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

Order 02-06

INSURANCE CORPORATION OF BRITISH COLUBMIA

David Loukidelis, Information and Privacy Commissioner
January 31, 2002

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Summary: The applicant requested particulars of investment securities held, bought and sold by ICBC, including transaction-specific information. ICBC refused, under s. 17(1), to disclose any responsive information on the basis that it would reveal details of its investment strategy that could harm its financial interests, lead to undue loss to it and undue gain to its competitors. ICBC later disclosed a security-specific summary of its investment holdings (without transaction details) as at June 30, 2001, and established a policy of disclosing of such a 'snapshot' every June 30 and December 31, six months in arrears. Section 17(1) does not authorize ICBC to indefinitely withhold all information relating to securities held, bought or sold for its investment portfolio. The risk of harm to ICBC's financial interests, by others copying or otherwise unfairly acting on the basis of, its investment strategies must be established by evidence. Risk of this happening can generally be expected to both diminish with the passage of time and be affected by the level of detail and the reporting period involved. The applicant sought to establish an entitlement approaching real time disclosure of ICBC's transaction specific information. ICBC has tendered sufficient evidence to establish that disclosure of such information – depending on the particular securities, investment strategies, market conditions and other factors involved – could reasonably be expected to harm its interests under s. 17(1)(d). ICBC was authorized under s. 17(1)(d) to refuse further disclosure, except for biannual 'snapshot' investment portfolio summaries (without transaction details) for June 30 and December 31, 1999 and June 30, 2000. Disclosure of the requested information is not required in the public interest under s. 25(1)(b).

Key Words: commercial or financial information – trade secret – monetary value – reasonable expectation of harm.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 17(1)(a), (b) and (d), 25(1)(b), 58.

Authorities Considered: B.C.: Order No. 15-1994, [1994] B.C.I.P.C.D. No. 18; Order No. 285-1998, [1998] B.C.I.P.C.D. No. 80; Order 00-37, [2000] B.C.I.P.C.D. No. 40;

Order 01-20, [2001] B.C.I.P.C.D. No. 21. **Ontario:** Order P-1210, [1996] O.I.P.C. No. 239.

1.0 INTRODUCTION

[1] On September 19, 2000, the applicant, who is a journalist, requested access, under the *Freedom of Information and Protection of Privacy Act* ("Act"), to records respecting the "investment holdings and transactions since January 1, 1999" of the Insurance Corporation of British Columbia ("ICBC"). The applicant specified that he "would like records of the numbers of shares held, bought and sold in each company".

[2] On October 20, 2000, ICBC refused to disclose the requested information, responding in the following terms:

> It is not appropriate to release the details relating to specific purchases and sales of stocks and bonds, as the investment strategy is an essential part of the Corporation's competitive strategy. Accordingly, these records are protected from disclosure by section 17 of the *Freedom of Information and Protection of Privacy Act*, as their disclosure would harm the competitive interests of ICBC.

[3] The applicant requested a review, under s. 53 of the Act, of ICBC's decision. During mediation, ICBC disclosed to the applicant records that related to its investment activities but were not directly responsive to his access request, including a heavily severed document entitled "Statement of Investment Policies and Procedures, June 15, 2000". It appears that the information severed from this record related to specific investment parameters or strategies of ICBC. Since the issue of the applicant's request for transaction specific information from January 1, 1999 to September 19, 2000 did not settle, a written inquiry proceeded under s. 56 of the Act.

2.0 ISSUES

[4] The issues addressed by the parties in this inquiry are as follows:

1. Is ICBC required by s. 25(1)(b) of the Act to disclose the requested information to the public without delay?

2. Is ICBC authorized by s. 17(1) of the Act to refuse to disclose the requested information to the applicant?

[5] Previous orders have established that the burden lies on the applicant to demonstrate that public interest disclosure is required under s. 25(1)(b). Under s. 57(1) of the Act, ICBC has the burden of establishing that s. 17(1) authorizes it to refuse disclosure of the information.

[6] The applicant also asked me to deal with his request for a fee waiver, even though ICBC had not yet made a decision on that request. In my view, it would not be appropriate for me to attempt to address an applicant's request for a fee waiver where the public body has yet to make a decision on the request.

3.0 DISCUSSION

[7] **3.1 ICBC's Information Disclosure After the Inquiry –** After the close of submissions in the inquiry, on November 9, 2001, ICBC released to the applicant a report, called an "Investment Portfolio Summary", containing some specific information about its investment holdings as at June 30, 2001. The report disclosed the issuers of securities held by ICBC, the class or type of each security held (*e.g.*, common shares), the number or par values of each security held, bond maturity date, bond interest rates, mortgage interest rates and maturity dates, and the market value of each holding. The report covered all internally and externally managed ICBC investment holdings. It also grouped securities by types, as appropriate, and further by sector (*e.g.*, industrial products shares and transportation shares) and by market (*e.g.*, Canadian bonds or Euro bonds).

[8] In a letter dated November 16, 2001, ICBC said the following:

> This disclosure followed a decision made by ICBC's executive, in consultation with the Minister responsible for ICBC, to make this information publicly available on a regular basis. This information will be disclosed every June 30th and December 31st, six months in arrears.
>
> While this document does not divulge ICBC's investment transactions, it may help bring this matter to a conclusion without the necessity of a formal Order from your office.
>
> However, if the matter must proceed through an Order then ICBC maintains that by disclosing this information ICBC is not abandoning the arguments against disclosing what was specifically requested by the applicant, and those arguments still stand, independent of this disclosure.

[9] Following disclosure of the investment portfolio summary, the applicant indicated that he still wanted access to the dates on which securities were bought or sold and the prices paid or received in each case. In a letter dated November 29, 2001, the applicant said the following:

> … I believe it is in the public interest for taxpayers to know the details of ICBC's transactions
>
> For instance, thanks to the records provided me under orders of finance minister Gary Collins, we now know that ICBC held almost two million Nortel shares as of last June 30.
>
> But we do not know what price ICBC paid for them – a matter, I submit, of considerable public interest.

[10] ICBC's November 9, 2001, disclosure of the June 30, 2001 investment portfolio summary and its new policy of disclosing such summaries biannually, six months in arrears, narrows the issues in this inquiry. It is no longer necessary for me to deal with

ICBC's former position that no investment portfolio information, with or without transaction details, could be disclosed without creating a reasonable expectation of harm to its financial interests within the meaning of s. 17(1) of the Act. ICBC has now disclosed, and says it will continue to disclose, the above-described investment portfolio summary as described above.

[11] It remains for me to decide, however, whether the applicant is entitled, under the Act, to transaction-specific information. The applicant's access request covered transaction details from January 1, 1999 to the date of the request, September 19, 2000. On November 29, 2001, the applicant indicated that he believed he should be entitled to transaction details relating to ICBC's securities as at June 30, 2001 (*i.e.*, information about ICBC's acquisition of Nortel securities). During the inquiry, the applicant also asked me to update his access request to a date on which I had sought further submissions from the parties. ICBC objected that this kind of updating would simply heighten its concerns about harm through disclosure of the requested information. I declined to update the applicant's access request. I have, however, considered the applicant's access request and his submissions in this inquiry on the basis that, from the outset, he has sought investment holdings and transaction information from January 1, 1999 up to the date of his access request, September 19, 2000. This amounts to a request that approaches including contemporaneous (what I will call "real time") disclosure of securities-trading transaction information (*i.e.*, disclosure within 30 days of September 19, 2000 of security-specific trading information for transactions that occurred up to that date).

[12] As I noted above, the report ICBC disclosed on November 9, 2001 contains investment holdings information as at June 30, 2001 and ICBC intends in future to release such reports biannually, for June 30 and December 31, six months in arrears. In a nutshell, these reports will constitute twice-yearly, delayed 'snapshots' of ICBC's investment holdings. I discuss below the significance of ICBC's delayed 'snapshot' disclosure of holdings, as opposed to the transaction activity information disclosure the applicant sees.

[13] **3.2 Description of the Sample Record –** Instead of providing a full text of the requested information for my examination in this inquiry, ICBC asked that I receive, on an *in camera* basis, what it described as a "sample of the Record in dispute". The affidavit of Susan Sillem has appended to it a "Summary of Purchases and Sales" from January 1, 1999 to September 30, 2001. Like the 'delayed snapshot' investment portfolio summary (as at June 30, 2001) that ICBC released on November 9, 2001, the sample record covers ICBC's internally and externally-managed investments. These investments are, however, broken down into different lists instead of being presented on the basis adopted for the delayed snapshot report. Unlike the delayed snapshot report, which includes headings by sector or type of securities, the sample record produced to me contains no such headings.

[14] The sample record is divided according to the following categories and sub-categories: Bond and Money Market Portfolio (short term purchases, short term sales,

short term maturities, bond purchases, bond sales); Mortgage Master Portfolio (mortgage purchases, mortgage sales, mortgage maturities); Equity Portfolio Canadian equity purchases, Canadian equity sales, U.S. equity purchases, U.S. equity sales, changes in capitalization (acquisitions), changes in capitalization (dispositions)). Each entry, except entries for changes in capitalization, reflects the number or par value of the securities involved, the security issuer, information describing the security and a net amount (*i.e.*, value).

[15] The delayed snapshot investment portfolio summary shows ICBC's investment holdings on a particular date, while the sample record shows investment activity over a period of time. It does not show the day or time on which discrete transactions occurred over the report period. This is not, I infer, because such information would not exist in ICBC's trading records. I infer, rather, that such information has simply not been included in the sample record provided to me. The sample record is, effectively, a compilation of delayed snapshot investment portfolio summaries generated for each day of the reporting period, but without breakdown by transaction date and time.

[16] **3.3 Public Interest Disclosure** – In his initial submission, the applicant raises the issue of mandatory disclosure of the requested information under s. 25(1)(b) of the Act. He did not mention s. 25 in his request for review and that section was not mentioned in the Notice of Written Inquiry that this Office sent to the parties. However, ICBC did not object to the applicant's raising s. 25(1)(b) at this stage and ICBC had an opportunity to make a submission on whether s. 25(1)(b) requires ICBC to disclose the requested information.

[17] Section 25(1)(b) requires the head of a public body to disclose "without delay" to the public, an affected group of people or an applicant any information "the disclosure of which is … clearly in the public interest". As I noted in Order 01-20, [2001] B.C.I.P.C.D. No. 21, the fact that the public may be, or may have been, interested in information does not necessarily mean it is "clearly" in the "public interest" to disclose it, without delay, under s. 25(1)(b). The applicant argues that, without transparency in ICBC's investment activities through disclosure of the requested information, there is no way for the public to ensure that ICBC's investments are managed prudently. He points out that ICBC is "a tax-payer owned corporation" and says the owners of a corporation "have the right to examine how it handles its assets". He also argues that ethical considerations arise, since only public disclosure will ensure that ICBC is adhering to its own investment policies and procedures, which include a prohibition against ICBC investing in liquor or tobacco companies.

[18] These are arguments for transparency and accountability, the latter of which is a purpose of the Act explicitly enshrined in s. 2(1). In Order 01-20, I faced the argument that because the University of British Columbia is a publicly-funded educational institution, disclosure of the disputed contract information was clearly in the public interest under s. 25(1)(b). The applicant's s. 25 argument here comes down to the same thing. The desirability of openness and accountability does not suffice to make the case

that immediate compulsory disclosure of the requested information is "clearly in the public interest" within the meaning of s. 25(1)(b).

[19] **3.4 Harm to Financial or Economic Interests** – As has been observed in a number of orders, s. 17(1) of the Act is intended to protect the financial and economic interests of public bodies from harm. It does so by permitting a public body to refuse to disclose "information the disclosure of which could reasonably be expected to harm the financial or economic interests" of the public body, including:

> (a) trade secrets of a public body or the government of British Columbia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia.

[20] Summing up its case, ICBC argues, at para. 15 of its initial submission, that disclosure of the requested information would harm its financial interests

> … by interfering with ICBC's investment strategy, providing a competitive advantage to ICBC competitors, and eliminating a competitive advantage ICBC currently enjoys as a result of the success of its investment strategy.

[21] Whether the evidence submitted by ICBC supports this claim must be decided in light of the reasonable expectation of harm test laid down in s. 17(1). ICBC accepts that, as I have indicated on a number of occasions, the section requires there to be more than a fanciful, imaginary or contrived fear of harm. As I said in Order 00-37, [2000] B.C.I.P.C.D. No. 40, at p. 4, "[e]vidence of speculative harm will not meet the reasonable expectation of harm test." Although it is not necessary to establish a certainty of harm, the quality and cogency of the evidence presented must be commensurate with a reasonable person's expectation that the disclosure could cause harm as contemplated by s. 17(1). ICBC says it has met this standard here, when viewed against ss. 17(1)(a), (b), (c) or (d) and, more generally, under the introductory portions of s. 17(1).

[22] ICBC emphasizes the competition it faces in certain aspects of the motor vehicle insurance market. Referring to these competitive pressures, it contends that disclosure of the requested information could reasonably be expected to harm its competitive position because the information would be of use to competitors in their own investment strategies. This would, ICBC says, be to the competitors' advantage and its

disadvantage. Here are paras. 26 and 27 of ICBC's initial submission (with citations omitted):

> One of the means by which ICBC achieves and maintains its competitive position is to make use of its investment income to offset upward pressure on premiums and to fund rebates to its customers. Unlike ICBC, ICBC's competitors are not subject to the disclosure provisions of the Act and can, therefore, maintain any competitive advantage they achieve through their own investment strategies without being subject to threat that ICBC would be able to use the information to ICBC's advantage and the competitors' detriment.
>
> In this case, disclosure of the Record would give ICBC competitors an unfair advantage in the competition for the whole optional coverage market and the top end of the insurance market. Accordingly, release will harm ICBC's economic interests and its ability to compete for business with private sector service providers.

[23] In para. 28 of its initial submission, ICBC argues that its "financial interests" for the purposes of s. 17(1) encompass its "financial position … including management of assets and liabilities" and its ability to "protect its own interests in financial transactions with third parties."

[24] It argues, at para. 31 of its initial submission, that the requested information qualifies as a "trade secret" of ICBC for the purposes of s. 17(1)(a) because it is "information with respect to its investment strategy" and its disclosure could reasonably be expected to cause it harm as contemplated by s. 17(1). This is because, ICBC says, once its "investment strategy" is disclosed, its "ability to continue to achieve high levels of return on its investment would be compromised by direct competition and possible 'front running' of ICBC's investment activity" (para. 35, initial submission). It cites Order No. 285-1998, [1998] B.C.I.P.C.D. No. 80, in arguing that the information is a "trade secret". ICBC also argues that "information with respect to its investment transactions and strategy" is covered by s. 17(1)(b) because it has "a monetary value in its own right" (para. 40, initial submission).

[25] At paras. 48 and following, ICBC argues – without providing details of how it could be done – that any investment professional could review the details of its transactions and "determine patterns of investment activity". In particular, it refers again to the requested information as "its investment strategy information", the disclosure of which ICBC says would enable its competitors to "apply this analysis and follow that same strategy." This would allow its competitors, ICBC argues, to follow the strategy and provide the "same savings per policy that now allows ICBC to enjoy a competitive advantage" (para. 49, initial submission).

[26] ICBC then argues as follows at paras. 51 and 53 of its initial submission (with affidavit references removed):

> ICBC's investments do not change substantially over time and it is not uncommon for ICBC to take several months to accumulate or dispose of assets. As well,

> patterns of investment remain the same over at least a two to three year period. If individuals were able to determine the asset mix held by ICBC and "buy ahead" of ICBC, those individuals would in essence be able to use "insider information" to their advantage and to ICBC's detriment. These individuals could "front run" ICBC, utilizing knowledge of possible future events to take advantage of current market conditions.
>
> …
>
> In addition, information concerning investment strategies and transactions is, itself, of monetary value. Several organizations attempt to gather information on asset holdings, which they then consolidate and sell for a fee.

[27] ICBC contends, at paras. 55 and following of its initial submission, that disclosure of the requested information could reasonably be expected to result in undue financial loss to ICBC and undue financial gain to a third party. It says that, if required to "disclose its investment strategy", other investors will be able to anticipate its investment activity and take advantage of that strategy, by front-running ICBC's trading activity, and "thereby deriving financial gain from this information to ICBC's detriment." It also argues there "is a public interest in ICBC maintaining a strong position with respect to its investment activity", since it uses its investment income to "serve the public efficiently and effectively."

[28] ICBC relies on Ontario Order P-1210, [1996] O.I.P.C. No. 239, where it was said that there was a public interest in allowing Ontario Hydro to keep negotiations confidential, so it could achieve the best possible deal in privatization negotiations. I will note here that, to the extent Order P-1210 could be taken to suggest there is a balancing exercise in applying s. 17(1), as between a public interest in confidentiality and other interests, I respectfully disagree that such an approach is appropriate for the purposes of analyzing and applying s. 17(1) of the British Columbia Act. The question of a 'public interest' in non-disclosure does not arise under s. 17(1). The test created by the language of that section – which does not refer to any such public interest – is the relevant standard. To the extent s. 17(1) is found to apply to information, the protection thus afforded to the information is in accordance with the public policy underlying the provision.

[29] ICBC's primary position is that disclosure of any of the requested information could reasonably be expected to harm its interests under s. 17(1). Only as an alternative does it contend, at para. 59 of its initial submission, that "no information should be disclosed concerning investment transactions that have taken place over the three-year period prior to the request", on the basis that

> … release of investment information over the three-year period preceding a request would be the most damaging to ICBC's financial interest and should not be disclosed.

[30] I will now turn to the evidence. ICBC relies on two affidavits sworn by Tom Ball, its Investment Manager, and one affidavit sworn by Daryl Jones, who is Vice

President, Policy and Research, for the British Columbia Investment Management Corporation ("BCIMC"), a separate public body under the Act. I will refer to these as the "First Ball Affidavit", the "Second Ball Affidavit" and the "Jones Affidavit".

[31] According to the First Ball Affidavit, disclosure of the "details of" ICBC's investment transactions would enable an investment professional to "analyze this information to determine patterns of investment activity" (paras. 15 and 16-19). At para. 22, Ball deposed that ICBC hires investment professionals "to develop strategies that will maximize its investment returns" and assist ICBC in maintaining its position in the competitive insurance market. He also deposed, at para. 23, that, to the best of his knowledge, "property or casualty companies are not required to divulge detailed listings of investment transactions to any regulatory authority, except under legal order during investigation".

[32] He further deposed, at para. 20, that ICBC takes "steps" – he did not say what these are – to ensure that its

> … investment strategies remain confidential so that the monetary value of this information is not lost. Any ICBC employee who participates in front-running, or similar actions, would face professional disciplinary action by their association and such action would likely constitute cause for dismissal by ICBC.

[33] At para. 21, he deposed that ICBC's investment department staff must comply "with normal industry conflict of interest guidelines" and must therefore submit "all their personal and associated transactions to ICBC each quarter for review."

[34] The Jones Affidavit spoke to BCIMC's likely response if it received a similar access request. Daryl Jones deposed, at para. 4, that BCIMC "uses quantitative style management and pooled investment portfolios that open on predetermined dates", thus making it possible for someone examining "our transaction records" to "detect trading patterns". He deposed that this would allow someone to "front-run" BCIMC's trading activity, to the financial advantage of the front-runner. According to Daryl Jones, this would necessarily reduce the profit of the investor who is front- run when that investor later sells the affected stock.

[35] In his reply submission, the applicant says he would be willing to accept a compromise, one that mirrors, as it turns out, the policy which ICBC has now adopted of disclosing its investment portfolio summary (without transaction details) biannually, six months in arrears. He says that, if I reject his "request for detailed portfolio transactions", it is his position that

> … there is a much weaker argument to support withholding lists of companies held since January 1, 1999 – without the actual transactions.

[36] In advancing this position, the applicant said that BCIMC had "recently" released to him "its six-month-old holdings on behalf of the MLA's pension fund." He argues that, if BCIMC can release six-month old information without "significant harm to the

pension portfolio", ICBC should be able to disclose similarly stale-dated information, since it is a smaller player in the market than is the BCIMC. Here is the relevant passage from the applicant's reply submission:

> ICBC has submitted that no records ought to be released that are newer than three years. This clashes with the practice of several other public bodies.
>
> Indeed, I note that in its submission ICBC had supplied an affidavit from Mr. Daryl Jones, of BC Investment Management Corporation, a Crown corporation which was set up in 2000 to take over the pension investment operations formerly handled within the finance ministry.
>
> In 1994, when the finance ministry still retained the pension investments, the ministry -- after first refusing -- released to me a list of shareholdings in the B.C. Endowment Fund as of a date six months previous.
>
> More recently, IMC released to me its six-month-old holdings on behalf of the MLAs pension fund.
>
> All of the fund's equities were in TSE index funds.
>
> Providing that information was tantamount to providing the holdings, since the identities of the companies making up the TSE indices at any one time are a matter of public record.
>
> Since IMC is a far bigger player in the market than ICBC, there was no significant harm to the pension portfolio through releasing six-month old information, *a fortiori* there would be no significant harm to ICBC in doing the same thing.

[37] In light of this argument – and my understanding that Canadian mutual fund issuers are required to make periodic public disclosure of some information about their investment holdings – I sought further submissions from the parties. I had some reservations about ICBC's argument that disclosure of investment portfolio information "could always be said to meet the s. 17(1) test, no matter how old" it is. In response, ICBC submitted the Second Ball Affidavit and further written argument. The applicant also made a further submission in response to ICBC's additional material.

[38] At para. 9 of its further submission, ICBC says the following:

> ICBC submits that amending the scope of the request to limit disclosure only to: names of holdings; to "stale-dated" information; or to only investment activity with respect to bonds, would not circumvent the very reasonable expectation of harm to its financial and economic interests.

[39] ICBC argues that disclosure of only the names of corporations or governments whose shares or bonds it holds "would be sufficient to allow an investment professional to analyze this information and determine patterns of investment activity" (para. 10, further submission). This is the same argument ICBC advances in relation to all of the

details of the various transactions. It says that disclosure of only the names of companies whose shares or bonds it holds would allow competitors to "patterns of activity" and use that derivative information "to anticipate patterns of future trading activity because ICBC's investment strategies remain consistent over long periods" (para. 12, further submission). ICBC relies in this respect on the Second Ball Affidavit, paras. 10 to 12.

[40] ICBC argues "there is a public interest in supporting ICBC's ability to obtain and maintain the competitive advantage it currently enjoys as a result of its investment strategies" (para. 13, further submission). According to ICBC, disclosure would "harm the public's interest in ensuring that ICBC maintains its position in the competitive insurance marketplace" (para. 13, further submission).

[41] On the question of stale-dating raised by the six month BCIMC disclosure mentioned in the applicant's reply, ICBC argues that its "investment patterns" are constant over as much as a seven year period and "perhaps" much more. ICBC says that it is not possible to determine with any certainty how far back one would have to go to determine that information would effectively be stale-dated (para. 17, further submission). It relies on paras. 13 to 16 from the Second Ball Affidavit. Among other things, at para. 13 Ball deposed that disclosure of "information with respect to trading activity…would allow a knowledgeable person to determine ICBC's trading strategies to their own gain and to ICBC's detriment." ICBC also argues that disclosure of only the information with respect to its bond dealings could reasonably be expected to harm its interests within the meaning of s. 17(1) and makes arguments about its bond-trading activities similar to those it makes for its share-trading activities.

[42] I am not satisfied that the requested information constitutes, or if disclosed would reveal, an ICBC "trade secret" within the meaning of s. 17(1)(a) of the Act. The evidence of the ICBC "investment strategies" said to be involved here is simply not specific enough to show that they qualify as a "trade secret" as defined in Schedule 1 of the Act. For example, it may be that ICBC's investment strategies are not unique, that they are well known to its competitors, and that the only thing its competitors do not know is that ICBC makes use of those known strategies. I am also not satisfied that the requested information falls under s. 17(1)(b). In my view, it is financial or commercial information that belongs to ICBC within the meaning of that section, but the evidence does not establish that it is reasonably likely to have independent monetary value.

[43] The s. 17 exception might nonetheless apply on the basis of the opening words of s. 17(1), because the requested information is information the disclosure of which could reasonably be expected to harm ICBC's financial or economic interests, or because under s. 17(1)(d) its disclosure could reasonably be expected to result in undue financial loss or gain to a third party (in this case, ICBC's competitors or other investors).

[44] The applicant says he seeks the requested information in order to scrutinize ICBC's investment activities, not for a competitive purpose. In my view, the correct analytical approach is to assume that disclosure to the applicant is public disclosure and that the information could end up in the hands of an ICBC competitor or another investor.

[45] ICBC appears, in a number of places, to argue that, because its competitors are not subject to the Act, they can "maintain any competitive advantage they achieve through their own investment strategies" because ICBC does not have access to information about its competitors' strategies. For example, ICBC argues, at para. 35 of its further submission, that for me to order disclosure of any of the requested information

> … would set a dangerous and unfair precedent against ICBC and place it in a situation where its competitors could achieve regular, detailed and close scrutiny of ICBC's investment strategies to their own benefit and to ICBC's detriment, at ICBC's expense.

[46] As is discussed in, among others, Order No. 15-1994, [1994] B.C.I.P.C.D. No. 18, ICBC competes with privately owned insurers for some motor vehicle insurance products. As I understand ICBC's argument, it amounts to saying that, since ICBC is subject to the Act and its competitors are not, the fact that they are differently situated in this respect represents harm to ICBC's financial and economic interests. ICBC should not, it is suggested, be put at a disadvantage in its investment activities, and thus its competitive position, through disclosure of information under the Act.

[47] The Legislature decided to designate ICBC as a public body under the Act. As a result, it is covered by the Act while its private sector competitors are not. The fact that ICBC, as a public body, is subject to the Act is not, of itself, proof of harm under s. 17(1). ICBC's reliance on s. 17(1) must stand or fall on the evidence it provides in each case. The question is whether the evidence before me in this case establishes that disclosure could reasonably be expected to harm ICBC's interests as contemplated by s. 17(1).

[48] Daryl Jones' evidence speaks to BCIMC's hypothetical response to a hypothetical request for information such as that in issue here. There is no evidence that Daryl Jones has expertise in investment matters, including the practice and consequences of front-running. I have given Daryl Jones' evidence some weight, but consider it to be of limited value.

[49] In my view, it is appropriate for me to consider in this inquiry the complexities of securities markets and of trading and investment strategies for portfolios of the magnitude ICBC manages. Some of those complexities are reflected in both the 'delayed snapshot' investment portfolio summary for June 30, 2001 that ICBC disclosed on November 9, 2001 and the periodic investment activity sample report from January 1, 1999 to September 30, 2001 that ICBC has provided to me.

[50] I am not satisfied on the evidence before me that ICBC's trading activities are significant or large enough that they necessarily have a direct or discernible effect on the markets for the securities it buys, sells or holds. That is a complex factual question that would depend on the specific securities, and market conditions, involved and on the financial capability, and inclination, of ICBC. I do not have any concrete evidence of that kind before me. In that light, I decline to adopt assumptions, presented to me through hypothetical examples, about whether ICBC drives the market for some or all of the securities in which it deals from time to time. Accordingly, I find that some of

ICBC's assertions are speculative about the likelihood, and impact on the market, of 'front-running' – as that phenomenon is described by ICBC – if the requested information is disclosed.

[51] Of course, a disclosure continuum exists. At one end is ICBC's submission that *no* information relating to its investment activities could be disclosed without creating a reasonable expectation of harm under s. 17(1) of the Act. The policy ICBC has now adopted, of disclosing periodic 'delayed snapshots' of its investment holdings, is further down the continuum. Yet farther along is the information found in the sample record provided to me in this case. At the end of the continuum, reflecting the most complete and timely disclosure, would be the sample record with added details broken down by transaction date and time. This is the kind of detailed transaction information that the applicant seeks, with a delay between transaction and disclosure of no more than 30 days.

[52] Tom Ball deposed that "it is very difficult to say with certainty what period is old enough to ensure that the information would effectively be 'stale-dated'" (para. 14, Second Ball Affidavit). This element of uncertainty in ICBC's case is underscored by the applicant's statement that BCIMC – a public body that is apparently engaged in investment activity similar to ICBC's – has (contrary to what is said in the Jones Affidavit) disclosed six-month old investment holding information to the applicant.

[53] The remaining question is how stale-dated or general (in the sense of information that is not transaction-specific) investment information would have to be before there be no reasonable expectation of harm because the information does not usefully reveal ICBC investment strategies. In my view, it is almost inconceivable – as ICBC's submissions and evidence accept – that ICBC could, relying on s. 17(1), refuse access to all specifics of its investment activities indefinitely. As ICBC acknowledges, there must be some cut-off and, as ICBC puts it at para. 59 of its initial submission, the transaction information is not "entirely excepted" from disclosure, in the sense of being permanently excepted under s. 17(1).

[54] I accept that ICBC engages investment professionals to develop strategies to maximize its investment returns and that transaction details of its investment activities may reveal those strategies and allow others to take advantage of them. After careful consideration, I have concluded that ICBC has established a reasonable expectation of harm, within the meaning of s. 17(1), if the details of its specific securities transactions are disclosed contemporaneously with, or in recent proximity, to the transactions. I am persuaded that, armed with knowledge of existing and anticipated market conditions generally and of the market for a particular issuer's securities, a knowledgeable person – whether an ICBC competitor or someone else – could use the prices, purchase dates, amounts of units bought or sold in order to copy or act in anticipation of ICBC's investment activity. This may or may not involve direct harm or loss to ICBC. The important point – and I so find – is that there is enough evidence to establish, under these conditions, a likely benefit to the ICBC competitor or other person which, in my view, would be an undue gain within the meaning of s. 17(1)(d) of the Act.

[55] I am not persuaded, however, that ICBC has established that such a harmful or gainful insight into its investment strategy or practices – or its likely market moves in a given security or market sector – could reasonably be expected to result from the disclosure of *any* of the requested information, *e.g.*, where it is disclosed in the form of stale-dated holdings (without transaction details). In this respect, the timeliness and specificity of the information are obviously relevant factors. ICBC has not established that no passage of time, or no limitation on the investment information specifics disclosed, can or would eliminate this kind of risk of harm to its interests under s. 17(1).

[56] Section 4(2) of the Act requires that information that is excepted from disclosure must be severed, and the remainder of the record disclosed, where that can reasonably be done. I have considered whether ICBC could have reasonably severed information disclosing its investment strategies from the requested records and concluded it could not reasonably be done because of the complexity of the trading information and the investment strategies involved. The answer, in my view, lies in identifying a level and frequency of disclosure that is not so extensive that it can be reasonably expected to harm ICBC's financial interests by conferring an undue financial gain on third parties who use the disclosed information to copy or move in anticipation of ICBC's investment activities.

[57] ICBC says that investment holding disclosure requirements that may apply to mutual fund issuers under securities legislation are not relevant here. I referred, in writing to the parties, to the disclosure requirements that may apply to mutual funds in relation to the issue of harm from disclosing stale-dated information. This reference to possible securities industry disclosure requirements did not imply that I sought to apply securities legislation disclosure requirements to ICBC or believed that such requirements actually apply by force of law. In my view, the accountability of mutual fund issuers to periodically disclose information about their investment activities to the investing public to whom they sell securities cannot be equated with ICBC's accountability as a public body under the Act. Disclosure standards under securities legislation are not necessarily an indication of the level of disclosure that the public should expect under the Act concerning ICBC's investment activities. It may be that, because mutual fund issuers are selling securities to the public, they are required to directly (or by inference) disclose information about their investment activities that might be protected by s. 17(1) of the Act in the case of public bodies such as ICBC.

[58] I find that ICBC's new policy of biannually disclosing security-specific "snapshot" investment portfolio summaries – as described in para. 7, above – six months in arrears is a level and frequency of disclosure that protects ICBC from a reasonable expectation of harm under s. 17(1). I find that, unlike ICBC's original refusal to disclose any responsive information to the applicant, until its change of position after the close of the inquiry, ICBC's new policy meets the legitimate need to protects s. 17(1) interests, the standard of proof under s. 17(1), and the consideration that information disclosing ICBC's investment strategies cannot be reasonably severed from the requested record. I find that ICBC is authorized by s. 17(1)(d) of the Act to refuse to disclose information covered by the applicant's access request, other than its biannual investment portfolio summaries for June 30 and December 31, 1999 and June 30, 2000.

4.0 CONCLUSION

[59] Because I have found ICBC is not required by s. 25(1)(b) of the Act to disclose the disputed information, no order is called for in that regard under s. 58(3).

[60] For the reasons given above, under s. 58(2)(a) of the Act, I require ICBC to give the applicant access to its biannual investment portfolio summaries for June 30 and December 31, 1999 and June 30, 2000. This is also consistent with the ICBC periodic disclosure policy instituted after the close of this inquiry. Under s. 58(2)(b) of the Act, I confirm ICBC's decision under s. 17(1)(d) to refuse access to the further information covered by the applicant's access request, as described above.

January 31, 2002

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia