



Order F21-21

INSURANCE CORPORATION OF BRITISH COLUMBIA

Elizabeth Barker
Director of Adjudication

May 27, 2021

CanLII Cite: 2021 BCIPC 26
Quicklaw Cite: [2021] B.C.I.P.C.D. No. 26

Summary: The public body refused the applicant access to information in his claim file under ss. 13 (advice or recommendations), 14 (solicitor client privilege), 17 (harm to public body's financial or economic interests) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that s. 13(1) did not apply because the records had been in existence for 10 or more years, so s. 13(3) was engaged. The adjudicator confirmed the public body's decision, in part, to refuse access under ss. 14, 17(1) and 22(1) and ordered the public body to disclose the balance of the information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 4(2), 13(1), 13(3), 14, 17(1), 22(1), 22(2), 22(3)(d), 22(4).

INTRODUCTION

[1] The applicant's car was rear-ended in 2003 and this inquiry is about his request for access to his Insurance Corporation of British Columbia (ICBC) claim file. ICBC provided some records but refused to disclose other records and parts of records under ss. 13 (advice or recommendations), 14 (solicitor client privilege), 17 (harm to public body's financial or economic interests) and 22 (unreasonable invasion of third party personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review ICBC's decision. During mediation, ICBC released additional records. However, mediation did not resolve the issues in dispute between the parties and they proceeded to inquiry.

[3] Upon request, the OIPC gave ICBC permission to submit portions of its initial inquiry submission and evidence *in camera*.

Preliminary Matters

[4] The applicant raises several issues in his response submission that were not listed in the notice of inquiry or the OIPC investigator's fact report. He says ICBC has failed in its duty under s. 6(1) of FIPPA to respond accurately and completely to his access request. He also submits full disclosure of the disputed information is in the public interest under s. 25. He also says ICBC failed to properly mark-up the records so he can understand which FIPPA subsections have been applied.

[5] ICBC says that ss. 6 and 25 are not properly in issue in this inquiry and any submissions with respect to those sections ought to be disregarded. ICBC says it should not be required to respond to new issues for the first time in reply.¹

Sections 6 and 25

[6] The applicant submits that ICBC contravened s. 6 in two ways. First, he alleges ICBC has deleted or is hiding information from the requested records. His allegation is based on a belief that there should be certain entries in the ICBC claim file notes that are absent.² He also points out differences between the records he received in 2007 through an earlier FIPPA request to ICBC and those same records which appear again in the records in dispute in this inquiry.³ He claims the differences are evidence that ICBC is "tampering with evidence" in order to hide what he claims is wrongdoing.⁴ He says he wants the "Inquiry's assistance with investigating" his allegations.⁵ Second, the applicant says ICBC failed in its s. 6 duty because it did not respond to his present FIPPA request within the required time period in FIPPA.⁶

[7] The applicant also submits that s. 25 applies because disclosure of the information is in the public interest. He says:

We respectfully request the assistance and co-operation of OIPC in disclosing all of the ICBC files, upon the basis that the public interest of knowing whether a state owned monopoly insurer is engaged in serious illegal activities must be paramount and supersede the isolated damages arising out of a single lawsuit.⁷

¹ ICBC's reply submission at paras. 20-24.

² For example, he identifies a period during which there are no adjusters claim file notes, which he finds suspicious because his lawyer and ICBC's lawyers were busily communicating about the litigation.

³ He points out these differences at para. 179 (pp. 35-39) of his submission.

⁴ The applicant alleges in part that ICBC is hiding evidence that its investigator broke into his house and copied files from his computer that were related to his ICBC claim.

⁵ Applicant's submission at para. 135.

⁶ Applicant's submission at paras. 146-160 and 179. The applicant made his FIPPA access request on November 13, 2013 and ICBC's response was dated June 23, 2015.

⁷ Applicant's submission at para. 184.

Findings

[8] The investigator's fact report and the notice of inquiry set out the issues to be decided in this inquiry. The OIPC also advised the parties that they may not add new issues without the OIPC's prior consent and any request to add a new issue must be made before the date for initial submissions. Past OIPC orders have reinforced this by saying that a party may only introduce a new issue into an inquiry if the OIPC grants permission to do so.⁸

[9] The applicant did not request prior permission from the OIPC to add ss. 6 and 25, and he is attempting to do so almost four years after he received the notice of inquiry and ICBC's initial submission.⁹ He does not explain why he did not raise these issues earlier in the request for review and inquiry process or ask for permission to expand the inquiry.

[10] Adding new issues so late in the day undermines or circumvents the OIPC investigation and mediation process. That process is designed to benefit both parties by clarifying the issues and potentially resolving them. In this case, investigation and mediation took place and the issues for the inquiry were crystallized years ago. ICBC made its initial submission on the understanding that the notice of inquiry contained the only issues it needed to address. In my view it would be unfair to add ss. 6 and 25 now and after considering what the applicant says in his submission, I can see no valid reason to warrant doing so. Therefore, ss. 6 and 25 are not issues that I will consider in this inquiry.

How the records have been marked-up

[11] The applicant also complains about the way that ICBC has marked-up the records.¹⁰ He says, "it is impossible to make our submission correctly until we know which subsection codes and hence which part of FIPPA ICBC actually is relying upon when it makes its redactions."¹¹ He says the OIPC should make ICBC mark the "subsections" on the records and then give him an opportunity to provide further evidence.

[12] I do not agree that ICBC has failed to appropriately mark-up the records in this inquiry. The way the severing has been indicated is not outside the norm for how public bodies mark-up records. The exceptions applied to the records are ss. 13, 14, 17 and 22, and it is evident on the face of the records and in ICBC's redaction tables what exceptions to disclosure are being applied and where.

⁸ Order F20-38, 2020 BCIPC 44 at paras 4-7 and Order F11-28, 2011 BCIPC 34 at para. 11.

⁹ The inquiry was adjourned almost a dozen times at the applicant's request and as a result, his response submission was provided 44 months after the OIPC issued the notice of inquiry and 41 months after it received ICBC's initial submission.

¹⁰ Applicant's submission at paras. 35-47 and 179 and Exhibits 2 and 10.

¹¹ Applicant's submission at para. 188.

ICBC also provides additional detail in its submissions about the FIPPA exceptions at issue and how it has severed specific pages.

[13] The applicant does not explain what “subsections” are missing and why they would be necessary to understand which exceptions have been applied and the legal issues related to those exceptions. I do not accept that the applicant did not know what issues his submission should address because I find the issues were unambiguously stated in the investigator’s fact report and in the notice of inquiry.¹² ICBC’s initial submission also clearly discuss which FIPPA exceptions it asserts apply to the records. Therefore, I am not persuaded that the applicant’s ability to provide a submission in this inquiry was negatively impacted in the way he says. ICBC is not required to change the way it has marked-up the records.

ISSUES

[14] The issues to be decided in this inquiry are as follows:

1. Is ICBC authorized to refuse to disclose the information in dispute under ss. 13, 14 and 17 of FIPPA?
2. Is ICBC required to refuse to disclose the information at issue under s. 22 of FIPPA?

[15] Section 57 of FIPPA says who has the burden of proof for the issues in dispute here. ICBC has the burden of proving that the applicant has no right of access to the information it is refusing to disclose under ss. 13, 14 and 17. However, the applicant has the burden of proving that disclosure of any personal information in the requested records would not be an unreasonable invasion of third party personal privacy under s. 22.

DISCUSSION

Background

[16] ICBC is the sole provider of universal and compulsory basic auto insurance in BC.

[17] On November 10, 2003, the applicant was injured when his car was rear-ended in Victoria. He made a claim to ICBC the next day. The claim was complicated, not least because the applicant’s vehicle was registered and insured in the United States and he did not have ICBC insurance or a BC driver’s licence.

¹² The applicant was represented by legal counsel in the inquiry.

[18] On November 1, 2005, the applicant filed a lawsuit against the driver who had rear-ended his car (defendant).¹³ The defendant was insured by ICBC, and ICBC engaged a lawyer to defend the claim. On November 9, 2005 the applicant also filed a lawsuit against ICBC.¹⁴

[19] The applicant made the FIPPA access request that is the subject of this inquiry on November 13, 2013.

[20] In June 2020 the applicant also commenced legal proceedings against ICBC in Florida. He alleges misconduct and criminal activity on the part of ICBC employees in processing his claim and access request.¹⁵

Information in dispute

[21] There are 3664 pages of records in this inquiry, the majority of which have been partially or entirely withheld under the FIPPA exceptions at issue. The information in dispute is contained in the following types of records:

- forms used to report the claim to ICBC;
- log entries in ICBC's electronic claim file folder, recording the activity on the claim (I will refer to these as claim file notes);
- hand written notes;
- letters, emails and fax cover sheets;
- summaries and analysis of various aspects of the claim;
- investigation and research materials;
- the front and back covers of a paper file folder for the claim;
- statements of account and invoices;
- reports about the driving and insurance coverage of the applicant and other people; and
- a report about the repairs to another driver's vehicle.

[22] Upon first reviewing the material in this case, I could see that ICBC and the applicant had communicated about the records during the course of the inquiry and there had been some back-and-forth to clarify and disclose overlooked pages. As a result, the records were spread amongst several sets of electronic and paper records.

¹³ The writ of summons and statement of claim for Vancouver Registry, Action No. M054841 are at pp. 1109-17 of the records.

¹⁴ The writ of summons for Vancouver Registry Action No. S055963 is at p. 2181 of the records. ICBC's submissions and affidavit evidence say it was filed on November 9, 2004, which I take to be a typo because the writ of summons is dated-stamped by the court "November 9, 2005".

¹⁵ ICBC's January 12, 2021 reply submission at para. 3.

[23] I wrote to ICBC to request a single, electronic copy of the responsive records for the purposes of my adjudication. This decision is based on the electronic copy of the records that ICBC provided me in response, as well as the two accompanying tables listing the FIPPA exceptions applied to each page.¹⁶

Solicitor client privilege - s. 14

[24] I will begin with the analysis of s. 14 because the vast majority of the information in dispute has been severed under that exception.

[25] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s. 14 of FIPPA encompasses both legal advice privilege and litigation privilege.¹⁷ ICBC submits that both apply in this case.

Legal advice privilege

[26] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion or analysis.¹⁸ In order for legal advice privilege to apply, the information at issue must be:

- (i) a communication between solicitor and client;
- (ii) which entails the seeking or giving of legal advice; and
- (iii) which is intended to be confidential by the parties.¹⁹

ICBC's submission

[27] ICBC's initial submission identifies the specific pages where it says legal advice privilege applies.²⁰ It provides the names of ICBC's in-house legal counsel and two external defence counsel who ICBC retained to work on various aspects of the applicant's claim.²¹ ICBC says that it is withholding these lawyers' direct communications or notes of direct communications with ICBC staff, as well as their legal invoices and references to those invoices.²² ICBC submits that a review of these records will confirm that they are communications and notes of

¹⁶ The single, electronic copy of the records and requester reports A-2013-05338 and A-2020-2020-01186 were received on March 25, 2021.

¹⁷ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII) [*College*] at para. 26.

¹⁸ *Ibid* at para. 31.

¹⁹ *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837.

²⁰ ICBC's initial submission at para. 19 and ICBC's reply submission at para. 42. ICBC relies on litigation privilege for the balance of the pages withheld under s. 14.

²¹ ICBC's initial submission at para. 19. Affidavit of ICBC's senior claims examiner (JDC) at para. 6.

²² ICBC's initial submission at para. 19.

communications for the purposes of seeking or receiving legal advice. It adds that other “records, which viewed in isolation do not on their face reflect the seeking or giving of legal advice form part of the necessary exchange of information leading to the provision of advice.”²³

[28] ICBC provides an affidavit from one of its senior claims examiners (JDC) who had conduct of the applicant’s claim file, on and off, over the years. JDC says that the records of communications between ICBC and its legal counsel being withheld under s. 14 were generated in the course of seeking and obtaining legal advice and representation regarding the applicant’s claim. He also says those communications were intended to remain confidential.²⁴

[29] JDC says that the applicant’s claim has been a highly contentious and long-standing action, and he also provides details of what took place between the parties during the litigation.²⁵

Applicant’s submission

[30] The applicant’s submission does not mention the law regarding legal advice privilege or litigation privilege and whether they apply in this case. He refers to s. 14 only tangentially in his allegations about the matters dismissed in the preliminary matters section of this order. Specifically, he says: “We respectfully submit it cannot be a matter of a solicitor client privilege (14) or damage to the Provinces finances (13) [sic] or a matter per [sic] of personal privacy (22).”²⁶

Findings, legal advice privilege

[31] Based on my review of the records, I find that the information ICBC is refusing to disclose under legal advice privilege is as follows:

- emails and letters between ICBC and its lawyers about legal advice and legal services ICBC requested and the lawyers provided;²⁷
- claim file notes recording the details of conversations between ICBC staff and ICBC’s lawyers about the claim, which reveal instructions to lawyers, legal advice and litigation strategy;²⁸ and

²³ ICBC’s initial submission at para. 20, citing Order F06-19, 2006 CanLII 37939 (BC IPC) at para. 54.

²⁴ JDC’s affidavit at para. 12.

²⁵ JDC’s affidavit at paras. 8-10.

²⁶ Applicant’s submission at para. 75.

²⁷ For example, at pp. 131-142, 2999-3008, 3142, 3414, 3441-3442.

²⁸ For example, at pp. 54-78, 95, 3417-18.

- claim file notes and legal invoices detailing the amounts billed by ICBC’s lawyers for the provision of legal advice and services.²⁹

[32] I find that legal advice privilege applies to all of that information. It is ICBC’s direct communication with its lawyers about legal advice sought and received or information that reveals what they said to each other about those matters. I am also satisfied that these communications were intended to be confidential. The only participants are ICBC staff and ICBC’s lawyers, and there is nothing to suggest that these communications have been, or were intended to be, disclosed outside that relationship.

[33] I also find that the lawyer’s billing and invoice information is protected by legal advice privilege. The courts have said that information about legal fees is presumptively privileged because it arises out of the solicitor client relationship and is capable of disclosing privileged information about communications between solicitor and client.³⁰ The onus is on the party attempting to displace the presumption - in this case the applicant - to establish that there is no reasonable possibility that disclosure would reveal privileged communications.³¹ The applicant made no submission about this, despite the fact that ICBC’s initial submission identifies that some of the records are legal invoices and references to those invoices. I find that the presumption that such information is protected by legal advice privilege applies and has not been rebutted.

Litigation privilege

[34] Litigation privilege is not restricted to the confidential communications between a client and solicitor. It includes communications between a solicitor and third parties, if made for the purpose of litigation. The object of litigation privilege is to create a “zone of privacy” that ensures the effectiveness of the adversarial process by allowing parties to prepare their positions in private, without interference and without fear of premature disclosure. Once the litigation has concluded, the privilege ends.³²

[35] To succeed in a claim of litigation privilege the party invoking it must establish that:

- i. litigation was “in reasonable prospect” when the document was produced; and

²⁹ For example, at pp. 56, 58, 1257-58, 1261-1263, 1326-1331.

³⁰ *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 at para. 60, referencing the principles stated in *Maranda v. Richer*, 2003 67 at para. 33.

³¹ *Ibid* at paras. 61, 76 and 85.

³² *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 27-34.

- ii. the “dominant purpose” of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.³³

[36] The threshold for determining whether litigation is “in reasonable prospect” is a low one and it does not require certainty.³⁴ The essential question is would a reasonable person, being aware of the circumstances, conclude that the claim will not likely be resolved without litigation?³⁵

[37] There is no absolute rule for determining whether litigation was the “dominant purpose” for the document’s production. A finding of dominant purpose is a factual determination that must be made based on all of the circumstances and the context in which the document was produced.³⁶

ICBC’s submission

[38] ICBC submissions and evidence is that on November 9, 2004 the applicant filed a writ of summons and statement of claim seeking damages in relation to the accident and that litigation is still ongoing.³⁷ ICBC submits the documents created after that date for the purposes of investigating the claim and gathering evidence for the defence of the claim “fall squarely within the scope of contemplated litigation privilege.”³⁸ ICBC says the majority of the records severed or withheld under litigation privilege are of that type, post-date the commencement of the litigation, and “on their face, contain information that relates to internal ICBC communications and derivative communications with third parties concerning the investigation and defence of this claim.”³⁹

[39] ICBC also says that a small number of records generated before the litigation began are also protected by litigation privilege. ICBC says that it was clear from the outset that the applicant intended to pursue his claim aggressively because, although ICBC considered the accident to have been minor, the applicant was claiming a head injury and seeking a “substantial six figure advance” on his claim.⁴⁰

[40] ICBC provided an affidavit from a senior claims examiner (SF) who was assigned to the applicant’s claim file between November 13, 2003 – February 10, 2004. SF says that she formed the view shortly after the applicant filed his claim

³³ *Raj v. Khosravi*, 2015 BCCA 49 [Raj], at para. 20. Also, *Gichuru v. British Columbia (Information and Privacy Commissioner)* 2014 BCCA 259 (CanLII) at para. 32.

³⁴ Raj, *Ibid* at para. 10.

³⁵ Raj, *Ibid* at para. 11 citing *Sauvé v. ICBC*, 2010 BCSC 763 at para. 30.

³⁶ Raj, *Ibid* at para. 17.

³⁷ ICBC’s initial submission at paras. 10 and 13, ICBC’s January 12, 2021 reply submission at para. 8, JDC’s affidavit at paras. 5 and 11.

³⁸ ICBC’s initial submission at para. 26.

³⁹ ICBC’s initial submission at para. 26.

⁴⁰ ICBC’s initial submission at paras. 9 and 28.

with ICBC that litigation was in reasonable contemplation. SF says that her notes in the claim file for November 13, 2003 state that the applicant said “he was a pro golfer and that the accident was likely to affect his career.” She says she also recorded, “there will be a tort issue, I have the feeling that this file will become represented, [applicant] is lawyer...?”⁴¹

[41] SF also relates what she recorded in the claim file on November 14, 2003 about her conversation with the applicant and their disagreement regarding ICBC’s responsibilities (as opposed to those of his own US insurer). SF says, “It was clear during our telephone call that [the applicant] intended to pursue his claim aggressively.”⁴²

[42] SF also says:

There are additional notes in the Claim File Folder in November 2003 regarding statements from [the applicant] that he is a professional golfer, runs a company and that there are big numbers involved in his career and there is big money invested in him and that he was taken to the hospital after the accident and checked out for a “broken neck and stuff like that”. ... reported that [the applicant] was evasive when she asked him where he lives. He confirmed to ... that he had a lawyer but would not say who it was. These statements were flags that litigation was likely as [the applicant] was seeking a large claim for injuries arising from what ICBC considered to be a very minor accident.⁴³

[43] SF’s affidavit also contains some *in camera* evidence about what ICBC staff recorded in the applicant’s claim file in November and December 2003 about their opinions, decisions and the processes they followed. SF says the *in camera* details demonstrate that ICBC had an “expectation that the claim was going to be contentious and only resolved through litigation”.⁴⁴

[44] In addition, JDC says that ICBC retained defence counsel for the litigation on December 9, 2005.⁴⁵ JDC also says that “articles, research, notes and third party derivative communications have been withheld on the basis of s. 14 of FIPPA as they were generated in anticipation of litigation and for trial preparation. These materials were intended to be and remain confidential for trial preparation.”⁴⁶

⁴¹ SF’s affidavit at para. 3.

⁴² SF’s affidavit at para. 4.

⁴³ SF’s affidavit at para. 6.

⁴⁴ SF’s affidavit at para. 8.

⁴⁵ JDC’s affidavit at para. 6.

⁴⁶ JDC’s affidavit at para. 13.

Findings

Litigation in reasonable prospect

[45] In order to prove that litigation privilege applies, ICBC need not prove that litigation was a certainty or that it had commenced, only that it was in reasonable prospect. For that reason, I do not make much of the fact that there is a discrepancy in the evidence about when the applicant commenced litigation. Specifically, ICBC says the applicant filed his action on November 9, 2004, but according to the court date-stamp, the applicant's two writs of summons were filed in 2005.⁴⁷ The action against the defendant was filed on November 1, 2005, and the action against ICBC was filed on November 9, 2005. I also note that ICBC's evidence is that it retained defence counsel on December 9, 2005.⁴⁸ Putting that information together, it is reasonable to conclude that the applicant commenced his litigation in early November 2005 and that ICBC's reference to November 9, 2004 in its inquiry materials is a typographical error.

[46] The claim file notes are evidence that reveals the context and circumstances of the applicant's ICBC claim. When the applicant spoke to ICBC on November 11, 2003, he said he had gone to the hospital due to a neck injury, his employment as a golf professional could be impacted, and his own US insurer had told him that ICBC should get him back into the state he was before the accident. The applicant also provided his lawyer's phone number.

[47] By November 14, 2003, I can see that the applicant and his US insurer were arguing with ICBC about who was responsible for accident benefits, vehicle repairs and car rental. The applicant told ICBC that he was going to get a lawyer.⁴⁹

[48] Claim file notes show that by the latter part of November and into the first days of December 2003, ICBC staff perceived the applicant to be evasive and uncooperative in providing details of the accident and completing and signing the required documentation.⁵⁰ ICBC was apparently having difficulty getting information about the applicant's US insurance coverage, whether he was properly licenced to drive in BC, where his vehicle was registered, where he resided, the nature of his injury, details about his purportedly lucrative career and even the identity of his lawyer.

⁴⁷ The writ of summons and statement of claim against the defendant, Action No. M054841, is at pp. 1109-17 of the records and the writ of summons against ICBC, Action No. S055963, is at p. 2181 of the records.

⁴⁸ JDC's affidavit at para. 6.

⁴⁹ At pp. 10-11 of the records. Also, according to p. 3621 of the records, the applicant's lawyer first reached out to ICBC on December 19, 2003.

⁵⁰ At pp. 15-20 of the records.

[49] In my view, the claim file notes for December 11, 2003 reveal a shift in the nature of the work being done on the claim file. I cannot provide additional details of what those notes say as they are information in dispute. However, the claim file notes persuade me that by December 11, 2003, ICBC believed that the applicant's claim was likely to result in litigation and ICBC needed to start preparing.

[50] Based on my review of the claim file notes, I conclude that litigation was in reasonable prospect from December 11, 2003 onwards.

[51] Further, ICBC's evidence is that the applicant's BC litigation is still ongoing, at least as of January 2021, when ICBC provided its reply submission. The applicant says nothing in his December 2020 submission to suggest that this is not the case. I am satisfied that the litigation is still ongoing.

Dominant purpose

[52] All of the records that ICBC is claiming are protected by litigation privilege are dated after December 11, 2003, the date by which litigation was in reasonable prospect. I have reviewed these records to determine if they were created for the dominant purpose of the litigation, which is the second element required to establish litigation privilege.

[53] ICBC's submissions and affidavit evidence do not specifically address the dominant purpose element of litigation privilege. Thus, my decision about the dominant purpose of the records is based on what the records reveal about what was going on when they were created.

[54] With the exception of the information withheld on page 91 of the records, I am satisfied that the dominant purpose of the information ICBC claims is protected by litigation privilege is to communicate about the litigation. I find that information to be as follows:

- communications among ICBC staff and/or ICBC's lawyers about various aspects of the litigation, including strategy, reserve amounts and costs;⁵¹
- communication between ICBC, its lawyers and third parties retained to assist ICBC with certain aspects of the litigation;⁵²
- invoices from third parties engaged to assist ICBC with the litigation;⁵³
and

⁵¹ For example, at pp. 124, 404, 3152, 3200, 3218, 3250-53 and 3363-3367 of the records.

⁵² For example, at pp. 2457-2470, 3195-97, 3202 and 3500 of the records.

⁵³ For example, at pp. 40 and 129-130 of the records.

- handwritten notes summarizing and analyzing ICBC's litigation strategy.⁵⁴

[55] The withheld information on page 91 is the reason ICBC transferred the applicant's file within ICBC. ICBC says nothing specific about page 91 to explain how litigation privilege applies. Based on what I read on that page, plus the context provided by the records, I do not see how the dominant purpose for the information on page 91 is litigation. Therefore, I find litigation privilege does not apply to the information on page 91 and ICBC is not authorized to refuse to disclose it under s. 14.

Conclusion, s. 14

[56] In conclusion, I find that ICBC has established that s. 14 applies to all of the information it claims is protected by solicitor client privilege, with the exception of the information on page 91 of the records.⁵⁵

Advice and recommendations - s. 13

[57] ICBC has refused to disclose some information in emails, claim file notes and correspondence under s. 13. There is some overlap between ICBC's application of ss. 13 and 14 to that information. Where I have decided that s. 14 applies, I have not considered whether s. 13 also applies.

[58] The parts of s. 13 that are relevant in this case state:

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

...

(3) Subsection (1) does not apply to information in a record that has been in existence for 10 or more years.

[59] I find that all of the information that ICBC is refusing to disclose under s. 13 is more than 10 years old. It is information in records that are dated in 2003 and 2004. Therefore, s. 13(3) applies and ICBC is not authorized to refuse to disclose any of that information under s. 13(1). Some of this information was also withheld under s. 17, so I will consider it again under that exception.⁵⁶

[60] However, I note that ICBC relied on only s. 13 to refuse access to page 3586, although it relied on s. 14 to refuse access to two duplicates of that same

⁵⁴ For example, at pp. 107, 2993-2297, 3526 and 3280 of the records.

⁵⁵ ICBC only applied s. 14 to the information on p. 91 of the records.

⁵⁶ The pages where I find s. 13 does not apply, and no other exceptions were applied, are pp. 14 (duplicate 3227, 3278), 26 (duplicates 3241, 3267), 3279, 3474-3476, 3482, 3491, 3507, 3516, 3521 of the records.

page.⁵⁷ I found that those duplicates are protected by litigation privilege and I make the same finding for page 3586. I conclude that ICBC made a typographical error when it labelled page 3586 as being withheld under s. 13, rather than s. 14.

Harm to financial or economic interests, s. 17

[61] ICBC is refusing to disclose some information under s. 17(1), which states:

17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

[(a) through (f)]

[62] To rely on s. 17(1) a public body must establish that disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy. Subsections 17(1)(a) to (f) are specific types of information whose disclosure could reasonably be expected to cause harm under s. 17(1).⁵⁸

[63] The standard of proof for s. 17, as is the case with all exceptions that use the language “could reasonably be expected to harm”, is a middle ground between that which is probable and that which is merely possible. A public body must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to meet the standard. The determination of whether the standard of proof is met is contextual. How much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and “inherent probabilities or improbabilities or the seriousness of the allegations or consequences.”⁵⁹

⁵⁷ The duplicates of p. 3586 are at pp. 3548 and 3557 of the records.

⁵⁸ Past orders have said that subsections 17(1)(a) to (f) are not stand-alone provisions; even if information fits within those subsections, a public body must also prove the harm described in the opening words of s. 17(1). For example: Order F10-39, 2010 CanLII 77325 (BC IPC) at para. 32–34, Order F12-02, 2012, BCIPC 2, at para. 42 and Order F20-38, 2020 BCIPC 44 at para 53.

⁵⁹ All principles and quotes in this paragraph are from *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3.

ICBC's submission

[64] ICBC submits that disclosing the information it is withholding under s. 17(1) could reasonably be expected to harm ICBC's financial or economic interests.⁶⁰ JDC says:

ICBC has severed reserve and claim coding information under s. 17 of FIPPA as that information reveals its litigation strategies. Reserve information is the dollar amount that ICBC notionally sets aside for a claim based on its view of the upper range of potential damages which may be necessary to settle a claim. Claims adjusters and examiners are required to post reserve information for each claim and to adjust reserve amounts as information becomes available concerning the potential upper ranges of damages for a claim.

Claim adjusters and examiners are also required to code claims using a series of letters. These letters reflect the nature of the claim and an assessment of the severity of the potential loss. Claims adjusters and examiners are also required to update codes as new information becomes available.

Reserve information and claim codes have been severed because they would reveal ICBC's assessment of the claim and file handling strategy to [applicant] and his counsel and disclosure of that information would harm ICBC's ability to effectively defend this claim.⁶¹

[65] The applicant's submission does not address s. 17.

Finding, s. 17

[66] The information that I am considering under s. 17(1) is as follows:

- reserve information;⁶²
- claim codes;⁶³
- a discussion about the claim in claim file notes and in an email;⁶⁴
- three paragraphs from a medical journal;⁶⁵ and
- A letter from the applicant with notations.⁶⁶

⁶⁰ ICBC does not mention subsections s. 17(1)(a) through (f).

⁶¹ JDC's affidavit at paras. 14-16.

⁶² At pages: 8, 3250, 3326, 3473 of the records.

⁶³ At pp. 8, 3473 of the records.

⁶⁴ At pp. 17-18 (duplicates 3230-3232, 3273-3275), 20 (duplicates 3233-3234, 3271-3272), 3477 of the records.

⁶⁵ At p. 629 of the records.

⁶⁶ At p. 899 of the records.

[67] Previous orders have found that s. 17(1) applies to ICBC's reserve information when the claim is still open and/or litigation regarding it is ongoing.⁶⁷ A reserve is the amount of money ICBC sets aside to cover its liability for a claim associated with a particular kind of loss (i.e., vehicle damage, no fault benefits, etc.).⁶⁸ Thus, reserve information reveals ICBC's assessment of the strengths of the claim and the upper range of what it may have to pay to resolve the claim.

[68] I make the same finding as previous orders about the reserve information in this case. It is financial information about an ongoing claim that is still being litigated. If the applicant learns that the reserve amount is higher than he was prepared to accept, it is reasonable to expect he would refuse to settle for anything less, thereby increasing the cost of the claim for ICBC. I am satisfied that disclosing the reserve information to the applicant could reasonably be expected to harm ICBC's financial interests, so s. 17(1) applies.

[69] However, I find that ICBC has not established that s. 17(1) applies to claim codes. ICBC does not explain where the codes are located in the records, although it does say that they are "a series of letters."⁶⁹ There are only two pages in the information that I am considering under s. 17(1) where letters appear to be used as claim codes.⁷⁰ It is not apparent how anyone outside ICBC would know what each letter code represents and how the letters reveal ICBC's claim assessment, strategy or reserve amount to an outsider. ICBC does not explain. Therefore, I am not persuaded that disclosing claim codes could reasonably be expected to cause the s. 17(1) harm ICBC claims. I note that a similar finding was made in Order F18-04, where the adjudicator found that s. 17(1) did not apply to "kind of loss" (KOL) codes.⁷¹

[70] I also find that ICBC has not established that disclosing the rest of the information I am considering under s. 17(1) could reasonably be expected to cause financial harm. It is not information about reserve amounts, and ICBC says nothing specific about it nor explains the connection between disclosure and financial harm.⁷²

⁶⁷ Order F06-19, 2006 CanLII 37939 (BC IPC) at para. 130; Order F08-19, 2008 CanLII 66913 (BC IPC) at para. 55; Order F18-04, 2018 BCIPC 4 (CanLII) at paras 99-100; Order F20-24, 2020 BCIPC 28 (CanLII) at paras. 95-97.

⁶⁸ Order 01-46, 2001 CanLII 21600 (BC IPC) at para. 14.

⁶⁹ JDC affidavit at para. 15 and ICBC's initial submission at para. 39.

⁷⁰ At pp. 8 and 3473 of the records. I conclude that ICBC's use of the term "claim codes" does not refer to "Kind of Loss" (KOL) codes because the KOLs in the records are digits and only sometimes are accompanied by a letter. Also, ICBC has disclosed KOLs throughout the records, so I conclude that is not what it means here.

⁷¹ Order F18-04, 2018 BCIPC 4 (CanLII) at para. 102.

⁷² I have highlighted the information that may not be withheld under either ss. 13 or 17 in the relevant pages of the records that will be sent to ICBC along with this order.

Unreasonable invasion of third party personal privacy, s. 22

[71] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.⁷³ I will only consider ICBC's application of s. 22 to information that I have not already found may be withheld under ss. 14 or 17.

Personal Information

[72] The first step in a s. 22 analysis is to determine if the information in dispute is personal information. Personal information is defined in FIPPA as "recorded information about an identifiable individual other than contact information." Contact information is defined as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."⁷⁴

[73] ICBC submits that the information it has severed is personal information. It provides some background about specific pages to explain the basis for refusing access under s. 22.

[74] The applicant's s. 22 submission is brief. He says that he disputes that the information on page 3652 of the records is personal information.⁷⁵

[75] I find that most of the information I am considering under s. 22 is personal information because it is about identifiable third parties. It is their names, dates of birth, home addresses, phone and fax numbers, employment, business and professional status, as well as details about their driver's licences, registration, vehicles, insurance coverage and claims.⁷⁶

[76] However, there is a one-page claim form where ICBC has severed employee names, job titles and work phone numbers.⁷⁷ I find that information is contact information, not personal information.

[77] In addition, there are some titles and headings (i.e., "Birth Date", "Address Change", "Driver Status", "Personal Health No", etc.) in computer-generated

⁷³ Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

⁷⁴ See Schedule 1 of FIPPA for the definitions of personal information and contact information.

⁷⁵ Applicant's submission at para 179 at p. 35.

⁷⁶ Note: ICBC withheld p. 255 under s. 22 and as "out of scope". I agree it is all third party personal information unrelated to the applicant and his ICBC claim.

⁷⁷ At p. 3255 (duplicate at 3652) of the records.

reports and in the one-page claim form that I find are not personal information.⁷⁸ These titles and headings are not, on their own, about identifiable individuals and for that reason they are not personal information.

Not an unreasonable invasion, s. 22(4)

[78] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, disclosure would not be an unreasonable invasion of third party personal privacy.

[79] I find that none of the factors in s. 22(4) apply to the third party personal information. ICBC submits that none apply, and the applicant's submission does not discuss s. 22(4).

Presumptions, s. 22(3)

[80] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosing that personal information is presumed to be an unreasonable invasion of third party personal privacy. ICBC submits that s. 22(3)(d) applies to some billing information about a third party on page 3508. The applicant makes no submission about s. 22(3).

[81] Section 22(3)(d) says that disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

[82] The information on page 3508 is a third party's "practitioner status" and "practitioner billing number", and it appears in the context of a report ICBC used to try and identify if it had located the correct third party. I find that information is about the employment and occupational history of the third party, so s. 22(3)(d) applies.

[83] I can see no other s. 22(3) presumptions that apply to the third party personal information.

Relevant circumstances, s. 22(2)

[84] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). It is at this step, after considering all relevant circumstances, that the s. 22(3) presumption may be rebutted.

⁷⁸ At pp. 2190-2198, 3255 (duplicate at 3652), 3368, 3469-3471, 3508, 3656-3658 of the records. These reports are like the report on p. 3473, most of which I have ordered disclosed to the applicant.

[85] ICBC says that it considered s. 22(2)(c) and that it does not apply. Section 22(2)(c) states:

22(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

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

[86] The applicant's submission does not say whether disclosure of the third party personal information would be an unreasonable invasion of third party personal privacy. He does not mention any s. 22(2) circumstances or say that the third party personal information is relevant for a fair determination of his rights.

[87] I can see no relevant circumstances that weigh in favour of disclosing any of the third party personal information to the applicant.

Conclusion, s. 22

[88] Most of the information that ICBC withheld under s. 22(1) is third party personal information. Section 22(3)(d) applies to a small portion. There are no relevant circumstances that weigh in favour of disclosing the third party personal information to the applicant. In conclusion, I find that disclosing the third parties' personal information would be an unreasonable invasion of their personal privacy under s. 22(1).

[89] However, some of the information that ICBC refused to disclose is contact information, not personal information, so s. 22(1) does not apply and ICBC must disclose it.⁷⁹

[90] In addition, the titles and headings in computer-generated reports are not personal information, so s. 22(1) does not apply. I recognize that s. 4(2) of FIPPA says that if excepted information can reasonably be severed from a record, an applicant has the right of access to the remainder of the record. In my view, it would not be reasonable to require ICBC to further sever the computer-generated reports in order to provide the applicant with pages of repeated, generic titles and headings.⁸⁰ Any information those titles and headings convey

⁷⁹ That information is on p. 3255 (duplicate 3652) of the records. I have highlighted that information in a copy of the two relevant pages which will be sent to ICBC along with this order.

⁸⁰ The computer-generated reports are at pp. 2190-2198, 3368, 3469-3471, 3656-3658 of the records. They are the same type of report as the report about the applicant at p. 3473, most of which I have ordered disclosed to the applicant.

would be meaningless without the accompanying third party personal information, which I have found must be withheld under s. 22(1).

CONCLUSION

[91] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. ICBC is not authorized under s. 13(1) of FIPPA to refuse to disclose the disputed information.
2. Subject to item 3 below, I confirm ICBC's decision, in part, to refuse to disclose the disputed information under ss. 14 and 17(1) of FIPPA.
3. ICBC is not authorized under ss. 14 or 17(1) to refuse to disclose the disputed information that I have highlighted on pages 8, 13-14, 17-18, 20, 26, 91, 629, 899, 3226-3227, 3230-3234, 3241, 3250, 3255, 3267, 3271-3275, 3278, 3279, 3326, 3473-3477, 3482, 3491, 3507, 3516, 3521 and 3652 of the records.
4. ICBC is required to give the applicant access to the highlighted information described in item 3 above and concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

[92] Pursuant to s. 59(1) of FIPPA, ICBC is required to comply with this order by July 9, 2021.

May 27, 2021

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F15-62217