

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 12-1994
June 22, 1994**

**INQUIRY RE: A Request for Access to Records of the Insurance Corporation of
British Columbia (ICBC)**

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1. Description and Nature of the Review

As the Information and Privacy Commissioner, I conducted a written inquiry under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry concerned a request to review the decision of the Insurance Corporation of British Columbia (ICBC) to deny the applicant access to various records in the custody of ICBC. The applicant is a former employee of ICBC, having been dismissed in November 1988.

The applicant wrote to ICBC on June 14, 1993 to request access to copies of all files in his name in the custody or under the control of ICBC. The applicant's request was made prior to the proclamation of the Act but ICBC handled the request before and after the Act's proclamation as a regular request.

On March 31, 1994 the applicant made a supplemental request for records that related to the original records falling within the June 14, 1993 request. ICBC and the applicant agreed that selected outstanding records relating to the March 31, 1994 request would be joined with records from the June 14, 1993 request in the Commissioner's review. The March 31, 1994 request also alleged that certain records relating to the June 14, 1993 request were missing from the lists of records provided by ICBC.

ICBC released unsevered and partially severed records to the applicant in a series of disclosures. Further searches by ICBC during the investigation period resulted in the complete or partial disclosure of records that had not been located during ICBC's initial searches. ICBC withheld some records pursuant to various exceptions under the Act. As well, ICBC claimed to be unable to locate some records sought by the applicant, either because the records never existed or because conversations alleged to have occurred between ICBC employees were never reduced to writing. According to ICBC, a full search of all its files has been conducted.

The applicant was not satisfied with the records released by ICBC and the thoroughness of ICBC's search for the requested records. On February 25, 1994 the applicant requested a review of ICBC's decision to withhold and sever records. Following discussions among the Office of the Information and Privacy Commissioner (the Office), the applicant, and ICBC, the applicant received more records and information from his ICBC files. In total, the records disclosed to the applicant included over 1,300 pages from his personnel files, grievance files, labour relations file, Special Investigation Unit (SIU) file, several Public Enquiries Department files, and a file kept by the ICBC Vice President of Human Resources.

2. Documentation of the Review Process

This Office provided the applicant and ICBC with notice of a written hearing to be held on May 26, 1994. Under sections 56(3) and (4) of the Act, the applicant and ICBC were given the opportunity to make written representations and to view each other's submissions. In reaching my decision on the review of ICBC's decision to withhold and sever records, I carefully considered these submissions.

3. The “In Camera” Affidavits

ICBC submitted two affidavits in support of its written argument against disclosure of the withheld and severed records. ICBC requested that the contents of the affidavits should not be disclosed to the applicant. I have agreed with ICBC on this point, and my reasons follow. However, I did not find the information contained in the affidavits to be very helpful and, accordingly, I have not relied on this evidence.

In any event, the submission of “in camera” affidavits by public bodies raises issues of fairness that this Office must handle carefully. As a matter of practice, public bodies and applicants receive and respond to written arguments presented by the opposite party, as well as affidavits (i.e., evidence) in support of those arguments. However, some affidavits will contain information which, in itself, may qualify for an exception from disclosure under the Act. In the present case, the two affidavits contain information that falls within the scope of section 15(1) of the Act.

The use of “in camera” affidavits in written hearings is similar to the use of “in camera” testimony at oral hearings where the applicant leaves the hearing room to permit the Commissioner to receive evidence from the public body. During “in camera” sessions at oral hearings, I am entitled to review records that may qualify for exceptions under the Act and to pose questions to the public body that, in themselves, may reveal information which is protected from disclosure. The intent of the Act and my procedures is to ensure that the applicant receives fair and balanced treatment, especially during hearings where he or she is excluded from the hearing room during “in camera” sessions. The Act recognizes the need for this in sections 56(2) and 56(4)(b):

56(2) An inquiry under subsection (1) may be conducted in private.

...
56(4) The commissioner may decide

...
(b) whether a person is entitled to be present during or to have access to or to comment on representations made to the commissioner by another person.

In my opinion, section 56(4)(b) provides authority for me to accept “in camera” affidavits in written hearings that may not, in whole or in part, be disclosed to another party (or intervenor, if any). In addition, section 47(3)(a) of the Act requires me, in conducting an inquiry, not to disclose any information that the head of a public body would be required or authorized to refuse to disclose under the Act. Section 47(3)(a) reads:

47(3) In conducting an investigation, audit or inquiry under this Act and in a report under this Act, the commissioner and anyone acting for or under the direction of the commissioner must take every reasonable precaution to avoid disclosing and must not disclose

(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 5....

In the present case, the information in the affidavits falls within section 15(1) of the Act and thus also falls within section 47(3)(a) of the Act. While I have carefully considered the objections of the applicant, I agree that the two ICBC affidavits need not be disclosed to the applicant. The applicant received notice from ICBC of the existence of the two affidavits, and ICBC provided him with a general description of their contents in its written argument. I find this description of the affidavits to be sufficient to ensure procedural fairness for the applicant in this hearing:

In considering whether the disclosure would be an unreasonable invasion of the insured’s privacy [a third party] we noted that the applicant had previously made threats against individuals involved in this case and the Corporation had been advised by the Police to take these threats seriously. The E-mail memo dated 4 May 1994 and the affidavits...supply further evidence in this regard, all of which I request be reviewed ‘in camera.’ [ICBC written submission to the Commissioner, May 26, 1994, page 3]

4. Issues under Review

The issues to be decided are: 1) the applicability of sections 13, 14, 15, and 22 of the Act to information in the records listed below; and 2) the adequacy of ICBC's search for missing records.

Under section 57(1) of the Act, in an inquiry about a decision to refuse an applicant access to a record, it is up to the head of ICBC to prove that the applicant has no right of access to the record. However, where the applicant has been refused access to personal information about a third party, section 57(2) of the Act states that it is up to the applicant to prove that disclosure of the personal information would not be an unreasonable invasion of the third party's personal privacy.

5. Severance of the Records

I have reviewed each of the records in dispute and offer my conclusions about each severance.

a) Page 45 of the Stage III Grievance File

ICBC conducted some physical surveillance of the applicant around the time of his dismissal. The bill for services was erroneously paid out of a specific person's claim file. ICBC has severed personal information about the claim in question under section 22(1) of the Act and in accordance with the expressed wishes of the third party. I accept ICBC's version of this event and believe that it is acting in good faith. I find that the applicant has not met the burden of proof imposed by section 57(2) of the Act because he has not proved that disclosure of the personal information about the third party would not be an unreasonable invasion of the third party's personal privacy.

b) The Penultimate Paragraph on Page 174 of the Stage III Grievance File

ICBC severed six lines from an internal memorandum under section 13(1) of the Act. The purpose of the memo was to advise the President of ICBC on how to respond to the applicant's request for a meeting. I am satisfied that ICBC correctly applied section 13(1) to the severed portions of the record. I accept ICBC's argument that "[m]anagement and staff must be able to give the Executive and senior management frank advice on how to deal with difficult complaints." This is also in accord with the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) (the Manual), which was prepared by the Information and Privacy Branch in the Ministry of Government Services (Section C.4.4, p. 3).

c) Items Excepted from the Vice President's File

These items were part of a file kept by the Vice President of Human Resources at ICBC. ICBC excepted about a dozen lines of a page-and-a-half memo, claiming for most lines either the policy advice (section 13(1)) or the harm to law enforcement (section 15(1)) exceptions. ICBC also excepted five lines from a single page memo under section 13(1). ICBC claimed the section 15(1) exception in respect of part of one record that, if disclosed, could harm a law enforcement matter (section 15(1)(a)) and could reveal the identity of a confidential source of law enforcement information (section 15(1)(d)). Having reviewed the records personally, I agree with these exceptions.

ICBC also correctly excluded from disclosure a half-page document created by the Office of the Ombudsman on the grounds that it is outside the scope of the Act under section 3(1)(c).

d) Page 93 of the Public Enquiries Files

ICBC excepted nine lines of handwritten notes of a meeting involving two managers and a solicitor for ICBC under section 14 of the Act. I do not believe that the mere presence of a lawyer at a meeting fully protects the records of that meeting from disclosure under section 14. However, in the present case, three lines can be construed as legal advice and the remainder can be excepted from disclosure under section 13(1) of the Act, since they are clearly policy advice on how to handle the applicant's case.

e) Pages 135, 136 and 137 of the Public Enquiries Files

Under sections 13(1) and 14, ICBC accurately excepted two electronic mail messages from the Manager, Information Access & Ombudsman Enquiries, to his manager about the applicant's case and also a summary for his manager of a discussion of the case with a labour lawyer.

Under the same sections, ICBC correctly severed five lines from a full page and almost all of a half-page handwritten discussion of the same Manager's meeting notes with the lawyer.

f) Pages 2, 3, and 4 of Labour Relations SIU File

These materials are from a two-and-a-half page typed memo from a Special Investigations Unit officer to his manager about an investigation of the work activity of the applicant at ICBC. About twenty lines were excepted under sections 15(1)(a) and (d) of the Act. I accept ICBC's argument that disclosure of the information might serve to identify a confidential source of law enforcement information and subject him or her to possible harassment or other harm.

6. The Adequacy of ICBC's Search for Missing Records

The applicant alleged that ICBC had not conducted an adequate search for records that he believed should be in the custody or under the control of ICBC. ICBC claimed to be unable to locate some of the records sought by the applicant, either because the records never existed or because conversations alleged to have occurred between ICBC employees were never reduced to writing. According to ICBC, a full search of all its files has been conducted.

I accept in good faith ICBC's claim that records alleged to exist by the applicant are not now in the custody or under the control of ICBC. However, I direct ICBC to

continue to make all reasonable efforts to locate the allegedly missing records, given their significance to the applicant. I would like ICBC to report back to the Office of the Information and Privacy Commissioner within three months of the date of this order to inform me of any results of the continued search for records.

7. Orders

Under section 58(2)(b) of the Act, I confirm the decision of the Insurance Corporation of British Columbia not to release the records requested to the applicant.

Under section 58(3)(a) of the Act, I order the Insurance Corporation of British Columbia to take all reasonable steps to continue searching for the allegedly missing records. ICBC must report the results of its continued search to the Office of the Information and Privacy Commissioner within three months of the date of this order. ICBC should send these results to my direct attention at the Office of the Information and Privacy Commissioner, Fourth Floor, 1675 Douglas Street, Victoria, British Columbia, V8V 1X4.

David H. Flaherty
Commissioner

June 22, 1994