



Order F24-33

INSURANCE CORPORATION OF BRITISH COLUMBIA

Carol Pakkala
Adjudicator

April 26, 2024

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Summary: An applicant requested that the Insurance Corporation of British Columbia (ICBC) provide access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records related to a motor vehicle accident. ICBC provided some information in response but withheld other information under several FIPPA exceptions to access. The adjudicator confirmed, in part, ICBC's application of ss. 13 (advice or recommendations), 14 (legal advice and litigation privilege), and 22 (unreasonable invasion of third party personal privacy). The adjudicator also confirmed ICBC's application of settlement privilege which is a common law exception to disclosure. The adjudicator ordered ICBC to disclose some information to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 13, 14, 22(1), 22(2), 22(3), 22(3)(a), 22(3)(d), 22(3)(f), and 22(4).

Introduction

[1] The applicant requested access to records related to a motor vehicle accident (accident) involving his motorhome. In response, the Insurance Corporation of British Columbia (ICBC) located 2434 pages of records and released or partially released many of these to the applicant. ICBC withheld some information under ss. 13 (advice or recommendations), 14 (solicitor client privilege), 17 (harm to financial or economic interests), and 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).¹

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review ICBC's decision. Mediation conducted by the OIPC did not resolve the matter and the applicant requested that it proceed to inquiry. Both the applicant and ICBC provided submissions in this inquiry. In its

¹ For clarity, unless otherwise specified, when I refer to sections in this order, I am referring to sections of FIPPA.

initial submissions, ICBC withdrew its reliance on s.17 in relation to any information contained in the records.²

PRELIMINARY MATTERS

New issue, settlement privilege

[3] The notice of inquiry (Notice) and the OIPC investigator's fact report set out the inquiry issues. These two documents identify ss. 13, 14, 17, and 22 as the issues in this inquiry.³ Settlement privilege is not listed as an issue. ICBC raises settlement privilege in its submissions under the umbrella of s. 14.

[4] ICBC says s. 14 creates a class-based exception to protect information that is subject to solicitor client privilege, litigation privilege, and settlement privilege.⁴ This submission misstates the law. Section 14 does not encompass settlement privilege.⁵ Public bodies can, where applicable, rely on settlement privilege as a common law exception to refuse to disclose information,⁶ but this issue is separate from s. 14 and is therefore a new issue.

[5] The Notice and OIPC's *Instructions for Written Inquiries*⁷ clearly explain the process for adding new issues to an inquiry. Past OIPC orders have consistently said that parties may only add new issues to an inquiry if permitted to do so by the OIPC.⁸ To allow otherwise would undermine the effectiveness of the mediation process. This process exists, in part, to assist parties in identifying, defining, and crystallizing the issues prior to the inquiry stage.⁹ I must now consider whether it is fair to add this new issue to the inquiry.

[6] I find the following factors weigh against adding settlement privilege as a new issue:

- ICBC did not request or receive OIPC's prior approval to add settlement privilege as an issue to this inquiry.
- ICBC offers no explanation as to why it only raised this issue at this late stage or as to why it should be permitted to do so now.

² ICBC's initial submissions at para. 16.

³ As noted above, s. 17 is no longer at issue.

⁴ ICBC's initial submissions at para. 30.

⁵ *Richmond (City) v Campbell* 2017 BCSC 331 at para. 96 [*Richmond*].

⁶ *Richmond* at paras. 71-73.

⁷ Available online: <https://www.oipc.bc.ca/documents/guidance-documents/1658>.

⁸ For example, see Order F12-07, 2012 BCIPC 10 (CanLII) at para. 6; Order F10-37, 2010 BCIPC 55 (CanLII) at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11; and Decision F08-02, 2008 CanLII 1647 (BC IPC).

⁹ Order F15-15, 2015 BCIPC 16 (CanLII) at para. 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.

[7] I find the following factors weigh in favour of adding settlement privilege as a new issue:

- ICBC raised settlement privilege in its initial submissions. The applicant had the opportunity to respond to those submissions but takes no position on settlement privilege.
- ICBC did not simply neglect to raise this issue earlier. ICBC erred in its interpretation of the application of s. 14 as encompassing settlement privilege. The law about privilege is nuanced.
- The interests protected by settlement privilege in the adversarial legal system are significant.
- The records to which ICBC applied settlement privilege involve the interests of a third party who is not a party to this inquiry.
- I see no potential for prejudice to the applicant by adding this issue at this stage.

[8] On balance, I find the relevant factors listed above weigh in favour of adding settlement privilege as a new issue to this inquiry, so I have done so.

Scope of the applicant's submissions

[9] The focus of the applicant's submissions is on recovering his losses resulting from the accident. He says he wishes to start his own lawsuit against the seller of the motorhome, its driver at the time of the accident, and ICBC. While I empathize with the applicant, my jurisdiction (authority) is limited to reviewing ICBC's application of FIPPA. Therefore, while I have read the applicant's entire submission, I will only consider his comments on matters directly related to an issue under FIPPA.

[10] Having said that, the applicant's primary submission is a general allegation that ICBC has stopped him from gaining important information using powers he did not know existed. I understand this to be a reference to ICBC's decision to withhold information under FIPPA. The purpose of this inquiry is to determine if ICBC had the legal authority under FIPPA to refuse the applicant access to the information at issue.

ISSUES AND BURDEN OF PROOF

[11] The issues I must decide in this inquiry are:

1. Is ICBC authorized to refuse to disclose the information at issue under ss. 13, 14, and settlement privilege?
2. Is ICBC required to refuse to disclose the information at issue under s. 22(1)?

[12] Section 57(1) of FIPPA places the burden on ICBC to prove the applicant has no right of access to the information withheld under ss. 13(1) and 14.

[13] Section 57(2) of FIPPA places the burden on the applicant to establish that disclosure of the information at issue would not unreasonably invade a third-party's personal privacy under s. 22(1). However, the public body has the initial burden of proving the information at issue qualifies as personal information.¹⁰

DISCUSSION

Background

[14] ICBC is the sole provider of universal and compulsory basic auto insurance in BC. The applicant owned an insured motorhome that accidentally crashed into a house (accident) while being driven by a third party (driver). The accident caused injuries to the driver and damages to the house owned by another third party (homeowner).

Records at issue

[15] There are 2434 pages of records in this inquiry. ICBC provided all of these pages to the OIPC for the purposes of this inquiry. The information at issue appears on approximately 330 pages, which ICBC withheld in full or in part from the applicant. The types of records from which information was withheld include:

- log entries in ICBC's electronic claim file folder, recording the activity on the claim (I will refer to these as claim file notes);
- emails;
- letters;
- reports;
- forms;
- invoices;
- transcripts; and
- photos.

Advice or recommendations, s. 13

[16] ICBC is withholding some of the information at issue under s. 13. Section 13(1) allows a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. However, s. 13(1) does not apply to certain types of records and information listed in s. 13(2), and s. 13(3) says it does not apply to information in a record that has been in existence for 10 or more years.

¹⁰ Order 03-41, 2003 CanLII 49220 (BCIPC) at paras. 9–11.

[17] The purpose of s. 13(1) is to allow for 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.¹¹

[18] Past OIPC orders and court decisions have established the following principles for the application of s. 13(1) and I adopt these same principles in making my decision:

- To “reveal” advice or recommendations means that s. 13(1) does not apply to information that has already been disclosed.¹²
- “Advice” is broader than “recommendations”¹³ and includes an opinion that involves exercising judgment and skill to weigh the significance of matters of fact.¹⁴ Advice can be an opinion about an existing set of circumstances and does not have to be a communication about future action.¹⁵
- “Advice” also includes factual information “compiled and selected by an expert, using his or her expertise, judgment and skill for the purpose of providing explanations necessary to the deliberative process of a public body.”¹⁶ This compilation of factual information and weighing the significance of matters of fact is an integral component of an expert’s advice and informs the decision-making process.
- “Recommendations” include material relating to a suggested course of action that will ultimately be accepted or rejected by the decision maker.¹⁷
- Section 13(1) applies not only to advice or recommendations, but also to information that would allow someone to accurately infer advice or recommendations.¹⁸

[19] The first step in a s. 13 analysis is to determine whether the withheld information would reveal advice or recommendations developed by or for a public body or minister. If it would, then I must decide whether ss. 13(2) or 13(3) apply to that information.

¹¹ *John Doe v. Ontario (Finance)*, 2014 SCC 36 at paras 45-51 [*John Doe*].

¹² See for examples: Order F23-41, 2023 BCIPC 59 at para. 96; Order F20-32, 2020 BCIPC 38 at para. 36; Order F13-24, 2013 BCIPC 21 at para. 19; Order F12-15, 2012 BCIPC 21 at para. 19.

¹³ *John Doe* at para. 24.

¹⁴ *College of Physicians of BC v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113 [*College*].

¹⁵ *College* at para. 103.

¹⁶ *Provincial Health Services Authority v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 2322 [*PHSA*] at para. 94.

¹⁷ *John Doe* at para. 23.

¹⁸ Order 02-38, 2002 CanLII42472 (BC IPC) at para. 135.

Parties' submissions, s. 13

[20] ICBC, relying on a previous order of the OIPC,¹⁹ says s. 13(1) properly applies to ICBC employees' and external adjusters' comments and opinions on the merits of the applicant's claim, assessments of his claim and options, and recommendations on how to handle the claim.²⁰

[21] ICBC further says the applicant's claim file is complex and the claim file notes include entries where factual material, opinions, and comments are intermingled with legal advice and recommendations. ICBC says some of the information at issue is factual information provided to its claims examiner that would allow the applicant to draw inferences about the advice or recommendations.²¹

[22] The applicant makes no submission relevant to s. 13.

Analysis, s. 13

[23] ICBC applied s. 13 to information in certain claim file notes.²²

[24] Based on my review of the claim file notes, I find the withheld information is a record of ICBC employees' and external adjusters' comments and opinions about the accident, as well discussions of options for lines of inquiry to pursue. I can see that this information was developed by ICBC employees and external adjusters for ICBC. I am satisfied that this information consists of advice and recommendations and find that s. 13(1) applies to it.²³

[25] ICBC did not make submissions specifically related to the exceptions in ss. 13(2) or (3). I have considered whether the withheld information that qualifies as advice or recommendations falls within any of the circumstances described in those subsections. In my view, they do not apply.

[26] ICBC also applied s. 13 to background information about the applicant.²⁴ ICBC says this information is factual information provided to its claims examiner that would allow the applicant to draw inferences about the advice or recommendations given.²⁵ I cannot see how this information relates to any advice or recommendations either directly, or by inference. Specifically, I cannot see how this information relates to any decision or course of action that may

¹⁹ Order F22-30, 2022 BCIPC 33 (CanLII).

²⁰ ICBC's initial submissions at para. 28.

²¹ ICBC's initial submissions at para. 29.

²² Claim file notes, pp. 34 to 39 of the Records. A similar type of information is withheld from an email at p. 2398 of the Records.

²³ Order F22-30, 2022 BCIPC 33 (CanLII) at para. 65.

²⁴ Records, pp. 1779-81 (repeated at pp. 1819-21; 1936-37; and 1967-69).

²⁵ ICBC's initial submissions at para. 29.

ultimately be accepted or rejected by ICBC. I find that ICBC has not established that disclosing this information would reveal advice or recommendations developed by or for a public body or a minister under s. 13(1).

[27] In reaching my conclusion, I considered whether the withheld information was a necessary part of the background facts required to form an expert opinion. Based on the facts before me, I cannot see how the withheld background information relates to an expert opinion. Further, even if it was a necessary part, I find it would constitute “factual material” under s. 13(2)(a) and accordingly would not be protected from disclosure.²⁶

[28] In addition, the withheld background information is about the applicant. Given the nature of the information, I find disclosing this information will not “reveal” anything because the information is already known to the applicant as it is his information.

[29] For all these reasons, I find s. 13(1) does not apply to this background information and ICBC is not authorized to withhold it under s. 13(1). Since disclosing this information would not reveal advice or recommendations, I need not consider the exceptions in ss. 13(2) or (3).

Solicitor-client privilege, s. 14

[30] ICBC is withholding some of the information at issue under s. 14. Section 14 allows a public body to refuse to disclose information that is subject to solicitor-client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.²⁷ ICBC relies on both.

[31] ICBC provided the records containing what it says is privileged information for my review in this inquiry. I turn now to discuss the applicability of each type of privilege to that information.

Legal advice privilege

[32] The purpose of legal advice privilege is to protect confidential communications between a solicitor and client made for the purpose of seeking or providing legal advice, opinion, or analysis.²⁸ This confidentiality allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.²⁹ Legal advice privilege is a foundational principle in the

²⁶ *PHSA* at para. 94.

²⁷ *College* at para. 26.

²⁸ *College* at para. 31.

²⁹ *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.

legal system. As such, it should apply broadly and be as close to absolute as possible.³⁰

[33] For information to be protected by legal advice privilege it must be:

- a communication (oral or written) between a solicitor and client (or their agent);
- intended by the solicitor and client to be confidential; and
- for the purpose of seeking or providing legal advice.³¹

[34] Not every communication between a solicitor and their client is privileged. If the conditions above are satisfied, however, then privilege applies.³² A communication does not, however, satisfy this test merely because it was sent to a lawyer.³³

[35] The courts have established certain principles for deciding if legal advice privilege applies:

- Privilege extends beyond the actual requesting or giving of legal advice to the “continuum of communications” between a lawyer and client, which includes the necessary exchange of information for the purpose of providing legal advice.³⁴
- A privileged exchange of information may include history and background from a client, communications to clarify or refine the issues or facts,³⁵ and communications of an administrative nature.³⁶
- Internal client discussions about the implications of legal advice provided by a lawyer are privileged because revealing these communications would reveal the substance of the privileged legal advice.³⁷
- Privilege extends to communications with in-house counsel provided they are acting in a legal capacity and not a business or management capacity.³⁸

[36] I adopt the above principles in making my decision.

³⁰ *R. v. McClure*, 2001 SCC 14 at para. 35 [*McLure*]; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [*Camp*].

³¹ *Solosky v. The Queen*, [1980] 1 SCR 821 at p. 837 [*Solosky*].

³² *Solosky* at p. 829.

³³ *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81 [*Keefer Laundry*] and *McClure* at para. 36.

³⁴ *Huang v Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83; *Camp* at para. 42.

³⁵ *Camp* at para. 40.

³⁶ *Descôteaux v Mierzwinski*, 1982 CanLII 22 (SCC) at pp. 892-893.

³⁷ *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 (CanLII) at paras. 22-24.

³⁸ *Keefer Laundry* at para. 63 and *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 20.

Parties' submissions, legal advice privilege

[37] ICBC says it applied legal advice privilege to communications between its claims examiner and in-house and external legal counsel and to emails and instructions between the claims examiner and external legal counsel.³⁹

[38] The applicant makes no submission relevant to legal advice privilege.

Analysis, legal advice privilege

[39] For the reasons that follow, I find legal advice privilege applies to most, but not all, of the information withheld on this basis.

[40] Based on my review of the records, I find that the information ICBC is refusing to disclose under legal advice privilege is as follows:

- claim file notes recording procedural steps in the claim file⁴⁰;
- claim file notes recording the details of conversations between ICBC staff and ICBC's lawyers about the claim, which reveal instructions to lawyers, legal advice, and litigation strategy⁴¹;
- emails between ICBC's claims examiner and lawyers (in-house and external)⁴²; and
- a retainer letter and associated form.⁴³

[41] From my review of the claim files notes recording procedural steps in the claim file, I am not satisfied that these notes are protected by legal advice privilege. They are simply notations about actions and do not appear confidential in any way. I find they do not meet the test for legal advice privilege to apply.

[42] I am satisfied that the remaining information withheld under s. 14 is protected by legal advice privilege.

[43] From my review of the other claim file notes and emails, I can see that the withheld information relates to the accident and involves communications with ICBC's internal and external lawyers (lawyers). It also includes both actual legal advice and information that I find is part of the "continuum of communications" between ICBC's lawyers and its claims examiner about the accident. I can also see an exchange of information, including history and background, for the purpose of legal advice. I find that this information pertains directly to seeking, formulating or giving legal advice.

³⁹ ICBC's initial submissions at para. 33.

⁴⁰ Records, pp. 29 and 30.

⁴¹ Records, pp. 42 and 44.

⁴² Records, pp. 581-82, 585-93, 644-46, 698-700, 800-803, and 808-811,

⁴³ Records, pp. 611, and 1771-1772.

[44] For the retainer letter and associated form, previous case law and OIPC orders, have found that the terms of a solicitor client relationship that are contained in a retainer agreement and related documents are privileged because they relate directly to the communication involved in the seeking, formulating or giving of legal advice.⁴⁴ I agree with this finding and apply it here.

[45] From the context of the records and the competing interests involved, I can see that the information at issue is confidential and there is nothing to suggest it was not kept confidential between ICBC and its lawyers.

[46] Therefore, I am satisfied that all the information except the claim file notes recording procedural steps in the claim file meets all the requirements for legal advice privilege to apply.

Litigation privilege

[47] Litigation privilege protects a party's ability to effectively conduct litigation. The purpose of litigation privilege is to ensure an effective adversarial process by creating a "zone of privacy" in which parties can prepare their cases. Litigation privilege is not restricted to the confidential communications between a client and solicitor. It includes communications between a solicitor and third parties, if made for the purpose of litigation. Once the litigation has concluded, the privilege ends.⁴⁵

[48] Litigation privilege applies to records where, at the time the record was produced:

- litigation was "in reasonable prospect"; and
- the "dominant purpose" of the document was to obtain legal advice or was to conduct or aid in the conduct of the litigation.⁴⁶

[49] The threshold for determining whether litigation is "in reasonable prospect" is a low one and it does not require certainty.⁴⁷ The essential question is whether a reasonable person, being aware of the circumstances, would conclude that the claim will not likely be resolved without litigation.⁴⁸

[50] There is no absolute rule for determining whether litigation was the "dominant purpose" for a document's production. A finding of dominant purpose

⁴⁴ *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2001 BCSC 203 (CanLII) at para. 13, upheld on appeal at 2003 BCCA 278; Order F18-29, 2018 BCIPC 32 (CanLII) at para. 17; and Order F15-15, 2015 BCIPC 16 (CanLII) at para. 17.

⁴⁵ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 27-34.

⁴⁶ *Raj v. Khosravi*, 2015 BCCA 49 [Raj] at para. 20.

⁴⁷ *Raj* at para. 10.

⁴⁸ *Raj* at para. 11 citing *Sauvé v. ICBC*, 2010 BCSC 763 at para. 30.

is a factual determination that must be made based on all the circumstances and the context in which the document was produced.⁴⁹

Parties' submissions, litigation privilege

[51] ICBC says it applied litigation privilege to extracts that include discussions between its claims examiner and an independent adjuster regarding lines of inquiry to be followed in the investigation relating to the accident.⁵⁰ ICBC submits that, in these specific circumstances, litigation was reasonably in contemplation and the instructions provided by its claims examiner to the independent adjuster were for the dominant purpose of gathering information and preparing for that potential litigation.⁵¹ In asserting litigation privilege, ICBC relies on what it says is the applicant's adversarial stance since the accident.

[52] The applicant makes no submission relevant to litigation privilege.

Analysis, litigation privilege

[53] ICBC applied litigation privilege to certain information found in the claim file notes and email communications.⁵² For the reasons that follow, I find litigation privilege applies to the information ICBC withheld on this basis.

Litigation in reasonable prospect

[54] ICBC applied litigation privilege to portions of its claims file notes and to emails. I can see that the withheld information is about discussions between ICBC's claims examiner and the independent adjuster regarding lines of inquiry to be followed in the accident investigation.

[55] Applying the first step of the test for litigation privilege, I find litigation was a reasonable prospect immediately following the accident. I wish to be clear that I am not saying that litigation is always a reasonable prospect after any accident. This prospect must be assessed based on circumstances. Here, the uncontroverted evidence is that

...litigation in which the applicant would be a defendant was contemplated by ICBC shortly after the time of the Collision due to the seriousness of the impact on the home, the injuries reported to ICBC by [the driver], and the coverage issues that were identified immediately afterwards.⁵³

⁴⁹ *Raj* at para. 17.

⁵⁰ ICBC's initial submissions at para. 39.

⁵¹ ICBC's initial submissions at para. 40.

⁵² Records, pp. 343-345.

⁵³ Affidavit of ICBC's Manager of Freedom of Information [Manager] at para. 14.

[56] My review of the records supports the reasonableness of ICBC's conclusion.

[57] I find that the applicant also reasonably contemplated litigation immediately following the accident. For example, I can see that the applicant told ICBC that he had already spoken to a lawyer as early as five days after the accident.⁵⁴

[58] Based on my review of the claim file notes and the emails, I conclude that litigation was in reasonable prospect immediately following the accident onwards. Further, ICBC's evidence is that litigation is ongoing, at least as of January 2024, when ICBC provided its initial submission.⁵⁵ The applicant says nothing in his submission to suggest that this is not the case. I am satisfied that the litigation is still ongoing.

Dominant purpose

[59] The second part of the test for litigation privilege requires that the records were created for the dominant purpose of litigation. My review of the withheld information shows that ICBC was mainly concerned about gathering information to prepare for and assist in the probable litigation. I find that these claim file notes, and email communications were created for the dominant purpose of investigating aspects of the accident in contemplation of probable litigation.

Conclusion, s. 14

[60] In summary, I find that disclosing most of the information ICBC withheld under s. 14 would reveal information protected by legal advice and litigation privilege. I conclude ICBC is authorized to refuse to disclose most of the information it withheld under s. 14. However, I find ICBC is not authorized under s. 14 to withhold the information about procedural steps in the claim file notes.⁵⁶

Settlement privilege

[61] As noted above, the BC Supreme Court, has recognized settlement privilege as a common law exception to the disclosure of information under FIPPA.

[62] ICBC is withholding some information based on settlement privilege. Settlement privilege is a common law privilege that protects communications made for the purpose of settling a dispute.

⁵⁴ Records, p. 168.

⁵⁵ Manager's affidavit at para. 17 and Exhibit "A" to that affidavit.

⁵⁶ Records, pp. 29 and 30.

[63] Settlement privilege applies to communications made:

- within the context of a litigious dispute in existence or within contemplation;
- with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and
- in an attempt to effect a settlement.⁵⁷

Parties' submissions, settlement privilege

[64] ICBC says it applied settlement privilege to what it describes as communications between its claims examiner and the homeowner's lawyer. ICBC says these communications were for the purposes of attempting to resolve the potential dispute prior to the initiation of litigation.⁵⁸

[65] ICBC submits that where a claim was not ultimately filed and the relationship between the parties was acrimonious, these communications meet the test for settlement privilege and are properly withheld.

[66] The applicant makes no submission relevant to settlement privilege.

Analysis, settlement privilege

[67] The first part of the test for settlement privilege requires that the communications happened within the context of a litigious dispute in existence or within contemplation. My review of the emails withheld based on settlement privilege⁵⁹ shows that they happened within the context of a contemplated litigious dispute. Here, the homeowner suffered significant damage to his property and clearly intended to recover his losses through litigation. The homeowner retained a lawyer less than a month after the accident.⁶⁰ I am satisfied the emails were exchanged within the context of that contemplated litigation.

[68] The second part of the test for settlement privilege is that the communications were made with the express or implied intention that they would not be disclosed to the court in the event negotiations failed. My review of the emails shows they are clearly marked "without prejudice".⁶¹ Both the context and the content of the emails confirms this express intention.

⁵⁷ *Nguyen v Dang* 2017 BCSC 1409 at para. 22.

⁵⁸ ICBC's initial submissions at para. 42.

⁵⁹ Records, pp. 249-252, 602-610, 657-667, 680-694, 712-730, and 755-764.

⁶⁰ Manager's affidavit at para. 12 and Records, pp. 1843-46.

⁶¹ The without prejudice label alone is not sufficient to establish the information is privileged. It is, the context and substance of the communications, not the label, that are the deciding factors. See: Order F20-21, 2020 BCIPC 25 (CanLII) at para. 69 referencing for an example *Re: Bella Senior Care Residences*, 2019 ONSC 3259 at para. 16.

[69] The third part of the test for settlement privilege is that the communications were an attempt to effect a settlement. Settlement privilege applies not just to settlement offers; it also applies to communications that are reasonably connected to the parties' negotiations.⁶² I find the content of some of the emails reveals an attempt to negotiate a settlement and the remainder are reasonably connected to those negotiations.

[70] I find that ICBC correctly applied settlement privilege to the information at issue.

Disclosure harmful to personal privacy, s. 22

[71] ICBC's application of s. 22 to some of the information at issue overlapped with its application of ss. 13 and 14. I will only consider ICBC's application of s. 22 to information that I have not already found may be withheld under ss. 13 or 14.

[72] Section 22(1) requires a public body to refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. A "third party" is defined in Schedule 1 of FIPPA as any person, group of persons or organization other than the person who made the access request or a public body.

[73] Previous orders have considered the proper approach to the application of s. 22 and I apply those same principles here.⁶³

Personal information

[74] Section 22(1) only applies to personal information, so the first step in a s. 22 analysis is to decide if the information at issue is personal information.

[75] FIPPA defines personal information 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."⁶⁴ Whether information is "contact information" depends upon the context in which it appears.⁶⁵

⁶² Order F22-57, 2022 BCIPC 65 (CanLII) at para. 39 relying on *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.* 2013 ABCA 10 [*Bellatrix*] at para. 26.

⁶³ Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58 sets out a summary of the four steps in a s. 22 analysis which I follow here.

⁶⁴ FIPPA, Schedule 1.

⁶⁵ Order F20-13, 2020 BCIPC 15 (CanLII) at para. 42.

[76] ICBC submits that the information it severed is personal information. The applicant makes no submission relevant to personal information.

[77] From my review of the information at issue under s. 22, I find that most of it meets the definition of personal information. This information, which appears in detailed records about the accident, relates to identifiable individuals, either on its own or when combined with information from other available sources. This information includes:

- Names, dates of birth, personal contact information, and personal histories.⁶⁶
- Insurance coverage details, health information, and financial information (income and assets).⁶⁷
- Pictures that I can see are obviously connected to identifiable individuals.⁶⁸
- Personal health information relating to injuries suffered during the accident, their diagnosis, treatment, ongoing condition, as well as information about unrelated medical issues and hospital attendances.⁶⁹

[78] I am satisfied that none of the withheld information just listed is contact information as defined under FIPPA and interpreted by past orders. As a result, I find most of the information withheld under s. 22(1) is personal information.

[79] I find there is a small amount of information in the claim file notes that is not about an identifiable individual. It is about procedural steps in the claims file.⁷⁰ I find this information is not personal information and cannot be withheld under s. 22(1).

Not an unreasonable invasion of privacy, s. 22(4)

[80] The second step in a s. 22 analysis is to assess whether the personal information falls into any of the types of information listed in s. 22(4). If so, then its disclosure is not an unreasonable invasion of personal privacy. ICBC submits that none of the exceptions in s. 22(4) apply. The applicant does not say anything

⁶⁶ See for examples: Records, pp. 5-49, 122, 129, 242, 253, 331, 334, 337, 419, 427, 429, 434, 496, 697, 755, 788, 794, 1733, 1768-69, 1783, 1804-1806, 1841-1842, 2127-2128, 2178-2180, 2309-2310, 2323-2324, 2380, 2383, 2385, 2388, and 2418.

⁶⁷ See for examples: Records, pp. 34-39, 40-41, 43, 1681, 1708, 1715-1716, 1739, 1743-1745, 1751, 1768-1769, 1792-1794, 2297-2298, 2306, 2313-2320, 2359-2360, 2363-2364, 2368, 2387, and 2390-2391.

⁶⁸ See for examples: Records, pp. 24-26, 32-34, 241, 433, 1810-1814, 1834-1840, 2120-2126, 2300-2304, and 2375-2379.

⁶⁹ See for examples: Records, pp. 18-20, 26, 32-34, 43, 44, 140, 142, 163, 1736-1738, 1775, and 1791-1792.

⁷⁰ Records, p. 29.

relevant to s. 22(4). I reviewed the various provisions under s. 22(4) and find none apply to the third party personal information.

Presumed invasion of privacy, s. 22(3)

[81] The third step in the s. 22 analysis is to determine whether s. 22(3) applies to the personal information. If so, disclosing that personal information is presumed to be an unreasonable invasion of third party personal privacy. ICBC submits ss. 22(3)(a), (d), and (f) apply. The applicant does not say anything relevant to s. 22(3). I have considered whether any of the other subsections in s. 22(3) apply and I find no others are relevant.

Health information, s. 22(3)(a)

[82] Section 22(3)(a) creates a rebuttable presumption against disclosure where the personal information relates to medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation. ICBC submits s. 22(3)(a) applies to information it severed relating to the health information of the driver.

[83] I find some of the information withheld by ICBC about the driver is detailed health information. It is information relating to injuries suffered during the accident, diagnosis, treatment, ongoing condition, medical issues, and hospital attendances, I find that s. 22(3)(a) applies to that information. Disclosure of this personal information is, therefore, presumed to be an unreasonable invasion of her personal privacy.

Employment history, s. 22(3)(d)

[84] Section 22(3)(d) creates a rebuttable presumption against disclosure where the personal information relates to the employment, occupational or educational history of a third party. ICBC submits s. 22(3)(d) applies to information it severed relating to third parties' employment history and training.

[85] I find some of the personal information withheld under s. 22(1) reveals details of the employment, occupational and educational history of the driver. Disclosure of this personal information is, therefore, presumed to be an unreasonable invasion of her personal privacy.

Financial information, s. 22(3)(f)

[86] Section 22(3)(f) creates a rebuttable presumption against disclosure where the personal information describes a third-party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. ICBC submits s. 22(3)(f) applies to information it severed relating to the financial information of third parties.

[87] I can see that some of the personal information is financial information, including specific details about income, assets, and financial activities, of the driver and of the homeowner. Disclosure of this personal information is, therefore, presumed to be an unreasonable invasion of their personal privacy.

[88] I find that no other s. 22(3) presumptions apply.

Relevant circumstances, s. 22(2)

[89] The fourth and final step in a s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). These circumstances can weigh either in favour of, or against, its disclosure. It is at this step, after considering all relevant circumstances, that any presumptions under s. 22(3) may be rebutted.

[90] ICBC does not identify which, if any, of the circumstances set out in s. 22(2) might be relevant. The applicant does not say anything relevant to s. 22(2).

[91] I considered all relevant circumstances, including those listed in s. 22(2) and find none weigh in favour of disclosing any of the third party personal information to the applicant. As a result, I conclude that the presumptions under ss. 22(3)(a), (d), and (f) have not been rebutted. For the personal information to which no presumption applies, I can see no relevant circumstances that weigh in favour of disclosing any of that third party personal information to the applicant.

Conclusion, s. 22(1)

[92] I found most of the information ICBC withheld under s. 22(1) is the personal information of third parties.

[93] I found that the disclosure of some of the personal information at issue is presumed to be an unreasonable invasion of third party personal privacy under ss. 22(3)(a), (d), and (f). I found none of the circumstances listed under s. 22(2) are relevant.

[94] I find that disclosing the third party personal information would be an unreasonable invasion of personal privacy under s. 22(1) and ICBC must refuse to give the applicant access to that information.

Conclusion

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

1. Subject to item 2 below, I confirm ICBC's decision to refuse access to the information withheld under ss. 13, 14, 22(1) and settlement privilege.

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2. ICBC is not authorized by ss. 13,14, or 22(1) to withhold the information I have highlighted (in orange) in a copy of the pages of the records that will be sent to ICBC with this order.
 3. I require ICBC to give the applicant access to the information described in item 2 above. ICBC must concurrently provide the OIPC registrar of inquiries with proof that it has complied with the terms of this order.

[96] Under s. 59 of FIPPA, ICBC is required to give the applicant access to the information it is not authorized or required to withhold by June 10, 2024.

April 26, 2024

ORIGINAL SIGNED BY

Carol Pakkala, Adjudicator

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