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

Order 00-42

INQUIRY REGARDING ICBC PERSONAL INJURY CLAIMS RECORDS

David Loukidelis, Information and Privacy Commissioner
September 25, 2000

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Summary: Applicant sought records from ICBC related to personal injury claims he had made, some of which resulted in litigation. ICBC's responses to applicant, in terms of its reasons for refusal to disclose and descriptions of records, were adequate for the purposes of ss. 6(1) and 8(1), though more detail was desirable. ICBC's delay in responding was contrary to the Act in relation to one request. After close of inquiry, ICBC abandoned reliance on s. 14 and s. 17 for almost all records. ICBC would not have succeeded in s. 14 or s. 17 claims for released records. ICBC is required in each case, however, to prove application of litigation privilege to each responsive record, by showing that both elements of the common law test for that privilege have been met in relation to each record. Under s. 17, ICBC is required to establish a reasonable expectation of harm to its financial or economic interests from disclosure of specific information, on a record by record basis. ICBC properly claimed s. 14 for contents of defence counsel's file, which it continued to withhold. ICBC was required by s. 22 to withhold small amounts of third party personal information.

Key Words: duty to assist – respond openly, accurately and completely – reasons for refusal – solicitor client privilege – law enforcement – financial or economic interests – reasonable expectation of harm – personal privacy unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 8(1), 14, 17(1), 22(1).

Authorities Considered: B.C.: Order No. 6-1994; Order No. 327-1999; Order No. 328-1999; Order 00-06; Order 00-08; Order 00-15; Order 00-23; Order 00-24; Order 00-32; Order 00-39. **Ontario:** Order P-441; Order P-1190; Order P-1363.

Cases Considered: *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.); *Shaughnessy Golf & Country Club* v. *Uniguard Services Ltd. et al.* (1986), 1 B.C.L.R. (2d) 309 (C.A.); *Baus et al.* v. *Middleditch* (1985), 9 C.P.C. (2d) 55 (B.C.S.C.); *Stewart* v. *Nguyen*, [1996] B.C.J. 2162 (S.C. Master); *Hodgkinson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129 (C.A.); *Vancouver Community College* v. *Barratt*, [1997] B.C.J. 3149 (S.C.); *Delgamuukw* v. *British*

Columbia (1998), 55 D.L.R. (4th) 73 (B.C.S.C.); *Bell Canada* v. *Olympia and York Ltd*. (1998), 36 C.P.C. (2d) 93 (Ont. H.C.J.).

1.0 INTRODUCTION

1.1 Background To This Inquiry – The volume of records processed by the Insurance Corporation of British Columbia ("ICBC") in responding to the applicant's request for access to records is quite staggering. ICBC says it located approximately 8,000 pages of records in response to the applicant's request under the *Freedom of Information and Protection of Privacy Act* ("Act") and released well over two-thirds of those pages in whole or in part. Despite this impressive tally, and despite mediation by this Office, the parties remained in disagreement on a number of issues and the matter resulted in an inquiry under s. 56 of the Act. The vigour of their opposition is underscored by the fact that the material submitted in the inquiry fills four three-inch binders of legal argument, affidavits, procedural objections and the disputed records.

The applicant's request for records stemmed from personal injury claims he made as a result of three motor vehicle accidents in which he was involved in the 1990s. The first two accidents happened in 1993 and the third occurred in 1996. All three of these accidents ultimately led to lawsuits, which the court ordered be tried together. The trial took place in Vancouver last August and September. The applicant filed a notice of appeal from the trial outcome and the appeal was scheduled to be heard in June of this year. This June the applicant abandoned that appeal and this effectively ended the litigation between him and, through its insured, ICBC. In light of this, ICBC on August 3, 2000 abandoned most of its ss. 14 and 17 claims for the purposes of this inquiry. This late development is dealt with again later in this order.

1.2 Scope of This Inquiry – This inquiry deals with six requests for review lodged by the applicant under s. 52 of the Act, each of which is connected with his December 18, 1998 access request to ICBC. That request was for the applicant's "complete file including all contents of whatever nature". The applicant gave the following description of records that he considered formed part of this request:

> … adjuster('s) notes and memos etc., police reports and other police documents, medical information of any kind, employment information, internal ICBC memos, letters to ICBC from me, letters to me from ICBC, letters and any other type of communication between ICBC or its agents and any governmental body (whether federal or provincial), and any other documents without restriction of any kind.

On January 6, 1999, the applicant confirmed in a letter to ICBC that his request "was for all records and not just for records associated with any one [ICBC] claim number". That letter referred to the three accidents described above, by date, and gave the ICBC claim number for each of the accidents.

ICBC's responses to this request stretched over a relatively long period. They consisted of an initial disclosure of records and a series of supplementary disclosures, as a result of

which ICBC ultimately processed and disclosed the large number of records referred to above. In its responses to the applicant, ICBC withheld information (and, in many cases, entire records) under ss. 14 and 17 of the Act. It also withheld third party personal information under s. 22 of the Act.

As appears below, ICBC's late abandonment of most of its ss. 14 and 17 case – after I had all but completed my deliberations and this order – rendered most of the issues before me moot. However, because this is the first case in which I have had an opportunity to address ICBC's use of s. 14 in light of Order No. 6-1994, I discuss the ss. 14 and 17 issues below.

1.3 A Late Development In the Case – As is noted above, well after the close of the inquiry – and after I had almost completed my deliberations – ICBC decided to disclose most of the disputed records to the applicant (while still maintaining the records are privileged). It also added a new basis for its application of s. 14 to some of the records it continued to withhold in relation to request 9588, *i.e.*, it argued that legal professional privilege, not only litigation privilege, applied. Because it had not been raised before by ICBC, the applicant had not had an opportunity to respond on that point. In response to my invitation to do so, the applicant made further submissions on that point.

In response to this change of position by ICBC respecting the bulk of the disputed records, counsel for the applicant argued – in a letter dated August 11, 2000 – that he had the "right to a decision which addresses whether the exemptions [earlier claimed by ICBC] apply", quite apart from ICBC's exercise of discretion to release them. That letter also objected to ICBC's raising of a new s. 14 ground so late in the day. In an August 16, 2000 letter to me, counsel for ICBC took issue with this letter, arguing that the applicant's counsel was "insistent upon disregarding the rules for exchange of submissions" by making this submission.

This objection, at least as it relates to the s. 14 issue, is not tenable. The letter from the applicant's counsel was obviously prompted by ICBC's disclosure of information after the inquiry had closed, an action which clearly raised the prospect that much of the effort invested in this inquiry might have been wasted. ICBC is not in a position to complain about that letter insofar as it objects to ICBC's advancing of a new s. 14 argument.

As for the applicant's assertion that he is entitled to a decision on the merits despite ICBC's further disclosure of records, I have not found it necessary to consider that argument. Even though ICBC's late disclosure means that an order is not appropriate respecting the bulk of the records, I have decided to set out my views on the merits of ICBC's initial decision regarding the records it has now disclosed. Accordingly, although I have not considered the applicant's August 11 objection on that point, I have left intact most of my reasons for decision, which I had almost completed before ICBC's change of heart. These reasons will be relevant to other cases where ICBC has applied, or considers applying, ss. 14, 17 and 22 to similar records and information.

1.4 Use of the Portfolio Officer's Fact Report – The amended Portfolio Officer's Fact Report in this inquiry describes ICBC's responses to the request and the applicant's successive various requests for review. It lists all of the records in dispute here using the numbers assigned by ICBC to the various pages of records. The appendix to this order has been created from that list of disputed records and is used for the purpose of identifying, and dealing with, the various disputed records.

In addressing the various issues before me, I have, for the sake of convenience, used the file numbers assigned by this Office to the applicant's various requests for review, again as set out in that Report. In some cases, as is set out in the amended Portfolio Officer's Fact Report, the single file number used here refers to combined access requests made by the applicant. For example, reference to "request 9588" means the request for review numbered 9588 by this Office. Reference to request 9588 includes a reference to request 9894, with which it has been combined.

2.0 ISSUES

The issues in this inquiry are as follows:

1. Did ICBC comply with its s. 6(1) obligation to respond openly, accurately and completely to the applicant's request in searching for records in relation to requests 9542, 9586 and 9588?

2. In relation to requests 8400, 9542, 9586 and 9588, did ICBC comply with ss. 6(1) and 8(1) of the Act in providing the applicant with descriptions of the records withheld from him and with reasons for ICBC's refusal to disclose?

3. Was ICBC authorized by s. 14 to refuse to disclose information to the applicant?

4. Was ICBC authorized by s. 17 to refuse to disclose information to the applicant?

5. Was ICBC required by s. 22 to refuse to disclose personal information to the applicant?

At the time of the inquiry, ICBC abandoned its previous reliance on ss. 15 and 19 of the Act respecting some information in the disputed records. Again, by a letter from its counsel dated August 3, 2000 – sent after the close of the inquiry – ICBC also abandoned its reliance on ss. 14 and 17 of the Act in withholding information in requests 8400 and 9542.

As was foreshadowed in ICBC's August 3 letter, ICBC has released to the applicant (severed) copies of the records to which it had originally applied ss. 14 and 17. It has now severed and withheld only third party personal information in those records (under s. 22(1)) and has withheld records in request 9588 under s. 14. Copies of the severed, newly disclosed, records were delivered to me and to the applicant's counsel on

August 4. The result is that the s. 22 issue set out in the amended Portfolio Officer's Fact Report remains in play, as does the s. 14 issue respecting request 9588.

As to the burden of proof, the parties both accept that, although s. 57 of the Act says nothing about the burden of proof in relation to s. 6(1) of the Act, it has been established that the public body bears this burden. See, for example Order No. 327-1999 and Order 00-15.

Under s. 57(1) of the Act, ICBC bears the burden of proof with respect to the remaining s. 14 and s. 17 issues, while s. 57(2) places the burden of proof on the applicant with respect to the s. 22(1) issues.

3.0 DISCUSSION

3.1 Procedural Objections – ICBC has objected to the filing by the applicant of a supplementary affidavit along with the applicant's reply submission and to the filing by the applicant of a further reply submission and affidavit. Its objection to the further affidavit was made on the basis that the process set out in the Notice of Written Inquiry issued by this Office "contemplates the filing of argument only on reply". ICBC took the position that the further affidavit did not "constitute proper reply".

As it happens, ICBC also filed a further affidavit, sworn by Robert Beech, as part of its reply submission. According to ICBC, it did this only "because the applicant raised a new issue which was not identified in the Portfolio Officer's Fact Report".

I have considered both the first supplementary affidavit filed by the applicant and ICBC's further affidavit, sworn by Robert Beech. As regards the applicant's affidavit, it responds to evidence adduced by ICBC in its initial submission, specifically in the first affidavit of Robert Beech and in the affidavit of Michael Vizsolyi. That affidavit deals directly with evidence adduced by ICBC as to what the applicant is alleged to have told ICBC representatives after his first accident in 1993 and in subsequent dealings with ICBC. The Notice of Written Inquiry delivered by this Office to the parties says, at p. 2, that "a reply submission should not include new facts or raise new issues". In my view, that affidavit does not, contrary to ICBC's contention, "raise new issues"; it responds to evidence, submitted by ICBC, that the applicant could not reasonably have anticipated in advance of seeing ICBC's initial submission. In any case, I prefer ICBC's version of what the applicant said to Michael Vizsolyi when they first met in 1993.

For its part, ICBC justifies its delivery of the further affidavit of Robert Beech, along with its reply, on the basis that it responds to a new issue that was not identified in the amended Portfolio Officer's Fact Report issued by this Office. That affidavit responds to the applicant's contention, framed in the material filed by the applicant initially in this inquiry, that Robert Beech had 'intimated' in a conversation with the applicant that ICBC might have been conducting surveillance of the applicant's activities at some point. In that affidavit, Robert Beech denies this conversation or any knowledge that ICBC had the applicant under surveillance. But this affidavit goes beyond that question and responds to

other issues – raised by the applicant in his initial submission and evidence – which were not, in any sense, "new". In my view, that affidavit stands, in all material respects, on the same footing as the further affidavit filed by the applicant.

This leaves the question of the further reply submission delivered by the applicant. He says "the primary reason for the further reply" is that ICBC has "taken the position that the requester has provided no evidence on certain points" raised in the applicant's initial submission. According to the applicant, the further reply is needed "in order that the record be complete". He says the other reason for the further reply is that "ICBC raised additional arguments in its reply submission to which the requester believes a response in necessary".

ICBC does take the position, in its reply submission, that the applicant failed to supply evidence on two points raised in his initial submission. It says, first, that the applicant failed to provide evidence to support the assertion, in his initial submission, that he had provided ICBC "with the names and numbers of two witnesses with respect to the 1996 accident". Second, ICBC says the applicant has not provided any evidence to support his claim that Robert Beech 'intimated' to him in conversation that ICBC had conducted surveillance of the applicant.

I conclude that, respecting the 'no evidence' points raised by ICBC, the applicant could have provided evidence in his initial submission, to support his case. Moreover, the rest of the applicant's further reply affidavit does not address ICBC's 'no evidence' argument. It attempts, rather, to further buttress evidence and argument submitted by the applicant, on other points, in his permitted submissions. The further reply submission and accompanying affidavit do not accord with the procedures laid down for this inquiry in the Notice of Written Inquiry. I have not considered the applicant's further reply and accompanying further reply affidavit.

3.2 Has ICBC Fulfilled Its Duties Under Sections 6 and 8? – Section 6(1) of the Act requires ICBC to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely". In relation to requests 9542, 9586 and 9588, the applicant says ICBC has failed to search adequately for records.

As I said in Order 00-15 and in Order 00-32, s. 6(1) requires a public body to exert that effort, in searching for records, which a fair and rational person would find to be acceptable and expect to be done. This entails thorough and comprehensive search efforts and, while a standard of perfection is not imposed, a public body must make every reasonable effort to explore all avenues in attempting to comply with its s. 6(1) obligation. In an inquiry such as this, a public body should describe, as candidly as possible, all potential sources of records and should give reasons for any decision not to explore a potential source of records. The public body should also describe, in reasonable detail, its efforts in searching for records, including by describing the various sources that were checked and by giving details as to how the search was actually

undertaken. An indication as to how much public body staff time was expended in the search is also desirable.

The applicant contends that ICBC has failed to fulfill this duty because it has not identified and disclosed all relevant records in a timely fashion. ICBC acknowledges that, despite the good-faith efforts of its staff, records that were responsive to the applicant's request were found and disclosed in stages, causing delay in their disclosure. It says that, despite this, it has complied with its s. 6(1) duty and should not be required to undertake further searches for records.

The applicant also complains that ICBC has not, because it has not adequately described the withheld records to him and has not given sufficient reasons for its refusal to disclose those records, fulfilled its obligations under ss. 6(1) and 8(1) of the Act..

Description of the Requests and of ICBC's Responses

ICBC says it has responded fully to the applicant's initial request of December 18, 1998. It says the initial request was expanded, on June 4, 1999, "to include off-site records from the independent adjuster and defence counsel" for ICBC. ICBC's responsible information officer then contacted counsel for ICBC and John Greiner, whom that employee mistakenly believed had been the independent adjuster for ICBC regarding the applicant's personal injury claims.

ICBC responded to the applicant's "request for off-site records" at the end of June and the beginning of July last year, but realized at the end of that year that John Greiner was not ICBC's independent adjuster. This error had caused ICBC not to pursue the appropriate avenue to retrieve records responsive to the applicant's request. Its discovery of this mistake caused it to obtain the relevant records from the independent adjuster and to supply the applicant with a supplementary response on February 16, 2000.

ICBC says a "third request for updated disclosure was made on April 7, 1999", which caused ICBC's information officer to contact the relevant ICBC claims adjuster and to request copies of all records added to the applicant's file since the date of his original request. This contact did not occur until August of 1999, which is roughly five months after the updated request was made on April 7, 1999. The applicant's updated request sought any records that had been added to his file between December 18, 1998 – the date of his original access request – and the date of his updated request (which ICBC treated as May 13, 1999).

Again in August of last year, ICBC responded to the updated request by sending records "for the period 13 May 1999 to the present". This response, ICBC now concedes, "generated some confusion", since it was not clear whether it dealt with the period between December 19, 1998 and May 11, 1999 (the date to which ICBC appears to have updated the request). ICBC's information officer, some considerable time later, contacted the claims adjuster to confirm he had received all records covered by the update request. It then turned out that the claims adjuster had "inadvertently" not

provided records for the period between December 19, 1998 and May 11, 1999. Those records were, according to ICBC, sent to the information officer "immediately after the error was discovered". This resulted in a further supplementary response to the applicant, in which further records were disclosed, on February 22, 2000.

The last aspect of this issue has to do with the applicant's August 11, 1999 letter to ICBC, which asked for records relating to all expenditures "paid, owing or incurred by ICBC for all matters involving myself arising after May 15, 1993", including a "detailed itemization of those expenditures". The letter stipulated that this included "all payments made and liabilities outstanding" to a number of experts involved in the applicant's claims and to a law firm that had represented ICBC in relation to those claims.

ICBC's November 5, 1999 response to this request dealt only with expenditures for lawyer's fees, which ICBC refused to disclose on the grounds of privilege under s. 14. ICBC says this response was appropriate because the applicant had told ICBC's information officer, "during one of their many telephone conversations", that the applicant only wanted to know the "expenditures for defence counsel". The applicant later alleged that ICBC had failed to respond fully to his request because it restricted its response to lawyer's fees. As a result, ICBC produced a broader list of expenditures in a February 16, 2000 supplementary response.

Applicant's Submissions on the Section 6(1) Search Issue

The applicant's position on the adequacy of ICBC's search efforts is in sharp contrast to ICBC's. He argues that ICBC ought to be ordered to conduct a further detailed search for records. He also says that, because of ICBC's inadequate description of the records in its responses (an issue I address further below), it is not possible for the applicant to know whether some of the records he says exist in fact do exist. He says some of the records he thinks ICBC created might form part of the records withheld by ICBC, but he has no way of knowing if this is true because of ICBC's inadequate description of the withheld records.

Of course, ICBC has now disclosed the bulk of those records, which will belatedly permit the applicant to determine whether he still thinks ICBC has not fulfilled its s. 6(1) in this respect. The s. 6(1) issues before me, however, are to be determined as at the times of ICBC's initial responses. That is how I have dealt with them.

The applicant has provided detailed reasons for his belief that other records exist. Those reasons can be summarized as follows:

- Eight ICBC employees have been involved in the applicant's claims files since 1993. It is therefore likely that numerous e-mails were exchanged among them, but only two e-mails have been identified. The applicant questions whether ICBC has checked its computer system for all e-mails.

- Having noted that ICBC retained counsel to defend itself, and on the basis that counsel's records are in the custody or control of ICBC, the applicant asks whether the lawyers' files have been reviewed for responsive records. He says there is little or no reference in ICBC's responses to records he believes should appear in the lawyers' files.

- In relation to the three outside experts ICBC retained – John Greiner, Baker Materials Engineering Ltd. and Dr. Paul Bishop – the applicant observes that some of their reports are identified by ICBC as being responsive, but "very little other documentation such as correspondence, working papers, clinical records or notes" is identified. He asks whether the experts' files have been reviewed for personal information of the applicant or for records of their activities on behalf of ICBC.

- The applicant alleges that ICBC contacted his former spouse and "questioned her extensively" about his injury claim and about his sex life and their personal relationship. He says records about that telephone contact have been identified as responsive to the request.

- The applicant says he at some point gave ICBC the names and telephone numbers for two witnesses to one of his accidents, but no "information about these witnesses has been identified as responsive" to his request.

- The applicant says ICBC obtained a statement from one of the drivers who rear-ended the applicant, but there is no reference to that statement in the responsive records identified by ICBC. He also says there is no reference to witness statements from drivers in the other accidents in which he was involved.

- The applicant observes that, although ICBC retained an independent adjuster, there is "very little reference to this adjuster, and virtually no reference to his report, communications between ICBC and the adjuster, working papers or any information" obtained by the adjuster.

- The applicant says the ICBC information officer who processed the access request "has intimated that there has been an investigation that ICBC is not disclosing", but says the information officer has "refused to officially confirm or deny the investigation". The applicant says that no records have been identified in relation to such an investigation.

- The applicant believes he may have been under surveillance before the trial "and in or about December 1988 and throughout 1999". He says it would be unusual if no surveillance was done and wonders why no records relating to surveillance have been identified or produced.

- The applicant says a number of pages are missing from ICBC's various release packages and are not listed in the release guide, being records 06183-06188, 06207-06219, 06223, 06231-06246, 06270-06303, 06314-06315, 06333 and 06350. He

also says that pages one to approximately 200 are missing from the first release package. He asks where these records are.

ICBC's Submissions on the Adequate Search Issue

ICBC characterizes what has happened here as involving unintentional "two administrative oversights". It says its employees "acted throughout in good faith". Any failure by ICBC to respond completely at the outset was due to "understandable error given the sheer volume of documents encompassed by the requests and [the] numerous individuals involved in the litigation". ICBC notes that, when errors were discovered, steps were taken to gather the appropriate records and supplementary responses were provided to the applicant.

As for its limited response to the request for records relating to expenditures on outside consultants, ICBC provided affidavit evidence – in the form of an affidavit sworn by Robert Beech – that the applicant had verbally limited his request to legal fees and disbursements. ICBC says it acted in good faith in relying on the applicant's statements about the scope of this aspect of the request and says it should not be found to be in breach of its s. 6(1) duty to assist where it has so relied. It cites Order No. 328-1999, where I encouraged public bodies to contact applicants whenever practicable, to clarify or refine vague or apparently over-broad requests. ICBC says the applicant appears to have later changed his mind about the scope of his request respecting expenditures and then alleged that ICBC had failed to respond completely. ICBC says it has "now taken steps to ensure that there has been a complete response with respect to all expenditures" made on all of the applicant's claims files.

As regards ICBC's delay in responding to the applicant's April 7, 1999 letter, ICBC simply says its information officer "was overwhelmed with requests under the Act at that time", and was not able to deal with the request earlier. No other information officers were available to assist with the applicant's requests. ICBC also has provided evidence that the applicant was "in frequent contact" with the information officer and that the applicant "was in the habit of calling him at least three or four times a week to discuss his various requests". ICBC says that these conversations were lengthy and detracted from the time otherwise available to its information officer to actually work on the requests.

Discussion of the Section 6(1) Issues

There is no doubt ICBC failed to respond within the time required by the Act as regards request 9588. ICBC admits as much at paragraphs 26 and 27 of its initial submission. Accordingly, I find that ICBC did not discharge its duty under s. 6(1) to respond to the applicant without delay. I accept ICBC's explanation that the delay was not intentional, *i.e.*, that it was a function of "administrative oversights" and a caseload that exceeded ICBC's resources. At this point, I can do little more than to state the obvious, *i.e.*, that ICBC has a clear obligation under the Act to respond to an applicant without delay and, at the latest, within the Act's timelines for request responses (including any extensions under s. 10).

As regards the adequacy of ICBC's search for responsive records, it is also apparent that – owing to some good faith errors by employees – ICBC initially failed to respond completely to the applicant's requests. I am satisfied, however, that ICBC's successive responses to the applicant ultimately cured its initial oversights, such that ICBC has fulfilled its s. 6(1) duty to respond completely and accurately to the applicant by making a reasonable search for records. This conclusion is borne out by the affidavit evidence of Robert Beech and Melanie Voight. Robert Beech's affidavit, especially, establishes that he made a reasonable effort to locate records (including as the applicant updated or amended his requests, which in some cases necessitated further searches). Equally, it is clear Robert Beech sought records again once he realized that he had made a mistake about some of the facts surrounding the applicant's injury claims. In the circumstances, I am satisfied that ICBC has discharged its s. 6(1) duty to search adequately for records in relation to requests 9542, 9586, and 9588.

Discussion of Adequacy of Description and Reasons for Refusal to Disclose

In essence, the applicant says ICBC has not fulfilled its s. 6(1) obligation to assist him by providing a sufficient description of the records it has withheld. He also argues that ICBC has failed to give sufficient reasons for its refusal to disclose records, contrary to its s. 8(1) obligation to give reasons for refusal. ICBC says its description of withheld records, and its stated reasons for refusal to disclose them, comply with its statutory obligations. It acknowledges that, consistent with Order No. 323-1999, it is not sufficient for a public body simply to reproduce the language of an exception as the ground for withholding a record. It says, however, that with large requests such as this, where thousands of pages of records are involved, a more attenuated approach to giving reasons is justified. Moreover, where a request is made in the context of ongoing litigation, the description "defence and investigation material" is an adequate summary of the reason for withholding records. It reflects the fact that the material relates to investigation and defence material collected for litigation purposes.

ICBC also notes that my predecessor held, in Order No. 105-1996, that s. 6(1) does not require a public body to create a list of responsive records if none existed. I agree with this view. ICBC is, in this light, to be commended for having created guides to release in which it numbers each page of records, describes each record and indicates the exception applied to withhold a record entirely or in part.

Having done that, however, ICBC should in my view provide a better description of each record than it did here in its release guides. Although I am not prepared to find that ICBC has not complied with the Act in this respect in this case, I do think it must make a better effort to describe records in future. In saying this, I am sensitive to the burden ICBC faces in responding to voluminous requests. But the demands entailed by providing better descriptions for records should be viewed in light of the prospect that better record descriptions may well decrease the chance that an applicant will seek a review of ICBC's decision. Moreover, better descriptions of records are a hallmark of compliance with both the letter and spirit of s. 6(1). I note, in passing, that the

descriptions found in Parts 1 and 2 of the Appendix to this order are more detailed than those given in ICBC's release guides. Part 3 of the Appendix reproduces, by way of comparison, ICBC's description of records. More detailed descriptions should not be overly difficult to create.

ICBC's reason for refusing to disclose each record consists simply of a reference, in its release guides, to the specific section of the Act relied on in relation to each record. Given the litigation between the applicant and ICBC at the time ICBC responded, the description given for each of the records that ICBC withheld was sufficient to alert the applicant to the general nature of the reasons for refusing to disclose the record. In addition, ICBC's initial response letter referred to Order No. 6-1994, which is discussed below, as the basis for withholding records under s. 14. Taken together, these supplied the applicant with adequate reasons, for the purposes of s. 8(1), in this case.

It must be emphasized, however, that a public body should be relatively forthcoming in its reasons for applying each exception. Instead, for example, of simply saying that certain records are covered by solicitor client privilege under s. 14, it should specify whether litigation privilege or legal professional privilege forms the basis for the s. 14 claim. Wherever possible, a public body should give a factual basis for its application of an exception. For example, instead of saying that information in a record is withheld under "s. 14 – solicitor client privilege", the public body could say something like this:

> Record 1234 is withheld under s. 14 of the Act, which protects information subject to solicitor client privilege. The record is a letter from our lawyers to us, setting out their legal advice to us on a matter. Such information is privileged.

I should note in closing that ICBC numbered each of the pages of responsive records, thus making it easier to assess ICBC's response and to conduct the review and inquiry under the Act. I strongly encourage this practice. It makes things much easier for the applicant, for the public body and, in cases where an applicant seeks a review, for this Office.

3.3 Solicitor Client Privilege – ICBC originally raised solicitor client privilege, which is recognized under s. 14 of the Act, as a basis for withholding many of the records in dispute in their entirety. Section 14 authorizes a public body to "refuse to disclose to an applicant information that is subject to solicitor client privilege". This provision, as the courts have made clear, incorporates the common law rules on solicitor client privilege.

Late–Breaking Development on Section 14

ICBC initially relied only on the category of solicitor client privilege commonly referred to as 'litigation privilege' or 'contemplated litigation privilege'. In a case such as this, that privilege will protect internal communications generated by a client – and communications between the client's lawyer, or the client, with third parties – if it is established that the dominant purpose for which such communications came into existence was to prepare for, advise upon or conduct litigation under way, or in

reasonable prospect, at the time the communication was created. Discussions of this principle in the context of the Act can be found in Order 00-08 and Order 00-23.

As is noted above, ICBC's reliance on s. 14 in relation to requests 8400 and 9542 is now moot in light of its August 4 disclosure of records. ICBC still maintains that the now-disclosed records "continue to be protected by contemplated litigation privilege", but says

> … without prejudice to the public body's right to claim contemplated litigation privilege in future inquiries involving the Applicant or other applicants where litigation has concluded, ICBC is prepared to exercise its discretion to waive that privilege and to withdraw s. 14 as a basis for withholding and severing the records which remain in dispute in OIPC 8400 … and OIPC 9542.

By contrast, ICBC "is not prepared to waive solicitor client privilege with respect to the records in OIPC 9588" (with the exception of record 43, an internal ICBC e-mail). ICBC says the records in request 9588 are, with one exception, all confidential communications between solicitor and client and are thus privileged under the common law 'legal professional privilege' that is also recognized by s. 14 of the Act. This is a change of position on ICBC's part, since it had not relied before on the first branch of solicitor client privilege under s. 14. This issue, too, is addressed further below.

Contemplated Litigation Privilege and Order No. 6-1994

I will deal first with ICBC's reliance on Order No. 6-1994, a decision of my predecessor. ICBC correctly contends that the question of whether a record is privileged under the litigation privilege rule turns on "the particular facts of the case". See the judgement of Wood J.A. in *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.). Closer to home, however, ICBC cites the following passage from Order No. 6-1994, a decision of my predecessor, at p. 3:

> For purposes of the Act, **any work** that ICBC does in the process of settling claims, where there is a reasonable probability of litigation, can be viewed as having been done in contemplation of litigation, if the case is not otherwise settled. [emphasis added by ICBC]

This passage was also quoted by ICBC in its initial response to the applicant.

The following passage also appears at p. 3 of Order No. 6-1994:

> In interpreting the Act, I am not persuaded by distinctions in the case law between the adjustments and litigation phases when assessing claims of privilege. These are technical matters that can be settled in the courts through the normal process of discovery in cases, like this one, where litigation is ongoing … .

The courts have, since Order No. 6-1994 was issued, confirmed that s. 14 incorporates the common law of solicitor client privilege, including litigation privilege. The privilege issue must be assessed, in each case, in light of the evidence as it relates to each

communication and not in light of a generalized assertion that "any work that ICBC does in the process of settling claims" is done "in contemplation of litigation". In the absence of evidence supporting such a conclusion in relation to each record, any such statement is, necessarily, conjecture. There must be evidence, in respect of a particular record, to support the conclusion that it is privileged under s. 14. In the case of litigation privilege, ICBC bears the burden of proving that the dominant purpose for creation of the record was to conduct, assist with, or advise upon litigation under way or in reasonable prospect at the time of its creation. That is the common law test and it must be met in each case.

In saying this, I am mindful of the following passage from page 3 of Order No. 6-1994:

> In terms of the interpretation of section 14 of the Act, I am persuaded of ICBC's view, at least for the purposes of the present case, that the reports in question were prepared in contemplation of litigation. An unintended consequence of the contrary position in this case would be that none of the advance work that ICBC does in deciding whether to settle a case could be protected from disclosure in the event that, as in the present case, settlement was not achieved (for whatever reason). This would also have direct consequences for the financial or economic interests of ICBC, since plaintiffs would have advance knowledge of a substantial element of its case.

Again, the evidence as it relates to the common law test for litigation privilege is the sole guide as to whether a given record is protected under s. 14. Similarly, the evidence as it relates to each record is the sole guide as to whether any of the Act's other exceptions to the right of access (including s. 17(1)(e), which protects "information about negotiations carried on by or for a public body") apply.

For the purposes of discussion, I have (consistent with ICBC's application of s. 14 to the records) divided the records into three separate classes. The following discussion addresses each class separately. It bears repeating here that the discussion below about s. 14 is not (except as it relates to request 9588) necessary in light of ICBC's release of records.

Are the Post-Accident Request 8400 Records Privileged?

The first class of records comprises the records covered by request 8400 that are numbered 8–12, 19, 615, 616, 621, 622, 666, 774a, 776, 1524 and 1525 (collectively, "Post-Accident Records"). ICBC says these records – which were prepared after the applicant's first accident – were made in "reasonable contemplation of litigation as a result of the claims adjuster's first meeting with the applicant in May 1993."

According to the affidavit of Michael Vizsolyi – the ICBC claims adjuster assigned to the applicant's claim in 1993 – his first meeting with the applicant gave ICBC reason to believe that litigation was, right away, in reasonable prospect. Vizsolyi's evidence is that the applicant told him he was considering retaining Simon Margolis, from a Vancouver law firm, to represent him on the claim. Vizsolyi deposed that he took a witness statement from the applicant, which he asked the applicant to review and sign at the

meeting. He says the applicant reviewed the statement, "agreed with it, initialled it, but decided not to sign it because he wanted to review it again". Vizsolyi deposed that he gave the applicant a copy of the statement and asked him to sign and return it as quickly as possible. This is paragraph 3 from Michael Vizsolyi's affidavit:

> Based on the Applicant's prior claim history and the nature of my discussions with the Applicant at the first meeting, I concluded that there was a reasonable likelihood that this claim would be litigated. His mention of retaining Mr. Margolis was only one factor that supported that conclusion. His decision not to sign a statement he acknowledged was accurate until he reviewed it raised a logical inference he was going to ask Mr. Margolis to review it as well. I noted in my file entry of May 18, 1993, that "this might be a protracted file". As an adjuster, it had been my experience that represented and litigated files took a longer time to resolve than those wherein we deal directly with the customer. My comment on the file being protracted was a reflection of my belief that he would retain counsel and litigate this matter.

Vizsolyi also deposed that all his file notes subsequent to the May 18, 1993 notes just described "were made in contemplation of litigation", although he does not say that any such notes were made for the dominant purpose of preparing for or conducting such contemplated litigation.

In its reply submission, ICBC characterizes the applicant's behaviour at his first meeting with Vizsolyi in May 1993 as "adversarial" and says that this conduct itself gave rise to ICBC's "well-founded opinion that litigation was reasonably contemplated". In support, ICBC says that the applicant refused to sign a statement although he acknowledged it to be accurate and "immediately put the claims adjuster on notice that he was considering retaining" a lawyer to represent him on the claim. The contention in ICBC's submissions that the applicant was "adversarial" is not borne out by the May 18, 1993 notes themselves or by Vizsolyi's affidavit.

The applicant's evidence contradicted that of Michael Vizsolyi as regards what happened at their May 18, 1993 meeting. Contrary to Vizsolyi's evidence, the applicant deposed that he told Vizsolyi that he "had not hired a lawyer". He also says he has no recollection of the name Simon Margolis and that he has never used the law firm with whom that lawyer apparently was associated.

As for his not signing the statement prepared for him, the applicant deposed that he "still felt ill from the accident, which had occurred two days previously". He says that he was on "medication, very tired and in severe pain". He felt he was being pressured "to sign something that may not have been perfectly accurate". He says "he wanted to review the statement" when he felt better and notes that he later signed and sent it to ICBC with some handwritten changes to it. He deposed that he did not "contact any lawyer to discuss the statement".

Moreover, he deposed, Vizsolyi "seemed inordinately interested in whether I had hired a lawyer" and in their May telephone "conversations", he was repeatedly asked by Vizsolyi

if he was going to hire a lawyer. All these conversations took place after May 18, 1993. He deposed Vizsolyi "even assured me I did not need a lawyer" and that he "repeatedly" told Vizsolyi "that I had not and did not intend to hire a lawyer". He also deposed that on several occasions he told Vizsolyi he did not think the matter was complex and that it "could be worked out between us without incurring unnecessary legal costs". His evidence is that he believed his claim could be settled "without resorting to lawyers". He deposed that he only hired a lawyer on or about April 25, 1995 and did so then "only because the two year limitation period for the first accident was to expire on May 16, 1995".

As for his previous claims experience with ICBC, he acknowledges that he hired a lawyer to assist with a claim that occurred on September 2, 1985, but says he hired the lawyer in March of 1986 only "because I was moving to Ontario temporarily for business purposes, and would be traveling extensively". He believed at the time that a lawyer "should handle the matter in my absence". He deposed that the claim was settled in July of 1986 "without any legal action being commenced". He deposed that he has had "several accidents resulting in ICBC claims over the years" and that he has not hired lawyers to deal with them. In relation to the two accidents that led to the litigation relevant to this inquiry, he deposed that ICBC admitted liability. Last, he deposed that, just after his third accident, ICBC's counsel wrote to him and noted that "it may not be necessary" to engage in litigation with respect to the third accident.

ICBC also relied on the affidavit of Melanie Voight, an ICBC claims adjuster, to support its claim of privilege. Her affidavit attests to her experience with litigious claimants generally and the alleged ability of ICBC adjusters to "often" be able to "assess after an initial meeting or discussion with a claimant whether there is a strong likelihood of litigation". Voight was not involved with the applicant's claim in 1993. To my mind, her evidence as to the alleged perspicacity of ICBC's adjusters is, at the highest, of marginal relevance to the s. 14 issue before me.

ICBC also says it is "evident from the nature of the records, and a review of their content, that their dominant purpose was related to this litigation". In support of this, Robert Beech deposed in his first affidavit, at paragraph 16, as follows:

> I.C.B.C. has claimed privilege with respect to records contained in its own internal files and records from the files from David Anderson and John Greiner on the basis of solicitor-client privilege. The internal records from I.C.B.C. files which predated commencement of the Applicant's first action on April 28, 1995 which remain in dispute in this Inquiry were made in contemplation of litigation based on the discussions of the claims adjuster with the Applicant on May 18, 1993. All of the internal records form I.C.B.C. files which were made after the commencement of the first action which remain in dispute in this inquiry were documents which were created in relation to the ongoing litigation commenced by the Applicant. I.C.B.C. is not prepared to waive solicitor-client privilege with respect to its records withheld from its internal file and the files of David Anderson and John Greiner on the basis of s. 14 of the *Freedom of Information and Protection of Privacy Act* because the litigation with the applicant is not yet complete. An Appeal is scheduled to be heard in June 2000.

Robert Beech is an ICBC information officer who formerly worked as a claims adjuster for ICBC. He was not at any stage involved in any of the applicant's claims or litigation. His only involvement with the applicant has been in the processing of the applicant's access requests and in this inquiry. To be clear, there is no evidence before me that Robert Beech was in any way responsible for, or involved in, the creation of any of the disputed records. It is not clear, therefore, on what basis Beech could depose that the disputed records "were made in contemplation of litigation". Nor is it clear how his evidence supports ICBC's contention that the dominant purpose for creation of these communications was to prepare for, advise on or conduct litigation. His evidence is really just his opinion, based on his review of the records, that the records are privileged. That is, of course, the very issue that I would have had to decide had ICBC not disclosed these records on August 4, 2000. Robert Beech's evidence is, at the very best, of marginal relevance to the s. 14 issue. This comment no relates to Beech's evidence as it touches on all classes of records in this case.

Returning to Michael Vizsolyi's evidence, I have decided that his version of what the applicant told him at the May 18, 1993 meeting about considering retaining a lawyer is to be preferred. Page 12 of the records is Vizsolyi's note to file of the May 18, 1993 meeting. ICBC has now disclosed that record to the applicant. It records the applicant's statement that he was "considering" retaining Simon Margolis @ Bull, Housser & Tupper". Although it appears from this that the applicant at that point was "considering" retaining a lawyer, it does not follow that contemplated litigation privilege attaches to all of the disputed records created on and after the May 18, 1993 meeting. The reasons for this conclusion follow.

According to the applicant, "ICBC has not referred to any specific documents to describe how the privilege attaches, and fails to meet the onus established by" s. 14 in relation to litigation privilege. Relying on the decision in *Hamalainen*, above, he argues that two criteria must be established before a claim of litigation privilege can succeed. First, "the document must have been created for the dominant purpose of litigation". Second, "the litigation must have been a reasonable prospect at the time the document was created". The applicant says the courts "have clearly rejected the proposition that litigation is always contemplated when an insurance claim is filed", citing (among other decisions) the Court of Appeal decision in *Shaughnessy Golf & Country Club* v. *Uniguard Services Ltd. et al.* (1986), 1 B.C.L.R. (2d) 309.

In this case, the applicant says, he cooperated with ICBC throughout the claims process, which involved accidents that were not his fault. The applicant says he "assisted ICBC by providing them with information about the other driver's alleged fraudulent claim about how the accident had occurred". He argues that "any documents prepared prior to April 25, 1995", the date on which he retained a lawyer, "are not privileged, as litigation was not even reasonably probable". Moreover, he says, some of the records in respect of which ICBC claims privilege were created within two weeks after the first accident and, citing *Baus et al.* v. *Middleditch* (1985), 9 C.P.C. (2d) 55 (B.C.S.C.), he argues these records should not be privileged, because ICBC "always creates such documents in order

to assess the circumstances of the accidents". Specifically, the applicant says that ICBC's CL-14 (Estimator's Report as to vehicle damage) form, adjusters' e-mails, a witness statement, bodily injury claims reports and an ICBC CL-341 (Claims Division Group File Review) form are not privileged because they were not created when litigation was in reasonable prospect. Finally, he says ICBC has not made out a valid claim for privilege with respect to two pages of undated records.

The undated records are pages 666 and 776, which are covered by request 8400. ICBC says that, along with other records created after the first 1993 accident, these pages are privileged. ICBC says in its argument that these two pages of records "were created shortly after the first accident", although it is not clear to me what evidence supports that claim. Nor did ICBC provide me with any evidence to establish why they are privileged on the basis they were prepared for the dominant purpose of litigation that was under way or in reasonable prospect at the time of their creation.

The applicant also argues, in his reply submission, that any "document, study or report that would normally be prepared in the usual scope of ICBC's business practices or activities could not have been prepared for the single dominant purpose of litigation". He says that most of the documents at issue here "were not made in the contemplation of litigation but rather to assess the claim for benefits". He also says the following at p. 9 of his reply submission:

> ICBC investigates all claims, and creates all kinds of documents in the normal course of an investigation. Most of these are not created for the dominant purpose of litigation. For example, damage claim forms are not for the dominant purpose of litigation. Further, insurance claimants are required to provide documents. For example, a claimant for Part VII benefits [under the *Insurance (Motor Vehicle) Act*] must provide ICBC with claims forms and, if requested, medical reports.

Moreover, he says, ICBC must also show that the dominant purpose for creation of each of these records was conducting, advising on or preparing for contemplated or existing litigation, even if ICBC has established that litigation was under way or in reasonable prospect at the time each communication was created.

The applicant relies on the following passage from the reasons of Master Brandreth-Gibbs in *Stewart* v. *Nguyen*, [1996] B.C.J. 2162, at paragraph 7:

> The second test is whether, when the document was created, was litigation in reasonable prospect. The above quoted passage from *Hamalainen* v. *Sippola*, found at page 261, shows that the test is not subjective, but objective. It is not whether the adjuster or investigator him or herself (s) thought that litigation was in reasonable prospect. Nor it is to be determined solely on the plaintiff's frame of mind, rather the court is obliged to look at all pertinent information, including that particular to one party or the other, and answer the question on the basis of what a reasonable person would conclude.

In *Stewart*, the plaintiff had applied for an order that the defendants – who were insured by ICBC – produce documents over which the defendants had claimed privilege. The plaintiff's lawyer conceded that the only purpose for creating the disputed documents was for use in litigation. It was argued, however, that the defendants had not provided satisfactory evidence to support their claim that litigation was in reasonable prospect at the time the documents were created.

In support of the claim of privilege, the defendants filed an affidavit sworn by the ICBC adjuster assigned to the plaintiff's claim. The adjuster deposed that, when he first met with the plaintiff, he formed the opinion that she was 'claims conscious' and "was likely to take advantage of ICBC if given the opportunity". The adjuster gave reasons for his having decided the plaintiff was 'claims conscious' (whatever that really means). He also deposed that, during their second meeting, he concluded she was to some extent feigning her injuries. At that meeting, the adjuster and the plaintiff "discussed her retaining a lawyer" and the adjuster deposed that the plaintiff was "contemplating hiring a lawyer and litigation was a reasonable prospect". The adjuster relied on his past experience as an insurance adjuster, as well as his interaction with the plaintiff, in forming the opinion that the plaintiff was exaggerating her injuries and was going to "hire a lawyer to represent her interests in the claim". He was "convinced litigation was more than likely" because the plaintiff spoke about retaining a lawyer and he concluded that she would "litigate her claim". The court nonetheless rejected the privilege claim.

This case bears some similarity to *Stewart*, at least as regards the May 18, 1993 meeting between the applicant and Michael Vizsolyi, which is critical to ICBC's case for privilege over the Post-Accident Records. In *Stewart*, the evidence indicated that the plaintiff had said she might retain a lawyer, but this was not enough on its own to establish a reasonable prospect of litigation. ICBC also claimed in that case that its adjuster was able, based on past experience to divine when a claimant was likely to litigate the matter.

Each case must, of course, be addressed on the basis of the evidence in the case: I am not bound to follow *Stewart* here. On the evidence in this case, even if I were to accept, as I would be inclined to do, that the applicant told Michael Vizsolyi that he was considering hiring a lawyer, I would not be persuaded that this fact alone raised a reasonable prospect of litigation as at May 18, 1993. Nor would the rest of ICBC's affidavit evidence persuade me otherwise.

My review of the records created by ICBC at that time indicates that the dealings between the parties after the May 18, 1993 initial meeting were consistent with the ordinary progress of a claim. Notes made by ICBC staff of their various conversations with the applicant in June, July and September of 1993 are not indicative, to my mind, of any reasonable prospect of litigation. The fact that ICBC continued to deal directly with the applicant two months after the initial meeting – with no mention of legal representation or any other plausible indicators of litigation then being in reasonable prospect – in my view supports the conclusion that ICBC has not demonstrated a reasonable prospect of litigation from and after the May 18, 1993 meeting. ICBC did not adduce any other evidence that would be sufficient to establish a reasonable prospect of

litigation at any time between the May 18, 1993 meeting and the date on which the applicant retained counsel some two years later.

Nor am I persuaded that other factors relied upon by ICBC would be sufficient to establish, viewed objectively, that there was a reasonable prospect of litigation beginning at May 18, 1993. Even if one considers them jointly, I do not think that the fact of the applicant's previous claim involving ICBC some eight years before, the fact that the applicant declined to sign the statement preferred by Vizsolyi at the meeting, or that he said he might consult a lawyer, are sufficient to establish that litigation was then in reasonable prospect. Quite apart from the applicant's explanation that his medical condition caused him to hesitate before signing the statement, I do not think any adverse inference can be drawn from the fact that he wished to take time to review a statement in order to ensure that it was accurate.

In light of all of the evidence on this point, I would not find that litigation was in reasonable prospect in the aftermath of the May 18, 1993 meeting between the applicant and Michael Vizsolyi. Nor would I find that ICBC has established that, even if one assumes litigation was in reasonable prospect from and after that meeting, the dominant purpose for the creation of any or all of the Post-Accident Records was to conduct, assist in or advise upon any such litigation. ICBC has not provided any direct evidence from the creators of the various records that each record was prepared for the dominant purpose of conducting, assisting or advising upon litigation underway, or in reasonable prospect, at the time it came into existence.

ICBC argued instead that the records themselves disclose that their "dominant purpose was related to this litigation", such that they are privileged. In Order 00-39, I accepted that a record can itself be direct evidence respecting facts in issue. In this case, however, the records themselves do not, on their own, provide the necessary direct support for ICBC's claim of privilege.

A number of the records are standard forms on which ICBC employees made notes about the applicant's accidents or his subsequent personal injury claims. For example, record 666 is an undated CL-14 Estimator's Report, on which the estimator noted

> Very minor impact. Isolator has <u>not</u> bottomed out on right side. [emphasis in original]

ICBC withheld this information under ss. 14 and 17. Its evidence in this inquiry did not provide any basis for application of these exceptions to this record specifically. Its evidence was much more general and really dealt with the records as a class.
This and other similar records appear on their face to be routine and workaday; their contents speak to work done by ICBC in processing an accident claim, not to work undertaken for the dominant purpose of litigation then in reasonable prospect.

Indeed, to the extent records such as the CL-14 are created by ICBC employees in the ordinary course of processing a claim, it is difficult to see how, in general, they could be said to have been created for the *dominant purpose* of preparing for, conducting or

advising on litigation (even if litigation is then in reasonable prospect). Such records, it seems to me, ordinarily would be created for the purpose of claims processing, not the dominant purpose of litigation. It may be that ICBC could show, on evidence it provides in a specific case, that a particular CL-14 form or other standard ICBC document is covered by litigation privilege. But the evidence would have to show that both elements of the litigation privilege test have been met in relation to such a record.

Are the Post-Writ Request 8400 Records Privileged?

The second class of records contains records covered by request 8400, *i.e.*, the records numbered 3, 822-835, 876-883, 1546, 1548, 1551, 1573a, 1623 and 1624 (collectively, "Post-Writ Records"). This class contains records that came into existence after the applicant commenced litigation in April of 1995. ICBC's further disclosure of August 4, 2000 included these records. If it were necessary to do so, I would have found that most of these records were not privileged.

ICBC says these records are all protected by litigation privilege because, as ICBC puts it at paragraph 42 of its initial submission:

> These are internal communications generated by the public body which are comprised of prior claims reports, claim file folders containing hand-written notes, adjuster file notes and a draft copy of the Greiner expert report.

The Post-Writ Records are privileged, ICBC says, because the "majority" of them was "created or acquired subsequent to the commencement of the first action [by the applicant] on April 28, 1995 and related directly to the litigation". ICBC says it is "evident from the nature of the records and a review of their content that their dominant purpose was related to this litigation".

In support, ICBC relies on the affidavit of Robert Beech, paragraph 16 of which is quoted above. I have already noted that Robert Beech's evidence is of little assistance on the privilege issue. Review of those records reveals, however, that some of them were created after the applicant commenced litigation and that, on their face, they were created for the purposes of that litigation. Pages 822-835 comprise a draft of the expert report by John Greiner. Pages 876-883 comprise a letter from Greiner to ICBC's litigation counsel for the purpose of assisting counsel in dealing with the case. Those records would be covered by litigation privilege. So would page three, which contains notes respecting ICBC's dealings with the applicant's litigation counsel after May of 1995.

Conversely, the contents of pages 1546 and 1548, which are ICBC administrative notes respecting transfers of file responsibility and the like, were not on their face created for the dominant purpose of conducting litigation. Pages 1623 and 1624 are apparently routine file notes respecting the facts of another accident involving the applicant. The contents of those pages disclose no basis for a finding that litigation privilege applies to them.

Are the 9542 Records Privileged?

The third class of records contains records covered by request 9542, being the records described on page 4 of the amended Portfolio Officer's Fact Report ("9542 Records"). These records were located in the files of ICBC's lawyer, at his offices, and largely contained records relating to expert witnesses.

At paragraph 44 of its initial submission ICBC says the following about the 9542 Records:

> The majority of the records were contained in the defence file of the public body's legal counsel. These records are comprised of notes by defence counsel of discussions with the independent adjuster [retained by ICBC] concerning potential trial witnesses, various draft copies of Mr. Greiner's expert report (some containing handwritten notes by counsel), a report from Jonathan Gough of Baker Materials Engineering Ltd. addressed to defence counsel, notes prepared by Mr. Greiner for defence counsel in relation to potential examination questions for trial, and counsel's notes for direct and cross examination at trial. All of these documents are properly excepted from disclosure on the basis of contemplated litigation privilege and form part of the solicitor's brief.

To support its position on this issue, ICBC also filed an affidavit sworn by David Anderson, the lawyer who represented ICBC in two British Columbia Supreme Court actions brought by the applicant, against ICBC's insured, respecting two accidents involving the applicant. Paragraph 9 of that affidavit reads as follows:

> On June 28, 1999, I attended at Mr. Beech's offices to review the package of material which he proposed to withhold on the basis of ss. 14 and 17 of the Act and the package which he proposed to release to the Applicant. I confirm all the information that Mr. Beech severed or withheld from my defence file is subject to solicitor–client privilege.

The last sentence of that paragraph is, of course, a statement of opinion as to the very issue I must decide in this inquiry in relation to the contents of the "defence file". At paragraphs 10 through 13 of his affidavit, Anderson further deposed "that all the documents contained in my defence file were generated in the course of legal advice and representation to ICBC in regards to the two actions commenced by the applicant". He deposed that John Greiner had been obtained as an expert accountant to provide an opinion on the applicant's claim for wage loss and that Baker Materials Engineering Ltd. had been retained to provide an expert opinion for the purposes of the litigation.

Anderson deposed that, on June 4, 1999, in response to a request from ICBC, he forwarded his "entire defence file" to ICBC for the purposes of responding to the applicant's access request. Anderson also deposed, at paragraph 10, that

> ... all the documents contained in my defence file were generated in the course of providing legal advice and representation to I.C.B.C. with regard to the two actions commenced by the Applicant. Many of the records were communications

> directly between my office and I.C.B.C. for the purposes of providing legal advice. The records contained in my defence file with respect to communications with Linda Smith, an independent adjuster, related to investigations for trial. The records contained in my defence file with respect to communications with Jonathan Gough, an engineer at Baker Materials Engineering Ltd., and John Greiner, related to an assessment of the applicant's expert reports and the preparation of expert reports for I.C.B.C. for use in the litigation.

He also deposed, at paragraphs 12 and 13, that all of these communications were intended to be, and remain, confidential:

> 12. I confirm that I tendered Mr. Greiner as an expert accountant to provide an opinion on the Applicant's claims for wage loss at the trial. The applicant's counsel did not request copies of my instructions to Mr. Greiner for preparation of the report, notes of my discussions with Mr. Greiner, or draft copies of his expert report or analysis either prior, during or subsequent to trial.
>
> 13. I confirm that I retained Baker Materials Engineering Ltd. on behalf of I.C.B.C. to assess the two expert reports produced by Craig Luker, Eng., on behalf of the Applicant. Although Mr. Gough prepared a report for I.C.B.C which I served on the Applicant's counsel prior to trial, it turned out to be unnecessary to tender the report or Mr. Gough as a witness at the trial. The Applicant's counsel did not request copies of my instructions to Mr. Gough for preparation of his report or notes of my discussions with Mr. Gough either prior to, during or subsequent to trial. There were no earlier drafts of the report**.**

For its part, ICBC says the contents of Anderson's defence file formed "part of the solicitor's brief" and, citing the Court of Appeal decision in *Hodgkinson* v. *Simms* (1989), 33 B.C.L.R. (2d) 129, argued that the courts have "emphasized the importance of maintaining the sanctity of a solicitor's brief, which has historically been inviolate". *Hodgkinson* dealt with a question of privilege in relation to copies of otherwise unprivileged documents, with privilege being claimed on the basis that the use of skill and judgement by a lawyer in deciding which documents to copy cloaked the copies with privilege as part of the solicitor's brief. The essential question here, of course, is whether the 9542 Records are each privileged because they were created for the dominant purpose of preparing for, advising upon or conducting litigation then in reasonable prospect or underway.

ICBC says the 9542 Records copied from John Greiner's file are privileged because they are derivative communications between a third party and ICBC's lawyer for the purpose of trial preparation. Similarly, ICBC says draft expert reports and notes of discussions respecting Jonathan Gough are privileged and need not be disclosed. ICBC acknowledges that its lawyers delivered a copy of Gough's expert report to the applicant's trial counsel but says that because neither Gough nor his report were tendered at trial, ICBC is still able to claim privilege for the materials just described. According to ICBC, the fact that Greiner testified at trial as an expert witness does not mean that privilege over the materials just described in relation to Greiner has been waived. The

applicant argues that Greiner's testimony at trial means privilege over records created by him has been lost.

In light of ICBC's affidavit evidence, and my review of the 9542 Records, I would find that they are subject to litigation privilege and that ICBC was authorized to withhold them under s. 14. It is clear these records were created for the dominant purpose of advising on or conducting the litigation then underway involving the applicant. I deal with the issue of waiver of privilege below, after addressing the last class of records.

Are the Request 9588 Records Privileged?

The fourth class of records, which consists of those identified in Part 3 of the Appendix to this order (collectively, "9588 Records"), have been withheld entirely on the basis of s. 14 of the Act. As is noted above, ICBC originally withheld these records on the basis of litigation privilege. In its August 3, 2000 letter, ICBC changed its position and advanced s. 14 on the basis that these records are, with one exception, privileged communications between solicitor and client. The affidavit evidence, and the records themselves, support this contention (as they do ICBC's original submission, that litigation privilege applies to these records).

In response to an invitation I made, the applicant made further submissions respecting ICBC's late claim of solicitor client privilege for the 9588 Records. The applicant argued that not all communications between a lawyer and her or his client are privileged. Only communications for the purpose of seeking or giving legal advice are privileged. He also argued that facts are not privileged and that once litigation has ceased, third party communications covered by litigation privilege cease to be privileged. On the last point, the applicant relies on *Bouliann* v. *Flynn*, [1970] 3 O.R. 84 (H.C.J.).

I also find that the communications between ICBC and its lawyer are privileged solicitor-client communications protected under s. 14. In light of this finding, it is not necessary for me to consider whether the end of the applicant's litigation against ICBC means litigation privilege has ceased. Litigation privilege ends with the cessation of the litigation for which a record was created, as I acknowledged in Order 00-08, but legal professional privilege does not end that way.

Has There Been a Waiver of Privilege Over Experts' Materials?

It was argued that, by calling certain expert witnesses at trial, ICBC waived any privilege over associated records. In light of ICBC's discretionary disclosure of the records over which it claimed litigation privilege, I do not have to decide that issue in this inquiry. The following discussion deals with that issue, however, since it may arise again in another inquiry.

ICBC relies on the judgement of Finch J. (as he then was) in *Vancouver Community College* v. *Barratt*, [1997] B.C.J. 3149, for the proposition that the fact an expert has testified at trial does not necessarily mean preliminary reports and communications

between expert and counsel are no longer privileged and must be produced. ICBC says *Barratt* stands for the proposition that there is, at most, "a rebuttable presumption of waiver in cases where production has been sought" of an expert witness's documents. This does not, ICBC says, mean that *Barratt* requires "automatic disclosure of draft reports and notes of discussions of experts who are tendered as witnesses at trial". The rule is discretionary, ICBC argues, and therefore must be applied on the basis of fairness and consistency in the circumstances in each case. ICBC also relies, on this point, on the judgement of McEachern C.J.S.C. (as he then was) in *Delgamuukw* v. *British Columbia* (1998), 55 D.L.R. (4th) 73, and the decision in *Bell Canada* v. *Olympia and York Ltd.* (1988), 36 C.P.C. (2d) 93 (Ont. H.C.J.).

Although ICBC concedes that, where a draft expert report has been ordered to be produced at trial, a public body cannot later rely on s. 14 to withhold disclosure under the Act, it says *Barratt* and *Delgamuukw* dealt with situations where disclosure of draft expert reports and notes was expressly sought by another party. ICBC distinguishes this case on the basis the applicant "did not seek production of the draft expert reports or notes during the course of the trial", which means ICBC had no opportunity to address the issue of implied waiver or to make submissions to the trial judge on whether or not disclosure would be fair in the circumstances of the litigation. As ICBC sees it, waiver only applies in situations where an expert witness has testified and where "production of the expert's draft reports and notes" has been sought. ICBC says that for the applicant to now claim that there has been a waiver of privilege would "blind side" it. According to ICBC, such a finding of waiver in the context of this inquiry would be unfair and inconsistent with the treatment of other experts at the applicant's trial.

The applicant argues that *Barratt* is authority for the proposition that it "is well established in British Columbia that once an expert is called to testify, that privilege is lost with respect to the expert's papers". The passage from *Barratt* relied on by ICBC, he argues, must be placed in its proper context. He cites the following passage from p. 6 of *Barratt*:

> It is fair that expert witnesses should be thoroughly cross–examined on all matters touching the weight of the evidence they offer. In our system, that is the accepted method of getting at the truth. It would not, however, be fair to require the witness to deliver up papers that are wholly irrelevant, either to the substance of his opinion or to his credibility. For example, papers concerning his personal affairs remain his own and are no one else's business. Similarly, the expert may be doing work for other persons not party to the litigation. He should not be required to disclose their secrets. As well, in the litigation in which the witness is called to testify, he may remain a confidential advisor to the party who retained him in, at least, one respect. He may be asked or may have been asked to give advice on how to cross–examine the other side's witnesses. In putting forward his own opinion, he need not necessarily attack the opinions of experts opposite. Counsel may wish to save that sort of ammunition until after the adverse expert has been called. It would not be fair to require the witness to disclose documents relating only to the cross–examination of such adverse experts because it would give the other side an advantage not available to the party calling evidence on a subject matter first.

> There are, no doubt, other examples of what may or may not be considered fair in other circumstances, but I believe those I have given will suffice for present purposes.

When Finch J. referred to "production" of such records in *Barratt*, he referred to whether or not production ought, in the interests of fairness and consistency, to be ordered at trial.

The applicant argues against ICBC's submission that failure to apply for production of the disputed records during the trial prevents him from doing so under the Act, on the basis that s. 14 of the Act incorporates the common law rules on solicitor client privilege in such a way that the issue is appropriately determined in this inquiry. ICBC's argument, the applicant submits, amounts to an attempt by ICBC "to adopt only part of the common law and reject others", as best suits ICBC alone. At the same time, the applicant acknowledges the Gough report was not admitted in evidence at trial, but points out that the report itself was provided to the applicant's trial counsel.

If it were necessary to do so, I would be inclined to find in ICBC's favour on this point, in this case at least. I do not think *Barratt* assists the applicant in this instance. Were it necessary to do so, I would find that ICBC has not, and should not be taken to have, waived privilege because it called one of its experts to the stand at trial.

3.4 Financial or Economic Harm To ICBC – ICBC initially relied also on s. 17 of the Act in refusing to disclose information to the applicant. In light of ICBC's August 3, 2000 decision to abandon its s. 17 case respecting most of the records, anything I say about the merits of its position applies only to the 9588 Records, which are in any case privileged under s. 14. My discussion of s. 17 is, therefore, strictly by way of observation only. Had it been necessary to do so, I would have found against ICBC on the s. 17 issue respecting all records in this case.

In support of its case, ICBC specifically cited s. 17(1)(e) of the Act, which reads as follows:

> 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:
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

ICBC argued that disclosure of information it withheld under s. 17(1) could reasonably be expected to harm its financial interests because the information is used by ICBC "in the development, implementation and monitoring of insurance claim negotiating and defence strategies". ICBC says the records withheld under s. 17 include:

- notes, correspondence and other communication and negotiating defence strategy,

- notes on discussions and telephone calls and the results of inquiries related to the legal action and settlement discussions,

- investigative materials (including draft expert reports and prior claims reports), and

- communications and advice between solicitor and client.

ICBC relies on the affidavit of John McGrath, who is a Senior Manager of Bodily Injury Technical Services and Injury Research. He deposed that he is responsible for coordinating technical support for approximately 400 ICBC adjusters who handle injuries claims. Since ICBC's argument respecting s. 17 relies on and closely follows McGrath's evidence, paragraphs six through nine of that affidavit merit quotation:

> 6. I believe that disclosure of the portions of the Records in Dispute severed or withheld under s. 17 of the Act could reasonably be expected to harm the financial and economic interests of I.C.B.C. because it could enable the Applicant and his counsel to obtain information about the negotiating and defence strategy of I.C.B.C. This information could enable the Applicant or his counsel to compare claim settlement offers with sensitive negotiating and defence strategy information. This would give the applicant a negotiation advantage. While the Applicant and his counsel would have access to sensitive information concerning I.C.B.C.'s negotiation and defence strategies, I.C.B.C. would have no corresponding access to the negotiation and defence strategy information of the Applicant.
>
> 7. I believe that disclosure of the portions of the Records in Dispute withheld or severed under s. 17 of the Act could reasonably be expected to give the Applicant and his counsel valuable information on the negotiating policies, guidelines, and practices used by I.C.B.C. to settle claims out of court in a cost-effective, yet fair and just manner.
>
> 8. I believe that disclosure of the portions of the Records in Dispute withheld or severed under s. 17 of the Act could reasonably be expected to have the effect of significantly reducing the recording of information related to negotiation and defence strategy in relation to claims files. There would no longer be a zone of confidentiality in which I.C.B.C. employees and claims adjusters would be able to develop information, recommendations, and advice related to the negotiation and defence of a particular claim. This could jeopardize the ability of I.C.B.C. to effectively negotiate claims.
>
> 9. It is difficult to quantify with precision the economic impact that disclosure of the portions of the Records in Dispute withheld or severed under s. 17 of the Act could have on I.C.B.C. Third party bodily injury claim payouts totaled $960 million in 1998 and $1.02 billion in 1997 for an average of $990 million. If disclosure of the above types of information to lawyers and their clients increased claims payouts on this and other files by one percent, then I.C.B.C. would suffer cumulative economic harm of $9.9 million. From a business perspective this

> amount is very significant. Based on my experience, I believe that disclosure of the above referenced types of information could easily increase claim payouts by one percent.

ICBC argues, at paragraph 61 of its initial submission, that disclosure of this information would

> ... provide the Applicant with a technical advantage as he would have access to sensitive information concerning ICBC's defence strategy, while the public body would have no corresponding access to the Applicant's litigation or negotiation strategy.

ICBC also contends that disclosure of the contents of its files in relation to the applicant's personal injury claims would *generally* harm ICBC's interests. This argument is found in paragraph 62 of ICBC's initial submission:

> Information of this nature also transcends the interests of the parties to this inquiry. Once the information is in the public domain, it may be used in other negotiations and litigation related to loss payouts conducted by the Applicant's counsel and others. Disclosure of the information could reasonably be expected to provide the Applicant and his counsel with valuable information regarding the negotiating policies, guidelines and practices used by I.C.B.C. to settle and litigate claims.

Moreover, ICBC contends, disclosure of this information could reasonably be expected to "reduce the recording of information relating to negotiation and defence strategy in relation to claims files" generally. This would hamper the ability of claims adjusters to "properly assess, monitor, and review their negotiating and defence strategy for a particular claims file". This would, generally, compromise ICBC's ability to negotiate and litigate claims.

The applicant's s. 17 argument is novel. He argues that s. 17(1) "was not intended to apply to cases where individuals are seeking monetary" or other redress. The Legislature intended, the applicant says, "to protect information at a macro level, not in individual dispute resolutions". He cites in support two orders issued under Ontario's access to information legislation, Order P-441 and Order P-1190. He candidly "recognizes that this argument takes a different view" of s. 17 than several of my predecessor's decisions respecting s. 17.

It might also be noted that this approach differs from the approach I have taken to s. 17 in a number of orders and I do not find it persuasive. Despite the views expressed in the Ontario orders referred to above, I see no basis in the express language of s. 17(1) on which the applicant's argument can be supported. To the contrary, it would be a mistake, in my view, to make the distinction advanced by the applicant.

This does not mean ICBC has made its case under s. 17(1). To the contrary, I find ICBC's evidence on this point – and it bears the burden of proof here – to be troubling. The standard of proof to be applied in such cases is found in the language of s. 17(1). As

I noted in Order 00-24, the standard in s. 17(1) is that of a reasonable expectation of harm. The feared harm must not be fanciful, imaginary or contrived and evidence of speculative harm will not satisfy the test, although it is not necessary to establish a certainty of harm. The quality and cogency of the evidence presented must be commensurate with a reasonable person's expectation that disclosure of the requested information could cause the harm specified in s. 17(1).

I have scrutinized ICBC's evidence and argument – and the disputed records – with care and deliberation and have decided that ICBC's evidence in this case falls short of the standard of proof engaged by s. 17. ICBC has not persuaded me that the specific, or generalized, harms referred to in its argument and evidence could reasonably be expected to flow from disclosure of the disputed records. ICBC's case on s. 17 amounts to a series of generalized speculations about possible injuries to its interests in relation to the applicant's claim and generally.

John McGrath's evidence as to his beliefs about the consequences of disclosure suffers from two weaknesses. First, the evidence speaks to *all* of the "portions of the Records in Dispute severed or withheld under s. 17" without particularizing how disclosure of any specific information in any one or more of these records could reasonably be expected to harm ICBC's interests as contemplated by s.17.

Second, and more fundamentally, ICBC does not explain *how* disclosure of any information in the records can be linked to the harms John McGrath identifies. For example, in paragraphs 6 and 7 of his affidavit, McGrath deposes that disclosure of information in the records could harm ICBC in its dealings with the applicant. This is because disclosure of information – which information he does not say – could give the applicant "a negotiation advantage", since he and his counsel would obtain "information about the negotiating and defence strategy of I.C.B.C." and could then "compare claim settlement offers with sensitive negotiating and defence strategy information".

My review of the information revealed nothing that could readily be identified as comprising, or revealing, 'negotiation strategy' or 'defence strategy'. Much of the information is, to all appearances, factual information (in standard forms) about the processing of the applicant's claims. Even if ICBC had established that negotiations with the applicant were, at any relevant time, either underway or in reasonable prospect, and it did not do so here, ICBC has not provided me with any evidence as to which pieces of disputed information constitute "sensitive negotiating and defence strategy information". Had it wished to do so, it could have done so *in camera*, in accordance with the procedure laid out in the Notice of Written Inquiry issued by this Office. In the absence of specific evidence about how this information could be said to constitute information about ICBC's "negotiating and defence strategy", I decline to speculate in ICBC's favour.

Similarly, in paragraph 7 of his affidavit, John McGrath deposed that disclosure of information could reasonably be expected to give the applicant and his counsel "valuable information on the negotiating policies, guidelines, and practices used by ICBC to settle

claims out of court in a cost–effective, yet fair and just manner". ICBC has not provided me with evidence as to which information in the records would disclose "policies", "guidelines" or "practices" used by ICBC generally to settle claims or to attempt to settle the applicant's claims.

Nor am I persuaded by ICBC's argument that disclosure of the disputed information could reasonably be expected to harm its financial or economic interests more generally. In paragraphs 8 and 9 of his affidavit, McGrath speculates that – although it "is difficult to quantify with precision the economic impact" disclosure of the information here would have – his "experience" allows him to say the harm to ICBC could be $9.9 million. This impact would allegedly flow from the fact that disclosure of the information in these particular records "could reasonably be expected to have the effect of significantly reducing the recording of information related to negotiation and defence strategy in relation to claims files". He deposed there

> … would no longer be a zone of confidentiality in which I.C.B.C. employees and claims adjusters would be able to develop information, recommendations, and advice related to the negotiation and defence of a particular claim.

The Act does not recognize, even implicitly, a separate, substantive 'zone of confidentiality'. At best, that phrase is useful shorthand for the outcome where one or more of the Act's exceptions to the right of access applies to a record. The evidence in each case will govern, record by record. The approach taken by ICBC here – as exemplified in the evidence of John McGrath – approaches an attempt to persuade me that certain information should enjoy a class-based exemption for records generated by ICBC employees in the discharge of their claims-processing functions. That kind of exception could only be created by the Legislature, which has not done so.

To be clear, the fact that I am not persuaded that s. 17 applies in this case does not mean that s. 17 (or other sections) will not apply to the contents of similar ICBC files in other cases. Section 17, or other exceptions under the Act, will only apply where information in a record merits protection under that exception. If the party bearing the burden of proof fails to persuade me that one of the Act's exceptions applies in a particular case, as here, no larger lesson can be drawn from that.

3.5 Protection of Personal Privacy – ICBC has refused to disclose third party personal information found in eight pages of records. This is not affected by ICBC's further disclosure of records on August 4, 2000. Personal information is still in issue under s. 22.

That section requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. The records in issue here comprise five pages of handwritten notes, taken by various ICBC employees involved with the applicant's claim, on CL-80 (Adjuster File Summary) forms and a two-page typewritten witness statement signed by a witness. In support of its position, ICBC cites ss. 22(2)(c) and (e), which read as follows:

> (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,
> …
>
> (e) the third party will be exposed unfairly to financial or other harm.

ICBC has withheld these pages of records – each of which was covered by request 8400 – it says, because the handwritten file notes refer "to the names of various third parties having some nexus to one of the accidents in which the applicant was involved". ICBC says the witness statement "is a statement from a third party containing that individual's driver's licence number, residential address, employment information and other third party personal information as defined in the Act". ICBC notes that the burden of proof under s. 22(1) is, by virtue of s. 57(2) of the Act, on the applicant and argues that "the applicant has failed to discharge the burden of demonstrating that" this information can be disclosed without unreasonably invading third party personal privacy.

Beginning with the third party witness statement, comprised in pages 1524 and 1525, I fail to see how the content of that statement qualifies as third party "personal information" protected by s. 22. ICBC has cited paragraph (a) of the Act's definition of "personal information", found in Schedule 1 to the Act. It provides that an "individual's personal views or opinions, except if they are about someone else" are personal information of that individual. The witness statement does not, in my view, express "personal views or opinions" of the third party witness. It is a statement of fact provided by the third party respecting the circumstances of an accident. It is not, by that token, third party personal information within the meaning of the Act. Even if it were personal information, I do not see how its disclosure to the applicant – who was involved in the accident in question – would unreasonably invade the personal privacy of the witness. As exceptions to this, the statement contains the third party's residential address and driver's licence number. This information is personal information and, although it does not fall under any of the presumed unreasonable invasions of personal privacy in s. 22(3) of the Act, I am not persuaded that it can be disclosed to the applicant. I am, however, persuaded that the balance of the information in these two pages cannot be withheld under s. 22(1) of the Act.

There may be cases where a witness statement of this kind contains personal information of a witness, such that s. 22 considerations arise. But an individual's statements as to his or her perceptions of what happened in an accident (including who said what at the time, about fault or other accident-related matters) do not by any stretch qualify as personal information of that witness.

As for pages 8-12 and 19 of the disputed records, I find that only minor portions of pages 10, 11 and 19 must be withheld under s. 22(1). Most of pages 8-12 and 19 contain either notes to file about internal ICBC actions with respect to the applicant's claim or notes of conversations with the applicant himself. These aspects of the records cannot, in my view, properly be characterized as personal information of any third party. To the contrary, to the extent the handwritten notes contain views or opinions about the applicant, they qualify as his personal information. As an exception to this, pages 10, 11 and 19 contain some information about third parties not related to the applicant's accident or claim in any direct way. I am persuaded that they cannot be disclosed to the applicant.

Those portions of the above described records that must be withheld by ICBC under s. 22(1) have been noted on copies of those pages delivered to ICBC with its copy of this order.

4.0 CONCLUSION

For clarity, ICBC's August 4, 2000 disclosure of the records in dispute in requests for review 8400 and 9542 means no order is called for in relation to those records, except as regards the s. 22(1) issue.

For the reasons given above, the following orders are made:

1. Under s. 58(2)(a) of the Act, subject to paragraph 2 below, I require ICBC to give the applicant access to the information it withheld from the 9588 Records under s. 17 of the Act;

2. Under s. 58(2)(b) of the Act, I confirm the decision of ICBC to refuse, under s. 14 of the Act, to give the applicant access to the 9588 Records; and

3. Under s. 58(2)(c) of the Act, I require ICBC to refuse to disclose, under s. 22 of the Act, the personal information shown on the copies of pages 10, 11, 19, 1524 and 1525 of the request 8400 records delivered to ICBC with its copy of this order.

September 25, 2000

Original signed by

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX
TO ORDER 00–42

PART 1 (OIPC 8400)

SEVERED PAGES		
Pages	**Sections of Act Applied**	**Description of Records**
666	14, 17	c1–14 form, comment on estimator's report
774a	14, 17	bodily injury prior claims report, printed May 20, 1993
776	14, 17	handwritten notes referring to applicant
1573a	14, 17	bodily injury prior claims report, printed August 14, 1996
ENTIRELY WITHHELD PAGES		
Pages	**Sections of Act Applied**	**Description of Records**
3	14, 17	claims work management system (cwms) notes of file activities, printout dated January 12, 1999
8–12, 19	14, 15, 17, 19, 22	c1–80 forms, dated handwritten notes to file
615, 616	14, 17	e-mails between adjusters, May 18, 1993
621, 622	14, 17	CL–341 form, file review, December 2, 1993
822–835	14, 17	expert witness report, financial, John Greiner to ICBC counsel, July 31, 1998
876–883	14, 17	expert witness report, financial, John Greiner to ICBC counsel, January 14, 1997
1524, 1525	14, 17, 22	statement of other driver, May 17, 1993
1546	14, 17	c1–80 forms, dated handwritten notes to file
1548	14, 17	claims work management system (cwms) notes of file activities, printout dated January 12, 1999
1551	14, 17	bodily injury prior claims report, printed June 18, 1996
1623, 1624	14, 17	claims work management system (cwms) notes of file activities, printout dated January 12, 1999

PART 2 (OIPC 9542)

ENTIRELY WITHHELD PAGES		
Pages	**Sections of Act Applied**	**Description of Records**
647–650	14, 17	notes about independent adjuster and potential trial witnesses
657–659	14, 17	notes about independent adjuster and potential trial witnesses
660–676	14, 17	expert witness report, financial, John Greiner to ICBC counsel, August 20, 1998
2672–2675	14, 17	notes about independent adjuster and potential trial witnesses
2787–2794	14, 17	expert witness report, engineering, Baker to ICBC Counsel, August 17, 1998
4334–4344	14, 17	expert witness report, financial, John Greiner to ICBC counsel, January 14, 1997
4608–4628	14, 17	expert witness report, financial, John Greiner to ICBC counsel, August 21, 1998
4820–4851	14, 17	expert witness report, financial, John Greiner to ICBC counsel, August 20, 1998
5563	14, 17	expert witness information, financial, John Greiner to ICBC counsel,
5651	14, 17	notes about independent adjuster and potential trial witnesses
5654–5665	14, 17	Independent adjuster report referring to potential trial witness, August 20, 1998
5951–5953	14, 17	expert witness information, financial, John Greiner to ICBC counsel
5960–5963	14, 17	expert witness information, financial, John Greiner to ICBC counsel
6089	14, 17	notes about John Greiner expert witness report
6100	14, 17	notes about Parks expert witness report
6142–6148	14, 17	notes about Parks expert witness report

6154–6170	14, 17	notes about Parks expert witness report
6177–6179	14, 17	notes about Parks expert witness report
6183	14, 17	note referring to expert witness reports and litigation issues
6211–6214	14, 17	expert witness information, financial, John Greiner to ICBC counsel
6216–6219	14, 17	notes about Parks expert witness report
6271	14, 17	page from Parks financial report with notations
6278–6292	14, 17	expert witness report, financial, John Greiner to ICBC counsel
6293–6300	14, 17	expert witness report, financial, John Greiner to ICBC counsel, January 14, 1997
6301–6303	14, 17	notes of John Greiner, expert witness
6314	14, 17	notes of John Greiner, expert witness
6315	14, 17	financial statement index
6333	14, 17	financial statement index
6350	14, 17	financial statement index

SEVERED		
Pages	**Sections of Act Applied**	**Description of Records**
6308	14, 17	notation on financial analysis
6356	14, 17	notation on financial statement index
6358	14, 17	notation on financial statement
6491	14, 17	notation on financial analysis
6497	14, 17	notation on financial analysis

6521	14, 17	notation on financial analysis

PART 3 (OIPC 9588 (COMBINED WITH OIPC 9894))

PAGES ENTIRELY WITHHELD		
Pages	**Sections of Act Applied**	**Description of Contents**
2–3	14, 17	defence and investigation material
18–20	14, 17	defence and investigation material
25–27	14, 17	defence and investigation material
34–36	14, 17	defence and investigation material
41–43	14, 17	defence and investigation material

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

Order 00-42

CORRECTION

INQUIRY REGARDING ICBC PERSONAL INJURY CLAIMS RECORDS

David Loukidelis, Information and Privacy Commissioner

October 4, 2000

By a letter dated September 29, 2000, counsel for the applicant in the above matter expressed concern about the order I made in paragraph 3, under heading 4.0, on page 32 of Order 00-42. It is apparent that the order made in paragraph 3 is not sufficiently specific as to the sub-sections of section 58(3) of the *Freedom of Information and Protection of Privacy Act* involved. This error was purely inadvertent. It has been corrected, such that paragraph 3 now reads as follows:

3. Because I have found that ICBC is only required by s. 22(1) of the Act to refuse to disclose some of the information it withheld under that section on pages 10, 11, 19, 1524 and 1525 of the request 8400 records, the following orders are made:

   (a) under s. 58(2)(c) of the Act, I require ICBC to refuse to disclose, under s. 22(1) of the Act, the personal information shown on the copies of pages 10, 11, 19, 1524 and 1525 of the request 8400 records delivered to ICBC with its copy of this order; and

   (b) under s. 58(2)(a) of the Act, I require ICBC to disclose to the applicant the rest of the information it withheld from pages 10, 11, 19, 1524 and 1525 of the request 8400 records.

October 4, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia