



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

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Order F19-17

INSURANCE CORPORATION OF BRITISH COLUMBIA

Laylí Antinuk
Adjudicator

March 29, 2019

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Summary: An applicant requested information related to a recent change to the insurance regime for Uber, Lyft and taxis. The public body withheld some information under sections 12(1) (cabinet confidences); 13 (advice or recommendations); 14 (solicitor client privilege); 17 (harm to public body's financial or economic interests); and 21 (harm to third party business interests). The adjudicator found that s. 13 applied to some of the withheld information, but not all of it. The adjudicator also found that ss. 12(1), 14, 17 and 21 did not apply to the remaining information and, therefore, ordered the public body to disclose that information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 12(1), 13(1), 13(2), 14, 17 and 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii), and 21(1)(c)(iii).

INTRODUCTION

[1] An applicant requested information from the Insurance Corporation of British Columbia (ICBC) related to a change to the insurance regime for taxis and ride-sharing services, like Uber and Lyft. ICBC responded by providing the applicant with records that had information withheld under one or more of ss. 12(1), 13, 14, 17 and 21 of the *Freedom of Information and Protection of Privacy Act* (FIPPA).¹

¹ Whenever I refer to section numbers throughout the remainder of this order, I refer to sections of FIPPA.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review ICBC's decision. Mediation did not resolve the matter and it proceeded to inquiry. The OIPC notified Uber about the inquiry under s. 54 and offered Uber the opportunity to make submissions for the inquiry because some of the information at issue involves Uber. Both ICBC and Uber provided inquiry submissions. Uber's submissions focus exclusively on s. 21. The applicant made no submissions other than to say, "the info should not be protected."²

ISSUES

[3] This inquiry involves the following issues:

1. Is ICBC required by ss. 12(1) or 21 to refuse to disclose the information?
2. Is ICBC authorized by ss. 13, 14 or 17 to refuse to disclose the information?

[4] ICBC bears the burden of proving that the applicant has no right to access the information.³

DISCUSSION

Background

[5] The Province established ICBC as a Provincial Crown corporation in 1973 to provide basic universal compulsory and optional vehicle insurance for BC vehicles.⁴ ICBC's compulsory insurance applies to all BC vehicles, including taxis.

[6] As noted above, the applicant requested information about insurance changes related to Uber, Lyft and taxis. Uber and Lyft offer ride-sharing or ride hailing services. Companies involved in this kind of work are called "Transportation Network Companies" or TNCs. TNCs provide for pre-arranged transportation in privately owned vehicles by utilizing mobile or smart phone applications (apps) to connect passengers with drivers willing to use their personal vehicles in exchange for payment.

² Applicant's January 7, 2019 email to the OIPC registrar of inquiries.

³ Section 57(1). I note that ICBC and Uber agree with respect to the application of s. 21(1) to the records. This inquiry is not a third party request for review in which the third party would bear the burden of proof pursuant to s. 57(3)(b).

⁴ ICBC submissions at para. 2. All information summarized in the remainder of the background section comes from ICBC's submissions at paras. 2-16 and 40 unless otherwise specified.

[7] Under the current legislation, a vehicle operating for a TNC in BC falls within the definition of “taxi” in the *Motor Vehicle Act*. Average basic insurance premiums for taxis operating in BC cost significantly more than personal passenger vehicle premiums. TNCs have raised concerns with this because, from their perspective, the risks and claims for vehicles operating for TNCs do not match those for taxis. To support this position, TNCs note that TNC drivers: (a) spend less time on the road and accumulate less work-related mileage when compared with taxis; and (b) own the vehicles they use and therefore drive with greater care and attention than taxis do.

[8] In 2015, the Ministry of Transportation and Infrastructure (the Ministry) began a project (the project) to modernize the Province’s treatment of all passenger transportation services, including TNCs and taxis. The project involved developing policy and legislative amendments.

[9] The Ministry asked ICBC to participate in the project so as to engage ICBC’s automobile insurance expertise. The Ministry required every ICBC employee involved in the project to sign a confidentiality undertaking because of the sensitive and controversial nature of the project. The Ministry and ICBC also interacted with Uber in relation to the project. To this end, the Ministry and Uber entered into a non-disclosure agreement in November of 2016.

[10] In July 2018, the Province announced its intention to introduce legislation in the fall session that would enable a modern insurance product in relation to taxis and TNCs.⁵

Records in dispute

[11] As noted above, the applicant specifically mentioned Uber and Lyft in his access request. None of the responsive records contain information expressly related to Lyft, but some of them contain information related to Uber.

[12] The records in dispute comprise the following:

- a project charter;
- internal ICBC emails;
- two drafts of a privacy impact assessment;
- two briefing notes (briefing note A and briefing note B);
- two PowerPoint presentations (presentation A and presentation B);
- an implementation plan;
- an insurance for TNCs sheet;⁶
- a question and answer sheet;⁷

⁵ Bill 55 – 2018: *Passenger Transportation Amendment Act* received royal assent in November of 2018 but is not yet in force. It will be brought into force by regulation.

⁶ Pages 14-16 of the records.

- an insurance background;⁸
- a technical fact sheet;⁹ and
- a letter from ICBC to Uber.

[13] ICBC withheld a few records in their entirety under one or more of ss. 12(1), 13, 17 and 21. ICBC released the balance of the records to the applicant with some information severed under ss. 12(1), 13, and 14.

[14] I will first consider whether s. 13 applies to any information in dispute because ICBC withheld the majority of the information under this exception. Then I will turn to the remaining information and relevant sections.

Advice or recommendations – section 13

[15] Section 13(1) allows public bodies to refuse to disclose information that contains or would reveal advice or recommendations developed by or for a public body or minister subject to certain exceptions set out in s. 13(2). Section 13 serves to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.¹⁰ In doing so, s. 13 preserves an effective and neutral public service.¹¹

[16] Section 13 applies both to information that explicitly contains advice and recommendations and to information that would enable an individual to make accurate inferences about underlying advice or recommendations.¹²

[17] Advice under s. 13 includes expert opinion on matters of fact on which a public body must make a decision for future action.¹³ The Supreme Court of Canada has noted that advice sets forth considerations for a decision maker to take into account when making any given decision; phrased differently, advice serves as the basis for making a decision among presented options.¹⁴ In short, advice or recommendations precede, inform and prompt decisions.

⁷ Pages 21-23 of the records.

⁸ Pages 8-10 of the records.

⁹ Pages 49-50 of the records.

¹⁰ *Insurance Corporation of British Columbia v. Automotive Retailers Association*, [Automotive Retailers], 2013 BCSC 2025 at para. 65; *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, [College of Physicians], 2002 BCCA 665 at para. 104-105; Order 01-15, [2001] B.C.I.P.C.D. No. 16 at para. 22.

¹¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43. In this case, the Court considered s. 13(1) of Ontario's freedom of information legislation which resembles s. 13 of FIPPA.

¹² *Automotive Retailers*, *supra* note 10 at para. 42; Order 02-38, [2002] B.C.I.P.C.D. No. 38 at para. 135; Order 01-17, [2001] B.C.I.P.C.D. No. 18 at para. 21; Order F15-12, 2015 BCIPC 12 at para. 42; Order F16-28, 2016 BCIPC 30 at para. 22; Order F17-01, 2017 BCIPC 01 at para. 13.

¹³ *College of Physicians*, *supra* note 10 at para. 113.

¹⁴ *John Doe*, *supra* note 11 at para. 47.

[18] The s. 13 analysis involves two steps.¹⁵

1. First, I must determine if disclosure of the information at issue would reveal advice or recommendations developed by or for a public body such that s. 13(1) would apply to it.
2. If it would, then I must determine whether the information falls into any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose it under s. 13(1).

ICBC's position

[19] ICBC submits that all the information withheld under s. 13(1) reveals advice and/or recommendations developed by ICBC or Uber or would allow for accurate inferences respecting such advice and/or recommendations.¹⁶ ICBC says the information withheld under s. 13(1) suggests a course, action or plan that has not yet been implemented and includes pros and cons, policy options, impacts and opinions.¹⁷

Analysis and findings – section 13(1)

[20] First I will discuss the information that I find does not qualify as advice or recommendations under s. 13(1).

Project charter

[21] ICBC has withheld everything in the project charter except the headers, footers, titles and a list of the project team members. ICBC submits that this document “provides advice about various aspects of a framework ICBC’s [sic] tasks and responsibilities” relating to the project.¹⁸ I disagree. In my view, nothing in this document qualifies as advice or recommendations. It does not contain policy options, implications of options, expert opinions, or pros and cons for a decision maker to consider. Rather, it describes the objectives, critical success factors, scope, assumptions and dependencies for the project. In my view, nothing in this record directly contains or would allow accurate inferences about advice or recommendations. ICBC has not adequately explained how the information in this record reveals advice or recommendations.

[22] I find that s. 13(1) does not apply to this information.

¹⁵ Order F07-17, 2007 CanLII 35478 (BC IPC), para 18; Order F17-01, *supra* note 12 at para. 14; Order F18-43, 2018 BCIPC 46 at para. 50.

¹⁶ ICBC submissions at para. 35.

¹⁷ *Ibid.*

¹⁸ ICBC submissions at para. 17, item 4.

Emails

[23] I also find that four emails or email chains do not contain or reveal advice or recommendations.

[24] ICBC claims that the first of these email chains (chain A)¹⁹ involves one ICBC employee seeking and receiving advice about a topic related to the project from another ICBC employee.²⁰ However, upon review of the record, I find that it involves an ICBC employee asking his colleague questions and the colleague providing entirely fact-based answers. Nothing in chain A reveals advice, or an opinion on matters of fact nor do the emails set out or imply options or recommended courses of action. Rather, the emails simply reveal matters of fact. As such, s. 13(1) does not apply to chain A.

[25] I make the same findings for the same reasons in relation to another three email communications (email B, chain C and an email in chain D).²¹ ICBC submits that email B contains a “small amount of advice.”²² However, I find that email B contains no advice. The author of email B simply states a fact. Nothing in the email describes the author’s opinion about this fact, or what this fact might mean in relation to the project, or what implications it might have for decision makers at ICBC or the Ministry. Therefore, s. 13(1) does not apply to email B.

[26] Similarly, chain C does not contain any advice or recommendations. It involves an exchange between ICBC employees in which they discuss factual and administrative matters. None of this qualifies as advice or recommendations, so s. 13(1) does not apply it.²³ Additionally, one of the emails²⁴ in chain D contains a single declaratory statement of fact that would not reveal advice or recommendations. Section 13(1) does not apply to this email either.²⁵ The remainder of information withheld in chain D does contain advice or recommendations.

Other information

[27] In addition, I find that some of the information withheld in the balance of the records does not qualify as advice or recommendations. Specifically, s. 13(1)

¹⁹ Chain A is at pages 69-70 of the records.

²⁰ ICBC submissions at para. 17, item 13.

²¹ Email B is at page 68 of the records; chain C is at page 85; chain D is at pages 83-84.

²² ICBC submissions at para. 17, item 12.

²³ ICBC has also claimed that s. 14 applies to chain C. Therefore, I will also consider whether ICBC can withhold chain C under s. 14 later in my analysis.

²⁴ Sent at 3:43 PM on January 16, 2017.

²⁵ ICBC withheld the contents of two emails in chain D under both ss. 13 and 14. I have found that one of these emails does contain advice and therefore ICBC can withhold it under s. 13. I will not consider this particular email under s. 14. However, I will consider whether s. 14 applies to the single-sentence email in chain D (*supra* note 24) that does not contain advice or recommendations.

does not apply to the following types of information because this information does not contain or reveal advice or recommendations.

- Background facts contained in both briefing notes, the insurance for TNCs sheet, the technical fact sheet,²⁶ and presentation A.
- The titles, some headings, contact information (if any) and page numbers or footers (if any) in the implementation plan, both presentations, the backgrounder²⁷ and briefing note B.²⁸
- The slides in presentation B that set out the title page, the agenda for the presentation, links to publicly available information sources and screen shots of the Uber app.²⁹
- Broadly-worded, generic information related to next steps in briefing note B that would not allow for accurate inferences as to the advice or recommendations contained in the note.

I have highlighted in pink all the information that does not qualify as advice or recommendations under s. 13(1) in a copy of the records that ICBC will receive with this order.

[28] I will now discuss the information that qualifies as advice or recommendations.

Privacy impact assessments

[29] The evidence indicates that whenever a ministry develops or changes a piece of legislation, it must complete a privacy impact assessment. This means that the Ministry must have completed a privacy impact assessment when preparing the legislative changes described in the background section above. The two draft privacy impact assessments in the records before me contain an ICBC employee's advice as to how the Ministry could choose to fill in this particular form. One of the emails in dispute provides context that persuades me

²⁶ ICBC also withheld the fact sheet under s. 12(1) so I will consider it again later in my analysis.

²⁷ ICBC also withheld the backgrounder under s. 12(1) so I will consider it again later in my analysis.

²⁸ ICBC also withheld briefing note B under s. 12(1) so I will consider it again later in my analysis.

²⁹ These slides are at pages 59-60 and 62 (agendas), and 65 (links) and 66 (screen shots) of the records. ICBC also submits that s. 21 requires it to withhold presentation B in its entirety. Accordingly, I will consider the impact of s. 21 in relation to the information on these slides later in my analysis.

that the information in the privacy impact assessments qualifies as advice developed for the Ministry.³⁰

Briefing notes

[30] I also find that the two briefing notes contain ICBC's advice to the Ministry respecting insurance options for TNCs (briefing note A) and the installation of forward collision avoidance technologies in taxis (briefing note B).³¹ The severed information in briefing note A consists of background explanations and analysis to assist the Ministry in making a selection between two options laid out in the note. Similarly, briefing note B presents recommendations in the form of a proposed plan. It also includes related background explanations for the decision maker to take into account when considering the proposal. These background explanations are integral to the analysis and the proposed plan so s. 13(1) applies to them.³²

PowerPoint Presentations

[31] I also find that the presentations contain some advice or recommendations. ICBC says it prepared presentation A for the Ministry.³³ It contains a summary of ICBC's plan for how TNC insurance could work and how ICBC could modernize taxi insurance. Presentation A also includes options, examples to show how ICBC will calculate the TNC insurance rates and how the proposed scheme will operate, and other considerations that informed the advice. I find that all of this information qualifies as advice and recommendations developed for the Ministry.

[32] ICBC says that Uber prepared presentation B for the Ministry and ICBC.³⁴ Previous orders and court judgments have held that s. 13 can apply to advice or recommendations developed by a private organization for a public body.³⁵ If the information qualifies as advice or recommendations developed "by or for a public body or minister," it does not matter who developed it.

[33] Some slides in presentation B contain Uber's suggestions as to:

³⁰ ICBC has also claimed that s. 12(1) and 14 apply to portions of the draft privacy impact assessments but because of my s. 13 findings, I will not consider how s. 12(1) or 14 might apply to this information.

³¹ Briefing note A, which includes a three page addendum, is at pages 1-7 of the records; briefing note B is at pages 53-55.

³² *Automotive Retailers*, *supra* note 10 at para. 52.

³³ ICBC submissions at para. 17, item 8.

³⁴ ICBC submissions at para. 17, item 11.

³⁵ *BC Freedom of Information and Privacy Association v. British Columbia (Information and Privacy Commissioner)*, 2010 BCSC 1162 at para. 66; Order F18-41, 2018 BCIPC 44 at para. 17.

- possible definitions to use for any insurance program ultimately developed;
- how premiums and insurance claims could work for TNC vehicles; and
- how TNCs could report vehicles covered by insurance.

I find that this information qualifies as advice or recommendations developed by Uber for ICBC and the Ministry.³⁶

Implementation plan

[34] ICBC prepared the implementation plan for the Ministry.³⁷ It contains a recommended insurance regime for TNCs and part-time taxis and a proposed work-plan and timeline. ICBC also provides its opinion on foreseeable challenges and the potential impact of the recommended insurance regime. In my view, all of this information qualifies as advice or recommendations.

Information, backgrounder and fact sheets

[35] The Ministry prepared the technical fact sheet for the Minister.³⁸ It explains and summarizes the proposed insurance regime ICBC developed for TNCs and taxis. As such, the release of the information in the fact sheet would reveal the advice and recommendations ICBC developed for the Ministry.

[36] ICBC prepared the question and answer sheet for the Ministry.³⁹ It contains a description of the proposed insurance regime ICBC developed for the Ministry along with an explanation of why ICBC thinks this proposed regime would work best. In other words, the document explains the policy rationale underlying the recommendation. This information qualifies as advice or recommendations.

[37] ICBC also prepared the insurance for TNCs sheet for the Ministry.⁴⁰ This document describes the proposed insurance regime ICBC developed for the Ministry in greater detail and sets out considerations and questions that ICBC thinks the Ministry should take into account or answer in order for the implementation of the new insurance regime to go smoothly. I consider all of this information advice within the meaning of s. 13(1).

³⁶ Specifically, ICBC can withhold the substantive information on the slides at pages 61, 63, 64 and 67 of the records. As described previously, however, the titles and footer line on each of these slides does not qualify as advice or recommendations and cannot be withheld under s. 13. Because ICBC also claims that s. 21 applies to presentation B, I will consider whether s. 21 requires ICBC to withhold the titles and footer lines on each of these slides.

³⁷ ICBC submissions at para. 17, item 6.

³⁸ ICBC submissions at para. 17, item 9. ICBC also claims that s. 12(1) applies to the fact sheet but given my decision respecting s. 13, I will not consider this particular record any further.

³⁹ ICBC submissions at para. 17, item 7.

⁴⁰ ICBC submissions at para. 17, item 5.

[38] ICBC prepared the backgrounder for the Ministry as well.⁴¹ The backgrounder summarizes ICBC's proposed insurance regime for TNCs, sets out examples and compares the proposed regime to other jurisdictions. It also describes the risks and potential challenges associated with the proposed rates. In my view, all of this information qualifies as advice or recommendations.

Exceptions – section 13(2)

[39] ICBC did not make submissions specifically related to the exceptions contained in s. 13(2). I have considered whether the information that qualifies as advice or recommendations falls within any of the circumstances described in s. 13(2). In my view, s. 13(2) does not apply.

Summary – section 13

[40] To summarize, ICBC can withhold much of the information in dispute under s. 13 because it is advice or recommendations developed by or for a public body and none of the exceptions in s. 13(2) apply. However, some of the information ICBC withheld under s. 13 does not qualify as advice or recommendations. ICBC has applied more than one exception to some of this information, so I will consider it again below.

Cabinet confidences – section 12(1)

[41] ICBC has applied ss. 12(1) and 13 to the same records. Given my finding that s. 13 applies to much of the information also withheld under s. 12(1), I need only consider whether s. 12(1) applies to the titles, headings and page numbers of the backgrounder and small amounts of the information in the fact sheet and briefing note B.

[42] Section 12(1) reads:

12(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

[43] Past orders and case law⁴² underscore the vital public interest in maintaining Cabinet confidentiality and have said that s. 12(1) "must be read as widely protecting the confidence of Cabinet communications."⁴³

⁴¹ ICBC submissions at para. 17, item 3.

⁴² For example, see *Babcock v. Canada (Attorney General)*, 2002 SCC 57 at para. 18.

⁴³ *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, [Aquasource], [1998] B.C.J. No. 1927 at para. 41.

[44] The phrase “substance of deliberations” refers to the body of information that Cabinet considered (or would consider in the case of submissions not yet presented) when making a decision.⁴⁴ From this, the s. 12(1) test emerges: did the information at issue form the basis for Cabinet or any of its committee’s deliberations?⁴⁵

ICBC’s position

[45] ICBC submits that it prepared the records over which it has claimed the s. 12(1) exemption with the understanding and expectation that the information in them would form part of materials prepared for or presented to Cabinet or a cabinet committee.⁴⁶

Analysis and findings – section 12(1)

[46] While ICBC applied s. 12(1) to the fact sheet and briefing note B, nothing in the evidence indicates that either of these documents would reveal the substance of deliberations of Cabinet or any of its committees. Instead, the evidence indicates that the Ministry prepared the fact sheet for the Minister and that ICBC prepared briefing note B for the Ministry.⁴⁷ Given this, ICBC has not persuaded me that the information in these records formed the basis for Cabinet deliberations. Section 12(1) does not apply to this information.

[47] ICBC has established that it prepared the backgrounder on the understanding that it would form the basis for the provision of advice to Cabinet.⁴⁸ That said and as noted above, the only remaining information in the backgrounder that I need to consider in relation to s. 12(1) is its title, headings and page numbers.

[48] Past orders and case law have held that s. 12(1) does not apply to headings or titles that reveal only bare-bones information about a subject as opposed to information about the substance of deliberations.⁴⁹ With this in mind, I find that the title and headings in the backgrounder would not reveal information about the substance of deliberations. In my view, this logic also extends to the page numbers of a document. I fail to see – and ICBC does not explain – how the page numbers of the backgrounder could reveal the substance of Cabinet

⁴⁴ *Aquasource*, *ibid* at para. 39.

⁴⁵ *Aquasource*, *supra* note 43 at para. 48; Order 01-02, 2001 CanLII 21556 (BC IPC) at para. 13.

⁴⁶ ICBC submissions at para. 27.

⁴⁷ ICBC submissions at para. 17, items 9-10.

⁴⁸ Affidavit of the Manager, Underwriting Services at para. 17.

⁴⁹ *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 112 at paras. 94-97 upholding the decision about Cabinet meeting agenda items in Order F08-17, 2008 CanLII 57360 (BC IPC) at paras. 18-24. See also: Order F12-01, 2012 BCIPC 1 (CanLII) at para. 22; Order F14-51, 2014 BCIPC 55 at para. 25; and Order F18-24, 2018 BCIPC 27 at para. 42.

deliberations. I find that the title, headings and page numbers of the backgrounder would not reveal the substance of deliberations. Therefore, s. 12(1) does not apply to this information.

Solicitor client privilege – section 14

[49] ICBC submits that s. 14 applies to email chains C and D and the privacy impact assessments. However, given my findings that s. 13 applies to much of this information, I need only consider the application of s. 14 to the information in chain C and one email in chain D.

[50] Section 14 states:

The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

[51] Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.⁵⁰ In this case, ICBC claims legal advice privilege over the information withheld under s. 14.⁵¹

[52] Legal advice privilege protects communications between a solicitor and client made for the purpose of obtaining and giving legal advice.⁵² In order for this form of privilege to shield a communication and records related to it, the communication must meet the following four conditions:

- 1) There must be an oral or written communication.
- 2) The communication must be confidential in character.
- 3) The communication must be between a client (or agent) and a legal advisor.
- 4) The communication must directly relate to the seeking, formulating, or giving of legal advice.⁵³

[53] One of ICBC's affiants states that these emails consist of communications that contain legal advice about the draft privacy impact assessment.⁵⁴ Based on my review of the records, I disagree.

⁵⁰ *College of Physicians*, *supra* note 10 at para. 28.

⁵¹ ICBC submissions at para. 36.

⁵² *Ibid.*

⁵³ *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22; *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 837. For a few examples of this test in the OIPC context, see Order F18-33, 2018 BCIPC 36 at para. 15-16; Order F17-43, 2017 BCIPC 47 at para. 38; Order F15-52, 2015 BCIPC 55 at para. 10; and Order F15-15, 2015 BCIPC 16 at para. 15.

⁵⁴ Affidavit of the Manager, Privacy & FOI at para. 5.

[54] Email chain C involves an exchange between ICBC employees in which one employee (a project manager) confirms something about another employee (a manager). One of the recipients of the email (legal counsel) then contacts the manager to ask for assistance. While I find that this communication occurred between employees and in-house legal counsel, nothing in the communication relates to or would reveal legal advice. No one in the email exchange asks the lawyer to provide legal advice and the lawyer does not provide any. Solicitor client privilege does not attach to chain C.

[55] Similarly, the email⁵⁵ in chain D does not contain or reveal legal advice. This email consists of one declarative sentence noting that a document has been revised. Like chain C, I accept that the email, sent by in-house legal counsel to another ICBC employee, involved a communication between solicitor and client. However, it does not contain any legal advice about the revisions it refers to or any other matter. ICBC has not provided persuasive evidence that establishes these emails are communications about giving, formulating and receiving legal advice. I find that s. 14 does not apply to them.

Harm to third party business interests – section 21(1)

[56] ICBC relies on s. 21(1) to refuse access to a letter it sent to Uber and presentation B.

[57] Section 21(1) requires a public body to withhold information if its disclosure could reasonably be expected to harm the business interests of a third party. The section sets out a three-part test for determining whether a public body must refuse disclosure. The party that bears the burden of proof – in this case ICBC – must pass all three parts of this test in order for s. 21(1) to apply.

[58] The relevant portions of s. 21(1) follow.

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

⁵⁵ Sent at 3:43 PM, Monday January 16, 2017.

- (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
- (iii) result in undue financial loss or gain to any person or organization...

[59] Each of subsections (a), (b) and (c) above sets out one part of the three-part test, so ICBC must provide evidence establishing all the following things:

- 1) The information at issue qualifies as the type of information described in s. 21(1)(a).
- 2) Uber supplied the information to ICBC in confidence (s. 21(1)(b)).
- 3) The disclosure of the information could reasonably be expected to cause one of the harms listed in s. 21(1)(c).

Parties' positions

[60] ICBC asserts that the information it withheld under s. 21 contains financial, proprietary and other information about Uber that Uber supplied to ICBC and the Ministry in confidence.⁵⁶ ICBC submits that the disclosure of this information could reasonably be expected to result in similar information no longer being supplied to public bodies when the public interest requires that public bodies continue to receive such information. ICBC also states that the disclosure of the information could cause Uber to lose business to its competitors.

[61] Uber states that the information at issue meets all three parts of the s. 21(1) test.⁵⁷ Specifically, Uber says the information qualifies as its trade secrets and as commercial/financial information that it supplied in confidence under the terms of a non-disclosure agreement.⁵⁸ According to Uber, disclosure of the information would significantly harm its competitive position, result in undue loss and “disincentivize” private parties from engaging with ICBC in the future.⁵⁹ In addition, Uber submits that the release of the information would inhibit the development of new and innovative insurance products.⁶⁰ Uber also submits that the release of the information would give its competitors a “free, open

⁵⁶ ICBC submissions at para. 42. All of the submissions summarized in this paragraph of my order come from para. 42.

⁵⁷ *Ibid* at para. 9.

⁵⁸ *Ibid* at para. 10-11.

⁵⁹ Uber submissions at para. 23.

⁶⁰ Affidavit of Uber’s Senior Manager of Public Policy at para. 35.

window into key parts” of Uber’s formula for success, which Uber “had to develop by itself at great cost, time, and effort.”⁶¹

Analysis and findings

Type of information – section 21(1)(a)

[62] In order to satisfy the first part of the s. 21(1) test, ICBC must establish that all the information qualifies either as trade secrets, or commercial, financial, labour relations, scientific or technical information of or about Uber. ICBC asserts that the information withheld under s. 21 “contains financial, proprietary and other information (including proposed pricing) about” Uber. Uber submits that the information qualifies as its trade secrets and commercial/financial information.

[63] FIPPA defines “trade secrets” as follows.⁶²

“**trade secret**” means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that

(a) is used, or may be used, in business or for any commercial advantage,

(b) derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use,

(c) is the subject of reasonable efforts to prevent it from becoming generally known, and

(d) the disclosure of which would result in harm or improper benefit.

[64] FIPPA does not define “commercial information” or “financial information.” However, previous orders have found that commercial information relates to the buying, selling or exchanging of goods and services.⁶³ Past orders have also held that commercial and financial information includes the terms and conditions for the buying or selling of goods and services. For example, a contractor’s fees or the commission rate for a contractor’s services qualifies as commercial information.⁶⁴ Other examples of commercial information from previous orders include:

- prices or amounts contained within a contract;
- hourly rates, expenses and other fees payable under a contract;

⁶¹ Uber submissions at para. 1.

⁶² Schedule 1 contains FIPPA’s defined terms. Emphasis in original.

⁶³ For example, see Order F16-39, 2016 BCIPC 43 at para. 17 and Order F08-03, 2008 CanLII 13321 (BC IPC) at paras. 62-63.

⁶⁴ Order F18-40, 2018 BCIPC 43 at para. 8.

- invoicing information about amounts billed, services and products provided, hourly rates and the number of hours needed to perform services;
- information respecting methods for supplying goods and services;
- information related to services provided by a third party in exchange for payment; and
- information that demonstrates the extent to which a third party is meeting its contractual obligations.⁶⁵

[65] The information for my consideration in relation to the first part of the s. 21 test consists of ICBC's letter and the following information in presentation B which I found ICBC cannot withhold under s. 13:

- the title page;
- three slides setting out the agenda for the presentation;
- some titles and the footers on each slide;
- a slide showing screen shots of the current Uber app; and
- a slide with underlined words and phrases which appear to be hyperlinks to publicly accessible website information.

Trade secrets

[66] I find that the slides that contain publicly accessible information – either in the form of screen shots of Uber's app or hyperlinks to website information or Uber's logo – do not qualify as trade secrets. By definition, trade secrets derive independent economic value from not being generally known to the public. Therefore, in my view, publicly accessible information cannot be trade secrets.⁶⁶ I also reject the claim that the title page and agendas contain trade secrets. They contain generic descriptors of subjects covered in the presentation, the date, Uber logo and a confidentiality statement. None of this fits within the definition of a trade secret.

[67] Similarly, I fail to see – and neither Uber nor ICBC explains – how the letter contains Uber's trade secrets. It contains information relating to ICBC's insurance products including coverage options and premium pricing information. I am not persuaded that this qualifies as Uber's trade secrets.

Commercial information

[68] I find that the letter ICBC wrote to Uber contains commercial information about Uber. It reveals what ICBC and Uber said to each other as they discussed

⁶⁵ Order F18-50, 2018 BCIPC 54 at para. 35; Order F14-58, 2014 BCIPC 62 at para. 19; Order F17-50, 2017 BCIPC 55 at para. 10; Order F18-21, 2018 BCIPC 24 at para. 8; Order F11-08, 2011 BCIPC 10 at para. 17; Order F13-20, 2013 BCIPC 27 at para. 14.

⁶⁶ For similar reasoning, see Order 01-20, [2001] B.C.I.P.C.D. No. 21 at para. 134.

what insurance coverages and terms would work best for Uber and ICBC. In other words, the letter contains information related to one of the aspects of Uber's business. As such, I find that it contains commercial information about Uber.

[69] Turning to presentation B, Uber notes that some of the information in it is publicly accessible information. However, Uber argues that "the selection of *what* publicly accessible information to showcase in a presentation was consciously made by Uber based on its experience."⁶⁷ According to Uber:

... even the agendas and publicly accessible information in [presentation B] as such were carefully curated for Uber's economic benefit... They set out a negotiation roadmap that is of value to anyone else who would seek to negotiate for a similar product.⁶⁸

[70] With these submissions in mind, I find that the slide that appears to contain hyperlinks qualifies as commercial information for the purposes of s. 21(1)(a). I make this finding because Uber compiled the information on this slide to create a list of resources that had specific business uses for Uber. Previous orders⁶⁹ have held that this type of information qualifies as commercial information and I make the same finding here.

[71] I also find that the slide that displays screen shots of certain aspects of Uber's current app contains Uber's commercial information. These visual representations show how a person using the app can navigate through it to find what he or she is looking for. As such, this slide contains information related to services Uber provides in exchange for payment. Therefore, the information on this slide also passes the first part of the s. 21(1) test.

[72] However, ICBC has not satisfied me that the balance of the information in presentation B qualifies as commercial information of or about Uber. Taken together, the title page, slide titles and footers and agendas contain generic information in the form of basic descriptors of subjects covered in the presentation, the date, Uber logo and confidentiality statements. The agendas lay out the general topics covered in the presentation in broad language. Uber asserts that the agendas "set out a roadmap to negotiating over insurance."⁷⁰ I disagree. The agendas do not contain any detail respecting what Uber said about any of the topics. Nothing in the agendas indicates anything about the steps, direction, or approach Uber took in its negotiations about insurance. Similarly, the title page contains the Uber logo, date, title, a standard confidentiality statement and what appears to be a stock image that has no discernible relationship to Uber's business. The footers on each slide also

⁶⁷ Affidavit of Uber's Senior Manager of Public Policy at para. 33. Emphasis in original.

⁶⁸ Uber submissions at para. 12.

⁶⁹ For example, see Order 01-36, 2001 CanLII 21590 (BC IPC) at paras. 17- 21.

⁷⁰ Affidavit of Uber's Senior Manager of Public Policy at para. 33.

contain a generic confidentiality statement and the slide titles repeat the words used in the agendas. None of this qualifies as commercial information under s. 21(1)(a).

[73] To summarize, the letter and the two slides (the remaining slides) described in paragraphs 70 and 71 above contain commercial information of or about Uber. As such, this information passes the first part of the s. 21(1) test.

[74] The next part of the test requires ICBC to prove that Uber supplied this commercial information in confidence. I will not consider the information that failed the first part of the test any further.

Supplied in confidence – section 21(1)(b)

[75] The test in s. 21(1)(b) involves a two-part query:

- 1) Did the third party *supply* the information to a public body?⁷¹
- 2) If so, did the third party supply the information *in confidence*?

[76] The test for whether a third party supplied information “explicitly or implicitly, in confidence” involves an objective question of fact. Evidence of the third party’s subjective intentions with respect to confidentiality will not suffice.⁷² ICBC must show that Uber had an “objectively reasonable expectation of confidentiality” at the time it supplied the information to ICBC and that it maintained that expectation.⁷³

Supplied

[77] The evidence clearly indicates that Uber created presentation B for the Ministry and ICBC. Given this, I am satisfied that Uber supplied the information in the two remaining slides.

[78] Turning to the letter, Uber asserts that “the entire content of the Letter – other than perhaps its salutation – sets out Uber’s proposed terms and conditions for optional coverage as well as ICBC’s responses thereto.”⁷⁴ According to ICBC,

⁷¹ I note that previous orders establish that s. 21(1)(b) is not limited to instances where the information was supplied directly by the third party opposing disclosure: Order F13-30, 2013 BCIPC 39 at para. 23; Order F13-20, *supra* note 65 at para. 20; Order 01-26, 2001 CanLII 21580 (BC IPC) at para. 29. However, given the facts involved in this particular inquiry, I need only consider whether Uber supplied the information in question to ICBC and the Ministry.

⁷² Order F16-39, *supra* note 63 at para. 27.

⁷³ Order F18-28, 2018 BCIPC 31 at para. 41; Order 01-36, *supra* note 69 at para. 23.

⁷⁴ Affidavit of Uber’s Senior Manager of Public Policy at para. 28.

the letter “contains information relating to various coverages and premium and policy options with pricing implications.”⁷⁵

[79] In reviewing the letter, I observe that in two places the letter reveals information about specific insurance coverages that Uber had a potential interest in purchasing. In my view, this qualifies as information Uber supplied to ICBC for the purposes of s. 21(1)(b).

[80] However, I find the balance of the information in the letter does not reveal information supplied by Uber. Rather, it consists of:

- ICBC’s letterhead, a date and signature block;
- a salutation and pleasantries;
- information about ICBC coverages and premiums;
- ICBC’s perspective respecting what it thinks Uber should select in terms of insurance and why; and
- ICBC’s reasons for choosing to offer a specified insurance term.

These aspects of the letter do not qualify as information Uber supplied nor would they allow for accurate inferences respecting information it supplied to ICBC. Therefore, these aspects of the letter do not pass the second part of the s. 21(1) test.

In confidence

[81] I find that Uber supplied the information in the ICBC letter and presentation B in confidence for the reasons that follow.

[82] The evidence indicates that Uber gave presentation B and received the letter months after it had signed a non-disclosure agreement with the Ministry. The title page of presentation B and a footer on each slide state that the presentation contains confidential business information. The letter contains a line noting that the author sends it under the terms of the non-disclosure agreement. In referring to the presentation and letter, ICBC states that “[t]here can be no doubt that this information was provided on the basis that it was confidential and was to be treated that way and has in fact been consistently treated that way.”⁷⁶ Taking all this into account, I am satisfied that Uber had an objectively reasonable expectation of confidentiality at the time it supplied the information and that it maintained this expectation.

⁷⁵ ICBC submissions at para. 17, item 14.

⁷⁶ ICBC submissions at para. 42.

Reasonable expectation of harm – section 21(1)(c)

[83] The final part of the s. 21(1) test requires ICBC to establish that disclosure of Uber’s confidentially supplied commercial information could reasonably be expected to cause one of the harms listed in s. 21(1)(c). To pass this part of the test, ICBC must prove that disclosure will result in a risk of harm that goes “well beyond the merely possible or speculative.”⁷⁷ The Supreme Court of Canada has described this standard as “a middle ground between that which is probable and that which is merely possible.”⁷⁸ The evidence must demonstrate “a clear and direct connection between the disclosure of specific information and the harm” alleged.⁷⁹

[84] The information remaining for my consideration in relation to the alleged harms consists of portions of ICBC’s letter and the remaining slides. I will now consider whether this information passes the final part of the s. 21(1) test.

Significant harm to competitive position – section 21(1)(c)(i)

[85] Both ICBC and Uber argue that disclosure of the information at issue could reasonably be expected to cause significant harm to Uber’s competitive position. ICBC submits that Uber could lose business to its competitors if the proposed insurance terms and pricing in the letter are disclosed.

[86] Uber says that competitors could use the pricing information in the letter to understand Uber’s “expense load.”⁸⁰ Additionally, Uber says the release of this information will allow competitors to prepare more attractive pricing proposals when negotiating for insurance products. As described above, Uber also asserts that presentation B contains a valuable negotiation roadmap that competitors could use when seeking to negotiate for a similar insurance product. Uber also explains that TNCs have to obtain insurance products in order to establish and run their businesses and submits that the disclosure of the information at issue would allow its competitors to understand Uber’s “processes and desired terms”⁸¹ which, in turn, would allow competitors to develop insurance products that customers might find more attractive.

[87] I am not satisfied that the disclosure of the information at issue could reasonably be expected to significantly harm Uber’s competitive position. ICBC does not explain how or why Uber could lose business to competitors if competitors knew about the proposed insurance product or prices described in the letter.

⁷⁷ *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.

⁷⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

⁷⁹ Order 04-06, 2004 CanLII 34260 (BC IPC) at para. 58.

⁸⁰ Uber submissions at para. 19.

⁸¹ Uber submissions at para. 18.

[88] Furthermore, I do not see how knowing what ICBC *proposed* with respect to premium pricing would allow a competitor to understand Uber's expense load. The letter does not reveal what ICBC and Uber eventually agreed to in terms of price or whether ICBC and Uber came to any such agreement at all. In other words, the disclosure of the information in the letter would not allow a competitor to understand how much Uber spends on insurance.

[89] Turning to the assertion that competitors could use presentation B as a "negotiation roadmap," I note first that the only information in presentation B that passed the first two parts of the s. 21 test is in the remaining two slides. As described above, the slide that displays screen shots of certain aspects of Uber's current app contains publicly accessible information. Uber and ICBC do not explain how disclosing this information already in use by Uber customers in other provinces could reasonably be expected to significantly harm Uber's competitive position. I do not see how the information on this slide would help Uber's competitors or serve as a negotiation roadmap.

[90] Turning to the last slide, I have described it as *appearing* to contain hyperlinks because it contains underlined words and phrases in two short lists. I find it reasonable to conclude that, if I had the original electronic version of presentation B, I could click on these underlined words and specific internet sites would then open in my internet browser. However, any hyperlinks that once might have led to specific internet sites do not work because the records are now in paper form. The slide does not contain URL addresses that one can enter into a web browser and neither ICBC nor Uber has explained where these hyperlinks led. Without knowing this, the information on the slide has no meaning: it is just a small collection of generic words without context and I do not see how it has any competitive value or could serve as a negotiation roadmap.

[91] With regards to competitors using this information to understand Uber's processes and desired terms and thereby develop a better insurance product, in my view, the information at issue does not reveal Uber's processes, but it does reveal some information about Uber's desired insurance terms. It is possible that a competitor could potentially use this information to obtain more attractive insurance coverage, thereby heightening competition. However, previous orders establish that the mere heightening of competition is not significant harm under s. 21(1)(c)(i).⁸² Therefore, I am not satisfied that the disclosure of Uber's desired insurance terms could reasonably be expected to cause significant harm to Uber's competitive position.

[92] I note that Uber also says that release of the information at issue would:

⁸² For example, see Order F18-28, *supra* note 73 at para. 53; Order F15-53, 2015 BCIPC 56 at para. 28; and Order F17-41, 2017 BCIPC 45 (CanLII) at para. 74.

... help drivers understand Uber's scope and scale and help them decide whether to spend money investing in British Columbia or not. (It goes without saying that choosing *not* to invest in British Columbia would free up those funds to compete more strongly in a *different* province).⁸³

Nothing in the evidence indicates that *drivers* “spend money investing” in BC or other provinces and it is not clear what Uber meant by this. I assume that Uber meant that the information would help *competitors* understand Uber's scope and scale. If this is what Uber meant, I disagree. The information at issue indicates nothing about Uber's scope and scale.

[93] To summarize, while Uber has provided information about the highly competitive nature of the TNC industry, nothing in the evidence before me indicates how the release of the specific information at issue could significantly harm Uber's competitive position. As stated by former Commissioner Loukidelis:

By adding the word “significantly” in s. 21(1)(c)(i), the Legislature clearly indicated that something more than “harm” is needed... by choosing a standard of significant harm, the Legislature clearly contemplated situations where disclosure could simply harm the interests of a private business, but still be permitted.⁸⁴

[94] For all these reasons, I conclude that ICBC has failed to establish that the release of the information could reasonably be expected to significantly harm Uber's competitive position.

Information no longer supplied when in public interest – section 21(1)(c)(ii)

[95] ICBC asserts that the disclosure of the information could “reasonably be expected to result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied.”⁸⁵ Uber states that potential future ICBC customers “will be less likely to enter into negotiations and make purchases from ICBC” if this information is released.⁸⁶

[96] I do not find ICBC and Uber's claims respecting harm under s. 21(1)(c)(ii) persuasive because the claims consist of assertions unaccompanied by factual detail or support. For example, ICBC claims that the release of this information could reasonably be expected to result in similar information no longer being supplied to it when it is in the public interest that similar information continue to be supplied. However, ICBC does not explain why it is in the public interest that it continue to receive the type of information at issue here. ICBC also does not

⁸³ Uber submissions at para. 19. Emphasis in original.

⁸⁴ Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 11. Emphasis added.

⁸⁵ ICBC submission at para. 42.

⁸⁶ Affidavit of Uber's Senior Manager of Public Policy at para. 35.

explain how the public interest was served when it received this particular information.

[97] Additionally, a section 21(1)(c)(ii) harms argument will not generally succeed if the third party provided the information because it had to or had a financial incentive to do so.⁸⁷ Turning to the evidence before me, I conclude that while Uber had no obligation to provide this information, it clearly had a financial incentive to do so. Uber describes the marketplace for TNC services in BC as a “greenfield opportunity” with “an enormous amount of possible new customers”⁸⁸ and notes that it prepared the information at issue “for Uber’s economic benefit.”⁸⁹ Uber also describes the upcoming legislative changes that will allow TNCs to operate in BC as “an anticipated upcoming major business opportunity” and says that the subject-matter of the information at issue “is a key to capitalizing on that business opportunity.”⁹⁰ Thus the evidence establishes that Uber had a financial incentive to provide the information at issue.

[98] Furthermore, it seems unlikely to me that potential large-scale customers (such as Uber or its TNC competitors) in the market for insurance would be unwilling to engage with ICBC, one of the largest insurance companies in the Province, if this information was released. I find the claim that other TNCs would not talk to ICBC about its insurance products unreasonable given ICBC’s size and market share when it comes to car insurance in BC and considering Uber’s characterization of the TNC market in BC as a “greenfield opportunity.”

[99] With all this in mind, I reject the assertion that the release of the information at issue could reasonably be expected to result in the harm contemplated under s. 21(1)(c)(ii).

Undue financial loss or gain – section 21(1)(c)(iii)

[100] I also reject the claim that the release of the information will result in undue financial loss for two reasons. First, ICBC bears the burden of proof in this inquiry, yet it provided no submissions or evidence about undue financial loss under s. 21(1)(c)(iii). Second, Uber’s evidence respecting this particular harm consists only of its affiant’s assertion that he believes disclosure of the information “would result in undue loss to Uber.”⁹¹ The affiant does not explain why he believes this would occur and Uber provides no further persuasive detail or explanation about what “undue loss” means or how it could reasonably be expected to result upon disclosure of the information at issue.

⁸⁷ For example, see Order F08-10, 2008 CanLII 30212 (BC IPC) at para. 67; Order F05-29, [2005] B.C.I.P.C.D. No. 39 at para. 78; and Order 03-05, [2003] B.C.I.P.C.D. No. 5 at para. 15.

⁸⁸ Uber submissions at para. 16, item (a).

⁸⁹ *Ibid* at para. 12.

⁹⁰ *Supra* note 87, item (e).

⁹¹ Affidavit of Uber’s Senior Manager of Public Policy at para. 26.

Summary of findings on section 21(1)

[101] For the reasons outlined above, I find that the letter and presentation B both contain commercial information of or about Uber. This information passes the first part of the test. I find that some of this information was supplied to ICBC in confidence and therefore passes the second part of the test. However, none of the remaining information passes the last part of the test because ICBC has not satisfied me that its disclosure could reasonably be expected to cause any of the s. 21(1)(c) harms alleged.

[102] In short, I find that none of the information withheld under s. 21(1) passes all three parts of the applicable test. Therefore, ICBC cannot withhold this information under s. 21(1).

Harm to financial or economic interests – section 17

[103] The only information remaining for my consideration under s. 17 is the ICBC letter and some of the information in presentation A.

[104] Section 17 serves to protect the financial interests of public bodies from harm.⁹² The relevant portions of s. 17 state:

17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in the undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the government of British Columbia; ...

[105] Previous orders describe subsections 17(1)(a) to (f) as examples of information that may result in harm under s. 17.⁹³ Past orders have also stated that the subsections do not function as stand-alone provisions; therefore, even if

⁹² *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217 at para. 14.

⁹³ For examples, see Order F17-01, *supra* note 15 at para. 20; Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 43; Order F09-13, 2009 CanLII 42409 (BC IPC) at para. 38; and Order F10-39, 2010 CanLII 77325 (BC IPC) at para. 32.

information falls into one of the subsections, a public body must still prove the harm described in the opening words of s. 17.⁹⁴

[106] Section 17 contains the same standard of proof already discussed in relation to s. 21. Both sections use the phrase “could reasonably be expected to” when describing the harms the sections protect against. Again, the Supreme Court of Canada has described this standard as “a middle ground between that which is probable and that which is merely possible.”⁹⁵ To meet this standard, ICBC must provide evidence “well beyond” or “considerably above” a mere possibility of harm.⁹⁶ The evidence must demonstrate “a clear and direct connection between the disclosure of specific information and the harm” that ICBC alleges.⁹⁷ As stated by former Commissioner Loukidelis:

General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s.17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information... There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.⁹⁸

Presentation A

[107] ICBC has withheld presentation A in its entirety under ss. 13 and 17. For the reasons outlined above, I have found that much of the information in presentation A qualifies as advice or recommendations. The only remaining information consists of some titles and headings, page numbers and footers and a slide that summarizes the current state of fleet plan insurance for taxis.⁹⁹

[108] In its submissions, ICBC states that the release of presentation A “could reasonably give rise to the premature disclosure of a proposal or project that is still the focus of consideration by government.”¹⁰⁰ In making this submission, I understand ICBC to refer to s. 17(1)(d). However, ICBC provides no further

⁹⁴ For examples, see Order F19-03, 2019 BCIPC 04 at para. 22; Order F18-49, 2018 BCIPC 53 at para. 46, Order F05-06, 2005 CanLII 11957 (BC IPC) at para 36; Order F10-39, *ibid* at paras. 32-34; Order F11-14, 2011 BCIPC 19 at paras. 47-48; and Order F12-02, 2012 BCIPC 2 at para. 42.

⁹⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra* note 78 at para. 54.

⁹⁶ Order F17-01, *supra* note 15 at para. 21.

⁹⁷ Order 02-50, [2002] B.C.I.P.C.D. No. 51 at para. 137; Order 04-06, *supra* note 79 at para. 58.

⁹⁸ Order 02-50, *ibid*.

⁹⁹ At page 41 of the records.

¹⁰⁰ ICBC submissions at para. 44.

submissions or evidence to explain how the harm listed in the opening words of s. 17(1) could reasonably be expected to arise upon disclosure. As described above, previous orders have said that even when information falls within one of the circumstances in the subsections, a public body must still prove that disclosure could reasonably be expected to harm the financial or economic interests of a public body or the ability of the government of British Columbia to manage the economy. ICBC has not done so here.

[109] Additionally, I fail to see – and ICBC does not explain – how the disclosure of titles, headings, page numbers and footers and a summary of the current insurance regime for taxis could reasonably be expected to harm the financial or economic interests of ICBC. Section 17 does not apply to the remaining information in presentation A.

ICBC letter

[110] Returning to the ICBC letter, I note that it contains proposed pricing of an optional insurance product ICBC hoped to ultimately sell to Uber. ICBC sells its optional insurance products in a competitive market place.¹⁰¹ ICBC's submits that:

Disclosing pricing information and reasons associated with the particular pricing before any pricing decision is made would enable competitors to not only set their pricing in a way that is favorable to that competitor, but to also discern what business is profitable to ICBC and what is not. Its release could therefore reasonably be expected to be harmful to ICBC's financial interests given it reveals information about negotiations between ICBC and Uber.¹⁰²

[111] ICBC argues that the disclosure of the information in the letter could reasonably be expected to harm ICBC's financial interests because it reveals information about negotiations between ICBC and Uber.¹⁰³ In making this submission, I understand ICBC to refer to s. 17(1)(e). However, ICBC has not provided convincing detail or evidence to support its case. For instance, ICBC says that the disclosure of the pricing information before any pricing decision is made would enable competitors to discern what business is profitable to ICBC and what is not. However, one cannot tell from the pricing information what ICBC's bottom line is, what sort of margin they may have worked into their pricing proposal to Uber or what Uber and ICBC eventually agreed to. Furthermore, even if a competitor could figure out what business ICBC considers to be profitable, ICBC has not explained how this could reasonably be expected to harm its financial interests.

¹⁰¹ ICBC submissions at para. 45.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*

[112] Additionally, while I recognize that having to price services or products competitively in a competitive market can ultimately impact a corporation's net profits, I fail to see how this amounts to the type of harm captured by s. 17. As noted by former Commissioner Loukidelis:

The threshold for harm under s. 17(1) is not a low one met by any impact. Nature and magnitude of outcome are factors to be considered. If it were otherwise, in the context of s. 17(1) any burden, of any level, on a financial or economic interest of a public body could meet the test. This would offend the purpose of FIPPA to make public bodies more accountable to the public by giving the public a right of access to records, subject to specified, limited exceptions.¹⁰⁴

[113] With all this in mind, I find that ICBC has not provided persuasive argument or evidence to support what it asserts about harm. Therefore, I conclude that ICBC cannot withhold the letter under s. 17.

CONCLUSION

[114] For the reasons above, I make the following order under s. 58:

- 1) Subject to paragraph 2, I confirm in part ICBC's decision to refuse to disclose information to the applicant under s. 13.
- 2) ICBC is not authorized under s. 13 to refuse to disclose the information highlighted in pink in the copy of the records it receives with this order.
- 3) ICBC is not authorized or required to refuse to give the applicant access to the information it withheld under ss. 12(1), 14, 17 or 21. FIPPA; and
- 4) I require ICBC to give the applicant access to the information described in paragraphs 2 and 3 immediately above by May 14, 2019. ICBC must concurrently provide the OIPC Registrar of Inquiries with a copy of its cover letter and the records sent to the applicant.

March 29, 2019

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File: F17-70593

¹⁰⁴ Order F08-22, *supra* note 93 at para. 50.