



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

Decision F08-08

**INSURANCE CORPORATION OF BRITISH COLUMBIA**

Celia Francis, Senior Adjudicator

July 24, 2008

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**Summary:** The applicant requested that this inquiry proceed as if litigation were ongoing, even though ICBC had disclosed the records to which it had applied ss. 13 and 14. ICBC objected on a number of grounds, including mootness. The inquiry will not proceed on the grounds that the records in issue under ss. 13 and 14 have been disclosed and the original issues are now moot. Although a few items remain withheld under s. 22, the applicant is not interested in them.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, s. 56.

**Authorities Considered:** **B.C.:** Decision F08-02, [2008] B.C.I.P.C.D. No. 2; Decision F07-04, [2007] B.C.I.P.C.D. No. 20; Order 00-42, [2000] B.C.I.P.C.D. No. 46.

**Cases Considered:** *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342; *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*, [1999] 3 S.C.R. 46.

## 1.0 INTRODUCTION

[1] This decision is related to Decision F08-02,<sup>1</sup> in which I did not permit the applicant to expand the scope of the issues under review in the inquiry which resulted from the applicant's request for review of a decision by the Insurance Corporation of British Columbia ("ICBC").

[2] The applicant recently wrote to this Office to say that her claim had been resolved but that she nevertheless wanted the inquiry to proceed as if litigation

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<sup>1</sup> [2008] B.C.I.P.C.D. No. 2.

were still ongoing. ICBC confirmed that the claim had settled but objected to the applicant's request on a number of grounds.

[3] I have considered the applicant's arguments in support of her request that this inquiry proceed as if litigation were still ongoing and I have considered the public body's response. For the reasons that follow, I have exercised my discretion under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to decline the applicant's request that this inquiry proceed.

## 2.0 DISCUSSION

### *Background*

[4] Decision F08-02 describes the events leading to the inquiry in this case and sets out my reasons for not permitting the applicant to expand the scope of the inquiry. After that decision and before I had completed my deliberations on this matter, the applicant wrote to this Office:

Please note, that while the claim which gave rise to the original FOI request has been resolved, we are still pursuing this matter. Please provide your resolution on the basis that litigation remains ongoing.<sup>2</sup>

[5] ICBC confirmed that the claim had been resolved. It stated that, consequently,

ICBC will release all of the information that was withheld under contemplated litigation privilege (and some of which was also withheld under section 13 of FIPPA). The records containing that information are attached.<sup>3</sup>

[6] ICBC said that it had disclosed these pages in full, except for minor severing under s. 22 on pp. 11 and 38.<sup>4</sup> Of the information still withheld under s. 22 on these pages, ICBC said, some of it was of a type the applicant did not want<sup>5</sup> and some was information ICBC now believed fell under s. 22(3)(h).

[7] ICBC closed by saying this:

In light of the fact that all of the information over which ICBC previously claimed ss. 13 and 14 has now been disclosed, the ss. 13 and 14 issues in the inquiry have become academic. ICBC maintains that it is therefore unnecessary (and may be inappropriate) for you to proceed to make a

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<sup>2</sup> This letter is dated June 4, 2008. This Office received a fax copy of it on June 18, 2007 and the original on June 20, 2008.

<sup>3</sup> Letter of June 17, 2008.

<sup>4</sup> In addition to those it attached to its letter of June 17, 2008, ICBC disclosed with its letter of July 3, 2008 a few more pages it had originally withheld under s. 14.

<sup>5</sup> See paras. 13 & 15 of Decision F08-02.

decision on the section 14 issue “on the basis that the litigation remains ongoing”, as that does not take into account the fact that the requested information has now been released because of the change in circumstances.<sup>6</sup>

[8] I invited the parties to make any further submissions they wished on the issue of whether an inquiry should proceed and they did so. I discuss them below.

### **Issue**

[9] Section 56(1) of the Act reads as follows:

#### **Inquiry by Commissioner**

56(1) If the matter is not referred to a mediator or is not settled under section 53, the commissioner may conduct an inquiry and decide all questions of fact and law arising in the course of the inquiry.

[10] As previous decisions on s. 56 have noted, the reasons for exercising discretion in favour of not holding an inquiry are open-ended.<sup>7</sup> Mootness is a relevant aspect of s. 56. In exercising my discretion in this case, I have considered the principles of mootness in *Borowski v. Canada (Attorney General)*<sup>8</sup> and *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]*.<sup>9</sup>

#### ***Should this inquiry proceed as if litigation were still ongoing?***

[11] The original issues in this inquiry were ICBC’s application of ss. 13, 14, 15, 16, 17, 20 and 22 to portions of specified records in the applicant’s claim file. At various times during and after the inquiry, some exceptions and information or records in issue fell away and, as of Decision F08-02, only pp. 8-11, 38-40 and 103-105 remained in dispute, with respect to the application of ss. 13 and 14. ICBC has since disclosed all of the records to which it applied ss. 13 and 14. Despite this, the applicant wishes me to proceed with an inquiry on the basis that litigation is still underway.

[12] Although a few items also remain withheld under s. 22, these are of a type in which the applicant is not interested. These items are therefore not in issue. ICBC said it recently realized that a few additional words fell under s. 22(3)(h).<sup>10</sup> I address these latter items below.

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<sup>6</sup> Letter of June 17, 2008.

<sup>7</sup> See, for example, Decision F07-04, [2007] B.C.I.P.C.D. No. 20.

<sup>8</sup> [1989] 1 S.C.R. 342, at paras. 15-16.

<sup>9</sup> [1999] 3 S.C.R. 46, at paras. 41-49.

<sup>10</sup> Letter of June 17, 2008.

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### ***Parties' arguments***

[13] The applicant argued that this inquiry should proceed for these reasons:

- A decision would be useful, both to the applicant in any future dealings with ICBC and to the public in general; Commissioner Loukidelis issued Order 00-42<sup>11</sup> based on information available at the time of the inquiry, on the basis that his decision would be relevant to other ICBC cases
- She opposes ICBC filing new arguments (this appears to be a reference to ICBC's reasons for suggesting that there is no need for this inquiry to proceed); the OIPC process contemplates each party filing an initial submission and a reply submission and it would be a departure from the OIPC's process and procedurally unfair to allow ICBC to file new arguments and evidence at this stage<sup>12</sup>

[14] ICBC does not agree with the applicant that a decision would be useful in this case for these reasons:

- The principles governing the application of s. 14 of FIPPA are well established and there are no unique or special circumstances in this case which might warrant further consideration of s. 14
- The application of s. 14 is fact specific and a decision in this case would have no precedential value
- ICBC has acted responsibly in releasing records on the basis that litigation privilege no longer applies to them and should not be put at risk of some disadvantage as a result<sup>13</sup>

[15] ICBC also drew my attention to relevant case law respecting whether "a decision should issue" despite the fact the underlying issue, here the application of s. 14, has become academic.<sup>14</sup> Applying the principles in those decisions, ICBC said, no inquiry should proceed here on what is now an academic or moot issue because:

- A decision will be of no practical benefit to the applicant
- The s. 14 issue is not one of "considerable and ongoing public importance requiring resolution in the public interest"
- The issue is "not one that can be considered capable of repetition but evasive of review"

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<sup>11</sup> [2000] B.C.I.P.C.D. No. 46.

<sup>12</sup> Letter of June 18, 2008.

<sup>13</sup> Letter of July 3, 2008.

<sup>14</sup> *Borowski and New Brunswick (Minister of Health and Community Services)*.

- The need of the OIPC to utilize scarce quasi-judicial resources in a more efficient way<sup>15</sup>

### ***Analysis***

[16] Commissioner Loukidelis issued Order 00-42 in part to provide guidance on future ICBC cases, even though litigation in that case was over and ICBC had, for the most part, abandoned s. 14 and s. 17. However, this Office has since issued upwards of six dozen orders and decisions regarding s. 14, some of them involving ICBC, and a number of which have given litigation privilege extensive consideration.

[17] There is no remedy available to the applicant in this case regarding ss. 13 and 14, as she already has the records to which ICBC applied those exceptions. A decision on the few items which ICBC withheld under s. 14 in this case would therefore be moot. It would further consume this Office's time and resources but without any real prospect that a decision on s. 14 would assist with its interpretation. Nor would a decision likely assist the applicant or her representative in future dealings with ICBC. There is no "considerable and ongoing public importance requiring resolution in the public interest" in this case; nor is the issue "evasive of review".

[18] I also reject the applicant's objection to what she terms ICBC's filing of "new issues" in this case. On the contrary, it is both cost-effective and reasonable for ICBC to raise, and for me to take into account, such a material change in circumstances. This Office routinely takes into account similar changes during inquiries and indeed I have already done so in this case. Moreover, this Office has on occasion cancelled an inquiry if the issues in dispute fell away before an order could be issued.

[19] For the reasons discussed above, I have exercised my discretion under s. 56 not to proceed with this inquiry with respect to ss. 13 and 14.

### ***Section 22***

[20] I noted above that much of the information that ICBC had withheld under s. 22 was of a type the applicant had earlier said she was not interested in.<sup>16</sup> She did not dispute this. I asked the applicant if she was interested in having me consider the application of s. 22(3)(h) to the few words ICBC had identified on pp. 11 and 38.<sup>17</sup>

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<sup>15</sup> Letter of July 3, 2008.

<sup>16</sup> See also my letter of June 24, 2008.

<sup>17</sup> Also in my letter of June 24, 2008.

[21] The applicant replied as follows:

The seven words referred to on pages 11 and 38, only remain in dispute to the extent that they should have been released while the matter remained in litigation.<sup>18</sup>

[22] I take the applicant to mean that she would like me to consider the application of s. 22 to these pages, but only if I decided to proceed with this inquiry as if litigation were still ongoing. As noted above, I have decided not to proceed with this inquiry as if litigation were ongoing. It is therefore not necessary for me to decide if s. 22 applies to the seven words in question on pp. 11 and 38.

### **3.0 CONCLUSION**

[23] I have decided, under s. 56, for reasons given above that this inquiry under Part 5 of FIPPA respecting the respondent's request for access to information will not proceed. This Office's file on this request for review will be closed.

July 24, 2008

#### **ORIGINAL SIGNED BY**

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Celia Francis  
Senior Adjudicator

OIPC File: F07-31656

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<sup>18</sup> Letter of June 26, 2008.