



OFFICE OF THE
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COMMISSIONER
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Order F17-34

INSURANCE CORPORATION OF BRITISH COLUMBIA

Elizabeth Barker
Senior Adjudicator

July 4, 2017

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Summary: The applicant requested all records relating to ICBC's 2016 Hall of Shame/Anti-Fraud campaign. ICBC refused to disclose some information under s. 13 (policy advice or recommendations) and s. 14 (solicitor client privilege) of FIPPA. The adjudicator confirmed ICBC's decision.

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

Authorities Considered: BC: Order 02-38, 2002 CanLII 42472 (BCIPC); Order F07-17, 2007 CanLII 35478 (BC IPC); Order F10-15, 2010 BCIPC 24 (CanLII).

Cases Considered: *John Doe v. Ontario (Finance)*, 2014 SCC 36; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44; *Canada v. Solosky*, 1979 CanLII 9 (SCC); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)* 2002 BCCA 665; *R. v. B.*, 1995 CanLII 2007 (BCSC).

INTRODUCTION

[1] The applicant requested all records relating to ICBC's 2016 Hall of Shame/Anti-Fraud campaign. The request was for information covering the period January 1, 2010 through December 31, 2015. ICBC provided the applicant with the requested records but withheld some information under s. 13 (policy advice or recommendations) and s. 14 (solicitor client privilege) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the

public body's response to his access request. Mediation did not resolve the matters in dispute and the applicant requested that they proceed to inquiry.

ISSUES

[2] The issues to be decided in this inquiry are whether ICBC is authorized to refuse to disclose information to the applicant under s. 13 and 14 of FIPPA. Section 57(1) of FIPPA states that the public body has the burden of proving that an applicant has no right of access to records or parts of records under ss. 13 and 14.

DISCUSSION

Information in dispute

[3] There are nine pages of records at issue in this inquiry.¹ ICBC is withholding blocks of text in seven pages of emails and the entirety of two pages of television/advertising script. There is some overlap between ICBC's application of ss. 13 and 14.

Advice or Recommendations, s. 13

[4] 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 a minister. 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.²

[5] Section 13(1) has been the subject of many orders, which have said that it applies not only when disclosure of the information would directly reveal advice or recommendations, but also when it would allow accurate inferences about the advice or recommendations.³ In *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner [College])*, 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 opinion on matters of fact on which a public body must make a decision for future action.⁴ Further, the Supreme Court of Canada said that the word "advice" includes policy options, whether or not the advice is communicated to anyone.⁵

¹ There are 32 pages of records in total.

² *John Doe v. Ontario (Finance)*, 2014 SCC 36 [*John Doe*] at para. 45.

³ Order 02-38, 2002 CanLII 42472 (BCIPC) and Order F10-15, 2010 BCIPC 24 (CanLII).

⁴ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 113.

⁵ *John Doe* at paras.47-51.

[6] The process for determining whether s. 13(1) applies to information involves two stages.⁶ The first is to determine whether the disclosure of the information would reveal advice or recommendations developed by or for the public body. If so, then it is necessary to consider whether the information falls within any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose the information under s. 13(1).

Parties' submissions

[7] ICBC says that the information it is withholding under s. 13 is advice or recommendations about elements of the public messaging for the campaign.

[8] The applicant submits that the information withheld under s. 13 does not appear to relate to weighing the significance of matters of fact or providing options or recommended courses of action.

Analysis and findings, s. 13

[9] Most of the information being withheld under s. 13 consists of communication between ICBC's marketing and communications staff,⁷ and a few excerpts also include an employee of an advertising company retained by ICBC to assist with its counter fraud awareness media efforts.⁸ The rest of the emails are between ICBC staff and ICBC's Senior Legal Counsel, Corporate Law Department (ICBC solicitor). The emails are about the television scripts and advertising matters.⁹

[10] For the following reasons, I find that all of the information withheld under s. 13 reveals advice or recommendations developed by or for ICBC. It is what individuals said to each other about the proposed media and public awareness materials ICBC was developing. In my view, these individuals are clearly engaged in deliberation about those matters. Some of the withheld information is explicit advice and recommendations regarding advertising copy and television scripts about ICBC-related fraud.¹⁰ There are also short excerpts withheld from two emails, which I find would allow one to accurately infer the advice and recommendations provided about the emails' attachments.¹¹ Also, much of the withheld information is opinion on what should be said and done, and I find that it is advice in the sense explained by *College*. Specifically, it is the opinion of

⁶ Order F07-17, 2007 CanLII 35478 (BC IPC), para 18.

⁷ ICBC's Marketing Communications Specialist, ICBC's Manager Customer Marketing & Strategy and ICBC's Communication Advisor.

⁸ ICBC's submissions, para. 16.

⁹ The subject of the communication is already revealed by the information already disclosed and in ICBC's submissions.

¹⁰ On pp. 11, 24 and 27.

¹¹ The excerpts on p. 5 and the top of p. 8 are in emails that I conclude accompanied pp. 24 and 27.

marketing and advertising professionals/specialists about media and communications matters for which ICBC must make a decision for future action is advice in the sense explained in *College*.

[11] I have considered whether the information that I find reveals advice or recommendations falls into any of the categories of information listed in s. 13(2). Neither party makes submissions regarding s. 13(2). I find that none of the categories of information listed in s. 13(2) apply. Therefore, ICBC may refuse to disclose this information to the applicant under s. 13(1).

[12] I will now consider ICBC's application of s. 14 to refuse the applicant access to the information in dispute. I will consider the application of s. 14 to information that is also being withheld under s. 13 because there is some overlap between ICBC's application of the two exceptions.¹²

Solicitor client privilege, s. 14

[13] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. Solicitor client privilege protects communications between a solicitor and client, intended to be confidential and related to the seeking and giving of legal advice. The Supreme Court of Canada has said that solicitor client privilege is a "rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counsellor or in some other non-legal capacity...".¹³

[14] The law is well established that s.14 encompasses both legal advice privilege and litigation privilege.¹⁴ ICBC submits that legal advice privilege applies to the information it is withholding under s. 14. When deciding if legal advice privilege applies, BC Orders have consistently used the following criteria:

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

[15] Not every communication between client and solicitor is protected by solicitor client privilege. However, if the four conditions set out above are

¹² The overlap is in the middle of p. 5, the bottom of p. 8 and the top of p.9.

¹³ *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.

¹⁴ *College* at para 26.

satisfied, then legal advice privilege applies to the communications and the records relating to it.¹⁵

Parties' submissions

[16] ICBC says that the information in dispute is confidential communications between ICBC staff and the ICBC solicitor for the purposes of giving or receiving legal advice.

[17] The applicant says that it appears that ICBC's lawyer plays a broader role within ICBC than providing pure legal advice, and that some of the ICBC staff communications with the ICBC solicitor were unrelated to obtaining legal advice. For that reason, the applicant questions the redactions on pages 5, 8 and 9, in particular, and says that it is not clear that they relate in any way to legal advice.

Analysis and findings, s. 14

[18] I have reviewed the information ICBC is withholding under s. 14 and the ICBC solicitor is involved in all of those emails. Except for one excerpt that I will discuss next, these communications are directly and patently related to seeking and giving legal advice about the advertising for the fraud campaign. I also conclude that they were confidential communications between solicitor and client. ICBC's affidavit evidence identifies the people with whom the ICBC lawyer communicated and they are all ICBC staff. There is nothing to suggest that anyone else was involved in these communications. Further, the ICBC lawyer's email signature block contains a statement that the information is confidential or privileged. In conclusion, I find that this information may be withheld under s. 14.

[19] There is one excerpt, however, where I find that the information withheld under s. 14 is not a confidential communication about legal advice.¹⁶ It is what the ICBC solicitor said about the wording of the television script. In my view, this excerpt does not reveal or contain anything related to legal advice. Given the context of this information and this record, the lawyer is acting in the role of policy advisor rather than legal advisor. I note that ICBC is also withholding this excerpt under s. 13, and I have found that exception applies. Further, this sentence was apparently not considered by ICBC to be a confidential communication about legal advice between itself and its solicitor. I say that because ICBC forwarded the email and its attachment to the advertising company retained by ICBC to assist with its counter fraud awareness media efforts. In conclusion, I find that this excerpt may not be withheld under s. 14.

¹⁵ *R. v. B.*, 1995 CanLII 2007 (BCSC) at para. 22. See also *Canada v. Solosky*, 1979 CanLII 9 (SCC) at p. 13.

¹⁶ On p. 5.

Exercise of discretion

[20] ICBC raised the issue of its exercise of discretion in this case. The word “may” in provisions such as s. 13 and 14 confers on the head of a public body the discretion to disclose information that can technically be withheld under those exceptions. The head must exercise that discretion by deciding whether to refuse access to information. If the head of the public body has not done so, he or she can be ordered to reconsider the exercise of discretion. Commissioner Loukidelis discussed the matter of a public body’s exercise of its discretion in Order 02-38 and stated:

As I have said before, the Act does not contemplate my substituting the decision I might have reached for the head’s decision. I can require a public body’s head to consider the exercise of discretion where that has not been done, but I will not myself exercise that discretion... Moreover, it is open to me to require a head to re-consider the exercise of discretion if she or he has exercised the discretion in bad faith or has considered irrelevant or extraneous grounds in doing so...¹⁷

[21] Commissioner Loukidelis also set out a non-exhaustive list of factors that a public body should consider in exercising its discretion.

[22] Based on my review of ICBC’s submissions and evidence, I am satisfied that it exercised its discretion having regard to appropriate considerations. The applicant did not argue otherwise. In conclusion, I see no basis to interfere with ICBC’s exercise of discretion in this matter.

CONCLUSION

[23] For the reasons given above, pursuant to s. 58(2)(b) of FIPPA, I confirm ICBC’s decision to refuse to give the applicant access to the information in dispute under ss. 13 and 14 of FIPPA.

July 4, 2017

ORIGINAL SIGNED BY

Elizabeth Barker, Senior Adjudicator

OIPC File No.: F16-67470

¹⁷ Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 147.