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

Order 01-22

INQUIRY REGARDING ICBC RECORDS

David Loukidelis, Information and Privacy Commissioner
May 31, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 23
Order URL: http://www.oipcbc.org/orders/Order-01-22.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

Summary: An auto body shop applied for records in the custody of ICBC. The records consisted of internal e-mails and documents relating to the ongoing relationship between the shop and ICBC. ICBC had denied the shop accreditation, resulting in an appeal and revocation of the shop's vendor number. ICBC did not succeed completely on its application of ss. 13 and 17 to a vast number of records. ICBC is required to demonstrate the information it withheld under s. 13 was created for the purpose of advising or recommending a specific course of action or range of actions or that it so advises or recommends. Under s. 17, ICBC is required to establish a reasonable expectation of harm to its financial or economic interest from disclosure of specific information. ICBC succeeded on its application of s. 14 to records created for the dominant purpose of preparing for, advising on or conducting litigation. ICBC succeeded in its application of s. 15 to certain investigation records. The Material Damage Specialist Fraud Unit's activities qualified as law enforcement, certain records were part of an actual investigation and ICBC demonstrated a reasonable expectation of harm. ICBC was able to demonstrate a reasonable expectation that disclosure of certain identities could threaten certain individuals' safety or mental or physical health. Thus s. 19 was accepted for certain identifying information. ICBC properly applied s. 22 to certain third party personal information, but it was not properly applied to ICBC employee names and identities.

Key Words: solicitor client privilege – contemplated litigation – advice and recommendations – law enforcement – reasonable expectation of harm – harm to public body's financial or economic interests – threat to safety, mental or physical health – personal privacy – unreasonable invasion.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 14, 15(1), 17(1), 19(1) and 22(1), 22(2)(c), (e) and (f), 22(3).

Authorities Considered: B.C.: Order No. 12-1994, [1994] B.C.I.P.C.D. No. 15; Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order No. 116-1996, [1996] B.C.I.P.C.D. No. 43; Order No. 159-1997, [1997] B.C.I.P.C.D. No. 17; Order No. 177-1997, [1997] B.C.I.P.C.D. No. 38; Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58; Order No. 323-1999, [1999] B.C.I.P.C.D. No. 36; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-17, [2000] B.C.I.P.C.D. No. 20; Order 00-42, [2000] B.C.I.P.C.D. No. 46; Order 00-50, [2000] B.C.I.P.C.D. No. 54; Order 01-01, [2001] B.C.I.P.C.D. No. 1. **Ontario:** Order 24, [1988] O.I.P.C. No. 24; Order 48, [1989] O.I.P.C. No. 12; Order P-92, [1989] O.I.P.C. No. 56; Order P-170, [1994] O.I.P.C. No. 32; Order 188, July 19, 1990; Order P-278, [1992] O.I.P.C. No. 22; Order P-411, [1993] O.I.P.C. No. 27; Order P-482, [1993] O.I.P.C. No. 161; Order P-508, [1993] O.I.P.C. No. 204; Order P-920, [1995] O.I.P.C. No. 186; Order P-948, [1995] O.I.P.C. No. 161; Order P-1150, [1996] O.I.P.C. No. 121.

Cases Considered: *Rubin* v. *Canada (Minister of Transport)*, [1997] F.C.J. No. 1614 (C.A.); *Ruby* v. *Canada (Solicitor General)*, [2000] F.C.J. No. 779 (C.A.); *Lavigne* v. *Canada (Commissioner of Official Languages)*, [1998] F.C.J. No. 5127.

1.0 INTRODUCTION

[1] 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") under the *Freedom of Information and Protection of Privacy Act* ("Act").

2.0 DISCUSSION

[2] On August 16, 1999, I delegated the authority to conduct inquiries to the Executive Director pursuant to s. 49 of the 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.

[3] 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

[4] 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. 13 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. 13 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. 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;

3. (a) Under s. 58(2)(a) of the act, subject to paragraph 3(b) below, I require ICBC to give the applicant access to some of the information it withheld under s. 15 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. 15 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;

4. (a) Under s. 58(2)(a) of the Act, subject to paragraph 4(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;

5. (a) Under s. 58(2)(a) of the Act, subject to paragraph 5(b) below, I require ICBC to give the applicant access to some of the information it withheld under s. 19 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. 19 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;

6. (a) Under s. 58(2)(a) of the Act, subject to paragraph 6(b) below, I require ICBC to give the applicant access to some of the 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 access to the information in the disputed records which was 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.

May 31, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 01-22

INQUIRY REGARDING ICBC RECORDS

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

1.0 INTRODUCTION

[5] In March 1988, the applicant, Blue Mountain Collision ("BMC"), acquired a vendor number from the Insurance Corporation of British Columbia ("ICBC"). This entitled BMC to receive payment, for repairs undertaken on insured vehicles, directly from ICBC every two weeks. In August 1996, BMC sought accreditation status from ICBC, as this would provide it with additional business advantages. In November of 1996, ICBC declined accreditation, but told BMC it could reapply in August 1997. BMC reapplied for accreditation in February 1997 and ICBC declined it in June 1997. BMC reapplied for accreditation in August 1997. ICBC declined it again in December 1997 and BMC appealed that decision in December 1997. ICBC revoked BMC's vendor number in December 1998 and BMC requested access to ICBC records, in February 1999, under the *Freedom of Information and Protection of Privacy Act* ("Act").

[6] BMC wrote to ICBC on March 12, 1999 and amended its original request for records, to read: "Please provide a copy of each record contained in our complete files from September 5, 1995 to present." On April 9, 1999, ICBC informed the applicant in writing that it was unable to meet its extended deadline of April 23, 1999 for responding to the request and had been granted an additional extension to May 25, 1999 by the Office of the Information and Privacy Commissioner. On April 16, 1999, the applicant asked this office to review its decision to grant the additional time extension to ICBC. This issue was resolved.

[7] On May 10, 1999, ICBC provided the applicant with its response to the access request. Of the 1,151 pages of responsive records identified by ICBC, 559 were released in their entirety to BMC. Another 508 were partially severed and released and 84 were withheld in their entirety. ICBC relied on ss. 13(1), 14, 17(1), and 22(1) of the Act to withhold or sever the records. The applicant requested a review of ICBC's decision and, as all outstanding issues were not resolved through mediation, the matter was scheduled for an inquiry.

[8] Following a lengthy mediation period, and after the notice of inquiry was sent out, ICBC notified this office and BMC that it would also be applying ss. 15 and 19 of the Act to some or all of the records in dispute. The Commissioner has strongly discouraged the late application of discretionary exemptions by public bodies, and I echo his concerns here. It is not conducive to an effective mediation process between public bodies and

applicants, if, late in the day when the matter proceeds to inquiry, new discretionary exceptions are applied. When an applicant requests a review of an access decision on the basis of a response under s. 8, the exceptions in issue should not be a moving target. Furthermore, since one of the aims of the mediation process is to narrow the issues that go to inquiry, to have the range of exceptions expanded once the mediation is finished and the inquiry notice is issued is counterproductive to say the least. There may be times when cogent and clear new evidence results in the public body applying a new, discretionary exemption, but these should be extremely limited. Still in this matter, given the protracted nature of the review and inquiry processes and in the context of the underlying dispute between the parties, I have allowed ICBC to apply the additional two discretionary exceptions to the extent discussed below.

2.0 ISSUES

[9] The issues in this case are whether ICBC is authorized under ss. 13, 14, 15, 17 and 19 to withhold information from the records in dispute and whether ICBC is required under s. 22 to withhold information from the records in dispute.

[10] Under s. 57(1) of the Act, ICBC has to prove that BMC has no right of access to all or part of the records in dispute where ICBC relies on ss. 13, 14, 15, 17 and 19. Under s. 57(2) of the Act, it is up to BMC to prove that disclosure of the information withheld under s. 22 would not be an unreasonable invasion of the third party's personal privacy.

3.0 DISCUSSION

[11] **3.1 Procedural Objections –** ICBC requested a three-week extension when the inquiry was first scheduled. It argued that the extra time was needed due to the large number of records still in dispute, the application of several exceptions which needed to be fully argued, the need to prepare a considerable number of affidavits and because counsel had other client commitments. The applicant strongly opposed what it termed the "fourth" extension that ICBC requested. In order to ensure that no party was deprived of making proper representations, this office allowed a further 10 days before initial submissions were due.

[12] BMC provided three letters as its initial submission and ICBC provided a binder of material containing arguments, supported by nine affidavits and numerous authorities.

[13] After the initial submissions had been exchanged, the applicant requested an extension of 30 days to review and "fully understand" all of the material presented by the public body in its initial submission. Counsel for ICBC vigorously opposed any further extension. Submissions were reviewed from both parties and I decided that, as there did not appear to be any prejudice to ICBC by providing additional time for submissions, to

grant a brief extension. The applicant was not represented by a lawyer and needed to deal with a considerable volume of affidavit material filed by ICBC. The inquiry was rescheduled to give to the applicant one week to prepare his reply submissions.

[14] ICBC did not initially provide a reply submission in this inquiry, but objected to the applicant's reply submissions, stating that, as BMC had not provided more in the way of an initial submission, it should not be permitted to provide argument in reply. ICBC stated that the applicant's initial submissions did not meet the definition of a "submission" as defined in this office's information document on written inquiries and requested a right of reply to the applicant's reply submission.

[15] ICBC subsequently, on December 10, 1999, provided a reply to the applicant's reply submission. I have carefully reviewed it and have accepted it in the inquiry, but in the end have given it little weight in my determinations. I have also accepted the applicant's initial submission as a "submission" because, with the exception of s. 22, the burden of proof is on the public body.

[16] The arguments and affidavits submitted by ICBC on s. 15 were initially all provided on an *in camera* basis. ICBC argued that *in camera* submissions were necessary because the disclosure of the information in the argument and affidavits would either reveal information protected from disclosure under the Act or would enable the reader to accurately infer information excepted from disclosure under the Act.

[17] However, since it is only under the most extraordinary circumstances that an entire submission should be made *in camera*, I sent a letter to the public body along with a copy of the submission, on which I indicated the information which I believed could be disclosed to the applicant. I pointed out that if I accept an entire submission *in camera*, including argument and evidence, I would not be able to discuss the reasons for my decision.

[18] ICBC responded on November 30, 2000 and agreed that the "majority of the information you wish to disclose can be disclosed to the Applicant." There was one portion of a sentence that ICBC submitted should continue to be withheld and, after reviewing its arguments, I agree. ICBC also agreed to release more information on the first page of the s. 15 submission than I had recommended. The revised s. 15 argument was sent to the applicant, who was invited to respond.

[19] On November 21, 2000, consequent to ICBC's concerns about the relevance of three orders: Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 00-42, [2000] B.C.I.P.C.D. No. 46; and Order 00-50, [2000] B.C.I.P.C.D. No. 54, I wrote to the parties to give them an opportunity "to make a submission on the impact of the Commissioner's recent orders on the present inquiry." The parties were asked to make any submission they wished to make on or before December 8, 2000. ICBC then wrote to say that the November 21

letter was received on November 27 and to ask for a six-week extension for further submissions. The applicant wrote November 27 to object to the time the whole matter had taken. ICBC wrote again on November 29 to ask for permission to include further submissions on s. 17 and again to extend the deadline for additional submissions by six weeks. I wrote to the parties on November 29, 2000 to deny the requested extension but to allow ICBC to include submissions on s. 17 in the inquiry. ICBC provided its submissions on December 8, 2000, accompanied by a binder of authorities (14 court decisions and 12 orders, although many were the same as those provided with the initial submissions).

[20] BMC wrote to this office on December 11 to object to ICBC's conduct as revealed by the disclosure to it of a portion of ICBC's initial submission regarding s. 15, which was initially submitted *in camera*, and to advise the OIPC that the "failure of ICBC to release the information in full has prevented the writer from making a full defence to the action commenced . . . by ICBC . . . in the Supreme Court of British Columbia." BMC wrote again, on December 18, to respond to ICBC's December 8 submission.

[21] On December 18, 2000, I wrote to the parties to tell them that, in light of ICBC's December 8 submission and the applicant's response, I had decided to give ICBC the opportunity to file supplementary evidence. I noted that my decision to allow the filing of further evidence, as requested by ICBC, should not be taken by the parties as my agreement with ICBC's submissions on the impact of intervening orders of the Commissioner, but rather was meant to acknowledge the issues raised and to give ICBC the opportunity to make submissions on that issue. I gave ICBC until January 22, 2001 to file supplementary evidence and I gave the applicant until January 31, 2001 to respond to ICBC's further submissions.

[22] ICBC suggested, in its December 8 submission, that I "defer" my jurisdiction in respect of records over which contemplated litigation privilege was claimed. ICBC also suggested that I first make a preliminary decision on the applicability of the exceptions, so that it could then adduce further evidence in respect of the records for which I was inclined to reject the exception claimed. I did not follow either suggestion and so informed the parties.

[23] The applicant wrote, on December 31, 2000, to express its frustration with the delay and to explain why it wants access to the records. BMC attached copies of some 1998 and 1999 correspondence between BMC and ICBC, none of which is relevant to my determination of whether ICBC is authorized or required to withhold information under the exceptions to the general right of access.

[24] **3.2 Relevant Sections of the Act** – The relevant provision of the Act are the following:

Policy advice, recommendations or draft regulations

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

(2) The head of a public body must not refuse to disclose under subsection

(a) any factual material, ...

Legal advice

14 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

...

(c) harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement,

(d) reveal the identity of a confidential source of law enforcement information, ...

Disclosure harmful to the financial or economic interests of a public body

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

(a) trade secrets of a public body or the government of British Columbia;

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British

Columbia and that has, or is reasonably likely to have, monetary value; ...

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety... .

Disclosure harmful to personal privacy

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

…

(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,

(f) the personal information has been supplied in confidence,

…

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

…

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation, … .

[25] The applicant did not make detailed submissions on any of the exceptions applied by the public body. BMC's position is that it is a small business and is concerned about the "unfair power wielded by a Crown corporation." BMC also states that it strongly believes ICBC is withholding the information by design to create a delay that will further prejudice the applicant and create additional hardship and financial difficulty (Applicant's initial submission). In its reply to ICBC's final submissions (January 22, 2001), BMC took great exception to some of the affidavit evidence.

[26] **3.3 Records in Dispute** – The wide variety of records in dispute is identified in the guide to release. The guide to release has been provided to the parties as an attachment. The guide indicates the sections of the Act applied by ICBC for each record in dispute. The guide identifies the type of record, the sections of the Act applied by ICBC and my finding. Their content includes the claim processing information of third parties, communications between ICBC and its legal counsel, information documenting the ICBC investigation into BMC, and the advisory/deliberative communication between ICBC staff. All relate directly or indirectly to the business dealings between ICBC and BMC. The format of the disputed records includes e-mails, memos, ICBC forms and charges, draft correspondence, computer printouts, handwritten notes, and facsimile cover pages. Many of the records are duplicates or part duplicates of other records. The vast majority of the disputed records are internal ICBC e-mails.

[27] **3.4 Advice or Recommendations** – Section 13(1) permits a public body to refuse to disclose information that "would reveal advice or recommendations developed by or for a public body or minister". Section 13(1) is limited by the circumstances listed in s. 13(2). Section 13(2)(a) states that a public body must not refuse to disclose under s. 13(1) "any factual material". Much of the discussion that follows focuses on whether the information in the records in dispute is "advice" or "recommendations" under s. 13(1) or whether the information is "factual material" under s. 13(2)(a).

[28] ICBC submits that the fundamental issue in relation to the application of s. 13 by public bodies to records in dispute is the balance between "openness … and confidentiality of advice and recommendations" (ICBC's initial submission, para. 2).

[29] ICBC's position is essentially that it must be able to take a contextual approach to s. 13. Although ICBC agrees there is no presumption that a public body enjoys a "zone of confidentiality" simply because of the subject mater of the records, it argues that the Commissioner is "entitled to take into account the particular circumstances surrounding the creation of the records when applying s. 13 to records in dispute" (ICBC's initial submission, para. 24).

[30] ICBC refers to several orders of former Commissioner David Flaherty (Order No. 12-1994, [1994] B.C.I.P.C.D. No. 15; Order No. 159-1997, [1997] B.C.I.P.C.D. No. 17 and Order No. 177-1997, [1997] B.C.I.P.C.D. No. 38) and further argues that a plain reading of s. 13 suggests a contextual approach: "[s]upport for a contextual approach is found in the breadth of meanings accorded the term 'advice.' It could

involve everything from an 'opinion offered as to action' to 'information given' " (ICBC's initial submission, paragraph 28).

[31] The context for this matter, according to ICBC, is that it created or gathered the records in dispute as it investigated alleged billing irregularities and problems at BMC's auto body shop, which it encountered during the course of reviewing an application for accreditation. As this was "new territory" for many ICBC managers and employees, there was a need for ongoing co-operation, co-ordination and communication. The effectiveness of the investigation depended on ensuring a high degree of confidentiality for the investigation itself while also ensuring that the day-to-day business relationship between ICBC and BMC was carefully handled. ICBC staff provided advice on an ongoing basis to each other both in relation to the investigative activity underway and in relation to the day-to-day business relationship with BMC. At times, the advice was as simple as a recommendation on a meeting time; in other instances, the advice was more formal and involved penalties and sanctions (ICBC's initial submission, paras. 32-42).

[32] ICBC argues that its "contextual" approach should be applied to the interpretation of factual material" in s. 13(2)(a) and that I should not be bound by a requirement to release all information of the factual nature in the records. ICBC distinguishes the word "material" in s. 13(2)(a) referring to the "matter" or "constituent parts" from information in s. 13(1), meaning discrete "items of knowledge". In ICBC's view this distinction "allows it to withhold factual information that takes on the character of advice by virtue of the context in which it is created". (ICBC's initial submission, paras. 27 – 310).

[33] Further, ICBC argues that, even if disclosure of the information in dispute would not explicitly reveal advice or recommendations, disclosure would implicitly result in such disclosure by allowing BMC to make accurate inferences regarding advice or recommendations. What might be considered mere reporting of events or information in other circumstances took on the character of advice in circumstances in which ICBC employees were updating and advising each other. In ICBC's view, they were implicitly providing advice to each other as to whether the course of action being taken with respect to BMC should be confirmed or modified.

[34] ICBC also submits that, to the extent the records in dispute contain factual material covered by s. 13(2), it is so intermingled with the advice or recommendations that either disclosure of the factual material would reveal the advice or recommendations or the only portions that could be released would be meaningless. In ICBC's view, the advice or recommendations include the accompanying analysis, evaluations and assessments of factual material, because they help explain the rationale for the advice or recommendations given.

[35] ICBC is concerned that disclosure of the information in the records it has withheld under s. 13 (and not protected under any other exception) will have a "chilling" effect on the ability of ICBC staff to give advice and recommendations for similar matters in the future. ICBC submits that BMC has the full panoply of discovery tools available to it in the context of the civil litigation now underway, that there are no issues of public accountability because the underlying matter is a business dispute with related investigations and that disclosure of information in the records in dispute would give BMC an unfair advantage (ICBC's initial submission, para. 43).

[36] Thus, ICBC argues that the word "advice" should be more broadly interpreted in some circumstances than in others and that factual information sometimes takes on the character of advice because of the context in which it is presented. Although I agree that the context in which a record is created can assist in deciding whether the application of s. 13 to particular information in a record is justified, I do not think the Act contemplates any specific context as determining whether or not s. 13 applies.

[37] In Ontario Order P-411, an Inquiry Officer held that advice or recommendations refers to suggested courses of action which will ultimately be accepted or rejected by the recipient during a deliberative process. In Order 00-08, [2000] B.C.I.P.C.D. No. 8 (pp. 38-39) the present Commissioner stated:

> "[I]n my view, the word 'advice' in s. 13(1) embraces more than 'information'. Of course, ordinary statutory interpretation principles dictate that the word 'advice' has meaning and does not merely duplicate 'recommendations'. Still 'advice' usually involves a communication, by an individual whose advice has been sought to the recipient of the advice, as to which courses of action are preferred or desirable."

[38] The Commissioner's view has been recently upheld by the Supreme Court of British Columbia in the *College of Physicians and Surgeons of British Columbia* v. *Information and Privacy Commissioner* 2001 B.C.S.C. 726. Mr. Justice Owen-Flood confirmed, at paragraph 131 that the test is whether the information is provided for the purpose "of advising or recommending a specific course of action or range of actions…".

[39] ICBC argues "factual material" in s. 13(2)(a) should be read within its specific context. I note the view taken in Ontario Order 24, that "factual material" does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in a record. (But I also note that the words "information" and "material" are used interchangeably in Ontario Orders (see, for example, Ontario Orders 24, 48, P-92, P-170, P-278, P-508, P-920)).

[40] ICBC argues that s. 13(1) applies to "occasional assertions of fact". I have difficulty accepting that an occasional assertion of fact amounts to advice or a recommendation. However, if the public body is able to demonstrate that a fact is so

interwoven with advice or recommendation that it cannot reasonably be considered separate and distinct, s. 13(1) will apply. In addition, I accept that there may be circumstances where the disclosure of a fact would implicitly result in disclosure of advice or recommendations by allowing an applicant to make an accurate inference of information that could be protected under s. 13(1).

[41] ICBC applied s. 13 to several e-mails which are no more than "electronic musings". In an earlier time, this information would have been conveyed by telephone or conversation. The content of these e-mails represents the "thinking" but does not amount to "advising or recommending a specific course of action or range of actions".

[42] ICBC argues that I must consider the "chilling effect" of disclosure on the process of giving advice and making recommendations. In my view, this argument amounts to an assertion that s. 13, as regards ICBC's activities, is a class exemption. I disagree. ICBC must prove, in each situation, that information amounts to "advice" or "recommendations". The Commissioner rejected a similar argument in relation to s. 15 in Order 00-11, [2000] B.C.I.P.C.D. No. 13, and in Order 01-07, [2000] B.C.I.P.C.D. No. 7, para. 9, in relation to s. 22. I have also taken guidance from *Rubin* v. *Canada (Minister of Transport)*, [1997] F.C.J. No. 1614 (C.A.) at paragraph 32, *Ruby* v. *Canada (Solicitor General)*, [2000] F.C.J. No. 779 (C.A.) at paragraph 94 and *Lavigne* v. *Canada (Commissioner of Official Languages)*, [1998] F.C.J. No. 5127 in which Dubé J. addressed the distinction between a specific investigation and the investigation process generally. This approach has been upheld in the *College of Physicians and Surgeons* v. *Information and Privacy Commissioner* 2001 B.C.S.C. 726, paras. 143-145.

[43] Consequently, I find that the only information ICBC can withhold is the information within the scope of s. 13(1). I have indicated on the guide to release, and the records themselves. Within pages 703 – 1148, I do not find it necessary to decide on the application of s. 13 for those on which I have accepted the application of s. 14.

[44] **3.4 Section 14 – Legal Advice** - Section 14 of the Act states:

> 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[45] ICBC states that the records subject to s. 14 were created or gathered by ICBC managers and employees during:

a) investigations of BMC for anticipated criminal and/or civil litigation against BMC

b) preparation for litigation by BMC against ICBC, and

c) communications between ICBC's solicitors and ICBC staff.

[46] The results of the ICBC investigation led ICBC to file court actions against BMC in September 1999.

[47] Section 14 of the Act protects common law solicitor client privilege; s. 14 records may therefore be excepted from disclosure under two categories of solicitor client privilege - legal professional privilege and contemplated litigation privilege.

[48] The test for the application of contemplated litigation privilege to a document was stated as follows by the Commissioner in Order 00-23, at page 5: "A public body may withhold a record that was created for the dominant purpose of preparing for, advising on or conducting litigation that was under way or in reasonable prospect at the time the record was created".

[49] ICBC submits, at paragraph 5 of its initial submission, that the question to be answered in determining which records are excepted from disclosure under contemplated litigation privilege is:

> At what point does an administrative investigation of BMC for accreditation become an investigation in which criminal and/or civil litigation is the dominant purpose for collecting the records?

[50] ICBC then lists a chronology of events, starting in August 1996 when BMC first applied for accreditation. ICBC began an investigation to determine whether BMC should receive accreditation status and be accorded the privileged business relationship which accrues. Based on the results of the investigation, ICBC declined BMC accreditation.

[51] Some correspondence between ICBC and BMC is dated between November 1996 and September 1997. During this time, BMC was attempting to clear up issues that arose during the investigation, so as to qualify for accreditation.

[52] ICBC argues that the pivotal point in the process was a September 26, 1997 letter from BMC, which states in part: "We read your letter with great interest and feel that the tone continues to reflect a bias towards us". ICBC submits that this is the point in the continuum between administrative investigation and investigation undertaken when litigation is in reasonable prospect: ICBC had informed BMC that its vendor number may be revoked; irregularities have continued to raise ICBC concerns for more than one year; and BMC is alleging bias by ICBC. In addition, records released to the applicant indicated that the applicant had expressed his intention to proceed with legal action. I agree with ICBC that a reasonable person possessed of all the above pertinent information, including that peculiar to the parties involved, would conclude that the matters of concern to ICBC would not likely be resolved without litigation. Therefore, I find litigation was a reasonable prospect by September 26, 1997. The next question is whether the records met the "dominant purpose" test.

[53] ICBC also submits that, for s. 14 to apply:

> [c]ontemplated litigation must be the dominant, but need not be the sole reason for the creation of a document. Provided that the dominant purpose is for

> contemplated litigation, the creation and gathering of documents subject to litigation privilege need not be at the direction of a lawyer but may be gathered by the client as part of its own research and investigation (ICBC's initial submission, paras. 77-78).

[54] In November 1997, ICBC referred the BMC file to its newly-formed "Special Investigations Unit for Material Damage". ICBC submits that, from November 1997 onwards, the dominant purpose of the records created about BMC was to gather information for contemplated litigation, even though they were also created, in part, for the purposes of responding to day-to-day business and in response to BMC's third accreditation application. It argues that the dominant purpose test is met by the seriousness of the issues under investigation, the repercussions for BMC, and the additional efforts of the staff at the claims center to assemble the BMC records despite the lack of sufficient personnel to carry out the necessary investigation.

[55] I accept ICBC's argument for many, but not all of the records. To attract s. 14 privilege, a record must be produced at a time when litigation was a reasonable prospect and be produced for the dominant, not sole, purpose of litigation. The purpose cannot be inferred solely by the date of production. The purpose must be set out in affidavit evidence or be clear from either the content or the context. Here, there are some records which were produced after litigation was a reasonable prospect, but there is not sufficient evidence, context, or content to establish that the dominant purpose was for contemplated litigation.

[56] In addition, ICBC has applied s. 14 to some records created prior to the beginning of the period during which litigation was contemplated, but which were later sent to ICBC's litigation department. These records were, ICBC submits, gathered and sent to the litigation department when it became clear that litigation was contemplated. I accept that s. 14 applies to these records, as they form part of a "lawyer's brief". However, for some of these records ICBC produced a severed version in both the original form and as records in the lawyer's brief. The privilege does not cover the records in their original form, *i.e.*, in the form prior to contemplation of litigation. The public body has not applied s. 14 to the "original records", even though the information in these records may reveal the information protected by s. 14. However tempting it may be to apply s. 14 to the earlier records, I am not able to apply a discretionary section where the public body did not apply it. I cannot replace the public body's exercise of discretion with my own decision.

[57] I have indicated on the guide to release those documents to which I accept the application of the s. 14 exception.

[58] **3.5 Disclosure Harmful to Law Enforcement** – Section 15(1)(a) provides that a public body has the discretion to withhold documents where disclosure of the documents could reasonably be expected to harm a law enforcement matter. ICBC argues that it purposely exercised its discretion to refuse to disclose the documents that were created and gathered by its Material Damage Specialist Fraud Unit as part of its investigation of BMC. These s. 15 records are listed in the guide to release.

[59] The Commissioner has commented, in Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34, "that the unqualified use of the word 'harm' in section 15(1)(a) signifies there is no need to establish serious or overwhelming harm in order for this exception to apply", so long as the harm that can be established is not so fleeting or minimal as to be truly insignificant to the law enforcement matter involved.

[60] Schedule 1 of the Act provides a statutory definition of law enforcement. ICBC argues that the implication is that a "law enforcement" matter may refer to the investigation of crime generally, a specific investigation, and or the proceedings that are a consequence of an investigation. It submits that the term "matter" also captures harm that can reasonably be expected to occur, from the disclosure of documents during an investigation, to other law enforcement investigations currently underway or the future capacity of a public body to perform its investigative mandate. It relies on Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58 to support this premise.

[61] The former Commissioner, in past decisions, identified three criteria that must be met before a public body may exercise discretion under s. 15(1)(a) with respect to an investigation:

(a) The public body must have a statutory mandate to conduct investigations;

(b) The public body must be able to impose a sanction or penalty; and

(c) The documents must relate to an actual law enforcement investigation.

See Order No. 36-1995, [1995] B.C.I.P.C.D. No. 8; Order No. 116-1996, [1996] B.C.I.P.C.D. No. 43; Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58.

[62] ICBC relies on s. 7(c) of the *Insurance Corporation Act* as its statutory mandate to investigate for material damage fraud. It argues that investigations by the Material Damage Specialist Fraud Unit can result in a range of sanctions against an auto body shop that has engaged in fraudulent conduct. These include:

- a claims centre requiring the re-inspection of repairs done by a particular auto body shop;
- the Suppliers Conduct Committee suspending or revoking an auto body shop's vendor number;
- a decision that ICBC will no longer do business with an auto body shop;
- the pursuit of civil remedies or referring the matter to Crown Counsel for consideration of criminal charges.

[63] At least in light of the last item, I agree with ICBC that its Material Damage Specialist Fraud Unit investigations can result in a penalty or sanction.

[64] It is also necessary to show that the documents are part of an actual law enforcement investigation. ICBC's evidence on this point was provided *in camera* and I accept ICBC's submission on this point. However, records that only reveal the mere existence of an investigation are not necessarily subject to s. 15.

[65] I now consider whether there is a reasonable expectation of harm under s. 15(1)(a). ICBC notes that BMC has ceased to do business as a body shop, but submits, on the basis of Order No. 321-1999, [1999] B.C.I.P.C.D. No. 34 (as well as several Ontario Orders) that this does not determine the issue. I agree but, having considered all argument and affidavit evidence (some of which was submitted *in camera*), find that ICBC is authorized to withhold only some of the records it withheld under s. 15 ICBC makes other submissions as to why information should be withheld under s. 15 but, as they were made *in camera,* I cannot discuss them here, as I would prefer. I can summarize the gist of ICBC's arguments this way: the investigation of material damage fraud and the need to deter it have become an important corporate function, so much so that the disclosure of the information withheld under s. 15 could harm future investigations of the type undertaken with respect to BMC. I have difficulty accepting that disclosure of the results of investigation(s) of BMC could harm future investigations of other allegations of material damage fraud, not least because the information ICBC wants to withhold under s. 15 appears to me to be mostly the results of common investigative techniques such as interviewing witnesses and reviewing documents. In any case, since the remainder of the records for which ICBC has applied s. 15 are those which I have found ICBC is authorized to withhold under s. 14, I do not find it necessary to decide whether ICBC can also withhold them under s. 15. These are marked on the guide to release.

[66] Finally, I note that s. 15 was not applied consistently to each of the duplicate copies of a few records. In some cases, s. 15 was added to an entire record, along with other exceptions, but not to an identical copy found elsewhere. Although this is likely the result of human error, it has added confusion to the matter, especially when dealing with an exception added to a large number of records.

[67] **3.6 Disclosure Harmful to Financial or Economic Interests** - ICBC submits that ss. 17(1)(a) and (b) are relevant.

[68] ICBC submits that the information in the s. 17 records, some of which may seem innocuous, collectively shows the workings of ICBC anti-fraud activities. It further submits that the information contained in the s. 17 records is properly characterized as financial or commercial in nature for the purposes of s. 17(1)(b). This is because the information either:

(a) reveals financial information associated with the business operations of ICBC;

(b) is information which is used in the context of the commercial operations, mainly, motor vehicle repairs resulting from automobile accidents; or

(c) reveals technical information in relation to the above.

[69] The argument for financial value is as follows. If the information were disclosed, it would be reasonable to expect that other people who wished to perpetrate fraud against ICBC would take the information and use it for their financial gain. The information would therefore open a window for potential fraud perpetrators to learn how ICBC's investigative techniques, resources and processes work.

[70] ICBC further submits that the s. 17 records amount to trade secrets of a public body for the purposes of s. 17(1)(a). It argues that the Act has a very broad definition of "trade secret" which encompasses the information at issue for the following reasons:

(a) a fraud operator could use the requested information in its business relationship with ICBC to defraud ICBC for the fraudulent operator's own commercial advantage;

(b) the information contained in the s. 17 records is confidential and is not generally known to ICBC autobody shops and others;

(c) ICBC takes steps to ensure the information remains confidential, including by treating the information as part of a law enforcement investigation; and

(d) For reasons noted earlier, the disclosure of the s. 17 records would result in harm to the economic interests of ICBC (ICBC's initial submission, paras. 97-99).

[71] The term "trade secrets" is also used in s. 21. The substance of ICBC's argument is, in effect, that the documents under consideration represent the trade secrets of ICBC because they demonstrate ICBC's methodology in investigating, detecting and prosecuting fraud. The information is argued to have financial value, as reflected in the savings accruing to ICBC insured as a result of these fraud investigations being completed and prosecuted. In my view, such information does not have sufficient independent, objectively ascertainable financial value to constitute a trade secret.

[72] ICBC also submits that the disclosure of certain information could reasonably be expected to result in undue financial gain to a third party. In support of its submissions, ICBC notes that material damage fraud is a major concern, that it pays out roughly $6 million per year for motor vehicle repairs resulting from automobile accidents, and that the Insurance Bureau of Canada estimates that as many as 10% of all such claims may be fraudulent. ICBC provided evidence to support its assertion that it saved, through the efforts of the Special Investigations Material Damage Fraud Unit, $20 million dollars in the fiscal year 1998/99.

[73] It does not necessarily follow, however, that access to the fraud investigation records relating to BMC would or could result in fraudulent operators being better able to manipulate ICBC's claim system to their own benefit. ICBC argues that the economic interests of ICBC will be harmed if fraudulent operators learn methods of avoiding detection and consequent exposure to civil and criminal penalties. I am not persuaded that the kind of undue financial gain contemplated by s. 17(1)(d) could result. In any case, since I have found that ICBC is authorized to withhold the information under s. 14, it is not necessary to decide for each record for which ICBC claims s. 17. For these reasons, even though I might have otherwise accepted the application of s. 17 to some of pp. 703 - 1148, I do not find it necessary to decide for each page because I have accepted that ICBC can withhold these records under s. 14.

[74] **3.7 Harm to Individual or Public Safety** – The test established by the Commissioner for withholding records under s. 19(1) is set out in Order 01-01, [2001] B.C.I.P.C.D. No. 1. There, the Commissioner accepted evidence of a reasonable expectation that the disputed information could be used to identify abortion service providers, based on the 'mosaic' effect. Generally speaking, it is necessary to show that if the disputed information is released, there is a reasonable expectation that the disclosure could threaten an individual's safety or mental or physical health.

[75] Many of the records in dispute raise issues regarding the protection of individual identities. ICBC's *in camera* affidavit evidence is intended to support the contention that the principal of BMC made veiled and direct threats against employees of ICBC. BMC's principal disputes the interpretation ICBC places on certain events.

[76] I accept that the *in camera* affidavit evidence demonstrates a reasonable expectation that some persons' mental or physical health might be put into jeopardy by the release to BMC of their names or other personal identifiers. ICBC notes that it has not withheld from disclosure the names of individuals whom BMC already knows are associated with this matter. I also accept that there is a reasonable expectation of a threat to the mental health, physical health or safety of previously unidentified individuals within the meaning of s. 19(1), as demonstrated by the conduct of the principal of BMC to ICBC employees and others in the past.

[77] Although ICBC's stated intention was to protect the names of employees whose involvement in any aspect of the matter was not otherwise apparent to the applicant, ICBC has not clearly identified those employees. Also, since the severing of names is inconsistent (see the discussion under s. 22), it is not always clear whether a named individual is or was an employee. In some cases, it appears that a name was disclosed on another record.

[78] For the above reasons, I accept that ICBC has properly applied the s. 19(1) exception to the records in dispute.

[79] **3.8 Personal Privacy** – ICBC argues that most, if not all, of the s. 22 records were created for, or formed part of, "an investigation into a possible violation of law", specifically alleged fraud. Accordingly, s. 22(3)(b) creates a presumption that disclosure will constitute an unreasonable invasion of a third party's privacy. It submits that the personal information contained in the s. 22 records is not relevant to a fair determination of the applicant's rights. It further submits that third parties will be exposed unfairly to other harms should these records be released. Finally, it is submitted that much of the information was supplied in confidence as part of ICBC's investigation of BMC.

[80] In its reply submission, BMC acknowledges that third-party information is an important tool in investigations and does not expect identification of the third parties. However, it wants access to the information to verify the accuracy of information given by third parties. The applicant did not meet the burden of proof imposed by the Act for this exception, especially as it did not provide argument or evidence on s. 22 in its initial submission. I find that the information withheld under s. 22 was appropriately withheld.

[81] ICBC's severing was inconsistent with respect to information withheld under s. 22. In some cases, a name was withheld from one portion of a record, even though it was disclosed in other portions. In others, a name was withheld from one record but not withheld from a companion record. In one case, the name was withheld from one copy of a record but not from another. In cases where ICBC released third party personal information, and it should have applied s. 22, I have decided to apply s. 22 to the previously released information. As much as I could, in the circumstances, I have authorized the application of s. 22 for names and other third party personal information not otherwise disclosed.

[82] ICBC has applied s. 22 to employee names in e-mails, correspondence and memos. In these cases, employees are acting in their professional capacities with ICBC. As I pointed out in Order 00-17,

> [w]hile a name is personal information under the definition of 'personal information' in Schedule 1 to the Act, release of the name of an employee, acting in his/her employment capacity with the public body, does not amount to an unreasonable invasion of privacy under Section 22 in the case.

[83] In these cases I find that ICBC was not required to apply s. 22.

4.0 FINDINGS AND RECOMMENDATIONS

[84] 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. 13 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. 13 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. 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;

3. (a) Under s. 58(2)(a) of the act, subject to paragraph 3(b) below, to require ICBC to give the applicant access to some of the information it withheld under s. 15 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. 15 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;

4. (a) Under s. 58(2)(a) of the Act, subject to paragraph 4(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;

5. (a) Under s. 58(2)(a) of the Act, subject to paragraph 5(b) below, to require ICBC to give the applicant access to some of the information it withheld under s. 19 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. 19 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;

6. (a) Under s. 58(2)(a) of the Act, subject to paragraph 6(b) below, to require ICBC to give the applicant access to some of the 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, to require ICBC to refuse access to the information in the disputed records which was 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.

May 30, 2001

ORIGINAL SIGNED BY

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