



Order F23-17

INSURANCE CORPORATION OF BRITISH COLUMBIA

Lisa Siew
Adjudicator

March 20, 2023

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Summary: An applicant requested access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a record related to a personal injury claim they made regarding a motor vehicle accident. The Insurance Corporation of British Columbia (ICBC) provided the applicant with partial access to this record, but withheld information under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA. The adjudicator found ICBC correctly applied ss. 14 and 22(1) to some of the information withheld in the responsive record. However, the adjudicator determined ICBC was not required or authorized under ss. 13(1), 14 and 22(1) to withhold other information and ordered ICBC to provide the applicant with access to that information.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 5(1)(b), 13(1), 13(2), 13(3), 14, 22(1), 22(2), 22(3)(a), 22(3)(d), 22(3)(f), 22(4). *Freedom of Information and Protection of Privacy Regulation*, BC Reg 155/2012, ss. 3 and 4.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Insurance Corporation of British Columbia (ICBC) provide access to a variety of records related to a motor vehicle accident, including any copies of adjuster notes and emails. ICBC provided the applicant with access to some of the requested records.

[2] For other records, ICBC withheld information in those records under multiple exceptions to access. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review ICBC's decision. Thereafter, ICBC reconsidered its decision and released further records to the applicant, but continued to withhold information under multiple exceptions to access.

[3] The OIPC's investigation and mediation process did not resolve the issues between the parties and the applicant requested an inquiry to determine those issues. The applicant later narrowed the scope of the inquiry. The applicant clarified that he was only interested in a review of ICBC's decision to withhold information in a set of adjuster notes under ss. 13(1), 14, 17(1) and 22(1) of FIPPA.

[4] Both parties provided submissions for the inquiry. The applicant's submission focused on information related to a specific matter. Therefore, during the inquiry, I asked the applicant whether he was still interested in the other information at issue. The applicant confirmed that he still sought access to all of the information withheld in the responsive record.¹

[5] During the inquiry, ICBC also withdrew its application of s. 17(1) to the information at issue and disclosed additional information to the applicant. Therefore, I conclude that information and s. 17(1) are no longer at issue in this inquiry.

ISSUES AND BURDEN OF PROOF

[6] The issues that I must decide in this inquiry are as follows:

- Is ICBC authorized to refuse to disclose the information at issue under s. 14?
- Is ICBC authorized to refuse to disclose the information at issue under s. 13(1)?
- Is ICBC required to refuse to disclose the information at issue under s. 22(1)?

[7] Section 57(1) of FIPPA places the burden on ICBC to prove the applicant has no right of access to the information withheld under ss. 13(1) and 14.

[8] Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of the information at issue would not unreasonably invade a third-party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue qualifies as personal information.²

¹ Email dated February 16, 2023 from applicant's legal representative to the OIPC's registrar of inquiries.

² Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

DISCUSSION

Background

[9] In 2015, the applicant was involved in a motor vehicle accident.³ The applicant was not the registered owner of the vehicle, but he was driving the vehicle when it was rear-ended by another driver. The applicant's spouse and youngest child were also in the vehicle. The applicant was injured in the accident and submitted a claim to ICBC for damages. ICBC is the sole provider of universal and compulsory basic auto insurance in BC.

[10] In 2016, the applicant filed a lawsuit against the other driver (defendant) seeking damages for injuries suffered in the accident, including damages for past and future economic loss. The defendant was insured by ICBC who hired a law firm to defend against the applicant's claim.

[11] One of the issues in the lawsuit was the applicant's present and future capacity to work following the accident. The applicant was employed in the transportation sector at the time of the accident. As part of the lawsuit, in 2019, the defendant's law firm sent a letter to several individuals and companies in the transportation industry seeking information about the applicant and his previous employment (Letter).

[12] The applicant objected to the Letter and its contents because, among other things, he alleged it contained a defamatory statement about him. The applicant later sued the defendant and their legal representatives, the law firm, ICBC and an ICBC adjuster for defamation and other harms (the Defamation Action). The applicant alleged the defendant, ICBC or the ICBC adjuster instructed the law firm to publish the defamatory statement in the Letter.

[13] In 2020, the applicant made the access request, that underlies this inquiry, to obtain records related to the motor vehicle accident and to determine who at ICBC instructed the law firm to send the Letter.

[14] In 2021, the defendants in the Defamation Action successfully applied to the BC Supreme Court for an order striking out the entirety of the applicant's pleadings because there was no reasonable prospect of success.

[15] In 2022, ICBC and the applicant settled the personal injury lawsuit related to the motor vehicle accident.

³ The information in the background section is compiled from the parties' submissions and evidence, including a court case cited by the applicant at para. 11 of his submission.

Record at issue

[16] The record at issue is a 52-page computer-generated document that is described as “CWMS adjuster notes.”⁴ The information at issue is located on approximately 31 of those pages.

[17] ICBC provided the record for my review. It is produced from ICBC’s electronic claims management system and it captures the work and activities completed by ICBC employees on an insurance claim, including conversations with claimants and other parties related to the claim such as health professionals and legal representatives. All of this information is entered by ICBC employees as individual log entries with defined fields such as topic, subject, details, author and update date. I will refer to this record as the “Notes.”

Solicitor-client privilege – s. 14

[18] Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.⁵ ICBC is claiming legal advice privilege over the information withheld under s. 14.⁶

[19] Legal advice privilege applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice, opinion or analysis.⁷ The courts and previous OIPC orders accept privilege can only be claimed document by document, with each document being required to meet the following criteria:

1. A communication between a solicitor and client (or their agent);
2. Which entails the seeking or giving of legal advice; and
3. Which is intended by the parties to be confidential.⁸

[20] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.⁹ However, if the conditions set out above are satisfied, then legal advice privilege applies to the communication and

⁴ ICBC’s initial submission at para. 1. The parties did not specify what “CWMS” stands for, but nothing in the analysis or consideration of the issues in this inquiry depends on this fact.

⁵ *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 26

⁶ ICBC’s initial submission at paras. 9-10. ICBC applied both ss. 13(1) and 14 to the same information. I will first consider whether s. 14 applies to that information.

⁷ *College* at paras. 26-31.

⁸ *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 838, [1980] 1 SCR 821 at p. 13.

⁹ *Keefer Laundry Ltd v. Pellerin Milnor Corp et al*, 2006 BCSC 1180 at para. 61.

the records relating to it.¹⁰ The scope of legal advice privilege also applies to information that would reveal the content of those privileged communications between a lawyer and their client.¹¹

The parties' submissions on s. 14

[21] ICBC submits that it correctly applied s. 14 to withhold information in the disputed record. ICBC says the withheld information would reveal communications between ICBC employees and the lawyer (defence counsel) it retained to defend against the applicant's personal injury lawsuit. ICBC says those communications with defence counsel were to discuss litigation strategy, to seek and give legal advice and to give instructions to defence counsel.¹²

[22] In support of its position, ICBC provided a table which generally describes the withheld information and an affidavit from its in-house lawyer. The in-house lawyer deposes that they reviewed the withheld information and that some of it reflects confidential communications with external legal counsel retained to defend against the Applicant's claim.¹³ ICBC also provided an affidavit from an employee who further describes the information at issue and confirms ICBC retained an external lawyer to defend against the applicant's lawsuit.¹⁴ As previously noted, ICBC also provided a copy of the s. 14 records.

[23] The applicant does not dispute that legal advice privilege applies to the information that ICBC withheld under s. 14. However, relying on an exclusion to privilege known as the "future crime or fraud exception," the applicant submits privilege does not apply because the communications between ICBC and its lawyers were used to facilitate unlawful conduct.¹⁵ I will outline and address the parties' submission on this exclusion to privilege further below. But, the first question I must address is whether legal advice privilege applies to the information that ICBC withheld under s. 14.

Analysis and findings on s. 14

[24] I will first consider whether there was a solicitor-client relationship. Previous OIPC orders and court decisions have determined that "when a lawyer is hired to represent an insured and an insurer, the lawyer is regarded as being jointly retained to represent both parties."¹⁶ In such situations, the relationship

¹⁰ *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22.

¹¹ Order F22-16, 2022 BCIPC 18 (CanLII) at para. 31.

¹² ICBC's initial submission at para. 10.

¹³ Affidavit of NL at para. 2. This is the full extent of NL's submission about the s. 14 information.

¹⁴ Affidavit of KF at paras. 3 and 5.

¹⁵ Applicant's submission at para. 13.

¹⁶ Order F18-33, 2018 BCIPC 36 (CanLII) at para. 20, citing *Chersinoff v. Allstate Insurance Co.*, 1968 CanLII 671 (BC SC) [I note that the court discusses the principle of joint retainer at pp. 658-661].

between the insured, the insurer and the lawyer has been referred to in past OIPC orders as a “tripartite relationship.”¹⁷ The courts accept that this tripartite relationship between an insured, the insurer and their lawyer qualifies as a solicitor-client relationship.¹⁸

[25] In the present case, it is an uncontested fact that the defendant was insured by ICBC who retained a number of law firms over the course of the litigation to defend against the applicant’s personal injury claim. There is also information in the Notes that shows various lawyers in those law firms acted for the defendant and ICBC and communicated with ICBC employees about the applicant’s personal injury claim and the litigation.

[26] I can also see that some of the information withheld under s. 14 in the Notes is about the spouse’s personal injury claim.¹⁹ ICBC did not address this information in its submissions or affidavit evidence, but it disclosed information in the Notes that shows the spouse submitted a personal injury claim for the same accident and that ICBC retained a law firm to defend against that claim.²⁰

[27] Taking all of this into account, I am satisfied a solicitor-client relationship existed between the defendant, ICBC and the lawyers of the various law firms retained to defend against the applicant and the spouse’s personal injury claims.

[28] I am also satisfied that some of the information withheld under s. 14 reveals privileged communications between ICBC and those lawyers. Based on my review of the withheld information and the evidence, I find ICBC is refusing to disclose information that would reveal discussions between ICBC employees and the various lawyers from the law firms that it retained to act as defence counsel.²¹ This information includes instructions given to those lawyers by ICBC employees and legal advice, opinion and strategy provided by those lawyers to ICBC about the personal injury claims and the conduct of the litigation. I am satisfied this information entails the seeking and giving of legal advice.

[29] In terms of confidentiality, there is nothing that indicates the content of those discussions was shared with people outside the solicitor-client relationship. As a result, I accept the parties intended for those communications to be confidential and were treated in that manner. Therefore, I find s. 14 applies to some of the information at issue since it would reveal the content of privileged communications between ICBC employees and the lawyers retained as defence counsel.

¹⁷ For example, Order F18-33, 2018 BCIPC 36 (CanLII) at para. 20.

¹⁸ *Corp. of the District of North Vancouver v. BC (The Information and Privacy Commissioner)*, 1996 CanLII 521 (BCSC) at para. 22.

¹⁹ Information located on pp. 22 of the record.

²⁰ Information disclosed on pp. 9, 14, 22, 24, 46 of the record.

²¹ Information withheld on pp. 22, 23, 24, 26-29, 29-30, 32, 34, 40-41, 42-43, 44-45, 46 of the record.

[30] However, I find ICBC has withheld the following information under s. 14 that does not reveal any privileged communications between ICBC and its lawyers:

- Information about the applicant and spouse's claim which lacks an intention of confidentiality since this information would have to be shared with others outside the solicitor-client relationship, such as the plaintiff's lawyers, as part of dealing with the personal injury claims.²²
- An ICBC employee's notes about information given to them by the applicant's lawyer and a summary of a conversation between the applicant's lawyer and defence counsel.²³ All of this information is provided by the applicant's lawyer to ICBC and it is not apparent how it would reveal privileged communications between ICBC and its lawyers.
- A senior ICBC employee's notes, assessment and opinion about aspects of the applicant's claim and the litigation and their instructions to other employees.²⁴ It is not apparent how this information would reveal ICBC's confidential communications with its lawyers. Rather, most of this information captures communications with other ICBC employees.
- Notes summarizing a discussion between ICBC employees about the applicant's claim and the litigation which I find does not reveal ICBC's confidential communications with defence counsel.²⁵ This withheld information consists of factual information about the applicant and his claim.
- An ICBC employee's notes, comments or actions completed on the applicant's claim file, including factual information that is clearly known to applicant through his participation in the litigation.²⁶ It is not clear how this withheld information reveals ICBC's confidential communications with defence counsel.

[31] Ultimately, it is unclear and ICBC does not sufficiently explain how the above-noted information falls within the scope of legal advice privilege. I find none of this information would reveal any confidential communications between ICBC and its lawyers that entails the seeking or giving of legal advice. As a result, I conclude legal advice privilege does not apply to this information.

²² Information located on pp. 22 and 46 of the record. I cannot say anything more about this information since it would reveal the information at issue.

²³ Information located on pp. 23 and 45 of the record.

²⁴ Information located on pp. 22, 23-24, 28, 32, 44, 45 of the record.

²⁵ Information located on pp. 40 of the record.

²⁶ Information located on pp. 41, 45 of the record.

Future crime or fraud exception to solicitor-client privilege

[32] I found legal advice privilege applies to some of the information withheld by ICBC under s. 14. For that information, the applicant argues privilege does not apply because the communications between ICBC and its lawyers were used to facilitate unlawful conduct.²⁷

[33] The courts have said solicitor-client privilege does not protect communications where legal advice is obtained to knowingly facilitate the commission of a crime or a fraud.²⁸ This limitation on solicitor-client privilege is commonly referred to as the “future crime or fraud exception.”²⁹ It includes acts that are not only criminal in nature, but contrary to law such as an abuse of the court’s process, torts and other breaches of duty.³⁰ Privilege does not apply to those communications because it is not part of a lawyer’s professional duties to commit or facilitate a criminal or wrongful act, nor is it in the interests of justice to protect those communications.

[34] In order to invoke the future crime or fraud exception, the applicant must establish a “*prima facie* case.”³¹ To meet that threshold, the applicant needs to do more than assert that the lawyer’s advice was sought in furtherance of an unlawful purpose. The applicant must set out their allegations in clear and definite terms and they must support those allegations by providing evidence and identifying relevant facts and circumstances.³² If the applicant is successful in establishing a *prima facie* case, then the decision-maker will order production and review the documents in question to determine whether the exclusion to privilege applies.³³

[35] In the present case, I do not need to engage in that two-step process since, as previously noted, ICBC provided the Notes for my review. With the benefit of seeing the information withheld under s. 14, I need to consider whether the following elements are met for the future crime or fraud exclusion to apply:

²⁷ Applicant’s submission at para. 13.

²⁸ *R. v. Campbell*, 1999 CanLII 676 (SCC) at paras. 55-63, *Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*, 1987 CanLII 153 (BC CA).

²⁹ Adam M. Dodek, *Solicitor-Client Privilege* (Ontario: LexisNexis Canada Inc., 2014) at §3.74: the author notes that this limitation is not an exception to privilege, but an exclusion or a “negation” of privilege. See also *Goldman, Sachs & Co. v. Sessions*, 1999 CanLII 5317 (BC SC) at para. 9.

³⁰ *Goldman, Sachs & Co. v. Sessions*, 1999 CanLII 5317 (BC SC) at paras. 16-17.

³¹ *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 (CanLII) at para. 24.

³² *McDermott v. McDermott*, 2013 BCSC 534 (CanLII) at para. 77. Order F18-26, 2018 BCIPC 29 (CanLII) at paras. 57-58.

³³ *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 (CanLII) at para. 58.

- 1) the challenged communications must pertain to proposed future conduct;
- 2) the client must be seeking to advance conduct which it knows or should know is unlawful; and
- 3) the wrongful conduct being contemplated must be clearly wrong.³⁴

[36] The applicant submits the three-part test is satisfied. The applicant says privilege would not apply to any information in the Notes that reveals an ICBC employee instructing defence counsel to send the Letter. The applicant describes that information as instructing the lawyer to engage in future conduct which ICBC knows is criminal or unlawful. The applicant also argues the wrongful conduct being contemplated, that is sending the Letter with its alleged defamatory content, is clearly wrong.³⁵

[37] ICBC disputes the applicant's allegations that it deliberately used its defence counsel to engage in or facilitate illegal or unlawful conduct. ICBC submits there is no evidence of any criminal conduct or a clear intention on its part to commit any unlawful act. ICBC identifies pages 45-47 of the Notes as relevant to this matter and says a review of that information will verify that there was no such unlawful intention or any instruction to its defence counsel about the Letter.³⁶

[38] Based on my review of the withheld information, I conclude none of the information that I found is protected by legal advice privilege reveals any instructions from ICBC to its defence counsel to send the Letter. Therefore, it is not necessary for me to determine whether that conduct would be unlawful or clearly wrong, as argued by the applicant.

[39] I also find none of the information properly withheld under s. 14 shows ICBC communicating with its lawyers to facilitate conduct that it knew or should have known was unlawful. Therefore, I am satisfied that the claim of privilege which applies to that information has not been negated by the future crime or fraud exception to solicitor-client privilege. As a result, I conclude ICBC is authorized to withhold that information under s. 14.

Advice and Recommendations – s. 13

[40] ICBC applied s. 13(1) to over half of the information withheld in the Notes.³⁷ Some of this information was withheld under both ss. 13(1) and 14. It is not necessary for me to determine whether s. 13(1) also applies to the

³⁴ *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88 (CanLII) at para. 28 and *McDermott v. McDermott*, 2013 BCSC 534 (CanLII) at para. 75.

³⁵ Applicant's submission at para. 18.

³⁶ ICBC's reply submission at para. 7.

³⁷ Information located on pp. 9, 15, 17-18, 20-24, 26-30, 32, 34, 40-45 of the record.

information that I found was properly withheld under s. 14. Therefore, along with the other s. 13(1) information, I will only consider ICBC's application of s. 13(1) to the information that it is not authorized to withhold under s. 14.³⁸

[41] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or minister. Previous OIPC orders recognize that s. 13(1) protects "a public body's internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations."³⁹

[42] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. The term "recommendations" includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.⁴⁰ The term "advice" has a broader meaning than "recommendations."⁴¹ "Advice" includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.⁴²

[43] A public body is also authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.⁴³

[44] As well, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice or recommendation.⁴⁴ This includes facts compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.⁴⁵

[45] The analysis under s. 13 has two steps. If I find the information at issue would reveal advice or recommendations under s. 13(1), then the next step is to

³⁸ Information located on pp. 22-24, 28, 32, 40, 41, 44, 45, 46 of the record.

³⁹ For example, Order 01-15, 2001 CanLII 21569 at para. 22.

⁴⁰ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

⁴¹ *Ibid* at para. 24.

⁴² *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

⁴³ Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

⁴⁴ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

⁴⁵ *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

consider if any of the categories or circumstances listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

The parties' submissions on advice and recommendations

[46] ICBC says the information withheld under s. 13(1) is advice and recommendations related to the handling of the applicant's personal injury claim. It describes some of the information withheld under s. 13(1) as a manager's advice about "authorizations given" and advice about the accident claim or a related file, about an examination for discovery and related matters, about information gathered about the accident claim for defence counsel and "advice gathered in furtherance of settlement of the claim inclusive of information about defence strategy."⁴⁶

[47] ICBC also submits that it withheld "a small amount of reserve information" in the Notes because the adjudicator in Order F16-38 found reserve amounts are properly withheld under s. 13(1).⁴⁷ The table of records describes some of this information as advice about "past wage loss" and "non-pecuniary loss" amounts and advice about reserve amounts and "risk and reserves". This is the full extent of ICBC's submissions about this information.

[48] The applicant submits s. 13(1) only applies to advice or recommendations related to "policy-making" such as "when a cabinet minister discusses policy recommendations or relies on a public servant for advice."⁴⁸ Therefore, the applicant says s. 13(1) does not apply to the information at issue because it does not involve policy-making, but relates to advice about a motor vehicle accident claim.

[49] In response, ICBC submits it does not matter who created the advice or recommendations. It notes the courts have found s. 13(1) can apply to advice or recommendations provided by a public body, an employee or a private citizen.⁴⁹ Therefore, ICBC rejects the applicant's argument that advice provided by an ICBC claims adjuster on a file does not qualify as advice or recommendations developed by or for a public body under s. 13(1). ICBC says the applicant's argument is not supported by well-established case law and that the applicant has not cited any authorities which would support his position.

⁴⁶ ICBC's initial submission at para. 17.

⁴⁷ ICBC's initial submission at para. 17, citing Order F16-38, 2016 BCIPC 42 (CanLII). Reserve information located on pp. 9, 15, 20, 23 and 24 of the record.

⁴⁸ Applicant's submission at para. 23.

⁴⁹ ICBC's initial submission at para. 15, citing *BC Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 (CanLII) at para. 66.

Analysis and findings on advice and recommendations

[50] Contrary to the applicant's claims, I conclude s. 13(1) is not limited to decisions only about government policy-making or restricted to public service employees. If that were the case, only government public bodies would be authorized to withhold information under s. 13(1) and only for a specific category of decisions. I find such an interpretation would be inconsistent with the scheme and object of the Act because FIPPA clearly applies to other kinds of non-governmental public bodies.⁵⁰ There is nothing in my review of FIPPA to indicate s. 13(1) should be interpreted so narrowly and I am not aware of any previous OIPC orders or court decisions that did so, nor did the applicant cite any relevant decisions.⁵¹ With that in mind, I turn now to consider the information at issue under s. 13(1).

[51] I find most of the information withheld by ICBC under s. 13(1) consists of comments, questions, factual information, actions ICBC employees took on the applicant or spouse's claims or instructions and directions that are not part of any advice or recommendations. I am not satisfied that any of this information reveals advice or recommendations developed by or for a public body or minister as required under s. 13(1).

[52] For instance, ICBC withheld an employee's notes about an aspect of the applicant's personal injury claim, including a question and a comment.⁵² The withheld information only conveys factual information about the claim. It is also clear that the question and comment are not directed to a decision-maker or another employee, but only records the employee's thoughts and further work the employee plans to complete on the file.

[53] As another example, in several places, ICBC withheld what several different employees have decided about aspects of the applicant or spouse's claim or the litigation.⁵³ ICBC describes some of this information as "manager advice about authorizations given" or "advice about accident claim and related file."⁵⁴ However, the withheld information only shows the employee's assessment of the claim and some questions to others, conveys information, records their decision or communicates their decision and instructions to other employees. There is no evidence that these other employees can choose whether or not to

⁵⁰ See definition of "public body" under Schedule 1 which refers to Schedule 2 (agencies, boards, commissions, corporations and other bodies) and the definition of "a local public body" which refers to "a health care body" and to Schedule 3 (governing bodies of professions or occupations).

⁵¹ See, for example, Order F22-30, 2022 BCIPC 33 (CanLII) which is another inquiry involving ICBC and s. 13(1).

⁵² Information located on pp. 17-18 of the record.

⁵³ Information located on pp. 9, 15, 20, 22, 32 of the record.

⁵⁴ ICBC's initial submission at para. 17, referring to pp. 20 and 22 of the record.

follow those instructions, which would be indicative of someone in the role of a decision-maker. Instead, it is apparent that the employees issuing the instructions are the ones making a decision and then recording those decisions in the Notes. Therefore, I find s. 13(1) does not apply to this information because these employees are not providing advice or recommendations to someone else, but are responsible for making decisions about the personal injury claims and the litigation.

[54] Lastly, regarding the reserve information, ICBC submits this information consists of advice or recommendations about the amount of money it has reserved or set aside to settle the personal injury claims. ICBC argues s. 13(1) applies to this information because the adjudicator in Order F16-38 found reserve amounts are properly withheld under s. 13(1).

[55] However, the adjudicator in that order was satisfied that the reserve information was a proposed amount that was part of the advice and recommendations flowing back and forth between ICBC adjusters and their managers.⁵⁵ In the present case, I am unable to draw the same conclusion. I find the reserve information at issue here is not advice or recommendations to others, but consists of instruction or comments to other employees and actions already taken about the reserve amounts. There is no evidence there was a back and forth discussion between employees about this information or that this information was an amount that was being proposed or recommended by one employee to another. Therefore, I am not satisfied that any of the reserve information reveals advice and recommendations developed by or for a public body.

[56] To conclude, I find none of the information withheld under s. 13(1) reveals, directly or by inference, any advice or recommendations developed by or for a public body. Therefore, I find s. 13(1) does not apply to this information and ICBC is not authorized to withhold it under s. 13(1). Given my findings, I do not need to consider whether ss. 13(2) or (3) applies.

Unreasonable invasion of third-party personal privacy – s. 22

[57] Section 22(1) of FIPPA requires a public body to refuse to disclose personal information the disclosure of which would unreasonably invade a third-party's personal privacy. Numerous OIPC orders have considered the application of s. 22(1) and I will apply the same approach in this inquiry.

⁵⁵ Order F16-38, 2016 BCIPC 42 (CanLII) at para. 104.

Personal information

[58] Section 22 only applies to personal information; therefore, the first step in the s. 22 analysis is to determine if the information at issue is personal information.

[59] “Personal information” is defined in FIPPA as “recorded information about an identifiable individual other than contact information.”⁵⁶ Information is about an identifiable individual when it is reasonably capable of identifying a particular individual, either alone or when combined with other available sources of information.

[60] “Contact information” is defined in FIPPA 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.”⁵⁷

[61] ICBC submits the information withheld under s. 22(1) is the personal information of the registered owner of the vehicle that the applicant was driving at the time of the accident (registered owner) and of other individuals involved in the same accident that also made personal injury claims. ICBC says the withheld information includes information about their “insurance coverage, injuries, benefits or health issues and the like.”⁵⁸ ICBC disclosed information in the Notes which shows the other personal injury claimants are the applicant’s spouse and younger child.⁵⁹

[62] I find the information withheld under s. 22(1) is the information of the applicant, the registered owner and their spouse, the applicant’s spouse and two children, ICBC employees, health professionals and employees of other businesses involved in the personal injury claim. This information includes their names, insurance coverage details, health information, comments, communications with others or actions taken on an individual’s personal injury file. I am satisfied that none of the withheld information about these individuals is contact information as defined under FIPPA and interpreted by past orders. As a result, I conclude the information withheld under s. 22(1) is personal information.

[63] For instance, I note that ICBC withheld the name, mailing address and phone number of a health professional.⁶⁰ This type of information is generally considered “contact information” under FIPPA; however, whether information qualifies as “contact information” will depend on the context in which the

⁵⁶ Schedule 1 of FIPPA.

⁵⁷ Schedule 1 of FIPPA.

⁵⁸ ICBC’s initial submission at para. 20.

⁵⁹ For example, information located on pp. 9, 12, 14, 20 and 22 of the records.

⁶⁰ Information located on pp. 11-14 of the records.

information appears in the record.⁶¹ Taking into account the context, I find this information is not contact information because it appears in relation to the applicant's youngest child and would reveal certain information about that child. Therefore, I find this information is personal information and not contact information.

Personal information of spouse and children

[64] As noted, some of the personal information at issue is about the applicant's spouse and children. The question is whether the applicant is acting on behalf of those individuals in requesting access to their personal information.

[65] FIPPA contains provisions regarding who can exercise another individual's access to information rights in certain circumstances such as when a guardian can act for a "minor" or who may act as an authorized representative for another adult.⁶² If an applicant is found to be acting on behalf of another individual, then the access request is treated as if this other individual is requesting access to their own personal information rather than the applicant requesting access to the personal information of a third party under FIPPA.

[66] In the present case, there is no evidence the applicant made his access request as an authorized representative of his spouse or as the guardian of his minor children. Therefore, I find the applicant made the request on his own behalf. As a result, when it comes to the personal information of the spouse and children, I conclude the applicant is requesting access to the personal information of a third party under FIPPA.

Section 22(4) – disclosure not an unreasonable invasion

[67] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is not an unreasonable invasion of a third party's personal privacy and the information cannot be withheld under s. 22(1).

[68] None of the parties made any submissions about s. 22(4). I have considered the types of information and circumstances listed under s. 22(4) and find none apply. For instance, there is no evidence that the applicant's spouse has, in writing, consented to the disclosure of their personal information to the applicant in accordance with s. 22(4)(a).

⁶¹ Order F21-35, 2021 BCIPC 43 (CanLII) at paras. 157-158 and 164.

⁶² Section 5(1)(b) and Freedom of Information and Protection of Privacy Regulation, BC Reg 155/2012 at ss. 3 and 4.

Section 22(3) – disclosure presumed to be an unreasonable invasion

[69] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third-party personal privacy.

[70] The applicant made no arguments about s. 22(3). ICBC submits the presumptions under ss. 22(3)(a), (d), and (f) apply. I will consider these provisions below. I have also considered the other presumptions under s. 22(3) and conclude there are no other presumptions to consider in this case.

Medical history, diagnosis, condition, treatment or evaluation – s. 22(3)(a)

[71] Section 22(3)(a) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. ICBC submits the presumption under s. 22(3)(a) applies to the health information of the registered owner and the applicant's spouse and youngest child.⁶³

[72] I find that some of the information withheld under s. 22(1) reveals the medical or psychological history, diagnosis, condition, treatment or evaluation of the applicant's spouse and youngest child.⁶⁴ This information includes details about their physical and mental condition after the accident, medical testing and a health professional's evaluation and recommendations.

[73] However, I am not satisfied that any of the information at issue is the medical information of the registered owner. ICBC says this information is on page seven of the records.⁶⁵ However, my review of this page does not show any information about the registered owner that would fall under s. 22(3)(a), especially since there is no evidence that the registered owner was involved in the accident or suffered any injuries related to the accident.

[74] ICBC also says there is "third party personal health information" on page 15 of the records.⁶⁶ However, it is not apparent and ICBC does not sufficiently explain how any of the information withheld on this page relates to a third party's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation. None of the withheld information on this page reveals that kind of

⁶³ ICBC's initial submission at paras. 22 and 23.

⁶⁴ Information located on pp. 8-14, 16, 17, 20 of the records.

⁶⁵ ICBC's initial submission at para. 22.

⁶⁶ ICBC's initial submission at para. 23.

information about a third party. Therefore, I conclude s. 22(3)(a) does not apply to the rest of the information withheld under s. 22(1).

Employment history - s. 22(3)(d)

[75] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational or educational history of a third party. ICBC submits s. 22(3)(d) applies to employment information about the applicant's spouse.⁶⁷ I find there is a small amount of information withheld under s. 22(1) that reveals the spouse's employment history, including her employment status.⁶⁸ Therefore, I conclude the presumption under s. 22(3)(d) applies to that information.

Third-party's financial history or activities – s. 22(3)(f)

[76] Section 22(3)(f) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third-party's personal privacy if the personal information describes a third-party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. ICBC submits s. 22(3)(f) applies to information about the registered owner's insurance and liability coverage.⁶⁹

[77] I can see that some of the information at issue is about the registered owner's insurance coverage. In terms of insurance information, previous OIPC orders have found that the presumption under s. 22(3)(f) applies to details about a third party's motor vehicle insurance coverage and policy information such as "policy dates, rate class, type of use, third-party liability limit, collision deductible and comprehensive deductible" because it describes a third party's finances and financial history.⁷⁰ Therefore, consistent with past orders, I find the presumption under s. 22(3)(f) applies to the information that ICBC withheld about the registered owner's insurance coverage, which includes policy information and the amount of their third-party liability coverage.

Section 22(2) – relevant circumstances

[78] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances. Section 22(2) requires a public body to consider the circumstances listed under s. 22(2)(a) to (i) and any other relevant circumstances to determine whether disclosing the personal information at issue would be an unreasonable invasion

⁶⁷ ICBC's initial submission at para. 24, citing pp. 20 and 22 of the record.

⁶⁸ Information located on p. 20 of the record.

⁶⁹ ICBC's initial submission at paras. 22-24, citing pp. 7, 9, 21, 49 of the record.

⁷⁰ Order 01-46, 2001 CanLII 21600 (BCIPC) at para. 42; Order 2016 BCIPC 42 (CanLII) at paras. 119-121 and Order F18-04, 2018 BCIPC 4 (CanLII) at para. 126.

of a third party's personal privacy. One or more of these circumstances may rebut the ss. 22(3)(a), (d), (f) presumptions that I found apply to some of the information withheld under s. 22(1).

[79] None of the parties made any submissions about s. 22(2). ICBC submits the information withheld under s. 22(1) should not be disclosed to the applicant because it would be an unreasonable invasion of a third party's personal privacy. However, it did not identify what relevant circumstances it considered in making that determination. On the other hand, the applicant did not identify what relevant circumstances favour disclosure of the personal information at issue or would rebut the s. 22(3) presumptions that ICBC argued applied to some information.

[80] Taking into account the circumstances, including those listed under s. 22(2), I find it would not be an unreasonable invasion of a third party's personal privacy to disclose information that is already known to the applicant or that is about him and his personal injury claim. For instance, ICBC withheld the reason why the applicant borrowed the registered owner's vehicle on the day of the accident, information that shows an identifiable individual is the registered owner of the vehicle, the age of the applicant's child and the fact that the applicant's spouse and youngest child made personal injury claims.⁷¹ It is evident that the applicant already knows all of this information because he was involved in the relevant events and there is information in the Notes that shows he communicated with ICBC employees about his family's claims.⁷²

[81] ICBC also withheld information about the applicant's spouse and youngest child that is clearly known to the applicant because he was the source of that information or was told that information by an ICBC employee.⁷³ I found the presumption under s. 22(3)(a) applies to some of this information because it reveals the youngest child's medical history, condition, treatment or evaluation. However, I conclude the presumption is rebutted because the applicant was the one who provided this information about his child to ICBC.⁷⁴ Therefore, where this information appears in the Notes, I find ICBC is not required to withhold it under s. 22(1).

[82] ICBC also withheld information about the applicant and his claim, including conversations he had with ICBC employees and work done on his claim by ICBC employees.⁷⁵ It is not apparent how disclosing this information about the applicant and his claim or the information already known to the applicant would be an unreasonable invasion of someone else's personal privacy. ICBC did not sufficiently explain or support its decision to withhold all of this information under

⁷¹ For example, information located on pp. 6, 7, 8 and 12 of the record.

⁷² Information located on pp. 7, 8 and 14 of the record.

⁷³ For example, information located on pp. 7, 8 and 14 of the record.

⁷⁴ Information located on p. 14 of the record.

⁷⁵ For example, information located on pp. 7, 12, 14 and 17-18 of the record.

s. 22(1). As noted, s. 22(2) requires a public body to consider the relevant circumstances and ICBC made no submissions about s. 22(2).

[83] However, I find it would be an unreasonable invasion to disclose the rest of the information withheld under s. 22(1). I considered whether there were any factors that weigh in favour of disclosing this personal information to the applicant or that would rebut the s. 22(3) presumptions and could find none, nor did the applicant identify any relevant circumstances. For instance, none of this information would be relevant to a fair determination of the applicant's rights since there is no evidence of a current or contemplated proceeding as required under s. 22(2)(c).

[84] As another example, I found there is a small amount of information withheld under s. 22(1) that reveals the spouse's employment history. There was no evidence or anything in the Notes that shows the applicant already knows this information or another relevant circumstance to rebut the s. 22(3)(d) presumption. Therefore, I conclude disclosing this information would be an unreasonable invasion of a third party's personal privacy.

[85] To conclude, I am satisfied that disclosing some of the personal information at issue would be an unreasonable invasion privacy of several third parties. There were no factors that favoured disclosing this information to the applicant. Therefore, ICBC is required to withhold that information under s. 22(1).

[86] However, ICBC is not required to withhold the other information at issue under s. 22(1) because this information is about the applicant and his personal injury claim or the information is already known to him. Therefore, I find disclosing this information would not be an unreasonable invasion of a third party's personal privacy.

CONCLUSION

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

1. Subject to item 2 below, I confirm ICBC's decision to refuse access to the information withheld in the Notes under ss. 14 and 22(1).
2. ICBC is not authorized or required by ss. 13, 14 and 22(1) to withhold the information highlighted (in red) in a copy of the Notes that will accompany this order.
3. I require ICBC to give the applicant access to the information in the Notes that it is not authorized or required to withhold. ICBC must concurrently provide the OIPC registrar of inquiries with proof that it has complied with

the terms of this order, along with a copy of the Notes that it will provide to the applicant.

[88] Under s. 59 of FIPPA, ICBC is required to give the applicant access to the information it is not authorized or required to withhold by May 3, 2023.

March 20, 2023

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F20-84835