Order F06-18

INSURANCE CORPORATION OF BRITISH COLUMBIA

Celia Francis, Adjudicator
September 21, 2006

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Summary: Applicant requested his ICBC file related to his claim regarding the loss of his motorhome and its contents by fire. ICBC disclosed some records but refused access to others, including fire investigation records. Sections 14, 15(1)(a) and 17(1) found not to apply. Section 22(1) found not to apply to a small amount of information.

Key Words: solicitor-client privilege—litigation privilege——disclosure harmful to law enforcement—financial or economic information—unreasonable invasion—personal privacy—position, functions or remuneration of public body employee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 15(1)(a), 17(1), 22(1), 22(4)(e).

Authorities Considered: B.C.: Order 00-42, [2000] B.C.I.P.C.D. No. 46; Order 02-01, [2002] B.C.I.P.C.D. No. 1; F06-16, [2006] B.C.I.P.C.D. No. 23; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58; Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44; Order 00-01, [2000] B.C.I.P.C.D. No. 1; Order F05-24, [2005] B.C.I.P.C.D. No. 32; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 01-53, [2001] B.C.I.P.C.D. No. 54.

Cases Considered: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Blank v. Canada (Ministry of Justice)*, 2006 SCC 39.

1.0 INTRODUCTION

[1] The applicant's motorhome was destroyed by fire and he made a claim to the Insurance Corporation of British Columbia ("ICBC"). ICBC was concerned

about the claim and asked the applicant to have his Proof of Loss form notarized. ICBC also spoke with an inspector with the local fire department who said that the cause of the fire could not be ascertained. A few days later, ICBC paid the applicant the declared payout value of $24,800 for the motorhome. The applicant was not satisfied that the payout excluded taxes and twice followed up on this issue with ICBC, saying he would check the matter out with his lawyer. ICBC declined to pay any additional amount for taxes. The applicant also made a claim regarding loss of contents he said were in the motorhome at the time of the fire. ICBC had concerns that the applicant's claim for contents was potentially fraudulent and referred this aspect of the claim to its Special Investigations Unit ("SIU") for investigation. This led to a criminal fraud investigation.[1]

[2] The ICBC claims centre manager and the SIU investigator met with the applicant to discuss his claim. When the applicant asked during that meeting what his options were if ICBC denied the applicant's claim, the claims centre manager told the applicant that his understanding was that "his [the applicant's] option would be to file an action". The day after this meeting, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for his claim file. ICBC responded by disclosing some records and severing and withholding other records under ss. 13, 14, 15, 16, 17, 19, 20 and 22 of FIPPA. Not long after, ICBC denied the applicant's claim for loss of contents of the motorhome under s. 19(1)(e)[2] of the *Insurance (Motor Vehicle) Act*. The applicant then wrote to ICBC saying he was filing for arbitration under the "coverage dispute provisions" and "accusing ICBC of provoking him to get a lawyer to sue them from the outset".[3]

[3] Because the request for review with this office did not settle in mediation, a written inquiry took place under Part 5 of FIPPA. During the inquiry, ICBC withdrew its reliance on ss. 13, 16, 19 and 20 completely and, respecting some information, ss. 14 and 17. It also disclosed more information and records to the applicant.

2.0 ISSUE

[4] The notice for this inquiry said that the issues in this case were:

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[1] Paras. 1-8, ICBC's initial submission; paras. 1-6, Warwick affidavit; paras. 1-4, Ahern affidavit; Aitken affidavit. ICBC's submission and the Warwick and Aitken affidavits state that the SIU referral was regarding the claim for contents only, while the Ahern affidavit states that the referral was to investigate both the contents claim and the cause of the motorhome fire.

[2] 19 (1) If … (e) an insured makes a willfully false statement with respect to a claim under a plan, all claims by or in respect of the applicant or the insured are rendered invalid, and his or her right and the right of a person claiming through or on behalf of or as a dependant of the applicant or the insured to benefits and insurance money is forfeited.

[3] Paras. 8-13, ICBC's initial submission; para. 7, Warwick affidavit.

1. Whether ICBC is authorized to refuse access under ss. 13, 14, 15, 16, 17, 19 and 20 of FIPPA.

2. Whether ICBC is required to refuse access under s. 22 of FIPPA.

[5] As noted above, ICBC withdrew its reliance on ss. 13, 16, 19 and 20. I therefore need not consider them here but only ss. 14, 15, 17 and 22. Under s. 57(1) of FIPPA, ICBC has the burden of proof regarding ss. 14, 15 and 17. Under s. 57(2), the applicant has the burden regarding third-party personal information.

3.0 DISCUSSION

[6] **3.1 Records in Dispute**—ICBC withheld or severed a number of items, principally the SIU and fire investigator's reports, notes and related information and correspondence. There are a number of duplicates among the records. ICBC provided me with copies of the newly disclosed and re-severed records with its initial submission, along with a table ("Requester Report") showing the exceptions on which it still relies.[4] In its submission, ICBC also gave some details of entire pages or individual items to which it had applied exceptions. It did not, however, annotate individual portions of the records to show where it considered exceptions apply, which would have been helpful for both the applicant and me. It simply inserted general statements at the bottom of each withheld or severed page saying, for example, "withheld s. 14, s. 17". I have therefore had to rely on ICBC's submission for assistance in determining where ICBC considers particular exceptions to apply to entire pages or to individual items, as appropriate.

[7] It has to be said, as well, that ICBC's table of withheld records is also not helpful, particularly to the applicant, in that it simply lists page numbers, whether pages were withheld, disclosed or severed and the exceptions applied. Thus, as far as I can tell, the applicant had no idea of the nature of the withheld records and information until he saw ICBC's submission. I encourage ICBC in future to provide more details in these areas to its applicants, in line with its duty under ss. 6(1) and 8(1). The Information and Privacy Commissioner has made similar comments in the past, as far back as Order 00-42.[5]

[8] **3.2 Solicitor-Client Privilege**—ICBC described the principles for applying s. 14, referring to relevant orders and case law, and said that it is relying on litigation privilege in this case. It acknowledged that the issues here are whether litigation was in reasonable prospect at the time ICBC was investigating

[4] Although ICBC did not, with its initial submission, also provide me with copies of the records that remained fully withheld, I was able to find them among the copies of the records originally in dispute that ICBC provided to this office for mediation purposes.
[5] [2000] B.C.I.P.C.D. No. 46.

the applicant's claim and whether the dominant purpose of the creation of the records was to further litigation.[6]

[9] ICBC said that it withheld the following types of information under s. 14:

- information at pp. 24-38 (and duplicates at pp. 196-204) from the fire investigator,
- correspondence at pp. 60-63 because it relates "to the fraud investigation to gather evidence",
- communications at pp. 110-113 because they outline "the status of the SIU investigation and strategy for dealing with the claim",
- the report at pp. 185-188 which was "prepared … [*in camera*]",
- notes and material at pp. 221-279 and 297-299 which "constitute the SIU file material for the investigation to gather evidence".[7]

[10] In ICBC's view, "the totality of evidence supports that litigation was reasonably anticipated from the time that the claim was referred to SIU for a fraud investigation" because of the following considerations:

- "The circumstances relating to the fire of the motor home were in themselves suspicious because the vehicle had only been insured for four days on a basic three month policy with specified perils of fire and theft when it was destroyed by fire",
- The claims adjuster required a notarized Proof of Loss form as she felt the claim was suspect and also documented "concerns about the claim",[8]
- From the beginning, the applicant was unco-operative and not forthcoming, failing to tell ICBC that the local fire department had directed him to move his motorhome because it was leaking gas and, when confronted with this information, responded that ICBC had not asked him about it,
- The applicant was "adversarial" and, upon receiving the declared value payout on the motor home only five days after making his claim, complained twice to ICBC that an additional amount for sales tax was not included; on the first occasion, the claims adjuster noted that the applicant said "he was going to take the documentation to his lawyer" and, on the second, that he said he would "check this out with a lawyer",

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[6] Paras. 15-22, initial submission.
[7] Para. 23, initial submission.
[8] Entries on pp. 3-5 of the records in dispute (which ICBC disclosed in full to the applicant) indicate that the adjuster's concerns arose from the fact that the applicant did not tell her the fire department had asked him to move his motorhome shortly before the fire, as it was parked on a slope and leaking gas.

- When ICBC told the applicant he had a right to make a claim for contents, it cautioned him not to exaggerate, as this could affect his entire claim, reflecting a "concern regarding his credibility and the potential for litigation",
- The applicant "nevertheless submitted an extensive claim for contents exceeding coverage limit … [*in camera*]",[9]
- The "suspicious nature of the claim for contents" prompted the ICBC claims centre manager to refer the matter to the SIU for a fraud investigation,
- The applicant asked the manager and SIU investigator what his options were if ICBC denied the claim, was told that he could "file an action" and asked if arbitration was an option,
- The "SIU determined that the claim … [*in camera*]",
- When ICBC declined the claim for contents, the applicant "immediately sent a letter purporting to invoke the arbitration process to settle the 'coverage dispute' and expressing dissatisfaction with the [local claims office's] 'misinformation and lies'", saying in addition that,

> ICBC says they don't like court but you insist on it and have be [*sic*] provoking me to get a lawyer and sue you from the beginning. This will be pursued because of your ignorance and lies,[10]

- ICBC claims staff believed that the applicant would seek legal recourse with respect to the denial of the claim for contents.[11]

[11] ICBC went on to say that, not only was the applicant adversarial, unco-operative and not forthcoming, he was aggressive, intimidating and threatening, repeatedly threatened that he would take the matter to his lawyer and submitted an "exaggerated claim for contents notwithstanding a caution from ICBC staff that doing so could affect his claim". In ICBC's view,

> … litigation became a reasonable prospect as soon as the claim file was flagged as a potentially fraudulent claim and forwarded to SIU for investigation and gathering of evidence. The referral to SIU was not done in the ordinary course of administering a claims file but reflected the highly suspicious and highly contentious nature of the claim.[12]

[12] ICBC argued that a reasonable person would accept that,

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[9] Page 7 of the disclosed records notes that the limit of the applicant's coverage for contents was $2,000.
[10] Para. 24, initial submission; paras. 1-7, Warwick affidavit; paras. 1-7, Ahern affidavit.
[11] Para. 8, Warwick affidavit; para. 5, Ahern affidavit.
[12] Para. 25, initial submission; para. 5, Ahern affidavit.

> … litigation was in reasonable prospect from the earliest stage of this claim, based on all of the pertinent information including the adversarial conduct of the Applicant … because it was unlikely from the beginning that the claim for loss would be resolved without litigation. Litigation (both civil and criminal) was in reasonable prospect at the time the documents were created.[13]

[13] In ICBC's view, it is clear from the records themselves that the dominant purpose of their production was to gather evidence for litigation, rather than in the ordinary course of claims processing. It said that normal files are not referred to SIU for investigation and that "the dominant purpose of creating the records was to gather and record the evidence that would be used to … [*in camera*] in defence of a potential civil claim".[14] "Disclosure of this information would provide the Applicant with insight concerning our strategy for challenging his claim in the event he commences an action for denying his claim for contents", ICBC concluded.[15]

[14] The applicant's submissions were brief and did not directly address s. 14. He said that ICBC is withholding information he is entitled to and that it has been evasive and not forthcoming with information.[16] He also said that the reason he was upset was that ICBC initially told him he was not entitled to coverage for the loss of the contents of the motor home and that ICBC only went ahead with his claim when he did his own research and brought his entitlement to ICBC's attention. He concluded:

> … so the reason i [*sic*] am pursuing this is because of their ignorance, or blatant lies of coverage that 100's of people should have been told about and never were. This is an attempt to let the system work as it should and protect people from being deceived by what we are told is a fair and just system for insurance. Who polices them when they decieve [*sic*], and try to cover it up?

[15] Section 14 reads as follows:

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

[16] The Information and Privacy Commissioner has considered the application of s. 14 in numerous orders and the principles for its application are well

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[13] Para. 26, initial submission; para. 6, Harbick affidavit.
[14] Para. 27, initial submission; paras. 11-13 (*in camera*), Aitken affidavit.
[15] Para. 8, Ahern affidavit.
[16] Initial submission.

established. See, for example, Order 02-01[17] and Order F06-16.[18] I will not repeat those principles but apply them here.

[17] I do not accept ICBC's arguments regarding s. 14 for a number of reasons. To begin, although ICBC said the applicant's claim was "suspicious" because the fire occurred only four days after he insured the motorhome, it admitted that the local fire department could not ascertain the cause of the fire. I also note that the May 10, 2004 entry on p. 4 of the records (which ICBC disclosed) says "the fire dept. are not suspicious of the cause of this file [*sic*] (not arson)".

[18] It is not clear how ICBC's "concerns about the claim"[19] and the adjuster's requirement that the applicant have his Proof of Loss form notarized support an argument that litigation was in reasonable prospect at the time ICBC created the records. ICBC did not explain this to me and it is certainly not evident from the material before me. Nor is ICBC's argument that the records would provide the applicant with "insight" into its claims strategy (whatever that means) relevant to the issue of privilege as presented in these circumstances.

[19] In any event, ICBC paid the declared value payout of nearly $25,000 only days after the applicant made the claim for the motorhome. This reasonably suggests that, if ICBC entertained any suspicions initially about that claim, it was apparently unable, in fairly short order, to substantiate them.

[20] I also do not accept that the applicant's "adversarial" behaviour and his indication that he wished to consult a lawyer necessarily indicate that he intended to sue ICBC. It is not clear if the applicant did hire or consult a lawyer but, even if he did, he may simply have wished to obtain advice on ICBC's actions. In addition, ICBC's own records and submissions indicate that, during the investigation, the applicant inquired twice about arbitration as an option, when told he could file an action if ICBC denied his claim for loss of the contents of the motorhome.

[21] Apart from one brief reference in the applicant's letter after his contents claim was denied, which might simply have been an indication of his annoyance at being turned down, there is no indication on the applicant's part that he seriously considered or intended to sue ICBC for denying him compensation for contents. Nor is there any evidence that he has since sued ICBC. The applicant was turned down on his claim for contents and, as far as I can tell from the material before me, apart from his access request, that was the end of the

[17] [2002] B.C.I.P.C.D. No. 1.
[18] [2006] B.C.I.P.C.D. No. 23.
[19] As noted above, these "concerns" flowed from the applicant's failure to tell the adjuster he was asked to move his vehicle.

matter. For these reasons, I do not accept ICBC's argument that civil litigation was in reasonable prospect at the relevant time.[20]

[22] As for the second part of the test, I conclude based on the material here, including the records themselves, that a very significant, if not the principal, purpose for the creation of the records was ordinary claims processing and, later, the investigation of the possibly fraudulent claim for contents. I do not in the circumstances accept ICBC's argument that the dominant purpose for the creation of the records was civil litigation.

[23] Turning now to possible criminal litigation, ICBC said it carried out a fraud investigation under s. 380(1) of the *Criminal Code*, which could presumably have led to criminal prosecution and thus litigation. ICBC claimed that criminal litigation was in reasonable prospect at the time of the investigation.[21]

[24] Assuming, for the purposes of discussion only, that criminal litigation can raise privilege under the litigation privilege rule,[22] and assuming, again for discussion purposes only, that, if any such privilege arises, ICBC is entitled to its benefit, I do not consider that ICBC has established that criminal litigation was in reasonable prospect at the time the disputed records were created.

[25] ICBC's argument that this was not an ordinary claim because of the referral to the SIU for a fraud investigation, and that criminal litigation was thus in reasonable prospect at the time the records were created, comes perilously close to saying that there is a reasonable prospect of criminal litigation with every such referral to the SIU, regardless of the merits of the referral. ICBC did not say what percentage of claims it refers for investigations of potential fraud nor of these how many lead to criminal proceedings. It also did not explain the link between fraud investigation and criminal prosecution. ICBC may investigate many possibly fraudulent claims with no thought of criminal prosecution at all or at least not until later in the process. At all events, without more, I do not see how a fraud investigation inevitably translates into criminal prosecution every time or the reasonable prospect of such proceedings. ICBC's other open and *in camera* evidence also do not establish that criminal litigation was in reasonable prospect at the time of the creation of the records.[23]

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[20] There is, I note in passing, no evidence that litigation was commenced, or was in reasonable prospect, at any time after the disputed records came into existence up to the holding of this inquiry.

[21] ICBC's principal argument and evidence on this point are *in camera*.

[22] In a recent decision, *Blank v. Canada (Ministry of Justice)*, 2006 SCC 39, at para. 43, the court appeared to contemplate that criminal prosecution raised litigation privilege.

[23] I note, again in passing, that there is no evidence in the material before me that, after the completion of the investigation and denial of the claim, criminal litigation was underway or contemplated in the 16 months from the date of the request to the date of this inquiry.

[26] I am also not persuaded from the records and evidence at hand that the dominant purpose of the creation of the records was any such litigation. As noted above, it is clear from the material before me that significant purposes for the creation of the records were claims processing and the fraud investigation and in the circumstances the dominant purpose for creation of the records was not criminal litigation.

[27] For all of these reasons, I find that s. 14 does not apply to the records in dispute.[24]

[28] **3.3 Harm to Law Enforcement**—ICBC referred to s. 15(1)(a) as its authority for withholding some of the information in dispute. It discussed various orders which considered the issue of whether a law enforcement investigation must still be active in order to engage s. 15(1)(a). It referred to an order[25] by the previous Information and Privacy Commissioner where he found that s. 15(1)(a) applied in a case where the investigation was over and to another[26] in which the current Commissioner "appeared to assume, at least implicitly, that an investigation or proceeding must still be underway".[27] ICBC then referred to Order 00-08[28] in which the Commissioner said he would make no comment as to whether the particular investigation had to be underway or in reasonable prospect in order for s. 15(1)(a) to apply. The Commissioner went on to find that, in that case, there was no evidence that a law enforcement matter had been underway or in reasonable prospect at the relevant times and that, even if it had, the public body had not shown a reasonable expectation of harm from disclosure of the records in dispute.

[29] ICBC also referred to federal case law which it said supported its view that the term "investigation" may be interpreted broadly and that an investigation need not be active in order for the equivalent exception in the federal legislation to apply.[29] In this regard, ICBC reproduced the following quote from *Lavigne v. Canada (Office of the Commissioner of Official Languages)*,[30] which interprets

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[24] See Order 00-42, where the Commissioner rejected similar arguments by ICBC.
[25] Order No. 197-1997, [1997] B.C.I.P.C.D. No. 58.
[26] Order No. 331-1999, [1999] B.C.I.P.C.D. No. 44.
[27] Para. 29, initial submission. It is not clear on what basis ICBC suggests that, in Order No. 331-1999, the Commissioner made this supposed implicit assumption. At pp. 19-20, he explicitly stated that, because *Police Act* proceedings were still underway, a "law enforcement matter" was in issue. He went on to say that the question remained whether s. 15(1)(a) applies because of a reasonable expectation of harm to that law enforcement matter, flowing from disclosure of the information in dispute. Ultimately, he found that the Vancouver Police Board had not established that such harm might occur.
[28] [2000] B.C.I.P.C.D. No. 8.
[29] Paras. 28-32, initial submission.
[30] [2002] 2 S.C.R. 773.

s. 22(1)(b) and s. 22(3),[31] provisions in the federal *Privacy Act* that protect certain kinds of law enforcement information:

> ¶51 In the case before us, the appellant is not arguing that the disclosure of information would be injurious to investigations that are underway, because all of the investigations had been concluded at the time when the respondent requested the personal information in question from him. However, he submits that disclosure of the personal information could reasonably be expected to be injurious to his future investigations. The appellant contests the argument [page807] made by the respondent and the intervener, which is that s. 22(1)(b) applies only to investigations that are underway and cannot be relied on to protect future investigations or the investigative process in general. In his submission, this is a needlessly narrow interpretation of that provision, and it is injurious to the implementation of the Act and the attainment of its objectives.
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> ¶52 First, it must be noted that the word "investigation" is defined in s. 22(3) of the Privacy Act: …
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> That definition does not suggest that the word is limited to a specific investigation, or an investigation that is circumscribed in time. Indeed, Parliament has not limited the scope of that expression by any qualifier whatever. None of the paragraphs of s. 22(3) limits the word "investigation" to investigations that are underway, or excludes future investigations or the investigative process in general from its protection. It therefore seems, *prima facie*, that the word retains its broad meaning and may refer equally to investigations that are underway, are about to commence, or will take place. …

[30] The Supreme Court of Canada then made it clear, however, that one must look at the statutory context and language to see if Parliament has narrowed a definition for the purposes of the federal *Privacy Act*. The passage ICBC cited is only a partial quote, with para. 52, and the discussion, continuing as follows:

> …We shall now consider whether Parliament restricted the scope of that definition for the purpose of the application of the exception to disclosure set out in s. 22(1)(b).

[31] These sections read as follows: 22(1) The head of a government institution may refuse to disclose any personal information requested under subsection 12(1) … (b) the disclosure of which could reasonably be expected to be injurious to the enforcement of any law of Canada or a province or the conduct of lawful investigations, including, without restricting the generality of the foregoing, any such information (i) relating to the existence or nature of a particular investigation, (ii) that would reveal the identity of a confidential source of information, or (iii) that was obtained or prepared in the course of an investigation; 22(3) For the purposes of paragraph (1)(b), "investigation" means an investigation that (a) pertains to the administration or enforcement of an Act of Parliament; (b) is authorized by or pursuant to an Act of Parliament; or (c) is within a class of investigations specified in the regulations.

> ¶53 Parliament made it plain that s. 22(1)(b) retains its broad and general meaning by providing a non-exhaustive list of examples. It uses the word "notamment", in the French version, to make it plain that the examples given are listed only for clarification, and do not operate to restrict the general scope of the introductory phrase. The English version of the provision is also plain. Parliament introduces the list of examples with the expression "without restricting [page808] the generality of the foregoing". This Court has had occasion in the past to examine the interpretation of the expression "without restricting the generality of the foregoing" in similar circumstances: in Dagg, *supra*, at para. 68, La Forest J. analyzed s. 3 of the *Privacy Act*, the wording of which resembles the wording of s. 22(1)(b) of that Act:
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> > In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91.
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> Although s. 22(1)(b)(i) relates specifically to a particular investigation, it in no way alters the generality of the introductory sentence. In fact, s. 22(1)(b)(ii), which authorizes refusal to disclose information that would reveal the identity of a confidential source of information, contemplates the protection of future investigations as well as existing investigations. A reliable confidential source may be useful beyond the confines of one specific investigation.
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> ¶54 In short, there is nothing in s. 22(1)(b) that should be interpreted as restricting the scope of the word "investigation" to investigations that are underway or are about to commence, or limiting the general meaning of that word to specific investigations. There is therefore no justification for limiting the scope of that section.

[31] ICBC argued that s. 15(1)(a) should not be restricted to investigations that are still underway but should also apply "where non-disclosure is necessary for the purposes of ensuring that the information gathered under the investigation or the investigative techniques used do not have an adverse impact on law enforcement". Here, ICBC argued, it has withheld information under s. 15(1)(a) "where its disclosure could reasonably be expected to harm its law enforcement function for fraud claims relating to fires" as follows:

- Information on p. 9 identifying the name of the fire investigator that the SIU used for the fraud investigation and next steps for investigation,
- "[*in camera*]" material on pp. 104-108,

- The SIU investigator's internal status report at pp. 110-113,
- The "[*in camera*]" report at pp. 185-188,
- The fire investigator's report at pp. 196-204 "prepared for SIU investigation and gathering of evidence",
- The SIU investigator's handwritten interview notes at p. 205.[32]

[32] ICBC concluded as follows, also providing *in camera* affidavit evidence[33] in support of its position on these points:

> 35. Disclosure of the SIU investigative material could reasonably be expected to harm law enforcement for future fraud investigations relating to claims arising from fires. Information of this nature transcends the interests of the parties to this inquiry. Once the information is in the public domain, it may be used by individuals seeking to make fraudulent insurance claims. Disclosure of the SIU's investigative tactics for fraud claims (both in terms of what SIU investigators and experts look for and what they do not look for and the limitations of fire investigation reports) would alert individuals seeking to defraud ICBC with intentional fires and evade prosecution for criminal fraud. The … [*in camera*] material is of particular sensitivity because ICBC is required to maintain the confidentiality of such material under its agreement with … [*in camera*].

[33] Section 15(1)(a) says the following:

> **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, …

[34] A number of orders have considered the interpretation of this exception and the principles for applying the "reasonable expectation of harm" test.[34] I apply those principles here without repeating them.

[35] It is implicit in ICBC's arguments and the records themselves that the investigation involving the applicant's claim is over—it ended in mid-2004. The thrust of ICBC's arguments is thus aimed at harm it foresees to future investigations from disclosure of the disputed information. I do not close the door to the possibility that s. 15(1)(a) might apply to future law enforcement investigations, depending on the circumstances. However, I have difficulty with

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[32] Paras. 33-34, initial submission.
[33] Aitken affidavit.
[34] See Order 00-01, [2000] B.C.I.P.C.D. No. 1, for example, and Order F05-24, [2005] B.C.I.P.C.D. No. 32.

ICBC's arguments on s. 15(1)(a), in the circumstances at hand, for a number of reasons.

[36] ICBC did not explain, even on an *in camera* basis, how the disputed information "transcends" the interests of the parties in this case nor how someone could use the information in question to thwart future ICBC investigations of fraud claims related to fire. It simply offered general assertions in this regard.

[37] The information in dispute consists principally of the investigators' accounts of the factual evidence uncovered, or not uncovered, during the investigations of this particular claim and the fire, as well as correspondence related to the claim. It is not at all apparent from the records themselves how the details from the report and other records would assist an individual intent on defrauding ICBC in the future or have implications for ICBC's future fraud investigations in general or in cases similar to this. ICBC has not, at least, explained this to me in any detail nor has it said how the (unspecified) "limitations" of the report enter into the matter. I do not accept that disclosure of the disputed information could reasonably be expected to harm future ICBC fraud investigations of such claims which are in any case, I note, likely to differ in their individual circumstances, findings and results.

[38] In addition, pp. 125-155 of the ICBC claims records, which consist of a transcript of the ICBC's interview with the applicant and which ICBC disclosed to the applicant, indicate that the claims centre manager and SIU investigator outlined the fire investigator's findings to the applicant during this meeting. In addition, the disclosed records include a letter and incident and investigation reports by the local fire inspector, at pp. 280-294. The letter states that the inspector did not find in the burned motorhome any of the items that the applicant claimed were in the motorhome at the time of the fire. The applicant thus already knows at least some of what the investigations found or, perhaps, did not find.[35]

[39] It is also far from clear how the name of the fire investigator could reasonably be expected to harm future law enforcement matters respecting ICBC's fraud investigations related to fires. ICBC did not provide any justification for its position on this aspect of the matter. However, as discussed below, since the applicant said he did not want the names of any individuals except public body employees, ICBC is free to sever this individual's name where it appears in the disputed records.

[40] I also do not accept ICBC's arguments regarding the so-called "sensitive" material, arguments which in my view have more to do with s. 16(1) than s. 15.

[35] I can say these things about the information in dispute without disclosing withheld information because the applicant knows them already and must know that this is in part what the records being discussed here say.

(ICBC withdrew its application of s. 16 during the inquiry.) The so-called "sensitive" material is minimal and actually, in my view, quite straightforward. ICBC's *in camera* discussion of this information does not explain how its disclosure could reasonably be expected to harm ICBC's future fraud investigations of claims related to fire.

[41] ICBC has not demonstrated how disclosure of the information in question could reasonably be expected to harm future law enforcement matters related to fraud investigations of claims related to fire. I find that s. 15(1)(a) does not apply here.

[42] I will also add that, in referring to the possible adverse impact on investigative techniques, at para. 33 of its initial submission, ICBC appears to be conflating its arguments on s. 15(1)(a) with s. 15(1)(c).[36] They are of course two separate provisions. To the extent that ICBC is also relying on s. 15(1)(c), even assuming for discussion purposes that this provision can properly be relied on at this stage of the proceedings, I would not accept that it applies here. The "investigative techniques" ICBC used can only be described as routine, not specialized or out of the ordinary. I do not see how disclosure of the findings of the investigation in this case could reasonably be expected to harm the effectiveness of such "investigative techniques" in the future.

[43] **3.4 Harm to ICBC's Financial Interests**—ICBC referred to past orders on s. 17(1) and then said it had withheld the following types of information under that exception:

- Specified entries on pp. 9 and 10 "which identify the name of the fire investigator as disclosure would reveal ICBC's expert for the defence of the claim",
- The fire investigator's material at pp. 24-38 as "disclosure would reveal the identity of the investigator and the content of his report which will be used for the defence of the claim",
- Correspondence at pp. 60-63 and 297-299 "outlining the evidence from third party witnesses which will be relevant to the defence of the claim",
- " … [*in camera*] investigation material" at pp. 104-109,
- Internal email exchanges at pp. 110-113 as "disclosure would reveal investigative steps and name of fire investigator and strategy for dealing with claim",
- " … [*in camera*]" at pp. 185-188,

[36] Section 15(1)(c) permits a public body to withhold information the disclosure of which could reasonably be expected to "harm the effectiveness of investigative techniques and procedures currently used, or likely to be used, in law enforcement".

- Fire investigator's report at pp. 196-204 and 230-278,
- The SIU investigator's handwritten notes at pp. 205 and 220-279,
- Third party information at pp. 297-299.[37]

[44] ICBC said that the majority of this information was severed or withheld as it is relevant to "defending the decision to deny the claim for contents and will be used in the defence of any civil claim (or arbitration proceeding) that the Applicant may commence".[38] (ICBC did not say what arbitration proceeding the applicant might commence.) ICBC argued, with support from open and *in camera* affidavit evidence,[39] that there is a reasonable expectation of harm to its financial interests in

> 41. … disclosing ICBC's strategy for dealing with the claim for contents and providing the Applicant with access to confidential information gathered as evidence that will be used to defend against a civil action arising from the denial of the content claim.

[45] A number of orders have considered the application of s. 17(1)[40] and I apply here without repeating them the principles from those orders.

[46] ICBC's arguments on s. 17(1) derive from its alleged concern that the applicant will commence a civil action and that disclosure of the information in dispute could reasonably be expected to harm ICBC's ability to defend itself in such an action. As with other aspects of ICBC's case, these are general assertions only and do not offer examples of specific information the disclosure of which is said to be a concern or explain how disclosure could reasonably be expected to harm ICBC's financial interests.

[47] I have already said I do not accept the contention that civil litigation was in reasonable prospect at the time of the records' creation or indeed at any time in the life of this claim. I do not accept ICBC's argument that disclosure of the information in question could reasonably be expected to harm its financial interests in litigation that has not occurred and for which there is not sufficient evidence that it is reasonably likely to occur. I do not consider that ICBC has established that s. 17(1) is applicable here on this or any other basis and I find it does not apply.

[48] **3.5 Personal Privacy**—ICBC said it withheld the names and other information of a number of individuals under s. 22(1) of FIPPA on a number of pages. It provided some of its reasons for doing so on an *in camera* basis. In other cases, ICBC said it wanted to protect the "names and home contact

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[37] Paras. 36-39, initial submission.
[38] Para. 40, initial submission.
[39] Harbick, Ahern & *in camera* affidavits.
[40] See, for example, Order 02-50, [2002] B.C.I.P.C.D. No. 51.

information" for "potential witnesses" "at page 185" and the names of others who were involved in motor vehicle accidents on p. 17.[41]

[49] The applicant stated in his initial submission that he does "not wish any detailed personal information which is covered under this section, but, if it's a public body employee, name and title should be made available". I therefore need only consider ICBC's application of s. 22(1) to information related to any public body employees.

[50] Many orders have looked at the application of s. 22[42] and I will apply here without repeating them the principles from those orders. The parts of s. 22 that ICBC relies on read as follows:

> **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, …
>
> (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, …

[51] Although ICBC did not mention it, s. 22(4)(e) is also relevant here. This section reads as follows:

> 22(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[41] Paras. 42-47, initial submission.
[42] See for example, Order 01-53, [2001] B.C.I.P.C.D. No. 54.

[52] The following definitions from Schedule 1 of FIPPA are also relevant here:

> **"contact information"** means information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual;
>
> **"personal information"** means recorded information about an identifiable individual other than contact information;

[53] The names and associated personal information that ICBC withheld under s. 22(1) on pp. 6, 7, 17, 66, 67, 178, 192, 193, 213, 298 and 299 are in the class of information that the applicant is not interested in. I will therefore not consider them here.

[54] This leaves only one page. The records in dispute and ICBC's table of withheld records indicate that ICBC did not apply s. 22 to p. 185,[43] as its submission said, but the records, table and submission show that it did apply s. 22 to p.186. ICBC did not annotate individual portions of this page to indicate exactly where it considers s. 22(1) to apply. From its submission, however, I take it that ICBC considers that s. 22(1) applies only to the names and what it calls the "home contact information" of the three individuals who appear on this page as "potential witnesses", but to no other information on this page, *i.e.*, their statements.

[55] The information related to these three individuals is their names and their office address information, not their "home contact information", as ICBC said. The first and third individuals' names are in the class of personal information the applicant does not want and I need not consider whether s. 22(1) applies to them. ICBC did not, for reasons it does not explain, apply s. 22(1) to these individuals' names and associated personal information elsewhere in the disputed records, possibly because it applied ss. 14, 15 and 17 to those other pages. I found above that these exceptions do not apply but since the applicant is not interested in these individuals' names and associated personal information, ICBC may sever this information, though not the contact information, wherever it appears.

[56] The second individual on p. 186 is a public body employee. This individual's name falls into s. 22(4)(e), in my view, as it appears in the context of the performance of his duties. For this reason, I find that s. 22(1) does not apply to this individual's name. (I note that this individual, apparently on behalf of his public body, consented to the disclosure of information that the public body provided,[44] which presumably includes his name. I also note that,

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[43] The information on p. 185 includes personal information about the applicant.
[44] See letter of November 4, 2005 from third party.

elsewhere in the records, ICBC disclosed other information that this public body provided.)

[57] The office contact information for all three individuals on p. 186 falls under the definition of "contact information" in Schedule 1. It is thus not "personal information" and s. 22(1) does not apply to it.

[58] According to its submission, table of records and the records themselves, ICBC, correctly, did not apply s. 22(1) to the names and titles of its employees on p. 187, just as it did not elsewhere the records. If it had, I would have made the same s. 22(4)(e) finding as I did for the public body employee on p. 186.

4.0 CONCLUSION

[59] For the reasons given above, under s. 58 of the Act, I make the following orders:

1. I find that ICBC is not authorized by ss. 14, 15(1)(a) and 17(1) to refuse the applicant access to the information it withheld under those sections and I require ICBC to disclose this information to the applicant.

2. I find that ICBC is not required by s. 22(1) to refuse the applicant access to the name and contact information of the second individual and to the contact information of the first and third individuals listed on p. 186 and I order ICBC to disclose this information to the applicant.

[60] For reasons given above, no order is necessary respecting the other personal information that ICBC withheld under s. 22(1).

September 21, 2006

ORIGINAL SIGNED BY

Celia Francis
Adjudicator