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Order F15-25

## INSURANCE CORPORATION OF BRITISH COLUMBIA (ICBC)

Elizabeth Barker  
Senior Adjudicator

June 18, 2015

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**Summary:** The BC Freedom of Information and Privacy Association requested that ICBC provide records related to the data sharing and privacy aspects of combining the BC driver's licence with the BC Services Card. ICBC refused to disclose some of the information in the responsive records under s. 13 (policy advice or recommendations), s. 14 (legal advice) and s. 22 (disclosure harmful to personal privacy). The adjudicator found that, with a few exceptions, most of information was properly withheld under ss. 13 and 14. The adjudicator determined that disclosure of the withheld personal information would not be an unreasonable invasion of personal privacy, so ICBC was not authorized to withhold it under s. 22. ICBC also refused to disclose parts of the records on the basis that they were "not responsive" or outside the scope of the applicant's request. The adjudicator held that ICBC is not authorized to refuse to disclose the information on that basis, and the only part of a responsive record that may be withheld is that which is covered by an exception under Part 2 of FIPPA.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 13, 14 and 22.

**Authorities Considered: B.C.:** Order 01-15, 2001 CanLII 21569 (BC IPC); Order 01-53, 2001 CanLII 21607 (BC IPC); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC); Order F07-23, 2007 BCIPCD 38; Order F10-15, 2010 BCIPC 24 (CanLII); Order F11-17, 2011 BCIPC 23 (CanLII); Order F14-31, 2014 BCIPC 34; Order F15-23, 2015 BCIPC 25; Order F15-24, 2015 BCIPC 26.

**Cases Considered:** *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII); *R. v. B.*, 1995 Can LII 2007 (BCSC);

*Canada v. Solosky*, 1979 CanLII 9 (SCC); *John Doe v. Ontario (Finance)* 2014 SCC 36 (CanLII);

## INTRODUCTION

[1] The BC Freedom of Information and Privacy Association (“applicant”) requested that the Insurance Corporation of BC (“ICBC”) provide it with copies of “all records related to or referring to the data sharing and privacy aspects of the modified BC Driver’s licence as an alternative to the new Care Card.”

[2] ICBC provided the applicant with records but refused to disclose some information under s. 13 (policy advice or recommendations), s. 14 (solicitor client privilege), s. 15 (harm to law enforcement), s. 16 (harm to intergovernmental relations or negotiations), s. 17 (harm to a public body’s financial or economic interests) and s. 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (“FIPPA”). ICBC also refused to disclose some information in the records because it determined the information was “not relevant” to the applicant’s request.

[3] The applicant asked the Office of the Information and Privacy Commissioner (“OIPC”) to review ICBC’s decision. During mediation, ICBC disclosed additional information and clarified that it was only withholding information on the basis of ss. 13, 14 and 22, and because it believed that some of the information was “not responsive” or “out of scope”. Mediation did not resolve the remaining issues and the applicant requested that they proceed to a written inquiry.

## ISSUES

The issues in this inquiry are as follows:

1. Is ICBC authorized under s. 14 of FIPPA to refuse access to information in the requested records?
2. Is ICBC authorized under s. 13 of FIPPA to refuse access to information in the requested records?
3. Is ICBC required under s. 22(1) of FIPPA to refuse access to information in the requested records?
4. Is ICBC authorized under FIPPA to refuse to disclose parts of the requested records because those parts are “not responsive” or “out of scope” of the access request?

[4] Section 57 of FIPPA establishes the burden of proof in an inquiry. At an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part. However, if the record or part that the applicant is refused access to 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 under s. 22 of FIPPA.

## DISCUSSION

[5] **Information in Dispute** – The information in dispute is contained in emails, handwritten notes, project charters, meeting minutes, briefing notes and project status reports.<sup>1</sup>

[6] **Solicitor client privilege** – The Ministry is withholding some information from the records on the basis that it is protected by solicitor client privilege, so s. 14 applies. Section 14 of FIPPA states that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[7] The law is well established that s.14 of FIPPA encompasses both types of solicitor client privilege found at common law: legal professional privilege (sometimes referred to as legal advice privilege), the privilege applicable to communications between solicitor and client for the purposes of obtaining legal advice, and litigation privilege, which applies to communications and material produced or brought into existence for the dominant purpose of litigation.<sup>2</sup> ICBC submits that legal advice privilege applies to the information that it withheld under s. 14.<sup>3</sup>

[8] The applicant submits that it is not clear that all of the information at issue may be withheld under s. 14, despite the affidavits of ICBC's legal counsel in this inquiry. It also submits that the involvement of legal counsel does not automatically result in solicitor client privilege applying to a given communication.<sup>4</sup>

[9] For legal advice privilege to apply the following conditions must be satisfied:

1. there must be a communication, whether oral or written;

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<sup>1</sup> Originally, there were approximately 2250 pages of records at issue. However, the parties resolved their dispute with respect to many of the records during the OIPC mediation process. The records that remain at issue were indexed and colour coded by the OIPC investigator - with the parties' agreement - for the purposes of clarifying the remaining information at issue.

<sup>2</sup> *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 (CanLII), para. 26.

<sup>3</sup> ICBC's initial submission, para. 23.

<sup>4</sup> Applicant's reply submission, para. 15-19.

2. the communication must be confidential;
3. the communication must be between a client (or agent) and a legal advisor; and
4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

[10] Not every communication between client and solicitor is protected by solicitor client privilege, but if the four conditions above are satisfied, then privilege applies to the communications and the records relating to it.<sup>5</sup> The above criteria have consistently been applied in BC Orders,<sup>6</sup> and I will take the same approach here.

[11] ICBC provided affidavits from four senior legal counsel with ICBC's Corporate Law Department. Each lists the pages of the records in dispute that they were involved with. They describe the information withheld under s. 14 as their legal opinions and advice, and communication with ICBC staff and/or other ICBC lawyers regarding the seeking, facilitating, providing and considering of legal advice and legal work product.

[12] I have reviewed the information for which privilege is claimed and find that, with only a few exceptions, it meets the criteria for legal advice privilege. The information that I find may be withheld under s. 14 consist of the following:

- lawyers' handwritten notes of communications with ICBC staff regarding matters for which the lawyer was providing legal advice;
- lawyers' handwritten notes in the margins of the documents;
- comments by ICBC employees in emails and other documents (e.g., meeting minutes and briefing notes) that reference legal opinions sought and provided by ICBC legal counsel;
- the exchange of information between ICBC staff and ICBC legal counsel, which is clearly part of the continuum of communications undertaken for the purpose of seeking and providing legal advice.

[13] However, there are a few instances where I find that the withheld information ( which is communications about ICBC's procurement activities) does not meet the criteria for solicitor client privilege.<sup>7</sup> These excerpts are not communications between ICBC and its lawyers, and they are not about the seeking, formulating or giving of legal advice. Further, these excerpts do not

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<sup>5</sup> For a statement of these principles see also *R. v. B.*, 1995 Can LII 2007 (BCSC) and *Canada v. Solosky*, 1979 CanLII 9 (SCC).

<sup>6</sup> For example Order 01-53, 2001 CanLII 21607 (BC IPC).

<sup>7</sup> Pages 201, 207, 209, 236, 239, 241, 243, 245, 248, 251, 254, 941, 943, 1752, 1791.

indirectly reveal such solicitor client communications or allow one to draw accurate inferences about such communications. In making these findings I note that not all information about ICBC's staff activities is privileged simply because, at some point in time, an ICBC lawyer provided advice or worked on the same topic to which the activities relate. The information being withheld still needs to meet the criteria for privilege, and it does not in these instances.

[14] ICBC applied both ss. 13 and 14 to much of the same information. I will consider the application of s. 13 to the information that I have not already found that ICBC is authorized to withhold under s. 14.<sup>8</sup>

[15] **Policy Advice or Recommendations** – Section 13(1) states that the head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

[16] Section 13(1) has been the subject of many Orders that have consistently held that the purpose of s. 13(1) is to allow full and frank discussion of advice or recommendations on a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny.<sup>9</sup> In *John Doe v. Ontario (Finance)*, the Supreme Court of Canada addressed Ontario's equivalent of s. 13 and said:

Political neutrality, both actual and perceived, is an essential feature of the civil service in Canada... The advice and recommendations provided by a public servant who knows that his work might one day be subject to public scrutiny is less likely to be full, free and frank, and is more likely to suffer from self-censorship. Similarly, a decision maker might hesitate to even request advice or recommendations in writing concerning a controversial matter if he knows the resulting information might be disclosed. Requiring that such advice or recommendations be disclosed risks introducing actual or perceived partisan considerations into public servants' participation in the decision-making process.<sup>10</sup>

[17] BC orders have also found that s. 13(1) applies not only when disclosure of the information would directly reveal advice and recommendations, but also when it would allow accurate inferences about the advice or recommendations.<sup>11</sup>

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<sup>8</sup> The pages that I will consider in the s. 13 analysis are: 193,197 (top), 226-28, 339,751, 923 (repeated at 932), 943, 945, 2188, 2207 and 2208. I have not considered the application of s. 13 to an email chain on pages 831-834, as I agree that it is a non-responsive record. See para. 32 below.

<sup>9</sup> For example, Order 01-15, 2001 CanLII 21569 (BC IPC) and Order F11-17, 2011 BCIPC 23 (CanLII).

<sup>10</sup> *John Doe v. Ontario (Finance)* 2014 SCC 36, at para. 45.

<sup>11</sup> Order F10-15, 2010 BCIPC 24 (CanLII); Order 02-38, 2002 CanLII 42472 (BCIPC); Order F06-16, 2006 CanLII 25576 (BCIPC).

[18] In *College of Physicians of B.C. v. British Columbia*, the British Columbia Court of Appeal said that “advice” includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact, including expert opinions on matters of fact on which a public body must make a decision for future action.<sup>12</sup> Further, in *John Doe v. Ministry of Finance*, the Supreme Court of Canada determined that the word “advice” in s. 13(1) of the Ontario FIPPA includes policy options, whether or not the advice is communicated to anyone.

[19] The process for determining whether s. 13(1) applies to information involves two stages. The first is to determine whether disclosure of the information would reveal advice or recommendations developed by or for the public body. If it does, it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). The effect of s. 13(2) is that, even in cases where information would reveal advice or recommendations developed by or for a public body, the public body may not withhold the information if it falls within any of the s. 13(2) categories.

[20] ICBC submits that the information it has severed under s. 13 is advice or recommendations, and in other instances it reveals advice and recommendations. The applicant submits that it is not clear that the information withheld under s. 13 is advice or recommendations.<sup>13</sup>

[21] I find that most of the information to which s. 13 has been applied is clearly the advice or recommendations of ICBC employees. The information that I find does reveal advice or recommendations is communications and information exchanged between ICBC employees and others about procurement and funding matters, related decisions and the wording of documents. In other instances, the information withheld would allow one to draw accurate inferences about such advice or recommendations. Therefore, I find that s. 13(1) applies to this information.<sup>14</sup> In addition, I find that the information that reveals advice or recommendations does not fall within any of the categories listed in s. 13(2), so it may be withheld under s. 13.

[22] There is only a small amount of information in emails and project meeting minutes that I find cannot be withheld under s. 13 because it is not advice or recommendations.<sup>15</sup> The information is factual updates on the progress of the BC Services Card project and related activities, and it neither directly nor indirectly reveals advice or recommendations. There is also an opinion in one email, but it is a one sentence comment about how the writer perceived an

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<sup>12</sup> *College of Physicians of B.C. v. British Columbia*, 2002 BCCA 665 (CanLII) at para. 113.

<sup>13</sup> Applicant’s submission, para. 9-14

<sup>14</sup> Pages 193, 197, 226-28, 339, 751, one sentence on 923 (repeated at 932), 2188, 2207 (bottom of page), 2208 (top of page).

<sup>15</sup> I have marked the information that may not be withheld under s. 13 on a copy of the relevant pages (i.e., 923, repeated at 932, 943, 945 and 2207-08) that have been sent to ICBC.

activity went. It is not an expert opinion on matters of fact on which a public body must make a decision for future action, so it is not advice.<sup>16</sup>

[23] **Disclosure harmful to personal privacy** – ICBC is withholding a very small amount of information on the basis that the disclosure would be an unreasonable invasion of a third party’s personal privacy under s. 22. Neither party made submissions about s. 22. Numerous orders have considered the application of s. 22, and I have applied those same principles in my analysis below.<sup>17</sup>

### *Personal information*

[24] The first step in any s. 22 analysis is to determine if the information is personal information. Personal information is defined as “recorded information about an identifiable individual other than contact information”. Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual”.<sup>18</sup>

[25] The information still in dispute that has been withheld under s. 22 is as follows:<sup>19</sup>

1. Information in a table under the heading “Resources” (pages 185-186). The table lists first the role (project manager, business lead, etc.) followed by the name of the individual in that role, the dates the role will be needed for the project and the percentage time commitment. ICBC has disclosed the role and name of the individual but is withholding the dates and time commitment information. I will refer to this information as #1.
2. Information in a project update email about the location of several named individuals (page 209) and some information about named employee absences (page 925). I will refer to this information as #2.

[26] I find that the information ICBC withheld under s. 22 is personal information.

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<sup>16</sup> Page 945. ICBC did not argue that it was expert opinion evidence amounting to advice.

<sup>17</sup> See for example, Order 01-53, 2001 CanLII 21607 (BC IPC) at p. 7.

<sup>18</sup> See Schedule 1 of FIPPA for these definitions.

<sup>19</sup> I have not considered the application of s. 22 to an email chain on pages 831-834, as I agree that it is a non-responsive record. See para. 32 below.

*Section 22(4)*

[27] The next step in the s. 22 analysis is to determine if the personal information in dispute falls into any of the types of information listed in s. 22(4). If it does, then disclosure would not be an unreasonable invasion of personal privacy, so s. 22 does not require that the public body refuse disclosure.

[28] I find that the personal information in #1 falls into s. 22(4)(e) as it is about the individuals' position and functions as employees of ICBC. Therefore disclosing it would not be an unreasonable invasion of third party personal privacy and it may not be withheld under s. 22. However, s. 22(4) does not apply to the personal information in #2.

*Section 22(3) - Presumptions*

[29] For the personal information at #2, the third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply to it, such that disclosure is presumed to be an unreasonable invasion of third party privacy. I find that none of the presumptions apply to the personal information in #2.

*Section 22(2) - Relevant Circumstances*

[30] The final step in deciding whether disclosure of the personal information would be an unreasonable invasion of third party privacy is to consider all relevant circumstances, including those listed in s. 22(2). I have done so, and I find that the information about these individuals does not relate in any way to health or disciplinary matters and it conveys no judgement about how these individuals were performing their work. It is simply information about the whereabouts of various team members, and who would handle functions in their absence. The fact that the information was shared amongst the team members also supports my finding that there is nothing sensitive or confidential about this information. Further, the personal information withheld on page 925 has been disclosed in duplicates of this same record at pages 1748 and 2118. In my view, disclosure of the personal information in #2 would not be an unreasonable invasion of these individuals' personal privacy, so it may not be withheld under s. 22.

[31] **Non-responsive or out of scope Information** - ICBC is withholding parts of some records because it submits that the information in those parts is "not relevant" to the applicant's request. It has labelled this information as "not responsive" or "out of scope". ICBC submits that this information is unrelated to the applicant's access request and deals with other matters. The applicant submits that FIPPA does not authorize a public body to withhold parts of a



responsive record because the public body believes those parts are not responsive to the access request.<sup>20</sup>

[32] With one exception, the information withheld as non-responsive consists of *parts* of responsive records. The exception is an email chain on pages 831-34, which ICBC withheld in its entirety as being non-responsive.<sup>21</sup> I find that the email chain is a single record that contains no information regarding the applicant's access request. In my view, ICBC appropriately identified it as a record that is non-responsive and it may continue to withhold it on that basis.

[33] ICBC refers to Order F07-23<sup>22</sup> in support of its decision to withhold parts of responsive records as non-responsive. In that case, the adjudicator found that the Ministry properly withheld some information from responsive records because the information did not relate to the subject matter of the applicant's access request. However, more recently, in Orders F15-23 and F15-24, Deputy Commissioner McEvoy has said that FIPPA does not authorize a public body to withhold portions of responsive records on the basis that those portions are not responsive.<sup>23</sup> He stated that the only part of a responsive record that may be withheld is that which is covered by an exception under Division 2 of Part 2 of FIPPA.

[34] For the reasons set out in Orders F15-23 and F15-24, I too find that a public body is not authorized by FIPPA to withhold parts of responsive records on the basis that those parts are, in the public body's view, non-responsive or outside the scope of the access request. Therefore, ICBC must process the information it withheld as being "not responsive" or "out of scope" by either disclosing it or withholding the information that it is authorized or required to withhold under Part 2, Division 2 of FIPPA. However, it need only do so for the information that I have not already determined can be withheld under ss. 13 and 14.<sup>24</sup>

## CONCLUSION

[35] For the reasons given above, under s. 58 of FIPPA, I order that:

1. Subject to paragraph two below, ICBC is authorized to refuse to disclose the information it withheld under ss. 13 and 14 of FIPPA.

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<sup>20</sup> Applicant's initial submissions, para. 24.

<sup>21</sup> There were a few other records withheld in their entirety as non-responsive but as I found that ss. 13 or 14 applied, I have not considered them in this non-responsive records analysis.

<sup>22</sup> Order F07-23, 2007 BCIPCD 38, at para 17.

<sup>23</sup> F15-23, 2015 BCIPC 25 and F15-24, 2015 BCIPC 26. See also Order F14-31, 2014 BCIPC 34.

<sup>24</sup> The information which it must process is on pp. 145, 185, 186, 199, 201, 207, 209, 236, 239, 241, 243, 245, 248, 251, 254, 923, 925, 932 (duplicate of 923), 941, 943, 945, 1259, 1326, 1748 (duplicate of 925), 1752, 1758, 1771, 1784 (top), 1791, 1834 (duplicate of 145) and 2207-08.

2. ICBC is not authorized under ss. 13 and 14 to refuse to disclose the information that has been marked as such in a copy of the pages of the records that accompany ICBC's copy of this Order.
3. ICBC is not required to refuse to disclose the personal information that it refused to disclose under s. 22 of FIPPA.
4. ICBC is not authorized to refuse to disclose parts of the responsive records, which it labeled as "not responsive" or "out of scope" on pages 145, 185, 186, 199, 201, 207, 209, 236, 239, 241, 243, 245, 248, 251, 254, 923, 925, 932 (duplicate of 923), 941, 943, 945, 1259, 1326, 1748 (duplicate of 925), 1752, 1758, 1771, 1784 (top), 1791, 1834 (duplicate of 145) and 2207-08. ICBC must complete the processing of the applicant's request with respect to that information by either disclosing the information or withholding it under an exception in Part 2, Division 2 of FIPPA.
5. ICBC must comply with the terms of this Order by July 31, 2015 and concurrently send the Registrar of Inquiries a copy of its cover letter and the records it sends to the applicant.

June 18, 2015

**ORIGINAL SIGNED BY**

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Elizabeth Barker, Senior Adjudicator

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