



Order F22-16

## INSURANCE CORPORATION OF BRITISH COLUMBIA

Lisa Siew  
Adjudicator

April 8, 2022

CanLII Cite: 2022 BCIPC 18  
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 18

**Summary:** The Insurance Corporation of British Columbia (ICBC) received an access request from an applicant for records related to a dispute over unpaid vehicle insurance premiums. ICBC provided the applicant with partial access to the responsive records, but withheld information under ss. 13 (advice and recommendations) and 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that ICBC had correctly applied s. 14 to some of the withheld information. The adjudicator also concluded ICBC properly exercised its discretion in applying s. 14 to the records. The adjudicator determined, however, that ICBC was not authorized to withhold some of the information at issue under ss. 13(1) and 14 and ordered ICBC to disclose that information to the applicant.

**Statute Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13 and 14.

### INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the Insurance Corporation of British Columbia (ICBC) provide access to a variety of records related to a dispute between the applicant and ICBC over unpaid vehicle insurance premiums. ICBC provided the applicant with partial access to the responsive records, but withheld information under ss. 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of third-party personal privacy) of FIPPA.

[2] The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review ICBC's decision. During the OIPC's investigation and mediation process, ICBC reconsidered its decision regarding the information withheld under s. 22(1) and disclosed this information to the applicant. The parties did not resolve the rest of the matters at issue and those matters were forwarded to a written inquiry.

## ISSUES AND BURDEN OF PROOF

[3] The issues in this inquiry are as follows:

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

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

[5] The parties' submissions also include an issue not set out in the OIPC investigator's fact report and the notice of inquiry. Specifically, the applicant accuses ICBC of breaching his privacy. As described in the notice of inquiry received by the parties, the investigator's fact report sets out the issues for the inquiry and parties may not add new or additional issues without prior consent.

[6] The applicant did not seek permission to add this issue to the inquiry or explain why he should be permitted to do so at this late stage. As a result, I decline to consider as part of this inquiry whether ICBC breached the applicant's privacy and will only refer to those submissions where it is necessary or relevant to the issues identified above.

## DISCUSSION

### *Background<sup>1</sup>*

[7] ICBC is the sole provider of universal and compulsory basic auto insurance in BC.<sup>2</sup> The applicant is the co-owner and co-director of a shipping and trucking company (Company). In 2018, the Company obtained vehicle fleet insurance through ICBC. Monthly insurance payments were automatically deducted from a bank account, but a number of payments were unpaid due to insufficient funds.

[8] Throughout this period, the applicant contacted ICBC and received approval to pay off the Company's accruing debt through a series of payment arrangements. However, each time payment was due, those payments were also returned as unpaid due to insufficient funds.

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<sup>1</sup> Almost all of the information in the background section is compiled from the parties' submissions and from information already disclosed in the records.

<sup>2</sup> Order F21-21, 2021 BCIPC 26 (CanLII) at para. 16.

[9] In 2019, the Company sued ICBC disputing the debt and alleging, among other things, that it was forced by an ICBC insurance agent to purchase fleet insurance rather than regular insurance on its commercial and personal vehicles resulting in higher premium rates that it could not pay.

[10] ICBC retained external legal counsel to represent it in the court action. ICBC filed a response and also counterclaimed for the debt owing from the unpaid insurance premiums.

### ***Records and information at issue***

[11] The responsive records total 491 pages with approximately 279 of those pages containing the information at issue. ICBC provided the responsive records for my review. The records consist of emails, email chains and printouts of ICBC database and employee log entries recording activity on the Company's account and files.

[12] In its inquiry submission, ICBC disclosed additional information to the applicant that was previously withheld under s. 14 or under both ss. 13 and 14.<sup>3</sup> As a result, I find that information is no longer in dispute in this inquiry since the applicant has received that information.

[13] During the inquiry, I also asked ICBC to process information in the records that it withheld on the basis that the information is a "duplicate".<sup>4</sup> There is no basis under Part 2 of FIPPA to withhold information in a record because it is duplicated elsewhere in the records. As a result of this process, ICBC disclosed additional information to the applicant which I conclude is also no longer at issue in this inquiry.<sup>5</sup>

### ***Solicitor-client privilege – s. 14***

[14] ICBC applied s. 14 to all of the information that it withheld in the responsive records. Section 14 states that a public body may refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses both legal advice privilege and litigation privilege.<sup>6</sup>

[15] During the inquiry, ICBC confirmed that it is only claiming legal advice privilege over the information withheld under s. 14.<sup>7</sup> Legal advice privilege

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<sup>3</sup> Attachment 5 of ICBC's submission dated December 21, 2021 at para. 3, with the disclosed information located on pp. 86-88, 216-240, 313-314 and 433-434.

<sup>4</sup> Letter to ICBC's legal counsel dated March 15, 2022.

<sup>5</sup> For example, information withheld on pp. 290-296 and 297-304 of the records.

<sup>6</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [College] at para. 26

<sup>7</sup> On February 24, 2022, ICBC's legal counsel in this inquiry confirmed with the OIPC's registrar of inquiries that ICBC is only relying on legal advice privilege and not litigation privilege.

applies to confidential communications between a solicitor and client for the purposes of obtaining and giving legal advice, opinion or analysis.<sup>8</sup>

[16] ICBC did not identify what test it applied to determine the information at issue is protected by legal advice privilege. However, the courts and previous OIPC orders accept privilege can only be claimed document by document, with each document being required to meet the following criteria:

1. A communication between a solicitor and client;
2. Which entails the seeking or giving of legal advice; and
3. Which is intended by the parties to be confidential.<sup>9</sup>

[17] Legal advice privilege does not apply to all communications or documents that pass between a lawyer and their client.<sup>10</sup> However, if the conditions set out above are satisfied, then legal advice privilege applies to the communication and the records relating to it.<sup>11</sup>

[18] The courts have also found that legal advice privilege extends to communications that are “part of the continuum of information exchanged” between the client and the lawyer in order to obtain or provide the legal advice.<sup>12</sup> A “continuum of communications” involves the necessary exchange of information between solicitor and client for the purpose of obtaining and providing legal advice such as “history and background from a client” or communications to clarify or refine the issues or facts.<sup>13</sup> The continuum also covers communications after the client receives the legal advice, such as internal client communications about the legal advice and its implications.<sup>14</sup>

### **The parties’ submissions on s. 14**

[19] ICBC submits that it correctly applied s. 14 to withhold information in the disputed records. ICBC categorizes those records as communications between its internal legal counsel and an external lawyer that it retained to represent it in the court action and as communications between ICBC employees and those lawyers. It also says the records contain communications between ICBC

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<sup>8</sup> *College* at paras. 26-31.

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

<sup>10</sup> *Keefer Laundry Ltd v. Pellerin Milnor Corp et al*, 2006 BCSC 1180 at para. 61.

<sup>11</sup> *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22.

<sup>12</sup> *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 [*Camp Development*] at paras. 40-46.

<sup>13</sup> *Camp Development* at para. 40.

<sup>14</sup> *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras. 22-24.

employees where information is sought or provided for the external lawyer and computer-generated records that reflect communications with the external lawyer or information gathered for the litigation.<sup>15</sup>

[20] In support of its position, ICBC provided an affidavit from its internal counsel and a table which generally describes the withheld information. The internal counsel identifies some of the people in the records and their roles and says that she agrees with the description of the records as set out in the table.

[21] The applicant did not address ICBC's arguments about s. 14, but generally asserts that he has a right to access the withheld information. The applicant questions why ICBC is resisting the release of this information and says "one should have no worries if one did nothing wrong."<sup>16</sup> The applicant suspects something is "not right" about his file with ICBC and says he needs access to that information since his "reputation" and "privacy" are at stake.<sup>17</sup>

#### **Analysis and findings: information properly withheld under s. 14**

[22] From my review of the records and evidence, I find ICBC is refusing to disclose information that consists of the following:

- Emails between ICBC employees and one or both of the lawyers where legal advice, strategy, opinion or instructions is requested, received or discussed regarding the litigation and related matters;<sup>18</sup>
- Emails between ICBC employees and one or both of the lawyers where information is exchanged or provided that is necessary to providing the legal advice and legal representation;<sup>19</sup>
- Emails between ICBC employees gathering information required or requested by the external lawyer for the purpose of providing legal advice to, or representation of, ICBC;<sup>20</sup>

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<sup>15</sup> ICBC's submission dated December 21, 2021 at para. 17.

<sup>16</sup> Applicant's email submission dated December 21, 2021.

<sup>17</sup> *Ibid.*

<sup>18</sup> Information located on pp. 153, 156, 288-289, 305, 315-316, 319, 321, 332, 350-351, 373-374, 390-391, 419-421 and 429-431 of the records.

<sup>19</sup> Information located on pp. 93, 120-121, 122-123, 124, 241, 258, 259, 271-274, 278-280, 297, 305-307, 332-334, 389, 408-409, 422, 427-428, 440-443, 444-447, 448-452 and 453-457 of the records.

<sup>20</sup> Information located on pp. 80-85, 96, 100, 125-126, 341-342, 343-345, 346-349, 425-426 and 435-436 of the records.

- Emails involving ICBC employees, internal counsel or the external counsel regarding administrative information related to the solicitor-client relationship and the litigation;<sup>21</sup> and
- Information withheld from documents and emails that reveal the content of privileged communications between ICBC and its lawyers.<sup>22</sup>

[23] As set out below, I conclude s. 14 applies to all of the above-noted information.

[24] Starting with the emails between ICBC employees and one or both of the lawyers, I am satisfied there was a solicitor-client relationship between ICBC and these lawyers. It is an uncontested fact that there was a legal dispute between the parties and that the external lawyer represented ICBC in the litigation. Internal counsel attests that ICBC retained outside legal counsel to defend it against the applicant's claim and the applicant does not dispute this evidence.<sup>23</sup>

[25] With regards to ICBC's internal counsel, solicitor-client privilege extends to a client's communications with in-house counsel provided the lawyer is acting in a legal capacity and not as a business or policy advisor.<sup>24</sup> To determine whether the lawyer is acting in a professional legal capacity at the relevant time, I must consider general evidence of the nature of the relationship, the subject matter of the advice and the circumstances in which it was sought or rendered.<sup>25</sup>

[26] In this case, internal counsel deposes that she was involved in the litigation between the applicant and ICBC.<sup>26</sup> My own review of the records confirms that internal counsel was involved in the conduct of the litigation in a legal capacity. I can also see that she was acting on behalf of ICBC in her communications with external counsel. Therefore, I conclude that the first requirement of the legal test is met as the communications at issue were between a solicitor and a client or their authorized representative.

[27] In terms of confidentiality, there is nothing in the descriptive table or in the affidavit evidence that addresses the parties' intentions regarding the confidentiality of these email communications. However, I can see from the records themselves that the emails only include ICBC employees and one or both of the lawyers. The emails do not include people from outside the solicitor-

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<sup>21</sup> Information located on pp. 89-90, 91-92, 94, 97-99, 101-104, 105-108, 109-111, 112-114, 115-118, 119, 163-164, 165-166, 167, 168, 169-172, 275-277, 352, 365-366, 389 and 399-401 of the records.

<sup>22</sup> Information located on pp. 34, 36-38, 437-439, 458-462, 463-468, 469-474, 475-480 and 481-487 of the records.

<sup>23</sup> Affidavit of internal counsel at para. 3.

<sup>24</sup> *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et. al.*, 2006 BCSC 1180 (CanLII) at para. 63.

<sup>25</sup> *Ibid* at para. 64, citing *R v. Campbell*, 1999 CanLII 676 (SCC) at para. 50.

<sup>26</sup> Affidavit of internal counsel at para. 2.

client relationship and there is nothing that indicates these emails or their contents were distributed more widely. As a result, I accept that the parties intended for the communications to be confidential and were treated in that manner.

[28] The last condition necessary for legal advice privilege to apply is that the communication must entail the seeking or giving of legal advice. I conclude all of the withheld information in these records entail the seeking or giving of legal advice or reveals what was said about those matters. In reaching this conclusion, I have taken into account that “legal advice is not confined to merely telling the client the law”, but must include “advice as to what should be done in the relevant legal context.”<sup>27</sup> Furthermore, it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communications in which the lawyer provides the legal advice.<sup>28</sup>

[29] I note that there are some emails that do not include a lawyer and are only between ICBC employees where information is compiled for the external lawyer.<sup>29</sup> Legal advice privilege may apply to internal client communications where information is gathered at the request of the lawyer for the purpose of providing legal advice.<sup>30</sup> Considering the content and context of these emails, I find that these emails came into existence because the external lawyer required or requested information to provide legal advice or representation to ICBC. I can also see that this collected information was subsequently communicated or forwarded to the external lawyer in other emails.<sup>31</sup> As a result, although these emails are not directly with a lawyer, I am satisfied these ICBC employee emails are protected under legal advice privilege.

[30] I am also satisfied s. 14 applies to information about administrative matters necessary to the seeking and providing of legal advice and legal representation between ICBC and its lawyers.<sup>32</sup> In reaching this conclusion, I have taken into account that the Supreme Court of Canada has found that “a lawyer’s client is entitled to have all communications made with a view to obtaining legal advice kept confidential” whether they deal with “matters of an administrative nature such as financial means or with the actual nature of the legal problem.”<sup>33</sup> My finding is also consistent with prior jurisprudence that applied s. 14 to similar information regarding scheduling, meeting arrangements, the terms of a retainer agreement and the exchange of court documents.<sup>34</sup>

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<sup>27</sup> *Gower v. Tolko Manitoba Inc.*, 2001 MBCA 11 (CanLII) at para. 19.

<sup>28</sup> *Camp Development* at paras. 42-43.

<sup>29</sup> For example, pp. 80-85, 96 and 100 of the records.

<sup>30</sup> *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII) at paras. 16 and 44.

<sup>31</sup> For example, p. 124 of the records.

<sup>32</sup> For example, information withheld on pp. 89-90 and 115-118 of the records.

<sup>33</sup> *Descoteaux v. Mierzwinski*, 1982 CanLII 22 (SCC) at 892-893.

<sup>34</sup> *Bank of Montreal v. Tortora*, 2010 BCSC 1430 (CanLII) at para. 43; Order F21-23, 2021 BCIPC 28 (CanLII) at para. 46; Order F20-24, 2020 BCIPC 28 (CanLII) at paras. 30-31; Order F19-01,

[31] I can see also that ICBC withheld information in other records that could reveal some of the information I find is protected by legal advice privilege. Solicitor-client privilege applies to information that would reveal the content of privileged communications between a lawyer and their client.<sup>35</sup> This other information is located in emails between ICBC employees and in database and employee log entries.<sup>36</sup> Although these records are not solicitor-client communications that entail the seeking or giving of legal advice, I find the disclosure of this information could reveal or allow accurate inferences about the content of such communications. Therefore, I conclude s. 14 applies to this information as well.

[32] Taking all of this into account, I am satisfied that the above-noted records contain the kind of information that properly falls within the scope of legal advice privilege.

[33] I considered whether some of the withheld information in these records could be severed and disclosed to the applicant in accordance with s. 4(2) of FIPPA. However, the courts have emphasized that severance of some of the communications in the continuum can only occur when there is no risk of revealing legal advice provided by the lawyer to the client.<sup>37</sup> Considering the circumstances, I am unable to conclude there is no risk of revealing such privileged information. Therefore, I do not find severance is appropriate for these records.

#### **Analysis and findings: information for which s. 14 does not apply**

[34] I find ICBC has withheld information under s. 14 that does not fall within the scope of legal advice privilege. This information is located in the following records:

- several emails between ICBC employees;<sup>38</sup>
- an email chain between ICBC employees and a third party;<sup>39</sup> and
- information withheld from database and log entries and a list of files.<sup>40</sup>

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2019 BCIPC 1 (CanLII) at para. 20; 2018 Order F18-29, BCIPC 32 (CanLII) at para. 17; Order F14-30, 2014 BCIPC 33 (CanLII) at para. 17.

<sup>35</sup> Order F20-19, 2020 BCIPC 22 (CanLII) at para. 24. *Saturley v. CIBC World Markets Inc.*, 2010 NSSC 361 (CanLII) at para. 29.

<sup>36</sup> For example, information located on pp. 34, 36-38 and 437-439 of the records.

<sup>37</sup> *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 51.

<sup>38</sup> Page 320 and pp. 360-362, 363-364, 382-384 and 385-388 of the records.

<sup>39</sup> Pages 267-270 of the records.

<sup>40</sup> Information located on pp. 34, 36-38 and 51 of the records.

[35] I conclude these records do not meet the test for solicitor-client privilege since they are not communications between a solicitor and a client. Specifically, none of the emails include internal counsel or the external lawyer. As set out below, I also find the information withheld from these records was not intended to be confidential or would not reveal the content of privileged communications between ICBC and its lawyers.

[36] To start, it is not apparent that the emails at issue here were part of the continuum of communications between a lawyer and client. For instance, there is a set of emails that is described as internal emails between two named ICBC employees “seeking information relevant to the litigation.”<sup>41</sup> However, there is no evidence in the records and materials before me that this information was provided to any of the lawyers for the purpose of seeking or obtaining legal advice.

[37] I also find the emails at issue here do not reveal any legal advice sought or given between ICBC and its lawyers. The emails consist of ICBC employees discussing certain matters related to the applicant and the Company or corresponding with a third party. None of this information reveals legal advice, analysis or opinion sought or given by a lawyer. On top of that, I also find it reasonable to conclude that some of the emails were not intended to be confidential since the withheld information or the content of these discussions is shared with the applicant in subsequent emails.<sup>42</sup>

[38] Turning to the other records at issue here, I found that s. 14 applies to some of the information in the database and log entries. However, I am satisfied that any privileged information can be easily severed and the non-privileged information disclosed to the applicant in accordance with s. 4(2) of FIPPA. In terms of confidentiality, I can also see that the file list and some of the information withheld in the database and log entries consists of information known to the applicant as part of his dealings with ICBC and the court process.<sup>43</sup> It is not apparent how confidentiality applies to information which is commonly known or shared between the parties or how it applies to communications that are between ICBC representatives and the applicant.

[39] As a result, for the reasons given, I conclude legal advice privilege does not apply to these records because they are not confidential solicitor-client communications that entail the seeking or giving of legal advice, nor would the disclosure of the withheld information at issue reveal such communications.

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<sup>41</sup> Information located on pp. 360-362 of the records.

<sup>42</sup> I have not identified where this information is located in the records since it would disclose some of the information at issue.

<sup>43</sup> For example, information disclosed on pp. 36, 54-62 and 64-79 of the records.

### Waiver of privilege under s. 14

[40] I can see that ICBC was inconsistent with its severance of the records. In some cases, ICBC withheld information under s. 14 that it then disclosed elsewhere in the records.<sup>44</sup> It is not apparent and ICBC did not explain why it chose to treat the same information differently. Nonetheless, ICBC's actions raise the question of waiver. By disclosing some of the information subject to privilege, did ICBC waive privilege where this information appears elsewhere in the records?

[41] Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege, and (2) voluntarily demonstrates an intention to waive that privilege.<sup>45</sup> Generally, solicitor-client privilege belongs to the client and can only be waived by the client. However, waiver may also occur in the absence of an express intention based on fairness and consistency. In the cases where there is a finding of an implied waiver, there is always some manifestation of a voluntary intention to waive the privilege.<sup>46</sup> For instance, waiver may be implied based on conduct that is inconsistent with the continuance of privilege.<sup>47</sup>

[42] I am satisfied that ICBC clearly knows of the existence of solicitor-client privilege; however, I am unable to conclude in this case that ICBC intended to waive privilege over some of the information that I found was subject to privilege. Given the importance of solicitor client privilege, there must be a clear intention to forego the privilege or that intention may be implied where there is some manifestation of a voluntary intention to waive the privilege.<sup>48</sup> In this case, I am unable to conclude ICBC expressly or by implication waived privilege when it disclosed this information to the applicant rather than the disclosure being a result of a mistake in its severing of the records. As a result, I conclude ICBC may continue to withhold the information at issue under s. 14.

### ICBC's exercise of discretion under s. 14

[43] The applicant alleges and suspects that ICBC is using s. 14 "as a ploy and a tactic to cover ICBC wrongdoing."<sup>49</sup> I infer the applicant to be arguing that ICBC exercised its discretion to refuse access for an improper purpose.

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<sup>44</sup> For example, information withheld on pp. 36-38 and 390-391, but disclosed elsewhere in the records.

<sup>45</sup> *S&K Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at para. 6.

<sup>46</sup> *Ibid* at para. 10.

<sup>47</sup> *Pax Management Ltd. v. A.R. Ristau Trucking Ltd.*, 1987 CanLII 153 (BC CA) at p. 9.

<sup>48</sup> *S. & K. Processors Ltd. v Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BCSC) at paras. 6 and 10; Order 17-35, 2017 BCIPC 37 at paras. 55-57; *Hallman Estate (Re)*, 2009 CanLII 49643 (ON SC) at paras. 14-16.

<sup>49</sup> Applicant's email submission dated December 24, 2021.

[44] Section 14 is a discretionary exception to access under FIPPA and the head of a public body must properly “exercise that discretion in deciding whether to refuse access to information, and upon proper considerations.”<sup>50</sup> In exercising their discretion, the head of the public body must “establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception.”<sup>51</sup>

[45] If the head of the public body has failed to properly exercise discretion, the Commissioner can require the head to do so. The Commissioner can also order the head of the public body to reconsider the exercise of discretion where “the decision was made in bad faith or for an improper purpose; the decision took into account irrelevant considerations; or, the decision failed to take into account relevant considerations.”<sup>52</sup>

[46] ICBC says that it considered whether to exercise its discretion in favour of releasing the withheld information, but declined to do so because of the importance of solicitor-client privilege, the legal nature of the communications and the fact that, as motor vehicle insurance regulator, ICBC has an ongoing relationship with the applicant.<sup>53</sup>

[47] I accept that ICBC took into account the above-noted factors in applying s. 14 to the records at issue. I also find it relevant that ICBC released additional information to the applicant during the inquiry that it previously withheld under s. 14.<sup>54</sup> I can also see that ICBC did not undertake a blanket approach to severing the records, but sometimes withheld only a portion of a record.<sup>55</sup> I find all of these actions demonstrate that ICBC exercised its discretion under s. 14 and considered whether to release or withhold information from the applicant.

[48] There is also nothing in the records that supports concluding that ICBC exercised its discretion in bad faith or for an improper purpose or based on irrelevant considerations. Although ICBC applied s. 14 to some information that I find is not protected by legal advice privilege, I do not take this to mean that it broadly applied s. 14 to cover up any alleged wrongdoing. I understand the applicant suspects ICBC is hiding something from him; however, none of the withheld information shows any wrongdoing on the part of ICBC or its lawyers.

[49] To conclude, I have carefully considered the applicant’s arguments and concerns, but I am satisfied ICBC exercised its discretion under s. 14 and that it

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<sup>50</sup> Order 02-50, 2002 CanLII 42486 (BCIPC) at para. 144.

<sup>51</sup> Order No. 325-1999, 1999 CanLII 4017 at p. 4.

<sup>52</sup> *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52 and Order 02-50, 2002 CanLII 42486 (BCIPC) at para. 144.

<sup>53</sup> ICBC’s submission dated December 21, 2021 at para. 20.

<sup>54</sup> *Ibid* at para. 3 and Attachment 5.

<sup>55</sup> For example, page 391 of the records.

did so lawfully. Therefore, I find this is not a situation that requires me to order ICBC to reconsider the exercise of its discretion in applying s. 14 to the records.

**Advice and recommendations – s. 13**

[50] ICBC applied s. 13(1) to the same information that it withheld under s. 14. I found s. 14 applies to most of the information at issue and it is, therefore, not necessary to consider whether s. 13(1) also applies to the same information. I found, however, that s. 14 did not apply to a number of emails<sup>56</sup> and some information withheld from database and employee log entries and a list of files.<sup>57</sup> I turn now to consider whether s. 13(1) applies to this information.

[51] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or minister. Previous OIPC orders recognize that s. 13(1) protects “a public body’s internal decision-making and policy-making processes, in particular while the public body is considering a given issue, by encouraging the free and frank flow of advice and recommendations.”<sup>58</sup>

[52] To determine whether s. 13(1) applies, I must first decide if disclosure of the withheld information would reveal advice or recommendations developed by or for a public body or minister. The term “recommendations” includes material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised and can be express or inferred.<sup>59</sup>

[53] The term “advice” has a broader meaning than “recommendations.”<sup>60</sup> “Advice” includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinion on matters of fact on which a public body must make a decision for future action.<sup>61</sup>

[54] A public body is also authorized to refuse access to information under s. 13(1), not only when the information itself directly reveals advice or recommendations, but also when disclosure of the information would enable an individual to draw accurate inferences about any advice or recommendations.<sup>62</sup>

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<sup>56</sup> Pages 267-270, 320, 360-362, 363-364, 382-384 and 385-388 of the records.

<sup>57</sup> Information located on pp. 34, 36-38 and 51 of the records.

<sup>58</sup> For example, Order 01-15, 2001 CanLII 21569 at para. 22.

<sup>59</sup> *John Doe v Ontario (Finance)*, 2014 SCC 36 at paras. 23-24.

<sup>60</sup> *Ibid* at para. 24.

<sup>61</sup> *College of Physicians of BC v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

<sup>62</sup> Order 02-38, 2002 CanLII 42472 at para. 135. See also Order F17-19, 2017 BCIPC 20 (CanLII) at para. 19.

[55] As well, s. 13(1) extends to factual or background information that is a necessary and integrated part of the advice.<sup>63</sup> This includes factual information compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.<sup>64</sup>

[56] If I find s. 13(1) applies, then the next step is to consider if any of the categories listed in ss. 13(2) or 13(3) apply. Subsections 13(2) and 13(3) identify certain types of records and information that may not be withheld under s. 13(1), such as factual material under s. 13(2)(a) and information in a record that has been in existence for 10 or more years under s. 13(3).

### **The parties' submissions on s. 13**

[57] ICBC submits that the withheld information consists of advice and recommendations “relating to the litigation which was provided either internally within ICBC or to ICBC’s external defence counsel.”<sup>65</sup>

[58] The applicant did not address ICBC’s arguments about s. 13, but generally asserts that he has a right to access the withheld information.

### **Analysis and findings on s. 13(1)**

[59] I have carefully reviewed the information withheld by ICBC under s. 13(1) and I am not satisfied that this information reveals advice or recommendations developed by or for a public body or minister. It is not apparent that the information in these records reveals information typically withheld under s. 13(1) such as a suggested course of action for a decision maker to consider or expert opinion on matters of fact on which a public body must make a decision.

[60] Most of the withheld information consists of questions, information and comments of a factual nature and updates about a matter, while other information only reveals instructions and directions that are not part of any advice or recommendations.<sup>66</sup> I find none of this withheld information reveals, directly or by inference, any advice or recommendations. I conclude, therefore, that s. 13(1) does not apply to this information and ICBC is not authorized to withhold the information at issue under s. 13(1). Given my findings, I do not need to consider whether ss. 13(2) or (3) applies.

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<sup>63</sup> *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at paras. 52-53.

<sup>64</sup> *Provincial Health Services Authority v. British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 at para. 94.

<sup>65</sup> ICBC’s submission dated December 21, 2021 at para. 21.

<sup>66</sup> Instructions and directions located on page 269 of the records.

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## CONCLUSION

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

1. Subject to item 2 below, I confirm in part ICBC's decision to refuse access to the information withheld in the records under s. 14.
2. ICBC is not authorized under ss. 13(1) or 14 to refuse access to the information entirely withheld on pages 51, 267-270, 320, 360-362, 363-364, 382-384, 385-388 of the records and the information that I have highlighted in green on pages 34 and 36-38 of the records that are provided to ICBC with this order.
3. I require ICBC to give the applicant access to the information that it is not authorized to withhold. ICBC must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order, along with a copy of the relevant records.

[62] Under s. 59 of FIPPA, ICBC is required to give the applicant access to the information that it is not authorized to withhold by May 25, 2022.

April 8, 2022

### ORIGINAL SIGNED BY

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Lisa Siew, Adjudicator

OIPC File No.: F19-81150