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

Order 00-50

INQUIRY REGARDING ICBC RECORDS

****** This Order has been subject to Judicial Review ******

David Loukidelis, Information and Privacy Commissioner
November 9, 2000

Quicklaw Cite: [2000] B.C.I.P.C.D. No. 54
Order URL: http://www.oipcbc.org/orders/Order00-50.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: Applicant sought records from ICBC related to personal injury claims he had made, some of which resulted in litigation. ICBC did not succeed in s. 14 or s. 17 claims for some of the records. ICBC is required in each case 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: solicitor client privilege – contemplated litigation – reasonable expectation of harm – personal privacy – unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 17(1)(e) and 22(1), 22(2)(a) and (c).

Authorities Considered: B.C.: Order No. 6-1994; Order 00-02; Order 00-42.

1.0 INTRODUCTION

This order results from the inquiry conducted by the Executive Director of the Office of the Information and Privacy Commissioner ("Executive Director") concerning an

applicant's request for review of a decision of the Insurance Corporation of British Columbia ("ICBC").

2.0 DISCUSSION

On August 16, 1999, I delegated the authority to conduct inquiries to the Executive Director pursuant to s. 49 of the *Freedom of Information and Protection of Privacy Act* ("Act"). Although s. 49 authorizes delegation of authority to conduct inquiries under s. 56 of the Act, it does not authorize delegation of my authority to make orders under s. 58.

The Executive Director conducted the inquiry in this matter. I took no part in the inquiry. The Executive Director prepared a report respecting the inquiry, a copy of which is appended to this order. After receiving the Executive Director's report, I reviewed the filed material and the records in dispute. I have adopted the Executive Director's recommendations, without variation, in this order and this order executes her findings and recommendations.

3.0 CONCLUSION

For the reasons given in the Executive Director's report:

1. (a) Under s. 58(2)(a) of the Act, subject to paragraph 1(b) below, I require ICBC to give the applicant access to some of the information it withheld under s. 14 of the Act, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

   (b) 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 remainder of the information it withheld, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

2. (a) Under s. 58(2)(a) of the Act, subject to paragraph 2(b) below, I require ICBC to give the applicant access to some of the information it withheld under s. 17 of the Act, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

   (b) Under s. 58(2)(b) of the Act, I confirm the decision of ICBC to refuse, under s. 17 of the Act, to give the applicant access to the remainder of the information it withheld as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

3. (a) Under s. 58(2)(a) of the Act, subject to paragraph 3(b) below, I require ICBC to give the applicant some of the personal information it withheld under s. 22 of the Act, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

(b) Under s. 58(2)(c) of the Act, I require ICBC to refuse to give the applicant access to the remainder of the personal information it withheld as shown on the Guide to Release and records provided to ICBC along with its copy of this order.

November 9, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 00-50

INQUIRY REGARDING ICBC RECORDS

REPORT OF THE EXECUTIVE DIRECTOR OF THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

1.0 INTRODUCTION

On May 9, 1999, the applicant submitted this request to the Insurance Corporation of British Columbia ("ICBC") "access to all information concerning myself and others, particularly info. on any motor vehicle accidents, Reports from Lawyers. Including videos, tapes, reports, written and audio, also cassettes. And all medical records pertaining to 1989-1994 accidents and all others".

ICBC responded to the applicant on July 13, 2000, by releasing approximately 500 pages of records, in whole or in part, out of 716 it identified as responsive to the request. Some information was severed or withheld under ss. 14, 17 and 22 of the *Freedom of Information and Protection of Privacy Act* ("the Act"). The applicant requested a review of ICBC's decision to withhold or sever information. As mediation was not successful and did not result in a change of the issues, an inquiry took place on October 25, 1999.

The sections of the Act relevant to this inquiry are as follows:

> 14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.
>
> 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.
>
> 22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining 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
>
> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
>
> …
>
> (c) the personal information is relevant to a fair determination of the applicant's rights….

2.0 ISSUES

The inquiry is to review ICBC's application of ss. 14, 17 and 22 to the records in dispute.

Under s. 57(1) of the Act, ICBC has to prove that the applicant has no right of access to all or part of the records it withheld under s. 14 and s. 17.

Under s. 57(2) of the Act, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of any third party's personal privacy.

3.0 ARGUMENT AND DISCUSSION

3.1 Records Withheld Pursuant To Section 14 – ICBC argues that the records listed in its Guide to Release as exempt from disclosure under s. 14 of the Act are properly withheld pursuant to the contemplated litigation element of solicitor client privilege and submits that Commissioner's Order No. 6-1994 applies to the s. 14 records:

> For the 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 otherwise not settled. [Emphasis added by ICBC]

ICBC provided a chronology of events relevant to the applicant's 1994 claim, after noting that the file for the applicant's 1989 claim was closed seven months before the 1994 claim was filed, and stated at pages 4 & 5 of its initial submissions:

> [A] reasonable person would conclude that litigation was in reasonable prospect at the time the s. 14 records were first prepared and collected by the ICBC adjuster. In fact, litigation was commenced (Action [number]).
>
> We submit further that the dominant purpose for the production of the s. 14 documents was in preparation for litigation from the time the applicant's claim was reported by the applicant's law firm. Based on the standard practice of the applicant's law firm, the claim reached the litigation end of the spectrum at the time it was made.

> In the alternative, we submit that, at the very least, litigation privilege was fully engaged once ICBC decided to deny the claim on July 11, 1994 and communicated this to the applicant's law firm on July 15th, 1994. This is in keeping with the facts set out in the B.C. Court of Appeal decision in *Hamalainen* v. *Sippola*.

As with the matter that resulted in Order 00-42, ICBC initially relied only on the category of solicitor client privilege commonly referred to as 'contemplated litigation privilege'.

The Commissioner noted in Order 00-42:

> 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.

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 also be found in Order 00-08 and Order 00-23.

In this case, the date and the nature of the documents do indicate that litigation was reasonably in prospect at the time some of them were created and that the dominant purpose for their production was to defend ICBC in the anticipated litigation. It is relevant to note that the 1994 accident was reported to ICBC by the applicant's counsel. The attached guide to release indicates the records for which I have accepted ICBC's argument under s. 14.

However, I find that some of the records withheld under s. 14 were not created with the subject litigation in mind, as they are from an earlier and settled ICBC claim file ("the claim file"). The settlement predates, by at least several months, the commencement of the "1994 claim file", for which contemplated litigation privilege was claimed. In my view, that litigation privilege cannot be claimed for records which predate the 1994 motor vehicle accident and claim.

The applicant states in his initial submission, at pages 2 and 3:

> I am not asking the head of a public body to disclose solicitor client privilege concerning their parties. What I am asking is; any information pertaining to my client-solicitor correspondence between the law firm of Klein-Lyons and their employees and the law firm of Simon and Holman and in particular, [names] lawyer's for the law firm Simon and Holman. They handled my 1989 case. I claim solicitor client privilege here and this case has been settled long ago [*sic*].

None of the records withheld by the public body is responsive to the applicant's statement above. The applicant also made an *in camera* submission, much of which consisted of copies of unrelated correspondence but all of which was submitted to emphasize his reasons for wanting access to all records.

3.2 Records Withheld Pursuant to Section 17 – ICBC has also applied s. 17 to all of the records to which it has applied s. 14. I have to decide whether the public body has discharged its burden of proof for each of the exceptions that it has applied and for which it has the burden of proof.

ICBC argues that the records listed in its Guide to Release are excepted, in whole or in part, from disclosure under s. 17(1)(e):

> 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 submits, on pages 6 and 7 of its initial submissions, that the standard to be met for the purposes of s. 17 of the Act is a reasonable expectation of harm:

> The section 17 records contain information used by ICBC as it develops its information, choices, recommendations and advice to guide the development, implementation, and monitoring of insurance claim negotiating and defence strategies to guide pending legal action and attempts to settle the matter out of court.
>
> …
>
> We submit that disclosure of the s. 17 records could reasonably be expected to harm the financial and economic interests of ICBC because it could enable plaintiff's counsel to obtain information about the negotiating and defence

> strategy of ICBC. This information could enable plaintiff's counsel to compare claim settlement offers with sensitive ICBC negotiating and defence strategy information. This in turn would give the Plaintiff a negotiation advantage, which could reasonably be expected to drive up settlement costs. The Plaintiff and his counsel would have access to sensitive information about ICBC's negotiation and defence strategy, while ICBC would have no corresponding access to the negotiation and defence strategy information of the Plaintiff and his counsel.
>
> …
>
> We submit that disclosure of the s. 17 records could reasonably be expected to significantly reduce the recording of information related to negotiation and defence strategy in relation to claims files. This would harm the economic interest of ICBC by limiting the ability of adjusters to properly assess, monitor, and review their negotiating and defence strategy for a particular claims file. Without effective and candid communications properly recorded, we submit that effective negotiations could be jeopardized.
>
> We submit that disclosure of the s. 17 records involving invoices of insurance claim service providers could reasonably be expected to harm the financial and economic interests of ICBC because it could enable competing insurance claim service providers to find out the financial arrangements ICBC has, and in some cases drive up the cost of services provided in relation to the handling and investigation of claims.
>
> It is difficult to quantify with precision the economic impact that disclosure of part or all of the s. 17 records could have on ICBC. Third party bodily injury claim payouts totalled $960 million in 1998 and $2.02 billion in 1997 for an average of $900 million. If disclosure of the above types of information to lawyers and their clients increased claim payouts on this and other files by one percent, then ICBC would suffer cummulative economic harm of $9.9 million. From a business perspective this amount is very significant. We submit, based on the experience of ICBC adjusters and management, that disclosure of the above referenced types of information could easily increase claim payouts by one percent.

I find that s. 17 also applies to some of the records for which I have found that s. 14 applies. For the records to which I have found s. 14 does not apply, I must then decide if s. 17 applies. These records are from the settled claims file, and include strategies, guidelines and practices used by ICBC in connection with their negotiations on that file. ICBC's argument for harm is mainly based on the idea that if the plaintiff has access to its thinking on one claim file, it will have an unfair advantage when settling the next claim file. Whether this "unfair advantage" will lead directly to economic harm for the public body is a threshold question that ICBC must prove on the balance of probabilities. As the Commissioner discussed at length in Order 00-42, ICBC has made general statements referencing all information withheld under s. 17. On a careful review of the

records, I am not willing to accept that any of the information can be withheld under s. 17. ICBC has not proven that economic harm would result from release to the applicant of these settled claim file records. I have indicated on these records the severing required.

3.3 Records Withheld Pursuant to Section 22 – The information withheld under s. 22 includes names of third parties, addresses, phone numbers, driver's licence numbers, employment information (of the other party involved in the accident) and similar other personal information. The applicant bears the burden of proving that releasing this information to him would not be an unreasonable invasion of any third party's personal privacy. Since there is no evidence before me that discharges this burden of proof, most of this information, including addresses and driver licence numbers, should be withheld under s. 22, as release would be an unreasonable invasion of the third party's personal privacy. However, the name of the other party involved in the motor vehicle accident is known to the applicant and should be released, as disclosure in this context would not unreasonably invade his privacy.

4.0 CONCLUSION

For the reasons given above, I recommend that the Commissioner make the following orders:

1. (a) Under s. 58(2)(a) of the Act, subject to paragraph 1(b) below, to require ICBC to give the applicant access to some of the information it withheld under s. 14 of the Act, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

   (b) Under s. 58(2)(b) of the Act, to confirm the decision of ICBC to refuse, under s. 14 of the Act, to give the applicant access to the remainder of the information it withheld as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

2. (a) Under s. 58(2)(a) of the Act, subject to paragraph 2(b) below, to require ICBC to give the applicant access to some of the information it withheld under s. 17 of the Act, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

   (b) Under s. 58(2)(b) of the Act, to confirm the decision of ICBC to refuse, under s. 17 of the Act, to give the applicant access to the remainder of the information it withheld as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

3. (a) Under s. 58(2)(a) of the Act, subject to paragraph 3(b) below, to require ICBC to give the applicant some of the personal information it withheld under s. 22, as shown on the Guide to Release and records provided to ICBC along with its copy of this order;

(b) Under s. 58(2)(c) of the Act, to require ICBC to refuse to give the applicant access to the remainder of the personal information it withheld as shown on the Guide to Release and records provided to ICBC along with its copy of this order.

November 9, 2000

ORIGINAL SIGNED BY

Lorrainne A. Dixon
Executive Director
Office of the Information and Privacy Commissioner