

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 5-1994
March 14, 1994**

**INQUIRY RE: A Request for a Report from the Insurance Corporation of British
Columbia**

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March 14, 1994

1. Description 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) concerning a request for review received under section 52.

On September 18, 1993, the applicant, Mr. Donald Baxter Caverley, requested a certain document held by the Insurance Corporation of British Columbia (ICBC) from the Minister of Transportation and Highways, the Minister responsible for ICBC. The Minister forwarded the request to ICBC.

In denying the request for access to information submitted under section 4 of the Act, ICBC cited section 14 of the Act concerning the non-disclosure of information that is subject to solicitor-client privilege. The above denial occurred on October 27, 1993; ICBC reconfirmed its initial decision, at the request of the applicant, on November 18, 1993.

2. Documentation of the Review Process

The Office of the Information and Privacy Commissioner provided both parties involved in the inquiry with a two-page portfolio officer's report. It incorporated the facts of this case, the most essential of which are included in this order and are not in dispute.

Under sections 56(3) and (4) of the Act, each party was given an opportunity to make written representations to me. In reaching my decision, I have carefully considered these submissions.

Under section 57(1) of the Act, at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part. Thus the burden of proof in this case fell on ICBC.

3. The Record in Dispute

The applicant was in an automobile accident on March 1, 1989. On October 25, 1990, he sued the other driver to recover alleged damages. Since ICBC carried that driver's car insurance, it prepared to defend itself against this action. ICBC's lawyer, who was from a private law firm, retained a private investigator to obtain information about the applicant. The investigator submitted a report (the Report) to ICBC's lawyer (and copied it to ICBC).

I have reviewed this Report, which is essentially composed of local political gossip and a summary of newspaper reports (four pages) and the actual newspaper clippings (eight pages) from the municipality in which the applicant was an elected councillor and a possible candidate for the New Democratic Party in the 1990 provincial election. The Report included one-half page of the investigator's own comments in these four pages.

4. The Applicant's Case

The applicant seeks access to the Report. He learned of its existence from his own lawyer, to whom the private investigator allegedly made a comment about the nature of local politics in the community in question. He has also had contact with at least one other person whom the investigator interviewed.

The applicant emphasizes that he does not wish access to the solicitor's report on his legal case but the private investigator's "report in her capacity as independ-adjuster [sic]."

The applicant further pointed out that section 14 of the Act is discretionary:

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

He urged me to consider the possibility of ordering a discretionary exemption.

5. The Ministry's Case

ICBC's position is that the Report "is excepted from disclosure under section 14 of the Act, information protected by privilege. The report was prepared for the dominant purpose of impending litigation." (Letter to the applicant, October 27, 1993) In the

second ICBC letter to the applicant (November 18, 1993), the grounds for denial of access were stated to be, simply, client/solicitor privilege.

ICBC made two direct submissions to the Office of the Information and Privacy Commissioner in support of its position on denial of access.

ICBC submitted that the private investigator was making inquiries about the applicant regarding certain allegations he made with respect to his claim for injuries sustained as a result of a motor vehicle accident.

ICBC acknowledges that in accordance with the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) (the Manual), which was prepared for the government by its own Information and Privacy Branch in the Ministry of Government Services, the head of a public body has the discretion to disclose information covered by solicitor/client privilege. (section C4.5, p. 1) ICBC, as the client in this case, has chosen not to waive its privilege and to withhold the information.

ICBC further points out that the Report contains personal information from witnesses "that was relevant to the legitimate defense of his claim." Furthermore, one of the witnesses *was* running for re-election and could have been subject to an exception for harm under section 22 of the Act. [emphasis added]

Finally, ICBC "considered the impact upon the Corporation's ability to properly investigate claims should the released [sic] of the report reveal the identities of the witnesses.... Should witnesses become aware that talking to a representative of ICBC might leave them open to potential harassment because we are unable to protect their privacy, they will simply refuse to speak to us at all. The result will be less complete investigations, fewer controls over fraudulent or exaggerated claims, and more stress on the public's premium dollar."

In its direct submission to me on March 10, 1994, ICBC added the following relevant information. In the Statement of Claim of his lawsuit of October 25, 1990, the applicant alleged that he had "suffered loss of earnings, loss of earning capacity, past present and prospective...." After his 1989 accident, the applicant was defeated for nomination as a provincial candidate and was also not re-elected to the local Council. During negotiations on the applicant's claim, his lawyer alleged that these defeats were due, at least in part, to the injuries suffered in the accident, leading to a claim for loss of opportunity.

ICBC's counsel retained the private investigator to investigate "the circumstances surrounding the election to determine whether the loss of opportunity claim had any merit." Her Report was based on interviews with two former local politicians and a local newspaper reporter and collecting newspaper clippings.

The applicant's insurance claim was settled by negotiation in 1991.

6. Discussion

I accept ICBC's position that the Report was created and obtained for existing or contemplated litigation and thus may be excepted from disclosure under section 14 of the Act (solicitor-client privilege).

ICBC's ad-hoc Freedom of Information Committee held a number of meetings to discuss whether the circumstances of the applicant's case would warrant waiving privilege and releasing the document to the applicant. ICBC concedes that release of the Report "would not cost the Corporation any more money, nor would it jeopardize the interests of our insured in this case."

ICBC then claims that "the people contacted in this investigation provided their information with at least the implicit expectation that it would not be made public or released to Mr. Caverley [sic]. Considering that this information was obtained before the Act was in force, there was likely little thought given to the fact that Mr. Caverley [sic] may at some point have a legal right of access." I note that there is no explicit support for the argument that the information in the Report was obtained in confidence.

Moreover, the second sentence of the ICBC statement is a non sequitur. Anyone interviewed by a private investigator concerning pending litigation should be aware that information disclosed might well be disclosed in the course of a trial (which is how I read the ICBC statement). This condition especially applies to former elected officials and a newspaper reporter, who cannot be considered in a state of ignorance about the potential disclosure of information from witnesses during trials. If information must be received in confidence, then that arrangement must be explicit.

ICBC's most important final submission is that release of the Report "particularly considering the publicity it might attract given the profile of the people involved, would significantly hinder the Corporation's ability to conduct similar investigations in future cases. Potential witnesses would be very reluctant in some cases to come forward if they felt that the information they provided would be revealed."

I find this argument without merit in the circumstances of the present case and in general, since witnesses should normally be aware, or be informed, that information they provide may require them to give evidence in a courtroom during a trial. Settlement precluded such disclosure in the present case, and the applicant is naturally curious about the contents of a report that he has heard about indirectly on several occasions. Release of the Report would satisfy this natural curiosity and no doubt fuel local political animosities. But prevention of embarrassment is not a goal of the Act.

Moreover, the Report was submitted on April 10, 1991, and is thus hardly current history, even in the evidently tangled politics of the municipality in question.

As described earlier, the Report is largely old political gossip collected from two local public figures (former elected politicians) and a newspaper reporter about a third public figure. Two thirds of the Report is made up of clippings from newspapers that are already in the public record.

I do not accept ICBC's argument that disclosure of the Report will harm its ability to conduct future investigations. If the result does make the public more careful about what information it discloses to private investigators, I think the public interest will be well served.

I note, finally, that the fundamental goal of the Act is to promote the accountability of public bodies to the public by creating a more open society [section 2(1)]. It is my view that this presumption of greater openness is the fundamental goal of the Act and should be supported whenever possible, especially if the head of a public body is applying a discretionary exception. In the circumstances of this case, ICBC is not required to refuse access.

I agree that under the Act, only the client has the discretion to waive solicitor-client privilege. In this case, the client is a public body with considerable obligations under the Act. In exercising its discretion under section 14, a public body must, in my view, take all relevant factors into consideration.

In this case, ICBC did not fully consider the following relevant factors when it decided not to waive its privilege:

- 1) Witnesses or potential witnesses do not necessarily provide information in confidence. In fact, they generally do so in circumstances where they may later be called to give evidence at a trial.
- 2) The Report itself is almost three years old and deals with events that are even older.
- 3) The Report contains mainly political gossip, and much of it is a collection of newspaper clippings already in the public domain.
- 4) The presumption of greater openness in the Act is significant for public bodies.

7. Order

Under section 58(2)(b) of the Act, I order the Insurance Corporation of British Columbia to reconsider its decision not to release the Report to the applicant.

Under section 58(4), this order is made with the following terms and conditions:

- 1) The reconsideration must be made within 10 working days from the date of this Order.
- 2) Written reasons for the decision which results from this reconsideration must be given to the applicant and copied to the Commissioner's office.

David H. Flaherty
Commissioner

March 14, 1994