

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 249-1998
July 20, 1998**

INQUIRY RE: The adequacy of a search for records by the Insurance Corporation of British Columbia (ICBC), and whether ICBC was required to create a record in response to an applicant's request

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on June 9, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the Insurance Corporation of British Columbia's (ICBC) response to the applicant's request, which indicated that ICBC could not provide access to some records, since they did not exist, that others were not available in the depth of detail requested by the applicant, and that it would not be reasonable for ICBC to create a record responsive to the applicant's request.

2. Documentation of the inquiry process

On October 21, 1997 the applicant submitted a request to ICBC for access to payment records for the law firms that ICBC dealt with between 1983 and 1996, and a list of "law firms which were employed by ICBC to defend any private actions put forth by an Auto Body Shop in B.C." This request letter also contained several questions which the applicant wished to have answered.

On November 27, 1997 ICBC responded to the applicant's request by disclosing records containing the payment information for the years 1988 to 1996 and informing the applicant that such records were unavailable for the time period prior to 1988. ICBC also informed the applicant that it did not have "comprehensive records responsive to" the portion of the applicant's request that related to a list of law firms employed by ICBC to defend private actions put forward by auto body shops, or to the firms' related billing records.

ICBC answered the applicant's questions, made referrals to alternate sources of information, and provided copies of guidelines relevant to the questions being asked.

On December 13, 1997 the applicant wrote to my Office and requested a review of ICBC's response to his request for records. On May 8, 1998 the applicant indicated that he wished to proceed to an inquiry before me. On May 12, 1998 both parties were notified that a written inquiry would take place on June 2, 1998.

On May 22, 1998 ICBC requested a one-week extension to the twenty-two day inquiry period in order to obtain affidavit material. The applicant objected to this extension. I decided, on the basis of fairness, that I should grant the extension. The new inquiry date was set for June 9, 1998.

3. Issue under review and the burden of proof

The issue under review in this inquiry is whether the search for the requested records conducted by ICBC complied with the requirements of section 6 of the Act, and whether ICBC was required under section 6 of the Act to create a record responsive to the applicant's request.

Section 6 of the Act states:

Duty to assist applicants

- 6(1) The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.
- (2) Moreover, the head of a public body must create a record for an applicant if
 - (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
 - (b) creating the record would not unreasonably interfere with the operations of the public body.

Section 57 of the Act, which establishes the burden of proof on parties in an inquiry, is silent with respect to a request for review about the issue of adequate search. I decided in Order No. 103-1996, May 23, 1996, that the burden of proof is on the public body in such circumstances.

Section 57 of the Act is also silent with respect to a request for review about the duty to create a record under section 6 of the Act. I decided in Order No. 106-1996, May 28, 1996, that the burden of proof is on the public body in these circumstances.

4. The records in dispute

The records in dispute consist of payment information for legal services provided to ICBC by a list of specified firms, between the years 1983 and 1988, a “list identifying any law firms which were employed by ICBC to defend any private actions put forth by an Auto Body shop in B. C.,” and billing records related to these firms.

5. The applicant’s case

My understanding of the applicant’s submission is that he has a history of litigation with ICBC; he implies as well that he was falsely accused of threatening an ICBC employee with physical harm. The applicant now appears to be interested in obtaining records of the relationship between ICBC and certain law firms that will allow him to establish bias. He refers to his interest in such matters as “research.” The applicant also seems to allege that there is some kind of collusion between and among auto body shops in this province and ICBC employees about the exchange of pricing and payment information.

The applicant’s position is that he is acting in the public interest by demanding access to certain ICBC records. Their disclosure, in his view, cannot possibly interfere with the operations of the public body.

6. The Insurance Corporation of British Columbia’s case

I have discussed below ICBC’s submissions on the application of specific sections of the Act.

7. Discussion

Section 6(1): The Duty to Assist an Applicant

I accept the submission of ICBC that I have established a standard of “reasonable effort” in order to comply with this section of the Act. (Submission of ICBC, paragraph 4.3) See Order No. 236-1998, May 15, 1998; and Order No. 110-1996, June 5, 1996.

ICBC has given me and the applicant a detailed accounting of its reasonable efforts, in the circumstances of this particular request, to find the requested records. This submission is supported by affidavit evidence. (Submission of ICBC, paragraphs 4.5 to 4.8 and an *in camera* affidavit of an ICBC employee)

ICBC has disclosed to the applicant records indicating the aggregate payments made to law firms from 1988 to 1996 inclusive. Records of payments to law firms for the period 1983 to 1987 are not available, because ICBC was not required by law to maintain such records. In fact, such records do not exist. (Submission of ICBC, paragraph 4.6)

ICBC also does not have records that list law firms employed by ICBC to defend private actions brought by auto body repair shops against ICBC. However, in order to assist the applicant, it has disclosed references for two such private actions that have occurred. (Submission of ICBC, paragraph 4.7) ICBC also disclosed some records that apply internally with respect to conflict-of-interest matters. (Submission of ICBC, paragraph 4.8)

Section 6(2): The Duty to Create a Record

ICBC's submission is that this subsection does not "require a public body to answer questions by gathering information - or creating information - and then recording it in physical form for release to an applicant." (Submission of ICBC, paragraph 4.9) When it searched its machine-readable records for payments to law firms, it located none. (Submission of ICBC, paragraph 4.10)

I find that ICBC and its employees have acted diligently and reasonably to meet their obligations under section 6 of the Act.

8. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an Order under this section. I find that the search for records conducted by the Insurance Corporation of British Columbia in this case was a reasonable effort within the meaning of section 6(1) of the Act. I also find that the Insurance Corporation of British Columbia was not required under section 6(2) to create a record responsive to the applicant's request.

Under section 58(3)(a) of the Act, I require the Insurance Corporation of British Columbia to perform its duty under section 6(1) to make every reasonable effort to assist the applicant. However, since I have found that the search for records conducted was reasonable, I find that the Insurance Corporation of British Columbia has complied with this Order and discharged its duty under section 6(1) of the Act.

David H. Flaherty
Commissioner

July 20, 1998