

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 292-1999
February 15, 1999**

INQUIRY RE: A decision by the Insurance Corporation of British Columbia to withhold records from an applicant and the duty of ICBC to respond to the applicant accurately and without delay

**Fourth Floor
1675 Douglas Street
Victoria, B.C. V8V 1X4
Telephone: 250-387-5629
Facsimile: 250-387-1696
Web Site: <http://www.oipcbc.org>**

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 October 26, 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 response given by the Insurance Corporation of British Columbia (ICBC) to an applicant concerning records relating to his claim file.⁴

2. Documentation of the inquiry process

On March 17, 1998 the applicant submitted a request for records under the Act to ICBC. The applicant asked for records relating to his claim file, including a police report, statements given by claimants and witnesses, transcripts of telephone conversations, damage reports, letters from police to ICBC, and notes of Claim Centre employees.

On June 12, 1998 ICBC responded by disclosing certain records responsive to the applicant's request and by severing and withholding other records under sections 14, 16, 17, and 22 of the Act. On June 30, 1998 the applicant submitted a request to this Office for a review of ICBC's decision. The applicant also expressed dissatisfaction with the length of time ICBC took to respond.

On September 23, 1998 ICBC released additional records to the applicant. The applicant wishes to receive a one-page record that ICBC continues to withhold under sections 14, 16, and 17 of the Act, and also questions the adequacy of ICBC's search for another record.

The original ninety-day deadline for this review was extended with the consent of the parties from October 5, 1998 to October 19, 1998 and a second time to October 26, 1998.

3. Issues under review and the burden of proof

The first issue before me is whether ICBC correctly applied sections 14, 16, and 17 of the Act to the withheld record.

The second issue before me is whether ICBC complied with its duty to assist under section 6 of the Act by responding to the applicant without delay and in a manner that was open, accurate, and complete. The applicant alleges that ICBC failed in its duty in two respects: first, that the amount of time taken by ICBC to respond to his request was excessive; and, second, that ICBC failed to locate records known by the applicant to exist in his file.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1) of the Act, where access to information in the record has been refused under sections 14, 16, and 17, it is up to the public body, in this case ICBC, to prove that the applicant has no right of access to the record or part of the record.

Section 57 of the Act is silent with respect to a request for review about the duty to assist under section 6(1). For reasons expressed in my Order No. 110-1996, June 5, 1996, I find that the burden of proof in these circumstances is on the public body.

The relevant sections of the Act are as follows:

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.

Time limit for responding

7. The head of a public body must respond not later than 30 days after a request is received unless
- (a) the time limit is extended under section 10, or
 - (b) the request has been transferred under section 11 to another public body.

Legal advice

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

Disclosure harmful to intergovernmental relations or negotiations

- 16(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

...

- (b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies, or

....

Disclosure harmful to the financial or economic interests of a public body

- 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

- (e) information about negotiations carried on by or for a public body or the government of British Columbia.

4. The record in dispute

The record in dispute consists of one page of internal Claims Work Management System notes created by ICBC employees.

5. Procedural objections

The applicant objects to my receiving and considering ICBC's initial submission in this inquiry, because parts of its submission were as much as two hours late in reaching my Office. The deadline for receiving submissions was 12:00 noon on Friday, October 16, 1998. ICBC called my Office before noon on that day to say that it had sent its submission by fax. The transmission records indicate that the submission arrived at 11:37. Due to transmission problems, several pages had to be faxed again and were received at 12:26 and 13:57 respectively. The applicant was not prejudiced in any way by this slight delay.

In light of these circumstances, I find the applicant's objections to be without merit.

6. The applicant's case

The applicant was involved in a motor vehicle accident which involved damage to an RCMP vehicle, and he subsequently asked ICBC for various records pertaining to the event. He is concerned that ICBC took approximately three months to disclose the initial batch of requested records to him, which disadvantaged him in his efforts to settle his case with the RCMP. He also alleges that ICBC has failed in its duty to him under section 6 of the Act by not disclosing his initial letter to ICBC dated November 16, 1997.

The applicant further contests ICBC's application of sections 14, 16, and 17 of the Act to the one-page record that it has not disclosed to him in full or in a severed or summary form. I have discussed below his submissions on the application of specific sections of the Act.

7. The Insurance Corporation of British Columbia's case

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

8. Discussion

With respect to the discussion that follows, I note that ICBC has fully and accurately described for the applicant the contents of the one-page record in dispute. (Submission of ICBC, paragraph 28)

Section 14: Solicitor client privilege

The applicant submits that this section does not apply to the entire record in dispute, because the RCMP is not in a solicitor-client relationship with ICBC.

ICBC has provided the applicant and me with a lengthy analysis of why solicitor-client privilege applies to the record in dispute. (Submission of ICBC, paragraphs 27-50) Having carefully reviewed the record in dispute and the submissions of the public body, I am satisfied that the information in it is clearly information collected in contemplation of litigation and that the "results of case law research" were prepared for the same purpose. I therefore find that ICBC properly applied section 14 of the Act to the record in dispute.

Section 16(1)(b): Disclosure harmful to intergovernmental relations or negotiations

Section 17(1)(e): Disclosure harmful to the financial or economic interests of a public body

ICBC also relies on sections 16 and 17 of the Act to justify withholding the record in dispute. Because I am of the view that section 14 clearly applies to that record, it is unnecessary for me to consider the application of sections 16 and 17 of the Act.

Section 6: Duty to assist the applicant

As I indicated, the applicant says that ICBC failed to comply with its duty to assist him in two ways. First, he says ICBC failed to respond to his request within a reasonable time. Second, he says that ICBC failed to locate a letter dated November 16, 1997 that he sent to ICBC by both fax and mail and which described his position with regard to an accident.

Excessive delay in responding to the applicant's request

After receiving the applicant's request, ICBC informed him that there might be delays in the processing of his request. Its explanations for the actual delay include "a 26% higher volume of requests, a significant backlog of requests, the personal and medical leave of the information officer assigned to process [the applicant's] request, and the fact that three other information officer positions were not filled at the time...." (Submission of ICBC, paragraph 14) ICBC had only four of eight trained staff available at that time to process requests. Eventually, the acting manager processed the request himself within a three-day period.

At the time that the information officer processing this request went on medical leave, he had had the records in dispute for about five weeks, but he was also processing fifty-nine other requests. (Affidavit of Mark Francis, paragraphs 7, 9) The applicant was not notified of ICBC's extension of time limits, although informed in the initial letter of acknowledgment that he would be. In fact, the reasons for the delay in responding are not in accordance with what section 7 of the Act permits. But the applicant was told on March 20, 1998 that, due to the high volume of requests to ICBC, "we find we are not always able to meet the timelines set out in the Act. We do the best we can and to be fair to all applicants, we process the requests in order of receipt; however, sometimes our responses are late. Please feel free to call me... if you have any concerns or questions about the process or wish to know more about your rights under the Act."

ICBC does not discuss its average processing times during this period. It also does not mention notifying applicants that there would be still further delay once its officer went on leave, nor does it adequately describe what steps it took to integrate his work into that of the remaining officers.

ICBC acknowledged that the delay was unacceptable but states that it is taking steps to ensure that delays encountered by this applicant and others are not repeated. These include:

- expanded routine release of vehicle damage reports;
- routine disclosure of selected information not subject to privilege where the dispute is over the assessment of liability;
- applying for extensions of time limits under Section 10 of the Act; and
- staffing up the Information and Privacy Department. (Submission of ICBC, paragraph 19, pp. 3-4)

As an aside, it is useful to note that I have been concerned, in general, about time delays at ICBC in responding to requests for access to information and have discussed this issue with its president and senior officials who oversee the Information and Privacy Department. At the request of my Office, ICBC conducted an internal investigation into factors contributing to the delays in responding. In October 1998, I received a full report of the findings of the investigation, and an outline of the remedial actions ICBC proposed to take to reduce the backlog of requests and to eliminate similar delays in future. At a follow-up meeting in December 1998, I received further assurances that the problems now evident in this inquiry would be addressed.

While ICBC did not respond to the applicant's request for information in accordance with the provisions of section 7 of the Act, I find that, based on all of the information put before me by the parties, it has provided a reasonable explanation for its delay and has made reasonable efforts to assist this applicant for purposes of section 6 of the Act. I also find that ICBC is currently taking appropriate steps to expedite and streamline its information and privacy request processes in order to ensure that requests are dealt with in a more timely manner.

Failure to locate a letter

The applicant also says that ICBC failed to discharge its duty to assist him because, despite ICBC's searches at several times in several places, it was not able to locate the applicant's letter to ICBC dated November 16, 1997, which the applicant states he faxed and mailed to ICBC. ICBC notes that he had written the missing letter to ICBC and therefore presumably has a copy of what he sent. He also received a summary of the missing letter, which was entered on ICBC's system two days after its receipt. Claims Centre staff have also been in touch with the applicant regularly about his concerns and ICBC's responses to them. (Submission of ICBC, paragraphs 20 to 26)

I am satisfied on the evidence that ICBC's search was adequate and that it made every reasonable effort to locate the letter. However, its inability to find the fax or original copy of the applicant's initial letter does bring into question the adequacy of ICBC's record retention policies. In any event, because the letter in question was written by the applicant, he has not been prejudiced by ICBC's inability to locate this record.

9. Order

I find that, while the delay in responding to this applicant's access request was considerable, in all of the circumstances, ICBC made every reasonable effort to respond to the applicant for the purposes of section 6 of the Act. I also find that, with respect to the letter that it could not locate, ICBC made an adequate search for that record. I therefore find that ICBC met its duty to assist this applicant under section 6 of the Act.

I also find that ICBC was authorized to withhold the record in dispute under section 14 of the Act. I therefore confirm the decision of ICBC to refuse access to the information in this record pursuant to section 58(2)(b) of the Act.

David H. Flaherty
Commissioner

February 15, 1999