REPORT **FI-05-47**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF JUSTICE** to refuse to disclose an autopsy report and other related records.

REVIEW OFFICER: Darce Fardy

REPORT DATE: September 30, 2005

ISSUE: Whether an autopsy report and other related records are excluded from the FOIPOP Act in accordance with Section 4(2)(1). Whether the autopsy can be denied under s.15(1)(a) (law enforcement) and s.20(3)(a) (protection of personal privacy).

In a Request for Review, dated July 11, 2005, under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), the Applicant asked that I recommend to the Department of Justice (the Department) that it reverse its decision and disclose an autopsy report and other related records.

Background

This application follows a criminal trial stemming from an armed standoff with police at a Halifax home in May 2004. During the standoff a woman died inside the home, raising questions regarding the circumstances surrounding her death.

The Applicant asked the Department for:

> *All reports, certificates and any other record generated from the investigation of the death, including the medical certificate of death and preliminary and concluded autopsy reports.*

The Department replied that the records relate to a prosecution which has not yet been concluded and are therefore exempt from FOIPOP pursuant to **Section 4(2)(i)** which reads:

> ...this Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

Both the solicitor for the Applicant and the Department made submissions to the Review. Each party was given an opportunity to read and respond to the other's arguments. In its decision, the Department cited only s.4(2)(i). In its submission the Department added **Section 15** (law enforcement) and **Section 20** (protection of personal privacy) as further exemptions. The Applicant's solicitor first submission addresses only s.4(2)(i).

The solicitor's submission:

The solicitor noted it was making its submission in the absence of any attempt by the Department, which carries the burden of proof, to show how s.4(2)(i) applies.

The solicitor questions the Department's assumption that the records being requested "relate" to a prosecution. "When giving meaning to the term 'relating to' one has to regard the *Act* as a whole and the legislative purposes." She cites the first edition of *Construction of Statutes* in which Professor Driedger, said:

> *Today there is only one principle or approach, namely, the words of the Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.*

The submission points out that "this modern principle has been cited and relied on in innumerable decisions of Canadian courts and has been declared to be the preferred approach of the Supreme Court of Canada.".

The submission also cites *O'Connor v. Nova Scotia* (2001) N.S.C.A 132, which recognized the uniqueness of the Nova Scotia legislation when it said:

> *... the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific."*
>
> *I conclude that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada. Nova Scotia's law-makers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation, ensure fairness in government decision-making, and permit the airing and reconciliation of divergent views. No other province or territory has gone so far in expressing such objectives*
> . . .
>
> *The provisions from the purpose section to which I have just referred simply make it clear that in order to achieve the Act's stated objectives, <u>any exemptions or exceptions to the obligation upon a fully accountable government to provide its citizens with government information, must be limited and specific</u>. Logic would dictate that any limitations upon the stated objective of insuring that public bodies are fully accountable, <u>must be few and tightly drawn.</u> They must be <u>clearly identified</u> and the basis upon which such a request for information might be refused, must be clearly stated.* (Emphasis added)

The Applicant's solicitor also found support in a ruling of the British Columbia Information and Privacy Commissioner who, while commenting on the equivalent section to s.4(2)(i) in the British Columbia *Act* said:

> *It is my view that this section only applies to records directly associated with a prosecution that is officially underway, which normally means that a charge has been laid.* (Order 20-1994)

She referred as well to an Alberta case which ruled that the exclusion was intended to apply to "evidentiary records" in a prosecution and to apply only until the prosecution is completed, not afterward. [*Alberta (Attorney General) v. Krushell* (2002)A.B.Q.B. 252]

The solicitor also submitted that a record "relating to" a prosecution should be evidence relevant to the criminal charges. "In other words, the records sought must carry some logical, reasonable connection to the charges . . . "

The solicitor concluded that

> *The autopsy records sought generated under the **Fatality Investigations Act** were not evidence at the trial. Although the appeal is outstanding, an appeal is not a re-trial unless an application is made and leave granted, new evidence is not admissible. The fact that the Medical Examiner's records were not evidence at trial is good evidence that they are not "related to" the prosecution and therefore, not excepted from application of the FOIPOP Act under s.4(2)(i).*

The Department's submission (in response)

The Department provided dictionary definitions for "relating to" and "prosecution" to show it was using these words in their "grammatical and ordinary sense" as Professor Driedger suggests in his "modern approach":

Relate to:

Oxford Dictionary: bring into relation with one another; establish a connection between.

Canadian Law Dictionary: to stand in some relation, connected . . .

Prosecution:

Oxford Dictionary: the institution and carrying on of a criminal charge in a court: the carrying on of legal proceedings against a person.

Canadian Law Dictionary: the proceeding with, or following up any matter in hand; the proceeding with any suit or action at law. (The Department added the emphasis)

Appeal:

Canadian Law Dictionary: The judicial process by which one party to a litigation resorts to a superior court to correct what he perceives to be an incorrect determination of the original proceedings . . . It then becomes, in a sense, a continuation of the original proceedings.

It's the view of the Department that the records relate to the prosecution. It holds that the Medical Examiner's Report, which was not complete at the time of the trial, could be used as evidence in any new trial, should one be ordered by the Court of Appeal.

The Department again resorts to dictionary definitions of "proceeding" and "completed" and concludes that

> *An appeal is considered to be a proceeding . . . The facts of the matter at this time are that the appeal is ongoing and that a re-trial is a possible outcome of the appeal process. The proceeding is therefore not "completed" at this date.*
>
> *The records relate to a prosecution whose proceedings are not yet completed, and is thus excluded from the Act. It is respectfully submitted that the purpose behind the exclusion is to ensure that such*

> *records are excluded from the application of the Act so as to ensure a fair trial (include appeal) for any defendant.*

The Department cites a ruling of the British Columbia Information and Privacy Commission which referred to their s.3(1)(h) which is the equivalent of FOIPOP's s.4(2)(i):

> *The plain meaning of s.3(1)(h) extends to all records relating to a prosecution, whether or not they are in the custody of Crown counsel. It is worth noting also that section 3(1)(h) is not limited, either expressly or by implication, to records in the custody of the Crown Counsel.* (Order 256-1998)

The records in this case are in the custody of the Medical Examiner's Office.

In this submission the Department introduced two exemptions to be considered if it is found that s.4(2)(i) does not apply. I will address them only if I conclude that the requested records are subject to *FOIPOP*.

Second submission of Applicant's solicitor:

In the matter of whether the records will be entered into any new trial ordered after an appeal, the solicitor said the Department was "hypothesizing" and speculating when it concluded that "<u>if</u> the appellants are successful in their appeal, a new trial <u>could</u> be ordered." It added: "<u>Should</u> this happen . . . the records requested under the FOIPOP Act <u>may</u> be used." (My emphasis). The solicitor wrote that the "basis for refusal must be grounded in evidence." "Mere hypothesizing and speculation is not sufficient . . . There must be a reasonable basis for the refusal." She disagreed with the Department's assertion that "(we) believe this to be so as they (the records sought) were listed in the original exhibit list." She said the records sought were not part of the original exhibit list and were not introduced as an exhibit or "they would have been

part of the public record and the Applicant would not have had to go through the hoops of this formal request pursuant to FOIPOP."

The solicitor also maintains that

> *(t)he prosecution's case is complete when the Crown's case is closed and the accused is entitled to call evidence. This makes good sense when one considers the purpose of the section - to insulate crown counsel from requests for information during the Crown's case. If it was intended to encompass every step in the trial and appeal process, this section could have specifically said so. Where there is any ambiguity, it is respectfully submitted, the interpretation favouring disclosure ought to be used.*

The solicitor also made some comments on the other two exemptions cited after the original decision. I will summarize them if I find it necessary to consider the Department's submissions on these late exemption citings.

Conclusion on s.4(2)(i):

It is my view the success of the case made by the Department rests on whether they have proven that the autopsy and the other relevant records in the custody of the Medical Examiner's Office relate to the prosecution. The submission of both parties confirm that this is arguable. In such cases I think it's appropriate for the Review Officer to consider the admonitions found in *O'Connor* that any limitations on the stated objective of the *FOIPOP Act* that calls for full accountability by public bodies must be "few and tightly drawn." This leads me to conclude that the argument made by the Department of Justice for excluding the requested records under s.4(2)(i) is not "tightly drawn." The Department is inviting me to give a broad interpretation to the phrase "a record relating

to a prosecution" which, if adopted, could conceivably result in many records not being considered under FOIPOP at all.

I accept the argument that the s.4(2)(i) exclusion is meant to apply to records relevant to criminal charges which have been laid if all proceedings in respect to the prosecution have not been completed. I accept that the records sought to be excluded must have "a logical reasonable connection" to the criminal charges laid. The Department has offered no proof of this.

I conclude that the records sought in this application are not excluded under s.4(2)(i).

As noted above both parties addressed the exemptions found in Sections 20 and 15. I will consider first the exemption under s.20. If s.20, a mandatory exemption, applies I will not consider s.15.

In its submission to the Review, the Department noted that a number of Information and Privacy Commissioners have agreed that deceased individuals have privacy rights and that an autopsy report contains the personal information of the deceased, and disclosing the autopsy report must be considered in accordance with s.20.

Personal information

> **20 (1)** The head of a public body shall 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 pursuant to 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 shall consider all the relevant circumstances . . .
>
> **(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, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;
(b) there are compelling circumstances affecting anyone's health or safety;
(c) an enactment authorizes the disclosure;
(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;
(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;
(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;
(g) the information is about expenses incurred by the third party while traveling at the expense of a public body;
(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or
(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

The Department, in determining whether disclosing the autopsy report would be an unreasonable invasion of privacy, followed the steps set out by the Supreme Court of Nova Scotia. [*Cyril House and 14900 Canada Inc.* (unreported) (2000) and *Dickie v. Department of Health* (N.S.C.A) (1999)]

Having found that the record sought does not contain the personal information listed in ss.(4), the Department determined that ss.(3)(a) applied because the autopsy report contains information about the deceased's medical and related information and therefore disclosing it would be an unreasonable invasion of personal privacy. The Department says the *Fatality Investigations Act* recognizes the importance of keeping autopsy reports from public disclosure in Section 23(1) and (2). These sections say that records such as autopsies cannot be disclosed without the permission of the Chief Medical Health Examiner, and then only on request of "the nearest relative, the executor or executrix of the deceased or other interested party considered valid by the Chief Medical Examiner." However, the *Fatalities Investigations Act* is not listed as taking precedence over the *FOIPOP* Act.

The solicitor's submission on s.20:

The solicitor cites a 2000 Ontario Supreme Court case in which the judge said:

> *Generally the effects of a deceased can be seized by the police at the scene of a sudden death without any concern about the invasion of any privacy right. Without intending to be glib, it is fair to say that the expectation of privacy of a deceased person dies with that person.* [R.v. Sanderson, 2000, Ont. S.C.J.2087]

The solicitor submits that the deceased have no privacy rights. And she argues the *Fatalities Investigations Act* permits the autopsy report to be disclosed to relatives of the deceased and to an "interested party" with the consent of the Chief Medical Examiner.

In a final comment on whether or not deceased people have privacy rights the Department says the position that the deceased do have privacy rights is supported by the Alberta

Government's Guidelines and Practices Manual, Order 02-44 of the British Columbia Information and Privacy Commissioner and Order 2000-12 of the Alberta Commissioner.

Conclusion on s.20:

Although the Department cited decisions on deceased privacy rights from other jurisdictions, it overlooked the decisions from its own jurisdiction. The matter of the personal rights of the deceased is discussed in three Nova Scotia Review Reports, FI-01-59, FI-01-81, and FI-03-13.

In FI-03-13, I concluded that the deceased do have some privacy rights. I cited **Section 30** of the *FOIPOP* Act which, although it does not specifically address personal privacy, lends support to my opinion:

> **30** The Public Archives of Nova Scotia or the archives of a public body, may disclose personal information for archival or historical purposes where
>
> > (c) the information is about someone who has been dead for twenty or more years.

In the same Review I noted that **Section 43** of *FOIPOP* sets out the circumstances in which another person can exercise someone's rights or powers under the Act. This section also recognizes that the deceased have privacy rights.

> **43** Any right or power conferred on an individual by this Act may be exercised
>
> > (a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate.

So, although s.20 does not address, specifically, the privacy rights of the deceased, the wording in Sections 30 and 43 leaves no doubt that Nova Scotia legislators expected the personal privacy of the deceased to be protected.

As well, the definition of "personal information" in **Section 3(i)** makes no distinction for the deceased.

Bulletin Number 16 of the Alberta Government's FOIP *Guidelines and Practices* declares that

> *Privacy rights do not end upon the death of an individual . . . The FOIP Act protects the privacy of deceased persons by regulating the collection, use and disclosure of personal information about a deceased individual . . .*

I have concluded that the Applicant's solicitor's position on this matter is not supported.

In conclusion, while I do not agree with the Department that s.4(2)(i) applies, I do agree with its subsequent submission that s.20 applies because the records, which I have seen, contain medical information of the deceased. [S.20(3)(a)]. I have considered the relevant circumstances found in ss.20(2) and have found nothing that would change my conclusion.

Recommendations:

- that the Department provide the Applicant with a new decision, refusing to disclose the records because this would constitute an unreasonable invasion of the deceased's personal privacy.

Section 40 of the Act requires the Department of Justice to make a decision on this recommendation within 30 days of receiving it and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, the Department is deemed to have refused to follow this recommendation.

Dated at Halifax, Nova Scotia this 30th day of September, 2005.

Darce Fardy, Review Officer