



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

Order 01-47

INSURANCE CORPORATION OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
October 12, 2001

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Summary: The applicant, a union representing ICBC employees, submitted a series of requests for information on several hundred senior ICBC employees. ICBC created software in order to respond and then provided computer-generated records to the applicant. The applicant also submitted requests for records on alternatives for ICBC's corporate structure, to which ICBC responded by providing briefings. The applicant requested reviews of ICBC's failure to respond in time, of a fee estimate, of ICBC's compliance with its s. 6 duty to assist and of ICBC's compliance with its s. 8 duty to inform the applicant of a decision to refuse access. ICBC is found to have calculated the estimated fee in compliance with s. 75. ICBC is found largely not to have complied with its s. 6, 7 or 8 duties, but no order is necessary respecting ss. 6-8.

Key Words: duty to assist – adequacy of search – respond without delay – respond openly, accurately and completely – every reasonable effort – duty to respond within 30 days – extension of time – duty to give reasons – appropriateness of fee.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 6(1), 6(2), 7, 8, 75.

Authorities Considered: B.C.: Order No. 292-1999, [1999] B.C.I.P.C.D. No. 5; Order 00-31, [2000] B.C.I.P.C.D. No. 33; Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 00-42, [2000] B.C.I.P.C.D. No. 46.

1.0 INTRODUCTION

[1] This order arises from several requests for review of various Insurance Corporation of British Columbia ("ICBC") decisions and actions connected with four different access requests made under the *Freedom of Information and Protection of Privacy Act* ("Act"). The requests were made by the Office & Professional Employees'

International Union, Local 378 (“OPEIU”). The access requests in issue here, one of which was made in February of 2000 and the other three of which were made in May of 2000, covered a variety of subjects. I summarize the pertinent events below.

Request 1

[2] The first request, dated February 2, 2000 (“Request 1”), had four parts, as follows:

- (a) monthly salaries and/or contractual payments made to 29 named ICBC staff for each month of 1999, together with their job titles for each month;
- (b) the expenses paid to 31 named individuals for 1997, 1998 and 1999;
- (c) the terms and conditions of employment for a named individual; and
- (d) salaries and/or contractual payments for each month of 1999 for, and the job titles of, 587 named individuals whom the OPEIU believed to be at first and second level of management classifications.

[3] ICBC sent the applicant a fee estimate of \$6,515 respecting Requests 1(a), 1(b) and 1(d). The applicant paid the fees respecting Requests 1(a) and 1(d) and ICBC ultimately responded to those two items on June 15, 2000 by providing a series of records. The applicant later requested reviews of ICBC’s failure to respond in time to Requests 1(a) and 1(d) (ICBC responded on June 15, 2000, a day after the extended time limit) and of the adequacy of ICBC’s response to these two requests (on the ground that ICBC had failed to provide records respecting several individuals). These issues remain in this inquiry.

[4] The applicant also requested a review of the estimated fee of \$3,750 for Request 1(b). This issue evolved into a new, narrowed, request in June 2000. In late July 2000, the applicant requested a review of ICBC’s failure to respond to the new version of Request 1(b). ICBC then sent the applicant a new fee estimate of \$7,850 in October 2000. The applicant requested a review of the new fee estimate and of whether ICBC had complied with s. 6(1) in calculating the fee estimate. These issues remain in this inquiry.

(Although the applicant also requested reviews of aspects of ICBC’s response to Request 1(c), no issues remain for me to deal with in this inquiry.)

Request 2

[5] The OPEIU’s May 4, 2000 request (“Request 2”) was for copies of studies and reports prepared by or for ICBC concerning alternatives to government ownership of ICBC and/or a co-operative governance structure, dated between August 1, 1999 and the date of the request. ICBC later took a 30-day extension. In late July 2000, the OPEIU requested a review respecting ICBC’s alleged failure to respond by the July 5, 2000

extended deadline. ICBC responded, ultimately, in late September 2000, by providing the applicant with a briefing on alternatives to government ownership of ICBC. The applicant was satisfied with the content of the briefing but still wished me to deal with ICBC's failure to respond by the extended deadline in this inquiry.

Request 3

[6] The May 5, 2000 request by the OPEIU ("Request 3") was for copies of records, dated between August 1, 1999 and the request date, in which a co-operative structure or alternatives to government ownership of ICBC were discussed, proposed, analyzed and/or studied by any individual on a list of 30 named employees that the applicant provided to ICBC. ICBC extended the 30-day response time to July 5, 2000 and ultimately responded in late September 2000 with a briefing. The applicant had, late in July 2000, requested a review of ICBC's failure to respond by the extended deadline. Despite being satisfied with the content of this briefing, again the applicant wished me to deal with ICBC's failure to respond within the extended time limit in this inquiry.

Request 4

[7] Last, the May 12, 2000 access request by the OPEIU ("Request 4") was for records of payments made to a named employee, the same person as in Request 1(c) and one of those listed in Request 1(a), for each month of 1999 and for the first four months of 2000. On June 19, 2000, the OPEIU requested a review of ICBC's alleged failure to respond to the request in time.

2.0 ISSUES

[8] The issues before me are as follows:

1. As regards Request 1:
 - (a) respecting Request 1(b), did ICBC comply with its duty under ss. 6 and 7 of the Act to respond in time?
 - (b) respecting Request 1(b), did ICBC appropriately determine a fee estimate under ss. 6 and 75 of the Act?
 - (c) respecting Requests 1(a) and (d), did ICBC comply with its duties under ss. 6 and 8 of the Act when searching for and disclosing records to the applicant? and
 - (d) respecting Requests 1(a) and (d), did ICBC comply with its duty under ss. 6 and 7 of the Act to respond when required to the requests?
2. Respecting Request 2, did ICBC comply with its duty under ss. 6 and 7 of the Act to meet the deadline required to respond to the applicant's requests?
3. Respecting Request 3, did ICBC comply with its duty under ss. 6 and 7 of the Act to meet the deadline required to respond to the applicant's requests? and

4. Respecting Request 4, did ICBC comply with its duty under ss. 6 and 7 of the Act to meet the deadline required to respond to the applicant's requests?

[9] Section 57 of the Act establishes the burden of proof in an inquiry but is silent respecting the burden in inquiries on ss. 6(1), 7, 8 and 75. Consistent with previous orders, however, the burden of proof lies on ICBC with respect to these issues and ICBC accepts that.

3.0 DISCUSSION

[10] **3.1 Background to This Inquiry** – According to ICBC, the OPEIU's requests were made in the context of collective bargaining then underway between ICBC and that union. By the close of 1999, ICBC had completed an initial phase of reorganization that adjusted executive compensation for certain senior levels of executives. Soon after, it also announced a general 2% salary increase for all other employees excluded from the union. ICBC says that this reorganization and salary adjustment, which took place during the ongoing collective bargaining, may have become a catalyst for the OPEIU's access requests about management compensation and corporate reorganization.

[11] The evidence is that the OPEIU submitted 15 access to information requests to ICBC between February 1, 2000 and June 19, 2000, many of which covered hundreds of employees and encompassed thousands of pages of records. In order to respond as best it could, ICBC developed special software to extract requested information, but still encountered difficulty in responding to the requests. According to ICBC's evidence, the OPEIU generally refused to define the scope of its requests or to consent to any time extensions, insisting at all times on strict compliance with the initial 30-day time limit set out in s. 10 of the Act. These requests, and the burden they placed on ICBC, ultimately prompted an application by ICBC for my authorization, under s. 43 of the Act, to ignore 12 outstanding access requests as at June 23, 2000. This application ultimately did not proceed.

[12] The OPEIU disputes ICBC's version of these events. It argues, at p. 1 of its initial submission, that the

... facts of these matters display a pattern of behaviour on the part of ICBC that is contrary to the letter and the spirit of the Act.

[13] For example, it says ICBC "has used every manner of games to delay" its response to Request 1(b) and that the fee estimate for that request "is likely a delay tactic to avoid responding" to the request. In responding to its requests, the OPEIU says, ICBC has repeatedly missed deadlines, failed to provide reasons for its actions and generally

been unhelpful towards the applicant. At pp. 1 and 2 of its initial submission, the OPEIU says it

... now takes the position that only an Order by ... [me] will correct ICBC's future approach toward our requests. OPEIU hopes to be able to continue to use the Act from time to time, but requests a change in attitude on ICBC's part for our information rights to be utilized in any meaningful way.

[14] The OPEIU also suggests, at para. 68 of its reply submission, that ICBC only responded after the OPEIU had lodged its requests for review. It supplied no evidence to support this contention, however.

[15] ICBC vigorously rejects the OPEIU's allegations. It emphasizes that it created special software, which it did not have to do, to respond. It says it spent considerable time and effort in complying with the OPEIU's "numerous and extensive" requests, which caused, it says, considerable disruption to its operations. It stresses that it attempted to obtain the OPEIU's agreement to narrow and streamline requests, to no avail. Instead, it says, the OPEIU continued to make requests and to submit requests for review.

[16] ICBC acknowledges that it has to comply with its statutory duties, notably regarding the time in which it must respond to a request. But it insists that its handling of the requests must be viewed in the context of the OPEIU's many other access requests, which ICBC anticipated would require a further 350 hours to process, as at the time of its s. 43 application. ICBC asks me, at p. 3 of its reply submission,

... to have regard to the Applicant's conduct in this case. The Applicant deluged the public body with extensive access requests, insisted upon 30 day responses and then complained of delay when the public body was unable to respond within that time frame to each of the requests.

[17] At para. 88 of its initial submission, ICBC also argues that the OPEIU has failed to recognize the need to exercise access rights in a manner "which does not cause unreasonable interference in the operations of the public body." It says previous decisions under the Act and "the courts have made it clear that access rights must be exercised in a reasonable manner."

[18] I will not go so far as to say applicants "must" exercise their access rights reasonably. The Act does not require them to do so and the courts have not gone that far. I will say, however, that an applicant's failure to be reasonable may have an impact on the outcome of issues such as those involved here under s. 6(1). If an applicant, for example, has information that would assist the public body in searching for responsive records, failure to divulge that information could lead to an inadequate search by the public body. Although the public body might be found not to have searched adequately for records, and might be ordered to conduct a further search, the applicant could have avoided the delay inevitably entailed in the inquiry process in the first place. Further, my ability to authorize, under s. 43 of the Act, the public body to disregard certain access requests tacitly acknowledges that, where a requester is acting unreasonably in making

systematic or repetitious requests that unreasonably interfere with the public body's operations, that abuse of the right of access under the Act can be curbed.

[19] In this case, the above-described requests for review are those remaining after several other related requests for review by the OPEIU were either settled in mediation or dropped by the OPEIU at the time initial submissions were due. As becomes all too clear from the discussion below, the thrust of almost all of the OPEIU's complaints is technical. As regards ICBC's failure to respond in time to the applicant's numerous and voluminous requests, the Act only empowers me to find that ICBC failed to respond in time. I can offer no other remedy to the OPEIU, which must have known this when it chose to insist on an inquiry.

[20] One wonders, in this light, whether the purpose of this exercise was to embarrass ICBC or to have it censured. The expense entailed by the OPEIU's dogged pursuit of its rights under the Act through this inquiry must have been considerable. Although most of its complaints in this inquiry are technically correct, I would have hoped the OPEIU would focus on more constructive ways to exercise its rights under the Act. Whether its access requests, and insistence on proceeding with this inquiry, speak more to the state of relations between ICBC and the OPEIU is something on which I cannot and will not comment.

[21] **3.2 Procedural Matters** – The OPEIU protested, in its reply submission, that ICBC had included, in its initial submission, material related to the mediation processes regarding various of the OPEIU's requests for review, arguments related to requests which are not in issue in this inquiry and some *in camera* material.

[22] As regards the *in camera* material, the OPEIU argues that it goes against the principles of natural justice for me to receive *in camera* material from ICBC. It even goes so far as to argue that I do not have the jurisdiction to receive *in camera* evidence "in the context of this case" (it does not elaborate on why) and asks that it be allowed to see this material or that I remove it from ICBC's submissions. Contrary to the OPEIU's contention, the Act clearly gives me authority to receive *in camera* material which, in this case, was minor. I am also satisfied that material was properly received *in camera*. In any case, I have not had to rely on *in camera* material in arriving at my decision.

[23] Nor have I considered ICBC's arguments about requests that are not in issue before me and the mediation-related material that it submitted. ICBC counters the applicant's objections by saying that it placed its mediation-related arguments in the context of attempts by the parties to arrive at a mediated resolution of its s. 43 application, rather than mediation on the requests for review of these four requests. ICBC argues that it would be unfair not to consider its delay arguments without considering that mediation of its s.43 application took place. Regardless of whether the mediation material was related to ICBC's s. 43 application or the four requests for review, however, I have not considered it in this inquiry. Nor have I considered ICBC's submissions about other requests.

[24] I note here that ICBC did not take the position that the OPEIU's requests for review in relation to ICBC's late responses to access requests were moot in light of the fact that ICBC had responded to the corresponding access requests.

[25] **3.3 Relevant Provisions** – Because the same sections are in issue for most of the requests for review involved here, it is useful to quote them here:

Duty to assist applicants

6 (1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Time limit for responding

7 The head of a public body must respond not later than 30 days after a request is received unless

(a) the time limit is extended under section 10, or

(b) the request has been transferred under section 11 to another public body.

Contents of response

8 (1) In a response under section 7, the head of the public body must tell the applicant

(a) whether or not the applicant is entitled to access to the record or to part of the record,

(b) if the applicant is entitled to access, where, when and how access will be given, and

(c) if access to the record or to part of the record is refused,

(i) the reasons for the refusal and the provision of this Act on which the refusal is based,

(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and

(iii) that the applicant may ask for a review under section 53 or 63.

(2) Moreover, the head of a public body must create a record for an applicant if

(a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and

(b) creating the record would not unreasonably interfere with the operations of the public body.

Fees

75 (1) The head of a public body may require an applicant who makes a request under section 5 to pay to the public body fees for the following services:

(a) locating, retrieving and producing the record;

(b) preparing the record for disclosure;

(c) shipping and handling the record;

(d) providing a copy of the record.

(2) An applicant must not be required under subsection (1) to pay a fee for

(a) the first 3 hours spent locating and retrieving a record, or

(b) time spent severing information from a record.

(3) Subsection (1) does not apply to a request for the applicant's own personal information.

(4) If an applicant is required to pay fees for services under subsection (1), the public body must give the applicant an estimate of the total fee before providing the services.

(5) The head of a public body may excuse an applicant from paying all or part of a fee if, in the head's opinion,

(a) the applicant cannot afford the payment or for any other reason it is fair to excuse payment, or

(b) the record relates to a matter of public interest, including the environment or public health or safety.

(6) The fees that prescribed categories of applicants are required to pay for services under subsection (1) may differ from the fees other applicants are required to pay for them, but may not be greater than the actual costs of the services.

[25] **3.4 Effect of ICBC's Section 43 Application** – As indicated above, ICBC argues that I should consider its responses to the applicant's requests in light of its application for a s. 43 authorization and the subsequent attempts to mediate that application. The two cannot be divorced, it argues. ICBC said it did not respond in time

to at least two of the requests before me because it had, in late June 2000, made a s. 43 application regarding these and other requests (paras. 16-18, 26-33, initial submission; p. 1, reply submission)

[26] In its reply submission, the OPEIU objects to ICBC relying on its s. 43 application, saying that it is irrelevant to the issues before me. Moreover, the OPEIU says, ICBC withdrew its s. 43 application and “cannot now try to breathe life into an application which it has withdrawn.” It argues that, in any case, ICBC’s s. 43 application did not act as a stay of proceedings nor is it grounds for an extension under s. 10 of the Act (paras. 3 & 10-12, reply submission).

[27] I reject ICBC’s argument that its s. 43 application is, in and of itself, relevant to its lack of compliance with the Act’s time requirements. Section 7 clearly exhausts the statutory conditions governing response times (unless s. 25 triggers a duty to disclose information without delay in the public interest). Nothing in s. 7 or the rest of the Act supports the argument that, if a public body brings a s. 43 application, a stay of some sort suspends the public body’s duty to continue processing outstanding requests, even if they are subject to the s. 43 application. The real focus of ICBC’s argument here, it seems to me, should be that the circumstances that led to its s. 43 application – and not the making of the application itself – are relevant in determining whether it made every reasonable effort to assist the applicant, including by responding without delay in the circumstances.

[28] Although ICBC was clearly faced with a large number of very broad requests made by the applicant, however, I am not prepared to find that, although it responded late – in breach of its s. 7 obligation to respond in time – it nonetheless fulfilled its s. 6(1) duty. In my view, where a public body does not respond sooner than s. 7 requires, or within the time s. 7 lays down, it will not have met its s. 6(1) obligation to assist. The reasons for that failure – or evidence of the public body’s good faith efforts to meet an applicant’s needs – will not avoid this conclusion. ICBC clearly attempted to respond as quickly as it could in the circumstances, but the fact remains that it did not respond within the required time. Compliance with s. 7 is a necessary condition of fulfilling the s. 6(1) duty to assist.

[29] ICBC’s s. 43 argument raises a side issue. While a s. 43 application is not one of the criteria in ss. 10(a) through (c) for an extension under s. 10, where a public body has made a s. 43 application, there may be grounds for a s. 10 extension and, if so, a public body should seek an extension rather than failing to respond to the request. Not all such cases will, of course, offer grounds for a s. 10 extension. The criteria in ss. 10(a) through (c) may offer a basis for any necessary time extension, but they may not. This rough fit of s. 10 in such a case could be considered as one example of needed amendments to the Act. I acknowledge the practicality of a public body suspending work on access requests that are the subject of a s. 43 application. The difficulty, however, is that the Act does not provide for such a situation, either explicitly or, in my view, implicitly. There is, again, no stay of proceedings under the current legislative scheme.

[30] **3.5 Request 1(a)** – The applicant asks me to decide whether ICBC complied with ss. 6 and 8 of the Act in its response, on the basis it had not initially provided the

requested information on several people. The applicant also asks me to determine whether ICBC complied with ss. 6 and 7 when it did not respond in time.

Sections 6 and 8

[31] ICBC addressed these issues in paras. 58-65 and 71 of its initial submission, supported by affidavit evidence from the manager of its information and privacy unit. ICBC says it inadvertently missed monthly payment information on a few individuals when it responded to the applicant. It argues that it went further than ss. 6(1) and 8 require, by developing special software to extract the requested information. ICBC says it was not practical to extract the requested information manually from a number of different payroll systems for each month of 1999 for each of the 587 employees in question.

[32] ICBC argues that it “acted fairly” in attempting to search for the records. Of course, the test here is not whether ICBC acted “fairly” in searching for records. As I said at p. 5 of Order 00-32, [2000] B.C.I.P.C.D. No. 35:

Given my findings in this case, it is worth repeating what I have said before – for example, in Order 00-15, Order 00-26 and Order 00-30 – about the standards imposed by s. 6(1) on a public body’s search for records. Although the Act does not impose a standard of perfection, a public body’s efforts in searching for records must conform to what a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. In an inquiry such as this, the public body’s evidence should candidly describe all the potential sources of records, identify those it searched and identify any sources that it did not check (with reasons for not doing so). It should also indicate how the searches were done and how much time its staff spent searching for the records.

[33] ICBC also says it could have relied on s. 6(2) and refused to create responsive records, but instead designed software that would generate the monthly information for all 970 excluded employees and then manually extracted the information about the 587 employees of interest.

[34] ICBC says that, in any case, it did include information on 15 of the 26 employees that the applicant alleged, in its request for review, were missing. ICBC says it provided this information, related to ICBC executives, at the same time as the information on the rest of the employees, but in a different format.

[35] ICBC acknowledges, however, that it missed information on 11 other individuals – in its reply submission, the OPEIU suggests that ICBC missed them deliberately – but says it later generated a report with the information on these missing employees. This took some time, as the staff involved had to fit the work in with their other duties. ICBC says it missed three of these 11 people because the OPEIU had provided different first or family names from those in ICBC’s records. It missed the other eight inadvertently, either due to an error in program design or program operation, or later during the manual removal of the information on the 587 employees from the computer-generated list of over 900 excluded employees.

[36] The applicant suggests, in para. 3.4 of its initial submission, that ICBC did not initially provide the information because it did not have it or, if it did, was refusing to provide it for some unknown reason. It devotes the next four pages of its submission to arguing, somewhat disingenuously in my view, that ICBC did not comply with s. 8(1) in that it did not inform the applicant of its reasons for refusing to provide this information. The OPEIU also argues that ICBC did not fulfil its s. 6(1) duty by failing to provide information on these employees and by also not providing a meaningful explanation of its search efforts or of its lack of a full response.

[37] I should say at once that the applicant could have approached ICBC directly about the missing information, rather than immediately requesting a review under the Act. It would be preferable in such a case for an applicant to approach the public body first with any concerns when records appear to be missing or the disclosure is otherwise not completely responsive. More often than not, such an approach will reveal any good-faith errors on the part of the public body more quickly than this Office's review process can hope to do. This approach will also reduce costs to the taxpayers entailed in the formal review process under the Act.

[38] For its part, ICBC says it never intended to deny access to information about these individuals. It says, rather, that it was difficult to respond to the request for monthly payment information. Having created special software that it was not obliged to create, it argues, it should not be faulted for slips in implementation, nor for failing to provide information on employees for whom the applicant had provided incorrect name information. When it discovered its errors, ICBC says, it promptly corrected them.

[39] ICBC's explanations regarding the "missing" employees are reasonable and I find that ICBC ultimately complied with its duties under s. 6(1) and its duty under s. 8. As ICBC pointed out, it was not obliged to create special software and to manually extract information from the computer-generated report. ICBC's oversight in providing an incomplete response was just that – an oversight. That oversight was corrected when it was pointed out to ICBC. The slip may be unfortunate, but it does not mean that ICBC failed to fulfill its s. 6(1) duties. I find that it made every reasonable effort to respond openly, accurately and completely as required by s. 6(1). Indeed, based on ICBC's evidence of what it did to produce the requested records, and as to the resulting disruption to its operations, it seems to me that, without deciding the point, it may have been in a position to refuse, relying on s. 6(2), to do what it did. ICBC says it chose to create the records to foster better relations with the OPEIU. I commend ICBC for going to the lengths it did to respond to this large-scale request and in this respect find that it met its s. 6(1) duty to assist the applicant.

Sections 6 and 7

[40] ICBC dealt with these issues in paras. 66-70 and 72-73 of its initial submission, again supported by affidavit evidence from the manager of its privacy unit. It says it took a 30-day extension, to April 2, 2000, in late February 2000 because of the voluminous nature of the records sought. In mid-March 2000, it issued a fee estimate, which was in part for creating the records to respond to Requests 1(a) and 1(d). ICBC later reduced the

fee and the OPEIU paid this reduced fee in mid-April 2000. ICBC obtained a further extension from my office in late April, taking its new response date to June 14, 2000. ICBC responded to the request on June 15, 2000.

[41] ICBC acknowledges that it missed the extended deadline by one day and says this was due to the fact that the request's actual processing took longer than anticipated, the actual time being 67.75 hours to create and implement the software, as opposed to the estimated time of 55.5 hours. ICBC chose to take the extra time to finish its response rather than seeking a second, in this case one-day, extension from my office.

[42] The OPEIU says it did not receive the response until June 22, 2000 and that, since ICBC had ample time to respond, there is no excuse for its delay. It suggests that ICBC is "arrogant" and that it would have been willing to overlook the missed deadline if ICBC did not treat the OPEIU with disdain. The OPEIU reminds me that I said in Order 00-31, [2000] B.C.I.P.C.D. No. 33, that the s. 6(1) obligation to respond without delay requires a public body to respond as quickly as possible within the s. 7 timeline. It points out that both my predecessor and I have dealt with ICBC's response delays in previous orders (see Order No. 292-1999, [1999] B.C.I.P.C.D. No. 5, and Order 00-42, [2000] B.C.I.P.C.D. No. 46) and that ICBC was supposedly given a second chance to improve. The OPEIU asks me to find that ICBC failed to live up to its ss. 6(1) and 7 obligations.

[43] ICBC did indeed miss its extended deadline by one day and thus I find that it did not comply with its ss. 6(1) and 7 obligations respecting this aspect of these requests. For the reasons given above, I cannot find otherwise. In so finding, however, I note ICBC's efforts went beyond the letter of the law, in an attempt to live up to the principles of openness and accountability that underpin the Act. I also consider this aspect of the OPEIU's case to fall under my earlier general comments about its forcing an issue of this kind to inquiry, especially given the lack of any remedy other than a finding of non-compliance.

[44] **3.6 Request 1(b)** – The OPEIU asks me to consider whether ICBC complied with ss. 6 and 7 of the Act, when it did not respond in time, and whether it complied with ss. 6 and 75 in calculating the fee estimate for this part of Request 1.

Sections 6 and 7

[45] ICBC outlines, in paras. 36-45 of its initial submission, the early stages of the first version of this request (as discussed above) and points out that the OPEIU resubmitted this request in a narrowed form on June 9, 2000. ICBC says it treated this narrowed version as a new request, but did not respond within 30 days because the request was part of its s. 43 application in late June of 2000. It therefore did no further work on this request and apparently took no time extension. ICBC argues that it was reasonable for it to await the outcome of mediation on its s. 43 application and that its failure to respond in time did not breach the Act.

[46] The OPEIU requested a review, in late July 2000, of ICBC's failure to respond within the time limit. ICBC eventually withdrew its s. 43 application and resumed work

on the request, apparently later in the summer of 2000. It invited the OPEIU to narrow the request, but heard nothing further from the OPEIU. It issued a new fee estimate, first verbally in early September 2000 and then in writing in early October 2000. The OPEIU requested a review of the fee estimate in mid-October 2000.

[47] The OPEIU's initial submission on this issue is similar to that on the ss. 6(1) and 7 issues regarding Requests 1(a) and 1(d). In its reply, it again rejects ICBC's reliance on its s. 43 application as a reason for the delay. It also points out that ICBC waited until early September 2000, some weeks after it withdrew its s. 43 application, to issue the verbal fee estimate and until October 2000 to issue the written one. ICBC should have issued the fee estimate within 30 days, it says.

[48] As I discussed above, ICBC's s. 43 application did not serve as a stay of the requests. Rather, ICBC should have continued to process the request, taking any appropriate extensions available under s. 10(1). In the circumstances, and for reasons set out in the s. 43 discussion above, I can only find that ICBC did not meet its ss. 6(1) and 7 obligation and I so find.

Sections 6 and 75

[49] ICBC argues, in paras. 46-57 of its initial submission – with the support of affidavit evidence from its information and privacy manager – that it complied with ss. 6(1) and 75 in calculating the fee estimate for the narrowed (June 9, 2000) request for expense claim information. Before the request was narrowed, ICBC had estimated a fee of \$3,750. After inviting the OPEIU to narrow the request further, it provided a verbal fee estimate in the range of \$7,800 in early September 2000 and a written fee estimate of \$7,850 in early October 2000. The OPEIU then requested a review of the fee estimate.

[50] The OPEIU admits that public bodies are allowed to charge fees, but argues, at paras. 7.1-7.4 of its initial submission, that ICBC was attempting to discourage access by issuing a higher fee estimate for the second, narrowed request for expense records – and then only after considerable delay. It says that one or the other of the fee estimates must be grossly inaccurate and asks me to order ICBC to issue a fee estimate more in line with its first, lower estimate of \$3,750. It suggests that this all proves ICBC did not comply with its s. 6(1) duty.

[51] ICBC acknowledges that the October 2000 fee estimate is higher than the fee estimate it originally issued in response to Request 1(b), as submitted by the OPEIU in February of 2000. It says this is because it initially underestimated the scope of the resources needed to retrieve the expense claim information over a three-year period. It had based the first estimate on its general knowledge of what it takes to retrieve isolated expense claim information. The June 2000 request, by contrast, involved looking up individual payments on the appropriate system, in some cases identifying the correct batch numbers for payments, identifying the correct boxes of records in off-site storage, retrieving the boxes, locating the appropriate files within those boxes, manually identifying the relevant records within those files, copying the records, returning the files to the boxes and returning the boxes to storage. ICBC says it estimates that it received

approximately 21,800 expense reports for each year in question and that each individual listed in the request submitted at least two expense reports per month for the 36-month period.

[52] It broke the \$7,850 fee estimate down as follows: five days to identify the boxes to be retrieved (5 days @ \$30/hr x 8 hrs/day = \$1,200); 25 days to search the boxes for relevant records (25 days @ \$30/hr x 8 hrs/day = \$6,000); copying charges (2,000 pages @ 25¢ each = \$500); and copying time (8 hrs @ \$30/hr = \$240), less the first three free hours at \$90. ICBC argues that fulfilling the request would be a considerable amount of work and that it calculated a reasonable estimate in accordance with the fee schedule and s. 75 of the Act. ICBC also disputes the applicant's suggestion that it did not comply with s. 6(1) in its calculations, although it does not elaborate on this point.

[53] The second fee estimate for the narrowed request is, apparently, considerably more accurate than the first. It is regrettable that ICBC did not verify the accuracy of its first estimate and that it delayed for some months before issuing its second estimate. I can understand the applicant's frustration when, after submitting a narrowed request with the aim of receiving a lower fee estimate, it received instead a fee estimate that was almost double the first estimate.

[54] Despite this, I take no issue with ICBC's calculations for the second estimate and I decline to interfere with the estimated fee. I find that ICBC complied with s. 75 in calculating it. Of course, if any of the final costs is actually lower than estimated – if, for example, the search takes less time or there are fewer pages of records than first estimated – ICBC must adjust the actual fee accordingly.

[55] As for the delay in issuing the fee estimate, ICBC says, first, that this request was part of its s. 43 application and therefore the delay is unobjectionable. I reject this argument for the reasons given above. ICBC says that, when its s. 43 application did not proceed, it invited the applicant to narrow the June 2000 request still further – for which I again commend it – but received no response from the OPEIU. The OPEIU does not comment on this. ICBC admits that it finally issued the second fee estimate some time later, verbally in September and in writing in October 2000, but does not explain why it took so long to do so. For the reasons given above in relation to the irrelevance of the s. 43 application, I find that, in failing to issue the revised estimate sooner, ICBC did not comply with its s. 6(1) duty to assist.

[56] **3.7 Requests 2 and 3** – The applicant has asked me to consider if ICBC complied with ss. 6 and 7 when it failed to respond in time to Requests 2 and 3. Both parties addressed these two requests together and it is convenient to do so here.

Sections 6 and 7

[57] The OPEIU says it requested reviews of ICBC's failure to respond to these two requests in late July 2000. The OPEIU points out that it was not until late August, some weeks after the expiry of the extended deadline for a response, that ICBC offered it a

briefing. It argues ICBC did not meet its s. 7 obligation to respond in time and that, as a result, ICBC failed to comply with its s. 6(1) duty to respond without delay.

[58] ICBC says it estimated that these two requests would encompass approximately 5,000 pages of records and require at least 50 hours to process. With the volume of other OPEIU requests it was handling at that time, ICBC says, it would not have been able to respond to Requests 2 and 3 within the 30-day legislated time frame. It therefore took 30-day extensions, ultimately to early July 2000. ICBC says it was unable to respond within that extended time, however, because of the volume of OPEIU requests it was then processing. It did not, however, seek a further extension from my office, as these two requests were part of its s. 43 application of late June 2000. It later provided briefings to the OPEIU, in late September 2000 and late October 2000, about the subjects of the two requests, which the OPEIU considered fulfilled its requests. It argues that its conduct was reasonable, once again in light of its s. 43 application.

[59] For the reasons given above, I again reject ICBC's argument that its s. 43 application excused it from fulfilling the requirements of ss. 6(1) and 7. I also note that ICBC did not request an extension from my Office under s. 10. ICBC failed to meet the extended deadlines for response and thus failed to meet its s. 7 obligation to respond in time to Requests 2 and 3. It follows that ICBC also failed to meet its s. 6(1) to respond to them without delay.

[60] **3.8 Request 4** – Once again, the issue in relation to Request 4 is whether ICBC complied with ss. 6 and 7 when it failed to respond in time.

[61] In this instance, ICBC did not respond until several weeks after the initial 30-day response deadline of mid-June 2000. The OPEIU appears to suggest that ICBC deliberately waited to release this information until after the conclusion of a tentative settlement on the collective agreement, when the information would no longer be of use to the OPEIU in negotiations. It argues that the fact that ICBC has since responded does not relieve ICBC of its responsibility to respond within the legislated timelines. Its arguments on these points are similar to those for the other requests at issue in this inquiry.

[62] ICBC says it was not able to respond within 30 days because of the backlog of other OPEIU requests. ICBC was also of the view that this request was included within the scope of Request 1 and thought there was less urgency to provide the information, as the OPEIU already had the information. For this reason, it did not extend the time for responding. It was not until mediation on Request 1 began, ICBC says, that it realized that it had missed information in its response to that request. In addition, ICBC was preparing its s. 43 application, which included this request. ICBC ultimately provided the information in late July 2000. It freely admits that it did not respond within the legislated time for this request but, as with the other requests at issue in this inquiry, says this was due to the backlog created by the OPEIU's other requests.

[63] If ICBC at the time thought that this request overlapped with aspects of Request 1, and that it had already provided the requested information in response to

Request 1, it should have so informed the OPEIU as soon as possible within the 30-day response time. ICBC does not say whether it did this. Had it done so, the OPEIU would have had an opportunity to discuss ICBC's interpretation and the parties might conceivably have agreed on a way of dealing with the request. It might also have avoided some of the confusion over the "missing" employees.

[64] ICBC also does not say whether, in the context of the larger OPEIU requests, it could have processed this relatively simple request concurrently with the other larger ones. It appears to suggest that it dealt with the requests consecutively. Although it will not always be feasible, a public body in ICBC's situation should attempt to deal with all requests concurrently. Further, if a request is simple, it should be dealt with as soon as possible, even if this means responding to it before earlier, larger requests. ICBC did not address any of these issues, but blames its inability to respond in time on the request backlog and relies again on its s. 43 application. I have earlier rejected the s. 43 argument and do so again here for the reasons given earlier. In the circumstances, I can only find that ICBC did not meet its s. 6(1) duty to assist the applicant and to respond without delay and that it did not meet its s. 7 obligations.

4.0 CONCLUSION

[65] For the reasons given above, under s. 58(3)(c) of the Act, I confirm ICBC's fee estimate regarding Request 1(b). Given my findings on the ss. 6, 7 and 8 issues, and since ICBC has responded to all of the other requests in issue here, no order under s. 58(3)(a) is necessary. As no other remedy is available under the Act, the OPEIU will have to be content with the above findings that ICBC, in responding late, did not comply with its statutory obligations under ss. 6(1) and 7. Without condoning ICBC's lateness in responding, the above findings are tempered by the fact that ICBC expended considerable efforts in responding to the significant demands placed on it by the OPEIU's numerous, large-scale requests.

October 12, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia