**Office of the Information and Privacy Commissioner**
**Province of British Columbia**
**Order No. 6-1994**
**March 31, 1994**

# INQUIRY RE: A Request for a Report from the Insurance Corporation of British Columbia (ICBC)

**Fourth Floor**
**1675 Douglas Street**
**Victoria, B.C. V8V 1X4**
**Telephone: 604-387-5629**
**Facsimile: 604-387-1696**

## 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 on December 29, 1993 under section 52.

On November 8, 1993 the applicant, Mr. John Berkyto, requested, through his legal counsel, records pertaining to his own motor vehicle accident claims held by the Insurance Corporation of British Columbia (ICBC).

In denying the request for access under the Act to at least certain items of information, ICBC cited in particular section 14 of the Act concerning the non-disclosure of information that is subject to solicitor-client privilege. This denial occurred on December 14, 1993.

Both parties agree that the primary issue under review is the scope and application of solicitor-client privilege which is contained in section 14 of the Act. This section provides as follows:

> 14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

In particular, the parties disagree over the scope of the "contemplated litigation" element of solicitor-client privilege which is described in Section C.4.5 of the Freedom of Information and Protection of Privacy Act Policy and Procedures Manual (1993) (the Manual), which was prepared for the government by the Information and Privacy Branch in the Ministry of Government Services.

## 2. Documentation of the Review Process

The Office of the Information and Privacy Commissioner provided both parties involved in the inquiry with a three-page report prepared by a Portfolio Officer on my staff. It incorporated the facts of this case, the most essential of which are included in this order and are not in dispute.

Under subsections 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.

Subsection 57(1) of the Act provides that 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 to a part of the record. Thus the burden of proof in this case fell on ICBC.

## 3. The Records and Issues in Dispute

This review concerns only two records that have not been released to the applicant: the six-page "confidential" report from Lindsey Morden Claim Services Ltd. of Vancouver, dated September 1, 1992, and an earlier draft of the report with an August 18, 1992 cover letter (the reports).

As noted above, both parties agree that the primary issue under review is the scope and application of solicitor-client privilege under section 14 of the Act. In particular, the parties disagree over the scope of the "contemplated litigation" element of solicitor-client privilege. Since the Act contains no definition of solicitor-client privilege, I agree that the scope of the privilege must be determined by reference to the common law. The parties also address the application of sections 17 and 22 of the Act to the Lindsey Morden report but, for reasons that follow, I need not consider the applicability of these latter exceptions.

The applicant's case involves an independent insurance adjuster's report that was submitted to ICBC and not to legal counsel. The Lindsey Morden report does not contain any direct communications between a lawyer and a client. ICBC takes the position that the report was created for use in litigation. The applicant argues that the report was created for the more immediate purpose of enabling ICBC to assess the merits of his wage loss claim, which might or might not result in litigation.

The automobile accident in question occurred on September 9, 1990. The material damage claim was settled shortly thereafter. The applicant's wage loss claim was made in the spring of 1992, after which ICBC hired the independent adjuster.

## 4. The Applicant's Case

Counsel for the applicant submitted that the independent adjuster's reports in issue should be disclosed by ICBC on the grounds that they were not prepared for the "dominant purpose" of litigation and, therefore, do not attract solicitor-client privilege.

The applicant's position is that litigation was not a reasonable prospect when the records were prepared in July 1992, since neither side had retained counsel. ICBC denied the claim for wage loss on August 26, 1992. Counsel for the applicant filed a lawsuit on August 31, 1992, after which, it is asserted, ICBC also retained counsel.

## 5. ICBC's Case

ICBC's position is that the reports should be exempted from disclosure on the grounds of solicitor-client privilege, that disclosure would be harmful to the financial or economic interests of ICBC (section 17), and that disclosure would lead to an unreasonable invasion of personal privacy of the people contacted (subsection 22(2)(e)).

Although ICBC acknowledges that it commissioned the report before the applicant retained counsel and commenced litigation, it argues that numerous factors on the file confirm that the dominant purpose for obtaining the file was for contemplated litigation, rather than for use in the possible settlement of the case prior to litigation. Admittedly, had the claim been settled, there would have been no litigation.

ICBC also admits that the case law dealing with claims of this type of privilege tends to distinguish between the handling of claims in an adjustment phase (which is not privileged) and a litigation or defense-oriented phase (which is privileged). However, ICBC argues that, in the circumstances of this case, it was already in the latter phase with the applicant due to a number of factors, such as the substantial sum ($50,000) that he had claimed for wage loss and the lack of medical evidence supporting the alleged disability.

ICBC also indicates that it is currently involved in tort litigation with the applicant over damages allegedly resulting from injuries he sustained in his accident, and that disclosure of the reports would harm its financial or economic interests (section 17). ICBC's argument that the applicant's claim is without substance is "based almost entirely on the evidence of people contacted by the independent adjuster."

Finally, ICBC advances the argument that disclosure of personal information about third parties in the reports will unfairly expose the people contacted to financial or other harm, since the applicant has indicated his intention to pursue libel actions (subsection 22(2)(e)). For reasons that follow, I need not address the latter arguments.

## 6. Analysis

In interpreting the Act, I am not persuaded by distinctions in the case law between the adjustment and the litigation phases when assessing claims of privilege. These are technical matters that can be settled in the courts through the normal process of discovery

in cases, like this one, where litigation is ongoing. For purposes of the Act, any work that ICBC does in the process of settling claims, where there is a reasonable probability of litigation, can be viewed as having been done in contemplation of litigation, if the case is not otherwise settled. This is especially true when claims adjusters suspect the validity of the claim. Even for settled cases, solicitor-client privilege may continue to apply to selected records.

In terms of the interpretation of section 14 of the Act, I am persuaded of ICBC's view, at least for the purposes of the present case, that the reports in question were prepared in contemplation of litigation. An unintended consequence of the contrary position in this case would be that none of the advance work that ICBC does in deciding whether to settle a case could be protected from disclosure in the event that, as in the present case, settlement was not achieved (for whatever reasons). This would also have direct consequences for the financial or economic interests of ICBC, since plaintiffs would have advance knowledge of a substantial element of its case.

In my view, the requested reports fall within the scope of the contemplated litigation element of solicitor-client privilege. While the Manual, of course, has no binding force in these proceedings, I am prepared to adopt the wording of Section C.4.5, page 7, of the Manual as an accurate statement of the principles applicable to the reports requested in this case:

> The section 14 exception protects a record from release if the record was created or obtained for existing or contemplated litigation.
>
> At the time of making the communication, litigation must either have commenced or been anticipated, and the communication must have been made for the dominant purpose of obtaining legal advice on such litigation, or for use in litigation. Dominant purpose means the primary reason the document or record was created or used.
>
> A document or record that came into existence before an action is commenced will only fall under contemplated litigation privilege if litigation was a definite prospect or reasonable probability at the time of its creation.

In addition, I draw some additional support from two affidavits submitted to me by ICBC in support of its case, both of which indicate the nature of the requested report. An affidavit of Fran Osen, then an adjuster with Lindsey Morden, described her dealings with the applicant and his wage loss claim covering the period from July 14, 1992 to July 17, 1992. At page 3, paragraph 8, Ms Osen deposed:

> These typewritten notes were prepared for the principle [sic] purpose of assisting in the preparation for and the conduct of the probable litigation.

The affidavit from Carol Clarke, then an adjuster with ICBC, deposed to her involvement with the applicant's wage loss claim covering the period from April 13, 1992 to July 1992. At page 3, paragraph 16, Ms Clarke deposed:

> ...I was now mainly concerned about gathering information to prepare for and assist in the probable litigation.

I accept ICBC's position that the reports were created and obtained for the dominant purpose of contemplated litigation and thus may be excepted from disclosure under section 14 of the Act (solicitor-client privilege) at the discretion of ICBC.

## 7. Order

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

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David H. Flaherty
Commissioner

March 31, 1994