OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 01-41

# INSURANCE CORPORATION OF BRITISH COLUMBIA

David Loukidelis, Information and Privacy Commissioner
September 18, 2001

Quicklaw Cite: [2001] B.C.I.P.C.D. No. 42
Document URL: http://www.oipcbc.org/orders/Order01-41.html
Office URL: http://www.oipcbc.org
ISSN 1198-6182

**Summary:** Applicant requested records related to communications regarding a legal action between himself, on his son's behalf, and ICBC. ICBC disclosed records but applicant not satisfied with ICBC's search. ICBC searched again, disclosed more records and withheld others under s. 14. ICBC found to have misinterpreted request and to have failed to conduct a proper search. ICBC found to have later rectified its failure to interpret the request reasonably, but some records it found and considered still out of scope were in fact subject to the request. ICBC ordered to process additional responsive records. ICBC also found to have withheld records properly under s. 14.

**Key Words:** duty to assist – every reasonable effort – search for records – interpretation of request – solicitor client privilege – litigation privilege.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 2(2), 6(1), 14.

**Authorities Considered: B.C.:** Order No. 328-1999, [1999] B.C.I.P.C.D. No. 41; Order 00-07, [2000] B.C.I.P.C.D. No. 7; Order 00-08, [2000] B.C.I.P.C.D. No. 8; Order 00-15, [2000] B.C.I.P.C.D. No. 18; Order 00-32, [2000] B.C.I.P.C.D. No. 35; Order 00-42, [2000] B.C.I.P.C.D. No. 46.

**Cases Considered:** *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.); *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.).

## 1.0 INTRODUCTION

[1] This case originates in a 1995 hit and run accident involving the applicant's two sons. The public body in this case, the Insurance Corporation of British Columbia ("ICBC"), has a claim file for the claims by the applicant's younger son regarding

disability and medical benefits for injuries arising from the accident. In addition, the applicant launched two British Columbia Supreme Court actions in 1997 – one against ICBC, for medical and disability benefits under the *Insurance (Motor Vehicle) Act*, and the other against the driver of the car, for damages for personal injury allegedly caused to the younger son.

[2] According to ICBC, the actions are still underway. As part of its work on those actions, in 1999 ICBC applied for and obtained a court order for production of the son's school, counselling and medical records from two schools, six doctors, a counsellor and the Medical Services Plan ("MSP") of British Columbia. ICBC later received copies of these records.

[3] In April of 2000, the applicant made a request under the *Freedom of Information and Protection of Privacy Act* ("Act") to ICBC for (1) records related to communications between ICBC, or its lawyers (he named two), and the son's own lawyer in connection with one of the Supreme Court actions and (2) any records related to communications about the applicant's son between ICBC, or its lawyers (the same two), and two schools, six doctors, a counsellor and MSP. He expressly added that, by "records" he meant "letters, e-mail, memos, notes of telephone conversations, desk diary notes, reports, and the like."

[4] ICBC responded in July of 2000 by providing the applicant with copies of what it considered to be the relevant records from the claim file. The applicant requested a review of this response, as he believed that there were further relevant records. During mediation, ICBC conducted a further search for records and, in September 2000, sent the applicant a letter saying that any further records it had located were in its defence counsel's files and that it was withholding them under ss. 14 and 17 of the Act. Because the matter did not settle during mediation, I held an inquiry under s. 56 of the Act.

[5] On the eve of the inquiry, ICBC conducted another search and disclosed another set of records to the applicant. It told him that it was withholding other records under s. 14 of the Act.

## 2.0 ISSUES

[6] ICBC says in its initial submission that it withdraws its reliance on s. 17. The issues before me in this inquiry therefore are as follows:

1. Did ICBC comply with its s. 6(1) obligation to respond openly, accurately and completely to the applicant's request?

2. Was ICBC authorized by s. 14 to refuse to disclose information to the applicant?

[7] Under s. 57(1) of the Act, ICBC bears the burden of proof with respect to s. 14. In keeping with previous orders, ICBC also has the burden of proof regarding s. 6(1) of the Act.

## 3.0 DISCUSSION

[8] **3.1 Mediation Material** – Both parties sought to have me consider material which was clearly related to the process of mediation by this Office of the s. 6(1) issue. I have not considered any of this material, except that I have taken into account the applicant's intimation of what other records he wanted, which in turn assisted ICBC in its searches.

[9] **3.2 Did ICBC Fulfill Its Section 6(1) Duty** – The first question is whether ICBC complied with its obligation under s. 6(1) of the Act to make every reasonable effort to assist the applicant in responding to his request.

***What Are the Search Standards?***

[10] Section 6(1) requires a public body to

> … make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[11] ICBC notes that I have said, in various orders dealing with the adequacy of a public body's search for records under s. 6(1), that the section requires a public body to undertake a thorough and comprehensive search and to explore all avenues in attempting to comply with its obligations under that section, while acknowledging that the Act does not impose a standard of perfection. ICBC also points out that I have said I expect a public body to describe in reasonable detail all sources of records it has searched, to give reasons for decisions not to explore potential sources of records and to describe its efforts in searching for the records, including where it searched and how much time staff spent searching (paras. 4-6, initial submission). See, for example, Order 00-15, [2000] B.C.I.P.C.D. No. 18, and Order 00-32, [2000] B.C.I.P.C.D. No. 35.

[12] ICBC also refers to Order 00-42, [2000] B.C.I.P.C.D. No. 46, where I said that a public body can, through its subsequent efforts to respond to an applicant's request, cure initial good-faith oversights. ICBC says that in Order 00-42 I found that, while ICBC had initially failed to respond completely to the applicant's requests, it had ultimately cured its initial oversights, such that it fulfilled its s. 6(1) duty to the applicant (para. 7, initial submission).

[13] ICBC is correct that I found in Order 00-42 that it had ultimately fulfilled its duty under s. 6(1). However, as I stressed at the beginning of the s. 6(1) search discussion in that case, the issue before me was whether ICBC had fulfilled its duty at the time of its initial response. In Order 00-42, the fact that ICBC cured its failure through its later searches merely meant that there was no reason to order it to search again. As I discuss below, I have arrived at a similar conclusion in this case, regarding one aspect of the s. 6(1) issue, at any rate.

### *ICBC's Search*

[14] ICBC described its various search efforts and its interpretation of the applicant's request in paras. 8-59 of its initial submission, supported by affidavit evidence from those involved. ICBC said it originally interpreted the applicant's request to cover correspondence between ICBC, or its defence counsel, and the other parties, but only if located in ICBC's claim file. ICBC says it thought it need not search its lawyer's file because it assumed that the applicant had access, through his own lawyer, to communications between his lawyer and ICBC and ICBC's lawyers. ICBC also assumed that the applicant could obtain any other records he needed through British Columbia Supreme Court procedures for production of documents.

[15] ICBC determined during mediation, however, that the applicant wanted more than this correspondence. It understood the applicant also to want records related to verbal communications and records which would be in ICBC's defence counsel's file. It also seemed likely to ICBC that the applicant did not have access to his lawyer's file in order to obtain copies of correspondence between his (now former) lawyer and others. ICBC therefore reviewed its outside counsel's file and, in late September 2000, sent a letter to the applicant saying it was denying access to records in that file under ss. 14 and 17 of the Act. ICBC later reviewed the claim file once more and also arranged for other outside counsel to review both this file and ICBC's lawyer's file for relevant documents. ICBC then wrote to the applicant in late October 2000 and told him that it was releasing some records and refusing access to other records under s. 14 of the Act. The outside legal counsel spent 25 hours carrying out her search for responsive records.

[16] ICBC also explained its later searches to me and how it broadened its interpretation of the request to include more than correspondence about the younger son between itself, or two of its defence counsel, and the other parties. ICBC said that it now considered the applicant to be requesting all records related to communications, written or verbal, about the applicant's younger son, between ICBC or two of its defence counsel and the various other parties, including records enclosed in or referred to in written correspondence, records referred to in notes of verbal communications or records which referred to written or verbal communications.

[17] Examples of records in this broader class include: letters from ICBC and its defence lawyers enclosing correspondence between themselves and the other parties; pleadings; court material; court orders; clinical, medical and school records attached to correspondence between its defence counsel and the other parties; and computer notes of ICBC adjusters and employees. ICBC says that its outside counsel located all records of communications between the two named defence counsel, or ICBC, and the third parties noted in the applicant's request, including records related to such communications. It says it considered to be outside the request's scope any records that were not written correspondence between ICBC or its defence counsel and the third parties, that were not enclosed or referred to in such correspondence, that were not referred to in notes regarding verbal communications between ICBC, its defence counsel and the third parties and that did not refer to such written or verbal communications.

[18] ICBC argues that its search was reasonable, thorough and comprehensive. ICBC also says it interpreted the applicant's request in a reasonable manner and that it was entitled to rely on the plain meaning of the request. It argues further that it was reasonable for it to have assumed that the applicant could obtain from his own legal counsel the communications between ICBC or its defence counsel and his own counsel or the other third parties and to assume that he could obtain other records through Supreme Court procedures. ICBC also argues that it was reasonable for it to consider s. 2(2) the Act, which states that the Act does not replace other procedures for access to information.

[19] It also says it thought that its defence counsel's file would be entirely subject to solicitor client privilege and that disclosure would harm its negotiations in the legal actions. (It acknowledges that it later determined solicitor client privilege did not cover all of the records in its defence counsel's file.) ICBC says that this all means it was reasonable for it not to have searched its defence counsel's file in the first place.

[20] The applicant's initial submission on s. 6(1) deals largely with matters not in issue in this inquiry, including numerous allegations of improprieties on the part of ICBC employees or lawyers and staff in my office. No foundation is offered for such allegations and, although they are not in issue before me and are thus technically irrelevant, I reject them.

[21] In para. 14 of his initial submission, however, the applicant says most of the records ICBC provided to him dealt, not with the court action he had specified in his request, but with the other court action. ICBC suggests in its own initial submission that, in providing records related to both court actions and not the one the applicant had specified, it had given the applicant more records than he had requested (although it admitted that it had provided records in both court actions because the correspondence did not distinguish between the two). In its view, this shows that ICBC was not acting in bad faith in essentially narrowing the scope of the request from its plain meaning. I have reviewed the records in this case, as well as ICBC's evidence on the point, and find that ICBC's explanation for providing records related to both court actions is reasonable.

[22] The applicant also appears to suggest, at the end of his initial submission, that two other records ought to have been produced. The first is a response to a September 1999 letter from his lawyer to ICBC's lawyer and the second is what the applicant calls a clinical report attached to a fax cover sheet sent to an ICBC employee by one of the other parties. ICBC responds to the first issue by saying that its lawyer responded directly to the applicant in a letter of October 2000. ICBC responds to the second issue by saying that there was no clinical report attached to a fax cover sheet, although it believes there was a letter attached to the fax cover sheet. It has already provided the applicant with that letter, along with other letters likely attached to the same fax cover sheet. It backs this up with evidence. ICBC's explanation is reasonable and I accept it.

***Did ICBC Interpret the Request Reasonably?***

[23] It is important to determine whether ICBC's interpretation of the applicant's request was reasonable, as part of its overall s. 6(1) duty to assist the applicant, because the issue of whether it adequately searched for records cannot be addressed without considering that question. A public body's interpretation of an access request will determine the nature and scope of its search for records. The evidence in this case amply supports the conclusion that ICBC's initial searches for records were driven by its interpretation of the applicant's request.

[24] In his request, the applicant expressly defined what he meant by "records", *i.e.*, "letters, e-mail, memos, notes of telephone conversations, desk diary notes, reports, and the like." In the face of such specific details of what the applicant wanted, and given that ICBC knows its counsel maintain a file separate from ICBC's claim file, it is not clear to me how or why ICBC restricted its interpretation of the request to certain written correspondence only and then only such records located in the claim file, not counsel's file.

[25] Moreover, contrary to what ICBC appears to suggest, s. 2(2) does not relieve public bodies of the responsibility to search all possible files and retrieve all relevant records, even where other avenues to obtain records are available to an applicant. As I said in Order 00-07, [2000] B.C.I.P.C.D. No. 7, regarding a similar situation, a public body cannot turn s. 2(2) on its head and fail or refuse to perform its duty under the Act to search for records because it believes an applicant may have other sources for them. That approach may be desirable in some cases, as a practical matter, but instead of failing to search or respond, the public body should contact the applicant to clarify the request, including to find out whether the applicant can get some or all of the same records elsewhere. If the applicant, nonetheless, insists on pursuing the request, the public body must comply.

[26] It must be said, in ICBC's defence, that the applicant in this case apparently was not open to discussing what he found deficient in ICBC's initial interpretation and search. He may, understandably, have considered that the wording of his request sufficed. It is unfortunate, though, that he was not more forthcoming during this phase, since his assistance might have avoided some unnecessary confusion, during the request and review processes, about what the applicant was after. As I said in Order No. 328-1999, [1999] B.C.I.P.C.D. No. 41, applicants have no legal duty to assist public bodies in the same way that public bodies have to assist applicants, but it is in an applicant's best interest to co-operate with a public body in clarifying the scope of a request and the types of records he or she wants.

[27] In this case, after what, it has to be said, was an unjustifiably narrow interpretation of the applicant's explicit request, ICBC appropriately broadened its interpretation of the request. Its later interpretation of the applicant's request led ICBC to retrieve more relevant records – it acknowledged that its counsel's file contained relevant records (which it conceded were not entirely covered by solicitor client privilege). If

ICBC had not already decided to search this file for relevant records, I would have had no hesitation in ordering it to do so.

[28] Based on ICBC's submissions and the wording of the applicant's request, I find that ICBC initially did not interpret the request in a reasonable manner. Its interpretation did not accord with the plain language of the request. I therefore find that ICBC as a result initially failed to conduct an adequate search for responsive records. In my view, however, ICBC later interpreted the request in a reasonable manner when it reconsidered the request's scope and it conducted an adequate search for records.

[29] I have, however, decided, based on my review of the records, that a number of records ICBC found, and says are outside the scope of the request, in fact respond to the request. I refer here to records 62, 65, 68, 72, 73, 75, 98, 99, 122, 142, 143, 148, 151, 154, 156, 158, 159, 176, 178, 179, 189, 233, 887, 888, 892, 909, 910, 924, 932, 933, 939, 958, 962, 974, 975, 1118, 1152, 1182 ("Other Records"). ICBC found those records, but incorrectly excluded them from the scope of the applicant's request. I am therefore driven to the finding that ICBC has not, ultimately, completely rectified its initial failure to respond completely, as required by s. 6(1). I deal further below with the Other Records in light of my conclusion – which I reached without difficulty – that the records are in any case privileged under s. 14.

[30] **3.3 Are the Disputed Records Privileged?** – Section 14 provides that a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege". It is well established that s. 14 of the Act protects both branches of privilege recognized under the common law of solicitor client privilege. The two branches of privilege are legal professional privilege (certain confidential communications between solicitor and client) and litigation privilege (certain communications that come into existence for the dominant purpose of existing or contemplated litigation). ICBC relies on both kinds of privilege to withhold 54 records under s. 14. It says that, after accounting for duplicates or near-duplicates of records (*e.g.*, signed and unsigned versions of a letter), it actually withheld only 16 records.

[31] The applicant failed, either in his initial submission or in any of his numerous letters that followed, to address the merits of ICBC's application of s. 14. He did, however, claim in one of his letters – apparently referring to ICBC's initial submission and a letter it sent to him – that ICBC was purporting to rely on s. 14 for the first time in the inquiry. He said ICBC should not be allowed to rely on s. 14. He argued that s. 14 was therefore not properly before me and asked that I not allow ICBC to rely on it. I note, however, that ICBC clearly informed the applicant, in a letter of September 27, 2000, that it was applying ss. 14 and 17 to relevant records in its lawyers' files. Section 14 was, therefore, in issue well before this inquiry began and I decline to do as the applicant asks.

***Legal Professional Privilege***

[32] ICBC claims legal professional privilege protects 51 of the 54 records to which it applied s. 14. It says all of these records are correspondence between ICBC and its outside defence counsel. ICBC argues that these 51 records are protected because they meet all of the following criteria, which I summarized in Order 00-08, [2000] B.C.I.P.C.D. No. 8:

- there must be a written or oral communication,
- the communication must be of a confidential character,
- the communication must be between a client (or her or his agent) and a legal advisor, and
- the communication must be directly relating to the seeking, formulating or giving of legal advice.

[33] See, also, *B.* v. *Canada*, [1995] 5 W.W.R. 374 (B.C.S.C.). In support of this argument, ICBC relies on two affidavits sworn by lawyers of the firm that ICBC retained to represent it in the legal actions. In them, the lawyers deposed that their firm was retained by ICBC to assume conduct of ICBC's defence in the two legal actions by the applicant and that all records were created after litigation commenced. They deposed that they reported to and received instructions from ICBC, through whichever insurance adjuster ICBC assigned to the claim from time to time.

[34] The lawyers deposed that the records were letters from them to ICBC claims adjusters who had conduct of the claim at various times and that these letters were sent for the purposes of seeking instructions from their client, to give legal advice and opinions to their client and for the proper conduct of the litigation. Each of these letters, they deposed, was written in confidence to their client. I have reviewed the 51 records described above and ICBC's affidavit evidence. I find that each them is privileged and therefore protected under s. 14.

***Litigation Privilege***

[35] ICBC quotes, at para. 43 of its initial submission, the following passage from Order 00-08, [2000] B.C.I.P.C.D. No. 8, at p. 20:

> Canadian law will protect a communication from disclosure if it is a communication between a client, or his or her lawyer, and a third party and the dominant purpose for which the communication came into existence was to prepare for, advise upon or conduct litigation that was under way or in reasonable prospect at the time the communication was created. See, for example, chapter 2 of Manes, above. As is noted above, this privilege, known as litigation privilege, is incorporated in section 14 of the Act.

[36] Citing *Hamalainen (Committee of)* v. *Sippola* (1991), 62 B.C.L.R. (2d) 254 (C.A.), ICBC sets out, at para. 44 of its initial submission, the test for determining if a communication is protected by contemplated litigation privilege, as follows:

- was litigation in reasonable prospect at the time the document was produced? and,
- if so, what was the dominant purpose for its production?

[37] As regards the first criterion, this privilege can also apply, of course, if litigation was actually under way at the time the record came into existence. Similarly, as regards the second, the dominant purpose for production of the record must have been to assist or advise on the conduct of litigation.

[38] In this case, ICBC said all three of the records over which it claims litigation privilege were created after the litigation began and says the dominant purpose of their creation was to prepare for or conduct litigation. ICBC also provided affidavit evidence sworn by one of its defence counsel and by two adjusters assigned to the claim file. The lawyer deposed that one, record 16, was a handwritten note from himself to his assistant, instructing her to draft a letter to the applicant's lawyer regarding the settlement of the legal actions and the scheduling of examinations for discovery. Its only purpose was for the conduct of the litigation.

[39] The two adjusters deposed that they gave instructions to and sought advice from whichever lawyer had conduct of the litigation and that they created the two other records – computerized notations 873 and 874 – for the purposes of the litigation. In one record, an adjuster provides instructions to her assistant, with a view to obtaining legal advice from outside legal counsel for the conduct of the litigation. The other note records the other adjuster's conversation with the applicant's lawyer, and her subsequent discussions with ICBC's outside legal counsel regarding that conversation, done for the purpose of seeking legal advice for the conduct of the litigation.

[40] Having considered ICBC's affidavit evidence, and having reviewed the three records, I am satisfied that they are all are protected by litigation privilege and are therefore excepted from disclosure under s. 14 of the Act.

[41] For the reasons given above, I find that ICBC is authorized by s. 14 of the Act to refuse to disclose the 54 records in question. As I indicated above, it is clear that the Other Records are, based on ICBC's evidence and submissions and the records' contents, also protected by litigation privilege. They are therefore protected under s. 14 of the Act. ICBC has not, technically, made a decision on these records in response to the applicant's request. Because s. 14 is discretionary, it is not appropriate for me to assume that, because it has declined to waive the section in relation to the records in dispute, ICBC will decline to waive the benefit of that section in relation to the Other Records.
I will therefore have to order ICBC to consider the applicant's request in relation to the Other Records and to make a decision about them.

## 4.0 CONCLUSION

[42] For the reasons given above, I make the following orders:

1. Under s. 58(3)(a) of the Act, I require ICBC to perform its duty under ss. 6(1) and 8 of the Act by considering the applicant's request in relation to the Other Records and by making a decision on the applicant's request for access to them. As a condition under s. 58(4) of the Act, I require ICBC to respond to the applicant within 30 days after the date of this order.

2. Under s. 58(2)(b) of the Act, I confirm ICBC's decision that it is authorized by s. 14 of the Act to refuse access to the records it withheld under that section.

Because I have found that, with the exception of its failure to respond to the applicant's access request as regards the Other Records, ICBC has cured its initial failure to fulfill its duty under s. 6(1) of the Act, no further order is necessary in that regard.

September 18, 2001

**ORIGINAL SIGNED BY**

David Loukidelis
Information and Privacy Commissioner
for British Columbia