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**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 25-1994
September 27, 1994**

**INQUIRY RE: A Request for Access to Records of the Insurance Corporation of
British Columbia**

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1. Description of the Review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on September 15, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This is the second inquiry arising from the request by the applicant for a copy of an investigative report in the custody of the public body, the Insurance Corporation of British Columbia (ICBC).

In December 1993, the applicant applied for review of a decision by the public body to sever and withhold information from an investigative report completed in April 1991. The public body applied section 14 (solicitor-client privilege) of the *Freedom of Information and Protection of Privacy Act* (the Act) to justify withholding the information.

On March 14, 1994, I issued Order No. 5-1994 in which I ordered the public body to reconsider its application of section 14 to the severed information. As a result, the public body waived its discretionary exception and agreed to release the investigative report to the applicant. However, Order No. 5-1994 did not consider the applicability of section 22 of the Act (protection of personal information about third parties--a mandatory exception) to the report. The Office of the Information and Privacy Commissioner and the public body agreed that some of the personal information about third parties in the investigative report qualified for possible exception from disclosure under section 22. The public body then consulted with the third parties as to whether they would agree to the disclosure of their personal information to the applicant. One of the third parties objected to disclosure of their personal information.

The public body severed the personal information about this third party and disclosed a severed version of the report to the applicant. The applicant then applied for review of the public body's decision to sever the personal information. Mediation between the parties resulted in the applicant agreeing to limit the Commissioner's review to personal information about the third party severed from pages one, two and three of the investigative report. The information severed from page four of the investigative report does not form part of this review.

2. Documentation of the Inquiry Process

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a one-page statement of facts (the fact report), which was accepted by all parties.

The applicant represented himself and submitted a series of letters and memoranda in support of his request for the investigative report. However, the applicant did not submit a formal written argument. The public body's written arguments were submitted by David Loukidelis, counsel for ICBC, of the law firm of Lidstone, Young, Anderson of Vancouver and Steve Heather, Manager, Information Access, ICBC. The third party, who has remained "unidentified" throughout the review process to protect his or her identity, submitted a written argument on his or her own behalf. In reaching my decision, I have carefully considered these submissions.

3. The record in dispute

The applicant was in an automobile accident on March 1, 1989. On October 25, 1990, he sued the other driver to recover alleged damages. Since ICBC carried that driver's car insurance, it prepared to defend itself against this action. ICBC's lawyer, who was from a private law firm, retained a private investigator to obtain information about the applicant. The investigator submitted a report (the Report) to ICBC's lawyer (and copied it to ICBC).

I have reviewed this Report, which is essentially composed of local political gossip and a summary of newspaper reports (four pages) and the actual newspaper clippings (eight pages) from the municipality in which the applicant was an elected councillor and a possible candidate for the New Democratic Party in the 1990 provincial election. The Report included one-half page of the investigator's own comments in these four pages. The number of words severed from the five-page report and that remain in dispute totals 90.

4. Issue under review in the inquiry

The issue to be decided in this inquiry is whether the applicant is entitled to receive personal information in the investigative report about the unidentified third party.

Under section 57(2) of the Act, where an applicant is refused access to all or part of a record that contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy. Thus the burden of proof in this case falls on the applicant. In Order No. 5-1994, the burden of proof fell on the public body to justify the application of section 14 (solicitor-client privilege) to the same investigative report.

5. The applicant's case

The applicant primarily commented on the arguments advanced by the public body. He has trouble understanding why the identity of only one of three persons interviewed for the report to ICBC is being withheld from him. He suspects that the hidden identity is being given preferential treatment. He further objects to the submission of in camera materials by the public body.

6. The public body's case

ICBC indicates that its decision-maker took account of the desire of a third party not to reveal his or her identity and concluded as follows (I am quoting almost verbatim from the submission):

- a) the disclosure was not desirable for the purpose of subjecting the activities of ICBC to public scrutiny (section 22(2)(a)),
- b) the applicant's personal injury claim had been settled, so the personal information was not "relevant to a fair determination of the applicant's rights" (section 22(2)(c)),
- c) the personal information was supplied in confidence (section 22(2)(f)),
- d) the disclosure could reasonably be expected to reveal that the third party supplied, in confidence, a personal recommendation or evaluation (section 22(3)(g.1)),
- e) none of the circumstances set out in section 22(4) of the Act applied, and
- f) the public interest did not clearly require disclosure of the personal information (section 25).

ICBC thus "concluded that disclosure of the personal information in dispute would be an unreasonable invasion of that third party's privacy."

ICBC pointed out that the head of the public body is required to consider the representations of third parties in cases such as this one: in its view, "in the absence of considerations or evidence clearly favouring disclosure to the applicant, a head should

give considerable weight to third party representations that raise factors explicitly or implicitly contemplated by s. 22(3) of the Act.”

The third party in the present case also claims that the information he or she supplied in the original interview with an ICBC investigator was assured “that the information supplied was confidential and would not be released.” The third party submitted an unsworn affidavit on this point.

In camera arguments and an exhibit submitted to me indicate that the third party has some grounds for fearing vengeful actions and risks to his or her personal safety (and his or her family) if his or her identity is released to the applicant. As I understand the situation, the applicant was provided with a summary version of these arguments and an exhibit prepared so as not to identify the applicant.

7. Discussion

In the present case, the applicant has received almost every word of the record in dispute, except for identifying details of a particular third party, who is concerned about vengeful actions and safety matters concerning him or her and his or her family. The third party advanced a reasoned case not to disclose certain personal information about himself or herself.

In Order No. 24-1994, September 27, 1994, I addressed the burden of proof imposed on an applicant in a case like this one to prove that access to the record would not be an unreasonable invasion of a third party’s personal privacy. In the present case, the applicant did not make a satisfactory effort to address the burden of proof imposed on him under section 57(2) of the Act. Moreover, my own role as the decision-maker to review the record and, in a way, to supplement the blind assessment of any applicant in such cases, did not persuade me that the presumption of privacy had been overridden. See Order No. 24-1994, at page 6.

8. Order

Under section 58(2)(b) of the Act, I confirm the decision of the Insurance Corporation of British Columbia not to disclose the personal information of the third party from the copy of the Report given to the applicant.

David H. Flaherty
Commissioner

September 27, 1994