



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

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Order F14-30

## **INSURANCE CORPORATION OF BRITISH COLUMBIA**

Hamish Flanagan  
Adjudicator

August 21, 2014

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**Summary:** An applicant, a lawyer, sought records relating to court applications by ICBC for personal costs against him. The personal costs applications arose from a motor vehicle accident claim in which the applicant was counsel. ICBC withheld the records under s. 13 and all of the records save one page under s. 14 of FIPPA. The adjudicator determined that all of the information withheld under s. 14 as subject to solicitor-client privilege could be withheld. ICBC was required to disclose the information it withheld in the remaining page of the records because it did not contain advice or recommendations under s. 13 of FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13 and 14.

**Authorities Considered: B.C.:** Order F13-03, 2013 BCIPC 3 (CanLII); Order F10-19, 2010 BCIPC 30 (CanLII); Order F14-11, 2014 BCIPC 13 (CanLII).

**Cases Considered:** *Central Coast School District No. 49, v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *Canada v. Solosky*, [1980] 1 S.C.R. 82; *Maranda v. Richer*, 2003 SCC 67; *R. v. B.*, 1995 CanLII 2007 (BCSC); *John Doe v. Ontario (Finance)*, [2012] S.C.C.A. No. 243.

## INTRODUCTION

[1] This inquiry is about records sought by an applicant, a lawyer, relating to court applications by the Insurance Corporation of British Columbia (“ICBC”) for personal costs against the applicant. The personal costs applications arose from a motor vehicle accident claim involving ICBC in which the applicant was counsel for the plaintiff (“claimant”). The applicant wanted information about ICBC’s decision to apply for personal costs against him and details of the legal fees ICBC incurred in its pursuit of personal costs. ICBC withheld some responsive information and the applicant requested that the Office of the Information and Privacy Commissioner for BC (“OIPC”) review ICBC’s decision. As a result of the applicant narrowing his request for records and ICBC releasing some additional information, the scope of the inquiry narrowed to only the records sought by the applicant relating to ICBC’s applications for personal costs against the applicant withheld by ICBC under ss. 13 and 14 of the Freedom of Information and Protection of Privacy Act (“FIPPA”).

## ISSUES

[2] This inquiry will consider whether ICBC is authorized to withhold information because:

- it is subject to solicitor-client privilege under s. 14 of FIPPA;
- disclosure would reveal advice or recommendations under s. 13 of FIPPA.

[3] ICBC has the burden of proof under s. 57(1) of FIPPA to show that the applicant has no right of access to the withheld information.

[4] ICBC withheld the records, save one page, under s. 14 of FIPPA. All of the records, including the one remaining page of the records, were also entirely or partially withheld under s. 13 of FIPPA. I will first consider whether s. 14 applies to the records. I will then consider whether s. 13 applies to the page of the records not withheld under s. 14, and any of the other records, if any, that cannot be withheld under s. 14.

## DISCUSSION

[5] **Records in issue**—The records withheld by ICBC all relate to an ICBC motor vehicle accident claim in which the applicant was counsel for a third party claimant. The records fall into three categories:

- 1) Information relating to ICBC’s application for personal costs against the applicant lawyer.

- 3) Information in the ICBC claim file folder for the third party claimant's motor vehicle accident claim.
- 4) Information about the legal fees ICBC spent on the motor vehicle accident claim file in which the applicant was counsel for a third party claimant, including the legal fees spent in seeking personal costs against the applicant lawyer.

*Preliminary issue — out of scope records*

[6] ICBC submits that pages 159, 160, most of page 161, and pages 162 and 163 of the ICBC claim file folder are outside of the scope of the request since they were created after the date of the applicant's initial request of January 6, 2011.<sup>1</sup> Some of the information on these pages include communications relating to the processing of an FOI request, which usually fall outside the scope of a request for records because communications relating to a request postdate the request. However, in this case, a series of communications between the applicant and ICBC after his initial January 6, 2011 request clarified the scope of his request. In particular, a September 27, 2012 letter from the applicant relied on by ICBC to clarify the scope of the applicant's request for records specifically states that pages 159-163, among other records, are within the scope of the request. Further, and as a result of the applicant's September 27, 2012 letter, the OIPC Investigator's Fact Report for this inquiry lists pages 159-163 as being part of the records in issue for this inquiry. I note that ICBC's initial submissions begin by stating they accept the statement of facts set out in the OIPC Investigator's Fact Report. While pages 159-163 were created after the applicant's initial request, I am satisfied that in the context of the back and forth between ICBC and the applicant clarifying the scope of the request, that those pages became part of the record that is responsive to the applicant's request. I note that ICBC has also applied s. 13 and s. 14 to withhold information on pages 159-163, so I will consider whether ss. 13 and 14 apply to the withheld information on those pages when considering the application of ss. 13 and 14 to the withheld records.

[7] In summary, I consider pages 159-163 of the ICBC claim file folder are part of the records in issue.

[8] **Legal Advice – s. 14**—Section 14 of FIPPA allows a public body to refuse to disclose information that is subject to solicitor-client privilege. This includes legal advice privilege,<sup>2</sup> which ICBC submits applies to all of the records in dispute, except page 163 of the ICBC claim file folder.

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<sup>1</sup> ICBC initial submission at paras. 30 and 33.

<sup>2</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26.

[9] For legal advice privilege to apply to information, the following conditions must be satisfied:

- there must be a communication, whether oral or written;
- the communication must be confidential;
- the communication must be between a client (or agent) and a legal advisor; and
- the communication must be directly related to the seeking, formulating, or giving of legal advice.

[10] If these four conditions are satisfied, then the communication and records relating to it are privileged.<sup>3</sup>

[11] The applicant states that he does not seek disclosure of information subject to legal advice privilege, including records relating to the day-to-day conduct of the motor vehicle accident litigation in which he was counsel for a claimant.<sup>4</sup> Similarly, his submissions regarding the legal fee information state that he is only requesting legal fee information that relates to the application for personal costs against him.<sup>5</sup>

[12] Some of the records do not relate to the personal costs aspect of the file sought by the applicant but to the third party's motor vehicle accident claim file, which the applicant excluded from his request.<sup>6</sup> Similarly, some of the legal fee information in the records relates not to the personal costs aspect of the file sought by the applicant but to the third party's motor vehicle accident claim file or to other ICBC claim files outside the scope of the applicant's request. Nonetheless, for the avoidance of doubt, I have considered the application of s. 14 to all the records provided by ICBC for this inquiry.

[13] ICBC submits that:

- 1) Withheld information in the file relating to ICBC's application for personal costs against the applicant consists of:
  - a. direct confidential communications between ICBC external defence counsel law firms and ICBC staff and/or ICBC

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<sup>3</sup> For a statement of these principles see also *R. v. B.*, 1995 CanLII 2007 (BCSC), para. 22 and *Canada v. Solosky*, [1980] 1 S.C.R 82, p. 13.

<sup>4</sup> Applicant's initial submissions at para. 59.

<sup>5</sup> Applicant's initial submissions at para. 76.

<sup>6</sup> The applicant recognized at para. 59 of his initial submission that many of these types of records are subject to solicitor-client privilege.

- internal legal counsel respecting the seeking, formulating and giving of legal advice;
  - b. direct confidential communications between ICBC internal legal counsel and ICBC staff respecting the seeking, formulating and giving of legal advice; or
  - c. handwritten notes by ICBC staff relaying the contents of confidential discussion with ICBC external defence counsel;
- 2) Withheld information in ICBC's claim file folder consists of confidential communications between ICBC staff and defence counsel in respect of legal advice sought or being provided in relation to the conduct of litigation; and
- 3) Withheld information about the legal fees ICBC spent on the file contain information relating to defence counsel billing and, if released, would reveal the type of communication which is protected by solicitor-client privilege.

[14] The applicant submits that the records should be released because they will reveal that ICBC has an operational strategy to target him. ICBC's motive in seeking legal advice is irrelevant to whether it may withhold that advice under s. 14 of FIPPA, so I have not considered this argument further.

[15] The applicant submits that solicitor-client privilege does not apply to any records that relate to seeking legal advice for a purpose other than defending the motor vehicle accident claim. He therefore submits that s. 14 does not apply to records that relate to him, and particularly to the pursuit of personal costs against him. ICBC submits that the applicant's argument does not affect whether records are subject to solicitor-client privilege.

[16] The applicant does not cite any authority for this significant narrowing of legal advice privilege, and I cannot find any legal basis for the distinction he proposes. If information meets the test for legal advice privilege above, the information is subject to privilege, regardless of the subject matter of the legal advice. Therefore, I will proceed to consider whether the information withheld by ICBC meets the above test.

[17] My review of the withheld information satisfies me that the information ICBC withheld under s. 14 meets the requirements for legal advice privilege. I find ICBC's description of the records above is an accurate summary of the withheld information. The withheld records, including emails and draft court documents such as affidavits, relate to the conduct of the legal action against the applicant. Although some of the documents are procedural in nature, for example, emails from ICBC's outside legal counsel to ICBC forwarding copies of procedural documents related to court appearances such as a notice of hearing or a letter from plaintiff's counsel, these records are confidential communications

directly related to the seeking, formulating and giving of legal advice. I am satisfied that the documents are covered by legal advice privilege under s. 14 of FIPPA.

[18] With respect to the legal fee information, the applicant concedes that there is a presumption that the legal fee information is covered by solicitor-client privilege.<sup>7</sup> However, he says the presumption of privilege can be rebutted because the litigation has concluded and therefore there is “very little that can be gleaned in terms of gaining competitive advantage, or deducing or acquiring privileged information”. I agree that a presumption of solicitor-client privilege applies to the records<sup>8</sup> and that this presumption may be rebutted if it is established that there is no reasonable possibility that disclosure will directly or indirectly reveal any communications protected by privilege.<sup>9</sup> The applicant seeks to rebut the presumption on the basis that litigation has concluded.

[19] I have reviewed the information and considered the applicant’s argument that the presumption should be rebutted for the legal fee information. I find that the presumption is not rebutted in this case because the records are connected to the solicitor-client relationship between ICBC and their counsel, and comprise a part of the communications that occurred in that relationship. Much of the legal fee information includes detailed descriptions of the work being billed. The fact that the litigation has ended has no bearing on whether the disclosure will reveal communications that are subject to solicitor-client privilege. The legal fee information in the records is protected by the solicitor-client privilege that attaches to communications between solicitor and client and it can be withheld under s. 14 of FIPPA.

[20] I note that the applicant did not argue for severance of parts of the legal bills, but I have considered this possibility in light of s. 4(2) of FIPPA which provides:

The right of access to a record does not extend to information excepted from disclosure ... but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[21] The Supreme Court of Canada in *Maranda v. Richer* acknowledged the inherent risk in attempting to sever a bill of account.<sup>10</sup> Similar to the finding of Adjudicator Barker in Order F13-03,<sup>11</sup> this is not a case where severance of the records is feasible or appropriate.

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<sup>7</sup> Applicant’s initial submissions at paras. 48-49.

<sup>8</sup> *Central Coast School District No. 49, v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427, at para. 126.

<sup>9</sup> *Ibid*, at paras. 104-106, approving of the approach taken in Order F10-19, 2010 BCIPC 30 (CanLII).

<sup>10</sup> *Maranda v. Richer*, 2003 SCC 67, at para. 33.

<sup>11</sup> 2013 BCIPC 3 (CanLII).

[22] I am also satisfied from ICBC's submission that it has exercised its discretion under s. 14 in deciding to withhold the records.

[23] In summary, ICBC may withhold this information under s. 14 of FIPPA.

[24] **Advice or recommendations – s. 13**—I found above that all of the records ICBC withheld under s. 14 were appropriately withheld under s. 14 of FIPPA. Therefore, I will consider s. 13 only in relation to the information on page 163 of the ICBC claim file folder withheld under that section.

[25] ICBC's submissions say that for all of the records withheld under s. 13 it is clear from the records themselves that they contain or would reveal advice and/or recommendations developed by or for a public body. ICBC does not address why s. 13 applies to page 163 specifically. The information on page 163 withheld under s. 13 is a copy of an email between ICBC staff containing some background information and a direction related to the processing of the applicant's FOI request. In my view, it is not apparent that page 163 contains advice or recommendations for the purposes of s. 13 of FIPPA, as it has been described in previous orders and cases.<sup>12</sup> Section 13 of FIPPA does not apply to the withheld information on page 163 of the ICBC claim file folder and it therefore must be released.

## CONCLUSION

[26] For the above reasons, pursuant to s. 58 of FIPPA I make the following orders:

1. Subject to para. 2 below, ICBC may continue to withhold the information it has withheld under s. 14 of FIPPA.
2. ICBC must give the applicant access to page 163 of the ICBC claim file folder by **October 3, 2014**.
3. ICBC must concurrently copy me on its cover letter to the applicant, together with a copy of page 163 of the ICBC claim file folder.

August 21, 2014

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Hamish Flanagan, Adjudicator

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<sup>12</sup> See for example Order F14-11, 2014 BCIPC 13 (CanLII), at paras. 26-29 and *John Doe v. Ontario (Finance)*, [2012] S.C.C.A. No. 243.

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