one coroner usually carries out the initial investigation and another presides over the inquest, the Ministry did not distinguish among a coroner's administrative, investigative or inquest functions. Nor did it distinguish among records arising out of these varied functions for the purposes of s. 3(1)(b). The Ministry also did not refer me to, nor could I find, any cases in this or other jurisdictions which have found that "coroners' personal notes and communications" like those before me fall into s. 3(1)(b) or an equivalent provision. While the Ministry argued that, in light of s. 3(1)(b), the applicant "had no 'vested' rights to access the personal notes and communications of a coroner prior to the passage of the new *Coroners Act"*, the issue of whether s. 3(1)(b) applies to coroner's records has in fact never been determined. Indeed, the Ministry admitted as much in Decision F07-10:[42]

> The [Ministry's] submission conceded that it is not settled law that s. 3(1)(b) applies to the records in dispute.

[64] The material before me indicates that coroners perform a variety of investigative and administrative functions and also perform a number of functions related to presiding over inquests. The question here is whether coroners are acting in a judicial or quasi judicial capacity in carrying out any or all of these functions and thus whether the records arising out of these activities fall under s. 3(1)(b).

[65] The *Coroners Act* empowered a coroner to carry out a number of functions when presiding over inquests, including these:

- rule on the admissibility of evidence, act on it and comment on the weight to be given to it (s. 41)
- summon and compel the attendance of witnesses (s. 37)
- examine witnesses on oath (s. 34)
- issue warrants (*e.g.*, s. 18, s. 25)
- summon, exclude and fine jurors (ss. 21, 30)
- adjourn an inquest (s. 47)
- preserve order at the inquest and give any necessary orders or directions to maintain order (s. 48)

[42] [2007] B.C.I.P.C.D. No. 40, at para. 7.

[66] The *Coroners Act* gave witnesses at an inquest the right to be represented (s. 40) and protection from self-incrimination (s. 39). It also gave persons with interest the right to appear at an inquest, be represented, tender evidence, call witnesses, examine, cross examine and re-examine witnesses and ask the coroner to summon witnesses (s. 36).

[67] In my view, the *Coroners Act* provided for "procedures, functions and happenings approximating those of a court"[43] 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:

- 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[44]
- 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[45]
- 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

[68] In addition, the case law is clear that when presiding over an inquiry a coroner acts in a quasi judicial capacity.

[69] A preliminary issue is whether the records over which s. 3(1)(b) is claimed fall within the category of "personal notes, communications or draft decisions." The Ministry has asserted that s. 3(1)(b) applies to a number of documents which do not, in my view, meet this preliminary test. There appear to be a number of

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[43] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2004 BCSC 1597.

[44] See *MacKenzie v. MacArthur,* [1980] B.C.J. No. 2174. See also paras. 45-46 of Order F05-31, [2005] B.C.I.P.C.D. No. 42, regarding the "legal right to a good reputation" in the context of a public inquiry.

[45] See p. 3, *Régie des permis d'alcool*.

forms which were utilized at various periods which the coroner was required to fill out. For example, there is a case completion plan, which states that it will be completed by a coroner in all cases that are not completed within 4.5 months and forwarded to the Regional Coroner.[46] This is more in the nature of an administrative status report and does not reveal any deliberations by the coroner. This form (record 1218.1) does not fall within s. 3(1)(b). Similarly, there is a "Coroner's Investigation Form" (record 3) which states that the coroner's only involvement was obtaining facilities and issuing notices. Record 3 and its duplicate, record 6, are not within s. 3(1)(b).

[70] There are also a number of forms labelled "BC Coroner's Investigation Worksheet", "Preliminary Investigation Report" or "Report of Investigation". The Ministry applied s. 3(1)(b) to some of these records. These forms appear to be filled out very shortly after the death occurs and record the preliminary facts as the Coroner found them. With one exception, they do not appear to record any deliberative process. The exception is a worksheet (record 1135) which clearly includes the notations of the coroner to himself regarding what should be done in course of conducting the investigation. The report states that an inquest is likely necessary. For the reasons set out below at paras. 74-75, I find that record 1135 is within s. 3(1)(b), but the other investigation worksheets, preliminary investigation reports and report of investigation are not. I find that s. 3(1)(b) does not apply to these records: p. 1 of 1170.1, 614, 605, 1047, 1925B, 1947, 1205, 914, 85, 915, 1922, 1421, 1419, 406, 1622, 83, 89, p. 2 of 172, 211, 1916, 1913, 113.4, 106.

[71] Some of the records the Ministry called "coroners' notes" are individual records. Many other "coroners' notes" comprise series of dated, handwritten or typed notes on forms entitled "B.C. Coroners Service Investigation Notes" ("investigation notes"). However, the heading of each of these forms is not determinative of whether it is within s. 3(1)(b). Still other "coroners' notes" comprise series of dated, typed or handwritten notes on pages which have no headings but the contents of which are similar in character to the "investigation notes". For the purposes of this decision, I refer to each series of dated "coroners' notes" as an "Item". I have had to review the contents of each record and Item, in order to determine whether the individual notes are, in substance, "personal notes or communications" of a person who is actually acting in a quasi judicial capacity.

[72] In some cases, the "coroners' notes" involve records of communications with members of a deceased's family, many years after the inquest is completed (*e.g.,* record 804[47]). In others, (*e.g.*, record 1416[48]), the records reflect

[46] This unnumbered record follows record 1218 in the first inventory. I have numbered it 1218.1 for convenience.

[47] Record 804 is identical in character to two unnumbered records that follow it in the first inventory.

conversations with those in the community regarding the implementation of juries' recommendations. In my view, neither of these categories constitutes notes of persons acting in a quasi judicial capacity, since the investigation and the inquest had been concluded.

[73] The notes sometimes record the presiding coroner's notes taken during an inquest or are otherwise related to conducting or presiding over an inquest. The personal notes and communications that relate to the coroner's conduct of an inquest, including those labelled as "investigation notes", are excluded from the scope of FIPPA under s. 3(1)(b). In my view, the following types of "coroner's notes" flow from the functions a coroner performs related to presiding over an inquest:

- summations to the jury (records 1435, 1715)
- notes of witnesses' testimony at inquests (records 908-911, 1207, 1716)
- "presiding coroner's comments" (records 210, 1427[49])
- notes on granting standing to persons with interest and related matters (*e.g.*, Item 163, bottom note)
- notes relating to deciding what witnesses to call to appear at inquests (*e.g.*, Item 163, top note)
- notes about what exhibits to use
- other notes related to the conduct of inquests (*e.g.*, Item 1923A)
- notes on these topics in Items 1925A, 1923B, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668

[74] As noted above, it is well understood that a person acting in an investigative capacity only is not acting in a quasi judicial capacity. However, the case law also suggests that some of a coroner's quasi judicial functions may occur prior to the commencement of the inquest itself. Moreover, in the context of this case, it is not always possible to draw a bright line between the coroner's purely investigative functions and those which relate to the preparation for the inquest. As Sharpe J. noted in *Young,* it is understood that the coroner's pre-inquest activities will inform his or her thoughts and activities when presiding over the inquest.

[75] Here, in almost all of the cases with respect to which the applicant sought access, an inquest was eventually held. In many cases, it was clear at the outset that an inquest would likely be necessary. The coroner may thus have been deliberating on the matters on which he or she was expected to act in a quasi judicial manner throughout the investigation process. The fact that

[48] Record 1416 records follow-up conversations regarding record 1401, which the Ministry disclosed to the applicant.

[49] Record 1301.1 is also this type of record but is not about the deceased third party in question. I have therefore not considered it here.

a note was created prior to the commencement of an inquest, and does not relate directly to the conduct of an inquest, does not mean that it is outside of s. 3(1)(b). If it reveals deliberations of a coroner which may relate to the exercise of quasi judicial powers in relation to an inquest, it is within s. 3(1)(b).[50] As a result, it is not always possible to separate those notes which relate to conducting the investigation and those which record the coroner's thoughts on the matters at issue on the inquest. The combination of investigatory and quasi judicial functions is highly unusual, if not unique, in the Canadian context, which is why the Court in *Young* held that concepts of the reasonable apprehension of bias must be understood within the particular statutory context in which the coroner operates. Similarly, s. 3(1)(b) must be applied in a manner which recognizes that the coroner's investigatory and quasi judicial activities are not conducted within watertight compartments. In light if this, I find that s. 3(1)(b) applies to the following:

- notes of conversations with pathologists on autopsy results (*e.g.,* Item 1923A, p. 4 of Item 1770.1) or with physicians who attended the deceased before their deaths
- notes of conversations between coroner and police on their respective investigations
- notes of calls, meetings and conversations with police, family members of the deceased, their representatives or their communities on the role and mandate of the coroner, the conduct of particular inquests and similar matters
- memos or notes of conversations with coroners' staff or coroner's counsel related to the conduct of inquests, including jury selection (*e.g.,* record 1308.5)
- notes of conversations with witnesses (*e.g.,* pp. 2-3 of Items 1770.1)
- notes of instructions or questions on investigations, including what steps to take (*e.g.,* record 612)
- coroner's comments on jury's recommendations (yellow sticky notes attached to Item 1121)
- notes on these topics in Items 1925A, 1923B, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668

[76] However, I find that the Ministry has claimed s. 3(1)(b) over some records which simply record the activities of an investigating coroner and do not in any way indicate that the coroner was actually engaged in deliberating over any of the issues which must be addressed in a quasi judicial manner, such as those I outlined just above. Examples are records 139, 913, 921 and 1958. Another is record 1934 which records a call from the media to the regional coroner (who was not the presiding coroner). Section 3(1)(b) does not apply to these types of records.

[50] An example is record 612.

[77] Finally, the exercise of purely administrative functions does not trigger s. 3(1(b). This includes these types of notes:

- about arrangements for booking rooms to hold inquests
- about setting, scheduling or re-scheduling suitable dates for inquests or meetings
- about administrative arrangements for the delivery of subpœnas or exhibits
- of calls or pages reporting deaths (*e.g.,* record 1951A),[51] setting autopsy dates, about receiving autopsy or toxicology results
- on immediate steps after receiving reports of deaths, including viewing of bodies (*e.g.,* record 1951A) or viewing of scenes of deaths
- on administrative arrangements for funerals or for the viewing or release of bodies
- on requesting, seeking, obtaining, copying or sending samples, files, transcripts or records
- of conversations with or messages to or from Crown counsel (or their staff) about updates on Crown counsel's review of files
- regarding informing individuals that inquests will happen
- factual accounts of or references to the inquest process
- travel or making travel arrangements
- about leaving telephone messages requesting status updates
- about doing or reviewing paperwork, getting or making telephone calls, arranging meetings, sending letters or verdicts
- on administrative arrangements for preparing or issuing press releases
- on administrative arrangements for delivering letters granting standing or on sending inquest materials to persons with standing (*e.g.*, record 811)
- related to requests or need for sheriffs' threat assessments for inquests
- about requests for copies of verdicts from media or others
- messages or calls from media or family members related to requests for inquest updates (*e.g.*, the two notes in Item 1121, but not including the yellow sticky notes attached to this Item)
- individual notes on these topics in Items 1925A, 1923B, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668

[51] This record is among some records classified as RCMP reports in the additional records. It is not however an RCMP record but is a note to the coroner providing some factual information about events immediately after the third party's death.

Conclusion on s. 3(1)(b)

[78] Some of the notes and communications that I discuss above are single records. Others are Items comprising series of dated notes in chronological order, with notes to which s. 3(1)(b) applies interleaved with those to which it does not.

[79] For ease of reference, I list here the records and notes to which I find s. 3(1)(b) does apply: 1135, 1435, 1715, 1207, 908-911, 1716, 210, 1427, 163, 1923A, 1308.5, 612; pp. 2-4 of Item 1770.1; the yellow sticky notes attached to Item 1121; individual notes containing information of the type I discussed above in paras. 73-75 in Items 1925A, 1923B, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668.

[80] I also list here for convenience the records and notes to which I find that s. 3(1)(b) does not apply: 1218.1, 3, 6, 804, 1416, p. 1 of 1170.1; 614, 605, 1047, 1925B, 1947, 1205, 914, 85, 915, 1922, 1421, 1419, 406, 1622, 83, 89, p. 2 of 172, 211, 1916, 1913, 113.4, 106, 1934, 139, 913, 920, 921, 1951A, 811, 1121; 1958; individual notes containing the types of information I described above in paras. 72 and 76-77 in Items 1925A, 1923B, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668. I consider these records and notes below under s. 22.

[81] **3.5 Section 3(1)(c)**—This section excludes from the scope of FIPPA certain types of records of officers of the Legislature. It has been the subject of a number of orders[52] and I take the same approach here without repetition. Section 3(1)(c) reads as follows:

> **Scope of this Act**
>
> 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: …
>
> (c) subject to subsection (3), a record that is created by or for, or is in the custody or control of, an officer of the Legislature and that relates to the exercise of that officer's functions under an Act; … .

[82] The inventory identified records 62 and 71 as falling under s. 3(1)(c) and described them as letters from the Ombudsman to the Chief Coroner. Record 72 is similarly described. The inventory indicates that record 72 was to be released to the applicant.

[83] The bottom of record 1500.1 and all of records 1503, 1519-1522 are correspondence from the Office of the Police Complaint Commissioner to the

[52] See for example Order 02-01, [2001] B.C.I.P.C.D. No. 1, and Order 01-43, [2001] B.C.I.P.C.D. No. 45.

Chief Coroner. Although the Police Complaint Commissioner is also an officer of the Legislature, the inventory listed s. 22 as applying to these records, rather than s. 3(1)(c).

[84] I am satisfied that all of these records relate to the exercise of the functions of these two officers of the Legislature under their respective Acts. I find that records 62, 71, 72, the bottom of record 1500.1, records 1503 and 1519-1522 are excluded from the scope of FIPPA under s. 3(1)(c).

[85] **3.6 Law Enforcement**—The relevant parts of s. 15(1) read 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 …
>
> (f) endanger the life or physical safety of a law enforcement officer or any other person. …
>
> (j) facilitate the escape from custody of a person who is under lawful detention, …
>
> (l) harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[86] The Ministry applied ss. 15(1)(f) and (l) to portions of the Victoria Police Department's 1986 jail manual (record 82.1), arguing that disclosing the withheld information would endanger the physical safety of law enforcement officers or others and could harm the security of the jail and the video surveillance system.[53] In support of these arguments, the Ministry submitted affidavit evidence, much of it *in camera*, from Inspector Cory Bond of the Victoria Police Department. The inventory of records indicates that the Ministry withheld a few other items under s. 15 as well,[54] such as police jail plans (VPD records), photos of prison cells, a police bulletin and an extract from a police policy manual, although the Ministry provided no separate arguments or evidence on these records. The Ministry did provide affidavit evidence in support of s. 15(1)(j) from Corporal Dean Allchin of the RCMP who deposed that disclosure of information about blueprints and plans of RCMP prisoner accommodations could facilitate someone's escape from custody.[55]

[87] The applicant had this to say in response to the Ministry's arguments on s. 15(1):

> I cede and agree and further urge the Commissioner **not** to release to me any records that might aid a jail-break, place law enforcement officers in danger or aid an Al Quaeda attack. Outside of those items — and I'll leave it to the Commissioner's discretion — I believe the legislation supports my

[53] Paras. 4.35-4.36, initial submission.
[54] The Ministry's inventory cited no subsections of s. 15(1) in the entries for these other items.
[55] Corporal Allchin did not specify which records he was referring to here.

> request. I'm willing to forgo physical diagrams but I would like any part of manuals that outline the professional standards guidelines for police officers in British Columbia.[56] [bolding in original]

[88] I have carefully reviewed the information to which the Ministry applied s. 15 and ss. 15(1)(f), (j) and (l) and could find no information on "professional standards guidelines for police officers in British Columbia". Some records to which the Ministry applied s. 15(1) are also classified as "non-responsive" to the request and, for reasons given above, I have not considered them. Others are jail plans, cell photos or, in the case of records 60.1, 82.1 and 131, policies or manual extracts on security procedures or similar items. As the applicant has disavowed any interest in these types of records, I need not decide whether s. 15(1) applies to them. I have also not considered whether s. 15 applies to another record, 1056. It is not clear how s. 15 might apply to this record but in any event I find below that s. 22(1) applies to it. The upshot is that I do not need to consider whether s. 15 applies in this case.

[89] **3.7 Information Received in Confidence—**The Ministry withheld a number of records under s. 16(1)(b), saying it had received these records in confidence from the RCMP. It reminded me that s. 16(1)(b) is not a harms-based exception and that the Information and Privacy Commissioner found in Order 02-19[57] that the RCMP are an agent of the federal government.

[90] It appears from the second inventory of records and a handwritten annotation on the record itself that the Ministry applied s. 16(1)(b) to a December 8, 2005 letter with attachments that the Coroners Service received from the City of Vancouver law department (record 1958[58]). The attachments are records that the Vancouver Police Department ("VPD") created. The Ministry's submissions on s. 16(1)(b) focused exclusively on the RCMP and did not explain how s. 16(1)(b) might apply to records the VPD provided. The Ministry did not apply s. 16(1)(b) to any other records that municipal police provided to the Coroners Service and it is therefore possible that the notations on this letter are an administrative error. I do not in any case see any basis in the material before me for finding that s. 16(1)(b) applies to this record.

[91] Turning to the other records to which the Ministry applied s. 16(1)(b), Corporal Dean Allchin of the RCMP deposed that he is regular member of the RCMP and a Policy analyst, Operational Policy Unit, Criminal Operations Secretariat. In this position he said he is responsible for providing policy advice to the RCMP about the handling of personal information under the federal *Privacy Act*. He also deposed that the exchange of personal information between the Coroners Service and the RCMP is "conducted under a mutual expectation of confidentiality" and that the RCMP provided a number of

[56] Page 21, reply submission.
[57] [2002] B.C.I.P.C.D. No. 19, at para. 58.
[58] I found above that s. 3(1)(b) of FIPPA does not apply to this record.

categories of records in confidence to the Coroners Service, including these: Form 1624 continuation reports (internal RCMP memoranda to investigation files, which Corporal Allchin said are normally considered confidential and not routinely disclosed to outside parties); witness statements; police officers' case notes; forensic photographs of crime scenes and deceased persons; prisoner logs; excerpts from operational manuals; blood alcohol test results; sudden death reports; police occurrence reports.[59]

[92] Norm Leibel, Deputy Chief Coroner, deposed as follows, based on his experience dealing frequently with police agencies:

- the police treat all deaths as potentially suspicious and as potential homicides
- the records the police provided to the Coroners Service were all created or compiled by the police for law enforcement purposes
- there is a clear mutual understanding between the police (including the RCMP) and the Coroners Service that, when the police provide sensitive law enforcement records to the Coroners Service, the Coroners Service is receiving the records in confidence and will keep and treat them confidentially
- the practice of the Coroners Service is to treat records received from the police in confidence
- court orders for documents for coroners' files generally exclude third-party documents
- recognizing that disclosure of police records could jeopardize police investigations, the Coroners Service provides secure storage for homicide files
- the Coroners Service requires legal counsel for parties to inquests to sign undertakings of confidentiality when they receive records to enable them to prepare for inquests
- while the Coroners Service has the power to compel the police to produce records, he believes that, if the Coroners Service did not agree to keep the records confidential, the police would delay providing the records until their investigation was complete (possibly up to a year) and, if the file is forwarded to Crown counsel, until Crown counsel had decided whether or not to lay charges, for fear of jeopardizing their investigation
- such a delay would impair the ability of the Coroners Service to conduct investigations and prepare for inquests
- although an inquest is a public proceeding, the Coroners Service ensures that sensitive material is kept as confidential as possible; he understands that the police understand this when providing records

[59] Paras. 9-10, Allchin affidavit.

- there is a draft memorandum of understanding ("MOU") on the sharing and disclosure of personal information among the Coroners Service and the RCMP and municipal police forces, which they follow, even though they have not yet finalized it; in the draft MOU, the parties agree, among other things, that they will exchange information in confidence and consult each other in the event of an access request under their respective legislation[60]

[93] The Ministry also provided a letter from the Vancouver Police Department ("VPD") pertaining to the overlap between this inquiry and two of three other inquiries which involved this applicant, where the VPD was the public body.[61] The Ministry argued that it would be appropriate for me to consider the VPD's submissions on s. 16(1)(b) in those inquiries, as they related to RCMP records. The VPD's letter also asks that I do so.[62]

[94] I decided I did not need to deal with s. 16(1)(b) in Orders F09-19 and F09-20,[63] as I had already found that s. 22(1) applied. I have decided that I do not need to consider the VPD's submissions from these other two inquiries in this case either, as the Ministry's evidence and argument suffice to establish that Ministry received the RCMP information in confidence.

[95] The applicant takes the view that s. 16(1)(b) "was meant to apply to far more serious matters and not for the preoccupation of the Coroners Office for maintaining good relationships with their former employers". The notion that the RCMP might refuse to co-operate in future inquests or ignore subpœnas is "laughable" in his view and the Ministry's decision to apply this discretionary exception "must be seen as an example of one thing — their utter resistance to transparency and accountability."[64]

Does section 16(1)(b) apply?

[96] The relevant parts of s. 16(1) read as follows:

Disclosure harmful to intergovernmental relations or negotiations

16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the government of British Columbia of relations between that government and any of the following or their agencies:

(i) the government of Canada or a province of Canada; …

[60] Paras. 12-22, Leibel affidavit. The Ministry did not provide me with a copy of this draft MOU.
[61] Orders F09-18 [2009] B.C.I.P.C.D. No. 24, F09-19, [2009] B.C.I.P.C.D. No. 25, and F09-20 [2009] B.C.I.P.C.D. No. 26. These orders concerned VPD files on the investigations into the deaths of three of the same individuals whose inquest files are involved here.
[62] Para. 4.56, initial submission; letter from VPD, Exhibit "B", Ackerman affidavit.
[63] Para. 31, Order F09-19, and para. 27, Order F09-20.
[64] Pages 18-19, reply submission.

> (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, …

[97] A number of orders have considered the application of s. 16(1)(b) and I have taken the same approach here.[65]

[98] The Commissioner found in Order 02-19 that the RCMP are an agency of the federal government for the purposes of s. 16(1)(b). I will therefore consider whether the Ministry has established that it received the information in question in confidence from the RCMP.

[99] The Ministry's evidence in support of its claim that it receives police records in confidence is not as compelling as it might be. It is not for example clear from Corporal Allchin's affidavit that he has any direct experience in the exchange of confidential information between the RCMP and the Coroners Service. Nor is it clear how he knows the conditions under which the RCMP provide records to the Coroners Service.

[100] As for Norm Leibel's evidence, he did not explain how, as deputy chief coroner, he is in a position to provide evidence on how the police treat deaths and the reasons for which they create and compile records. Other than citing his experience dealing with police, Norm Leibel also did not provide any support, documentary or otherwise, for his belief that delay in the police providing files might occur if the Coroners Service failed to keep police records confidential. Norm Leibel deposed that the Coroners Service has the statutory power to compel the police to produce records[66] and I thus have difficulty understanding why there might be a delay if the Coroners Service ordered production of specific RCMP records.

[101] Despite these deficiencies, however, I am satisfied from the following factors that the Coroners Service received the RCMP records in confidence:

- the records contain information of a type which a reasonable person would expect to be received in confidence and kept confidential
- Norm Leibel's evidence that the Coroners Service has consistently treated police records as confidential
- Norm Leibel's evidence of an established relationship between the Coroners Service and the RCMP in which there is a mutual understanding that sensitive information is exchanged confidentially, including under the draft MOU

[65] See, for example, Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44, and Order 02-19.

[66] Norm Leibel did not refer me to specific sections of the *Coroners Act* in this regard although I note that the previous *Coroners Act* gave coroners these investigative powers: "inspect information in any records relating to the deceased or the deceased's circumstances"; and "seize anything that the coroner has reasonable grounds to believe is material to the investigation" (s. 15(2)(a) & (b)).

[102] I therefore find that the information the Coroners Service received from the RCMP was received in confidence, for the purposes of s. 16(1)(b). This does not end the matter, however, as I must also consider the Ministry's exercise of discretion in applying s. 16(1)(b).

Exercise of discretion

[103] The Ministry said that, because the information it withheld under s. 16(1)(b) also falls under s. 22, it had no discretion to release the information. Accordingly, it said, its head did not consider the factors public bodies normally consider when a discretionary exception applies.[67]

[104] The Ministry's bald admission that it did not exercise discretion in applying s. 16(1)(b) is unsettling, not least because it did not apply s. 22 to all of the records it withheld under s. 16(1)(b). On the contrary, s. 16(1)(b) is the only exception the Ministry applied in a number of cases. Moreover, previous orders have established that public bodies should consider all relevant circumstances in deciding whether or not to apply a discretionary exception. The applicability of s. 22 might well require a public body to withhold information that also happens to fall under s. 16(1)(b) but this does not absolve the public body, as a separate matter, from exercising its discretion in applying s. 16(1)(b). The Ministry's failure to exercise discretion suggests that it treated s. 16(1)(b) as a blanket exception. As the Commissioner has said:

> [66] … Section 16(1)(b) is not a blanket exception that applies in every case to the entirety of any record received from the RCMP or the entirety of any record that in some degree contains information received in confidence from the RCMP.[68]

[105] The Ministry's admission that it did not exercise discretion also appears to be at odds with the fact that, during the inquiry process, it disclosed a number of records consisting of the RCMP's responses to coroner's jury's recommendations. It had apparently withheld these records earlier under ss. 16(1)(b) and 22.[69] The fact that the Ministry disclosed these records later suggests that it did exercise its discretion in deciding not to apply s. 16(1)(b), at least regarding those records.

[106] In light of the Ministry's admitted failure to exercise discretion in applying s. 16(1)(b), it is appropriate for me to order it to reconsider its decision to apply this exception, taking into account all relevant factors. These factors include the age of the records (their dates range from 1971 to 2004), the public interest and

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[67] Para. 4.57, initial submission. The Ministry repeated this assertion in its supplementary submission on the more recently located records.
[68] Order 02-19.
[69] See, as an example only, record 1800, a letter from the RCMP to the coroner in response to the jury's recommendations.

FIPPA's purpose of making public bodies more accountable. In my view, the Ministry should also consider the desirability of public scrutiny of the RCMP's involvement in these cases and its actions in investigating the deaths.

[107] The content of the records is also a factor. A number of items contain no personal information. Many appear to be innocuous, routine items. Still others were published or intended for publication. Examples include:

- numerous media related items such as news releases, media advisories, press statements, newspaper clippings
- letters, emails and other correspondence on routine, administrative matters (records 16.8, 81, 1041, 1132, 1309, 1310, 1725, 1738, 1032, 1033)
- a letter from the coroner to the RCMP (record 1624)
- a photocopy of a page from a medical text (record 308.11)
- a dictionary excerpt (record 1118)
- diagrams called "Incident Management/Intervention Model" (records 925, 1067)
- "notes re suggested policy/practice changes (source uncertain)" (record 662.2)
- diagram and discussion paper called "National Use of Force Model (record 1069)
- numerous manual/policy excerpts and bulletins

[108] It would also be appropriate for the Ministry to seek the RCMP's consent to the disclosure of the RCMP's records. The Commissioner encouraged public bodies to do this in Order 02-19[70] but there is no evidence that the Ministry sought the RCMP's consent to disclosure in this case.

[109] Previous orders have set out still other factors that public bodies should consider in the exercise of discretion[71] and I will not repeat them here. The Ministry should however take them into account as well in reconsidering its decision regarding all of the records to which it applied s. 16(1)(b).

[110] **3.8 Third-party Privacy**—The Ministry withheld many of the records under s. 22. Many previous orders have considered its application[72] and I take the same approach here. The relevant provisions are these:

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[70] At para. 67

[71] See, for example, Order No. 325-1999, [1999] B.C.I.P.C.D. No. 38, Order 02-38, [2002] B.C.I.P.C.D. No. 38, and Order 02-50, [2002] B.C.I.P.C.D. No. 51.

[72] See Order 01-53, [2001] B.C.I.P.C.D. No. 56, and Order 02-56, [2002] B.C.I.P.C.D. No. 58, for example.

Disclosure harmful to personal privacy

22(1) The head of 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.

(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, …

(d) the disclosure will assist in researching or validating the claims, disputes or grievances of aboriginal people, …

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

(a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

(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, …

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

[111] The Ministry said that, given the mandate of the Coroners Service, it was not surprising that many of the withheld records relate to a medical diagnosis or evaluation of deceased third parties, such as medical certificates of death, autopsy reports, toxicology reports, photographs of the deceased, police investigation reports, hospital and physician records related to the deceased, results of post mortem examinations, pathology records, corrections records, sudden death reports, coroners' notes, witness lists[73] and jurors' names.[74] The Ministry argued that all these records fall under s. 22(3)(a).

[112] Other information falls under s. 22(3)(b), the Ministry said, as the police treat all deaths as suspicious and as potential homicides and the only reason the police compile or generate the information is to assist in the investigation of a possible offence.[75] The Ministry argued that the information in question was

[73] The Ministry said it disclosed the names of witnesses who were professionals but withheld the names of "lay" witnesses; para. 4.74, initial submission.

[74] The Ministry said that jurors are not introduced or named in coroners' inquests to ensure their privacy and safety; para. 4.76, initial submission.

[75] This information came from the affidavit of Norm Leibel (at paras. 16 & 23) who, as noted earlier, does not say how he is in a position to provide evidence on the police's functions.

therefore compiled and identifiable as part of an investigation into a possible violation of law, that is, the *Criminal Code*.[76] Other information it withheld included names of family members and information on third parties, such as their past involvement with the criminal justice system or their use of drugs and alcohol.[77] The Ministry also asked that I consider the VPD's letter on the overlap between this inquiry and the three VPD inquiries I mentioned above. The VPD's letter in turn asks that I consider the affidavit of Inspector Porteous of the VPD and the VPD's submissions on those three inquiries regarding s. 22(3)(b). I have done both.

[113] The Ministry argued that it would not be reasonable to sever the records as the result would be "disconnected snippets" or "worthless", "meaningless" or "misleading" information.[78] This is not of course relevant to whether or not s. 22 applies but to whether it is reasonable under s. 4(2) to sever excepted information (personal or non-personal) from the records and disclose the rest.

[114] The applicant's submissions did not explicitly address s. 22(3) although it is clear he is aware that the records contain third-party personal medical information and information compiled in the course of police investigations.

Is it personal information?

[115] Before I consider whether s. 22(3) applies, I will first determine if the information the Ministry withheld under s. 22 is personal information. The inventories indicate that the Ministry applied s. 22 to several records that do not in fact contain any personal information and to which s. 22 therefore does not apply. These records are as follows:

- numerous extracts from policy or operational manuals or bulletins,[79] including a Victoria Police Department policy on jailor absence (record 58.2)
- "cell statistics"[80]
- a dictionary definition (record 1118)
- diagrams called "Incident Management/Intervention Model" (records 925 and 1067)
- "notes re suggested policy/practice changes (source uncertain)" (record 662.2)

[76] Paras. 4.58-4.80, initial submission; Leibel, McLean and Porteous affidavits. The Ministry also referred to a number of BC and Ontario orders in support of its arguments on these points.
[77] Para. 4.85, initial submission.
[78] Paras. 4.69, 4.71-4.72.
[79] I do not include here these types of records where the Ministry applied s. 15 to them, as the applicant said he did not want them.
[80] I do not include here cell plan drawings, cell layout plans or photos of cells, in cases where the Ministry withheld them under s. 15, as the applicant said he did not want them.

- a diagram and paper called "National Use of Force Model (record 1069)
- similar "use of force" policy and framework records and an internal investigation policy in the "exhibit package" in the fifth set of additional records (part of record 1960)
- routine correspondence (records 633, 802.3, 810, 1002, 1004, 1041, 1738, 1032, 1033)

[116] I agree with the Ministry's characterization of the remaining personal information it withheld under ss. 22(3)(a) and (b) and I find that these sections apply to this information. Some personal information also falls under s. 22(3)(d), although the Ministry did not argue this section and did not list it in the inventories. Disclosure of this information is therefore presumed under ss. 22(3)(a), (b) and (d) to be an unreasonable invasion of third-party privacy.

Relevant circumstances

[117] The general thrust of the applicant's submissions is that there is a need to subject the Coroners Service to public scrutiny. The applicant intends to make a documentary about "Aboriginal deaths in custody" and wants access to the records in dispute for this purpose. He appears to question whether the Coroners Service and police investigated these deaths properly. Thus, in his view, the public interest in disclosure outweighs any invasion of privacy of the deceased third parties, as it would shed light on the actions of the Coroners Service.[81] The applicant also made the following arguments, ostensibly with reference to s. 22(2)(d) and an unspecified "Aboriginal grievance",[82] but which appear to relate more to his views on the need to cast light on the actions of the Coroners Service:

> That the Coroner like the VPD is using the right to personal privacy of individuals who have died in police custody where the internal investigation may have been flawed (I'm referring to the Wood Report yet again) to shield themselves from scrutiny is morally reprehensible and should be, and shortly will be, a source of great shame and embarrassment. I've written ad naseum [*sic*] about this elsewhere and am getting a bit dizzy pointing out the patently obvious — the public interest in the documents is obvious and inherent. The refusal to release and abuse of process is an indication of bad faith and a desire to avoid scrutiny.
>
> …

[81] Initial submission.

[82] I accept that the applicant has concerns respecting the deaths of aboriginal people in police custody. The applicant also attached three letters to his reply submission, including two from aboriginal organizations, which raise similar concerns. I do not however consider that any issues arising out of these deaths are "claims, disputes or grievances of aboriginal people" for the purposes of s. 22(2)(d). See my comments in footnote 18 in Order F09-18, where I dealt with a similar argument by this applicant.

> Again, I am not investigating the Aboriginal men and women who died in police custody. The purpose of my work is to investigate the actions of the police and oversight bodies such as the Coroners Office. I have the support of all majour [*sic*] BC Aboriginal organizations in this venture. Further, the medical evidence is necessary for judging the actions of the police and the decisions of oversight bodies such as the Coroners Office ergo this is not an unjustified invasion of personal privacy. Just as privacy rights do not end when a person dies nor must their right to to [*sic*] ensure that their deaths are not ignored — especially if bias, inaction, and less than full professional standards expected are displayed during the investigations.[83]

[118] The applicant alleged the Coroners Service is neither independent nor transparent. He also suggested that there is a potential bias in the Coroners Service in that coroners, many of whom he said are former police officers, are investigating the actions of former colleagues.[84] In his view, the Coroners Service does not vigorously investigate aboriginal deaths in custody and thus fails British Columbia's aboriginal population.[85]

[119] The Ministry disputed these allegations, arguing that it exhaustively investigated each death. It said that in each case there was an inquest, open to the public, including the media, where the public could hear the testimony of witnesses and where the jury later issued a verdict. The Ministry said the applicant has not provided any evidence to show that it failed to investigate the deaths properly or that there was "any lack of transparency in the inquests relating to those deaths".[86]

[120] In the view of the Ministry, the sensitivity of the personal information is a factor favouring its withholding. The Ministry acknowledged that the applicant wishes access to the records to do a CBC documentary but argued that, as it has disclosed the coroners' judgements of inquiry and verdicts, as well as follow-up correspondence on the juries' recommendations, further disclosure is not desirable for the purposes of subjecting the Coroners Service to public scrutiny.[87] It also argued that previous orders have found that deceased individuals retain their privacy rights, although such rights diminish over time.[88]

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[83] Pages 24-25, reply submission

[84] See Order F09-24, [2009] B.C.I.P.C.D. No. 30, at para. 20, which noted that, of 45 inquests held in 2007, 34 concerned deaths in custody and that coroners with police backgrounds presided over only four of those inquests.

[85] Reply submission.

[86] Para. 19, reply submission.

[87] Paras. 4.83-4.87, initial submission.

[88] Paras. 4.89-4.92, initial submission.

Analysis

[121] A relevant circumstance, which the parties did not raise but which in my view applies, is that some of the records were publicly released, that is, the media-related records (news releases, media advisories, press statements, newspaper clippings[89]). While these records contain personal information which falls under s. 22(3)(a), (b) or (d), the fact that they were created for public consumption or published, or both, rebuts the presumed unreasonable invasion of third-party privacy. I find that s. 22(1) does not apply to any of the media-related items.

[122] I also considered the fact that some records—the preliminary investigation and coroners worksheet forms I discussed above at paras. 65-66—contain information which is also found in the verdicts, which the Ministry has disclosed. I fail to see how its re-disclosure in these forms would be an unreasonable invasion of third-party privacy. I find that s. 22(1) does not apply to the following records: 1218.1, p. 1 of 1770.1, 605, 614, 1047, 1925B, 1947, 1205, 913,[90] 3, 6, 915, 1922, 1421, 1419, 406, 1622, 83, 89, 85, p. 2 of 172, 211, 1916, 1913, 114.4,[91] 106. Exceptions to this finding are the age, date of birth, home address, medical history (where known), drug/medication information (where known) of the deceased third parties, the names of their next of kin and family doctor and any home telephone numbers, to which for reasons I discuss below I find s. 22(1) applies.

[123] I agree with the Ministry that the sensitivity of the personal information is a relevant circumstance. However, many of the records and notes do not contain sensitive third-party personal information. I refer here to the "coroners' notes" and correspondence related to coroners' investigative and administrative functions (see paras. 72 and 76-77 above on the records and notes to which I found s. 3(1)(b) does not apply). These records and notes relate to coroners' routine workplace activities and interactions, frequently with other individuals (including "professional" witnesses) also acting in their employment or professional capacities. While such information may fall under s. 22(3)(d), its routine, administrative nature means that its disclosure would not be an unreasonable invasion of third-party privacy. Exceptions are names and other identifying information of third parties with whom coroners dealt and who were not acting in their employment capacities (principally family members, friends and associates of the deceased and "lay" witnesses), to which for reasons I discuss below I find that s. 22(1) applies. I find that s. 22(1) does not apply to the following records (with any additional exceptions to my finding noted in parentheses):

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[89] I concluded above that it is appropriate for the Ministry to reconsider its decision to apply s. 16(1)(b) to these media-related items.
[90] The table lists this records as 914 but the record itself is annotated 913.
[91] This record is listed as 113.4 in the table but is annotated 114.4.

- to notes containing information on coroners' administrative functions, to which I found that s. 3(1)(b) does not apply, in Items 1925A, 1923B, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668
- to the following routine correspondence: records 400.1, 411.2, 411.3,[92] 633, 645, 802.4,[93] 802.2, 802.3, 803, 810, 812-815, 920, 922-924, 924.2, 1002, 1003,1004, 1010-1012, 1014, 1022, 1030 1032-1034, 1040, 1041, 1124, 1125, 1307, 1308, 1407, 1615, 1617, 1618, 1717, 1718, 1910, 1951A, 1958
- records 1416, 811, 921, 1934, pp. 1 and 2 of Item 1121 (except for the yellow sticky notes attached to this record), record 405 (except information on address, MSP number and next of kin of the deceased, to which I find for reasons I discuss below s. 22(1) applies), records 412 and 915.1 (except dates of birth, to which I find for reasons I discuss below s. 22(1) applies)
- record 403.1, a series of four letters which relate to juries' recommendations (except for the names of deceased third parties whose inquest files are not in issue here and except for an attachment containing a list, to which for reasons I discuss below I find that s. 22(1) applies)

[124] Turning to the remaining information and records, I accept that the applicant has concerns about the deaths of aboriginal people in custody. I also accept that there is a public interest in scrutinizing the actions of the Coroners Service and the police in investigating these deaths. In my view however the Ministry has satisfactorily taken into account the desirability of public scrutiny of the actions of the Coroners Service and police in the disclosures it has already made. The autopsy photographs and reports, death registrations, final post mortem reports, toxicology reports, registrations of death, coroner's medical certificates of death, ambulance reports, hospital records, medical investigation or behavioural reports, police investigation and sudden death reports, witness statements and other withheld information all contain sensitive third-party personal information, a factor that favours their withholding. I include here some items to which the Ministry did not apply s. 22 but to which in my view it applies, that is, records 1056, 221, 222, 224, 403, 1132, 1706, 1903, 1904, 1951B.[94] I do not consider that disclosure of these types of information and records would add meaningfully to the public's understanding of the actions of the Coroners Service or the police. Finally, given the sensitivity of the personal information in these records and the fact that many of the third parties mentioned in the records are likely still alive, I do not consider that the length of time since the deaths of the third parties diminishes the privacy rights of the deceased or other third parties in

[92] Records 411.2 and 411.3 follow record 411.1 in the first inventory. I numbered them for convenience.

[93] For convenience, I also numbered Record 802.4, a letter from the coroner to the College of Physicians and Surgeons, which is the second record after 802 in the first inventory.

[94] Record 1951B was also among some records the Ministry classified as RCMP reports in the additional records. It is not however an RCMP record but is a note to the coroner from the pathologist.

this case. I therefore find that s. 22(1) applies to all of the remaining information and records.

4.0 CONCLUSION

[125] For reasons given above, under s. 58, I make the following orders:

1. I require the Ministry to reconsider its decision to refuse the applicant access to all of the information it withheld under s. 16(1)(b), taking into account the factors I set out above in paras. 106-109, and to provide the applicant and me with its decision on these records, together with an explanation of the factors it considered in exercising its discretion.

2. Subject to paras. 3 and 4 below, I require the Ministry to refuse the applicant access to the information it withheld under s. 22(1).

3. Subject to para. 1 above, I require the Ministry to give the applicant access to the information and records to which the Ministry applied s. 16(1)(b) and to which I found s. 22(1) does not apply, as follows:

   (a) the media related items I discuss in para. 107 above

   (b) the various extracts from policy or operational manuals or bulletins[95]

   (c) a dictionary definition (record 1118)

   (d) diagrams called "Incident Management/Intervention Model" (records 925 and 1067)

   (e) "notes re suggested policy/practice changes (source uncertain)" (record 662.2)

   (f) a diagram and paper called "National Use of Force Model (record 1069)

   (g) routine correspondence (records 1041, 1738, 1032, 1033)

   (h) cell statistics

4. I require the Ministry to give the applicant access to the remaining information and records to which I have found s. 22(1) does not apply, as follows (with any exceptions to this order in parentheses):

   a) records 1218.1, p. 1 of 1770.1, 605, 614, 1047, 1925B, 1947, 1205, 913,[96] 3, 6, 915, 1922, 1421, 1419, 406, 1622, 83, 89, 85, p. 2 of

[95] I note the applicant said he would abandon his request for these types of records where the Ministry applied s. 15 to them.
[96] The table lists this record as 914 but the record itself is annotated 913.

172, 211, 1916, 1913, 114.4,[97] 106 (with the exception of information on the age, date of birth, home address, medical history, drug/medication information of the deceased, the names of their next of kin and family doctor and any home telephone numbers, to which I require the Ministry to refuse access under s. 22(1))

(b) "use of force" policy and framework records and an internal investigation policy in the "exhibit package" in the fifth set of additional records, part of the record I numbered 1960; record 58.2, a Victoria Police Department policy on jailor absence

(c) records 400.1, 403.1 (except for the list attached to record 403.1), 411.2, 411.3,[98] 633, 645, 802.4,[99] 802.2, 802.3, 803, 810, 812-815, 920, 922-924, 924.2, 1002, 1003, 1004, 1010-1012, 1014, 1022, 1030, 1032-1034, 1040, 1041, 1124, 1125, 1307, 1308, 1407, 1615, 1617, 1618, 1717, 1718, 1910, 1945, 1951A, 1958.

(d) records 1416, 811, 921, 1934, pp. 1 and 2 of Item 1121 (except for the yellow sticky notes attached to this Item, to which I found s. 3(1)(b) applies), record 405 (except information on the address, MSP number and next of kin of the deceased, to which I require the Ministry to refuse access under s. 22(1)), records 412 and 915.1 (except dates of birth, to which I require the Ministry to refuse access under s. 22(1)).

(e) the individual notes on topics to which I found above s. 3(1)(b) does not apply in Items 1925A, 1923A, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668 (except for names and other identifying information of third parties with whom coroners dealt and who were not acting in their employment or professional capacities—that is, family members, friends and associates of the deceased and "lay" witnesses—to which I require the Ministry to refuse access under s. 22(1),).

5. I require the Ministry to give the applicant access to the information described in paras. 3 and 4 above, together with any additional information it decides to disclose after reconsidering its decision under para. 1 above, within 30 days of the date of this order, as FIPPA defines "day", that is, on or before April 21, 2010 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

[97] This record is listed as 113.4 in the table but is annotated 114.4.
[98] Records 411.2 and 411.3 follow record 411.1 in the first inventory.
[99] Record 802.4 is the second record after 802 in the first inventory.

6. As conditions under s. 58(4), I specify the following:

(a) that, in complying with my order in para. 4(e) above, the Ministry is to be guided by my findings and comments in paras. 73-75 above in removing the notes in Items 1925A, 1923A, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668 to which I find s. 3(1)(b) applies and the Ministry is to be guided by my findings and comments in paras. 72 and 76-77 above in disclosing the notes in Items 1925A, 1923A, 912, 113.18, 613, 1204, 1134, 1044, 1952, 668 to which I find s. 3(1)(b) does not apply

(b) that, no later than five days before compliance with this order is due, as FIPPA defines "day", that is, on or before April 14, 2010, the Ministry is to provide me with copies of the records and notes it will be disclosing in accordance with my order under paras. 3 and 4 above, for my approval

(c) that the applicant is at liberty to apply to me within 15 days of the date of this order, as FIPPA defines "day", that is on or before March 29, 2010, on the issue of which "non-responsive" records he considers to be responsive to his request, together with his reasons as to why he considers them responsive. If he does so, I will give the Ministry an opportunity to comment on his submission before I decide this issue.

[126] Given my comments on s. 15 and my finding that s. 3(1)(c) applies to some records and information, no order is necessary respecting these sections.

March 8, 2010

ORIGINAL SIGNED BY

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Celia Francis
Senior Adjudicator