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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 170-1997
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INQUIRY RE: A decision by the Insurance Corporation of British Columbia (ICBC) to withhold records from an applicant and the adequacy of ICBC's search for records

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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 April 17, 1997 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 a decision by the Insurance Corporation of British Columbia (ICBC) (the public body) to withhold records requested by the applicant and of the adequacy of its search for records.

Certain of the records responsive to the applicant's request relate to the Office of the Ombudsman and the Office of the Information and Privacy Commissioner. ICBC withheld them under section 3(1)(c) of the Act. Other records were withheld under sections 13, 14, 15, 17, 19, and 22 of the Act. These relate to labour relations hearings and a judicial review involving the applicant.

2. Documentation of the inquiry process

On August 6, 1996 the applicant asked ICBC for records withheld pursuant to a request that he had made to ICBC in December 1993 (resulting in a written inquiry and Order No. 12-1994, June 22, 1994) and for records accumulated by ICBC after December 1993.

On October 4, 1996 ICBC released 53 pages of records with portions severed. With respect to the applicant's request for records withheld pursuant to previous requests, specifically of December 1993 and May 1995, ICBC stated that they had been properly dealt with, and no further records would be disclosed.

On October 23, 1996 the applicant submitted a request for review of ICBC's decision to my Office. He described a list of records that he said he should have received from ICBC.

On March 6, 1997 ICBC released a second package of material from additional records it found to be responsive to the applicant's request. Approximately one-half of the additional records were withheld and severed under sections 3, 13, 14, 15, 17, 19, and 22 of the Act. The applicant then requested a review of ICBC's decision not to release certain of these records.

The second release contained records relating to the Office of the Ombudsman and, on March 14, 1997, it was given notice of this inquiry and an opportunity to make a submission.

Finally, on April 8, 1997 ICBC located two photographs that the applicant described in his request for review as missing from the first disclosure package. It sent copies to the applicant on April 16, 1997.

3. Issues under review at the inquiry and the burden of proof

There are three issues before me in this inquiry. The first is whether section 3(1)(c) of the Act applies to certain records withheld or severed by ICBC that relate to the Office of the Ombudsman and to my Office.

The second issue is whether ICBC properly applied sections 13, 14, 15, 17, 19, and 22 of the Act to records withheld from the applicant.

The third issue is whether ICBC fulfilled its duty to the applicant under section 6 of the Act by adequately searching for and releasing all the records pertaining to him in its custody or under its control.

The relevant sections of the Act are as follows:

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Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

...

(c) a record that is created by or is in the custody of an officer of the Legislature and that relates to the exercise of that officer's functions under an Act;

....

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.

Policy advice or recommendations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

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 law enforcement

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm a law enforcement matter,

....

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:

...

(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;

....

Disclosure harmful to individual or public safety

19(1) The head of the public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

(a) threaten anyone else's safety or mental or physical health, or

(b) interfere with public safety.

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and gave harm to the applicant's safety or mental or physical health.

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Section 57 of the Act, which establishes the burden of proof on the parties in an inquiry, is silent with respect to a request for review about the application of section 3 to records in the custody or under the control of a public body. Since ICBC is asserting that section 3 applies in these circumstances, it has the burden of proof.

Under section 57(1), if access to information in a record has been refused under sections 13, 14, 15, 17, and 19, 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.

Under section 57(2), if the record the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

Section 57 of the Act is silent with respect to the adequacy of a search for records arising under section 6 of the Act. I decided in Order No. 103-1996, May 23, 1996, that, in these circumstances, the burden of proof is on the public body.

4. The records in dispute

The records in dispute consist mainly of information relating to the employment and termination of the applicant by ICBC and the ensuing labour relations hearings and judicial review.

5. ICBC's submission

ICBC states that the applicant received over 1,300 pages of his records in connection with his request that resulted in my Order No. 12-1994 (in favour of ICBC). ICBC argues that this particular inquiry should focus on the applicant's May 1995 access request rather than earlier ones. (Submission of ICBC, paragraph 13)

I have reviewed below ICBC's most important submissions on particular sections of the Act. With respect to sections 13, 15, 17, and 19, these submissions were so cursory that I did not find it necessary to present them in detail. These sections were also applied to only a small number of records and mostly in situations where a record could be withheld under several exceptions.

6. The Ombudsman's submission

The Ombudsman emphasizes that confidentiality is at the core of her work: "The ability of parties to prepare positions and to communicate candidly and freely with the Ombudsman in an effort to resolve complaints about unfair governmental conduct is essential." This goal is supported by section 9 of the *Ombudsman Act* and a 1985 decision of the Supreme Court of British Columbia in Levey v. Friedmann (1985), 60 B.C.L.R. 101.

In the Ombudsman's opinion, section 3(1)(c) of the Act is "clearly designed to respect both the independence and autonomy of the Ombudsman, and to facilitate her work according to the terms of her statute." Her interpretation of the words "created by" in this section is that it "includes all records which the Ombudsman causes to come into existence as part of an investigation or that relate to her work or that of her delegates." The Ombudsman wishes to avoid the "anomalous situation where a letter sent from a public body to the Ombudsman could be protected from disclosure by the Ombudsman herself, but the Ministry file copy could be subject to the *Freedom of Information and Protection of Privacy Act.*"

7. The applicant's submission

The applicant's position is that ICBC should disclose all of his records to him in an unsevered format. He also furnished me with a list of missing files and offered suggestions as to the nature of the missing files, which he regards (with the severing) as suggesting a coverup by ICBC in matters affecting him.

8. Discussion

Section 3(1)(c): Scope of the Act

This section provides that the Act does not apply to the records of an Officer of the Legislature that relate to the exercise of that Officer's functions under an appropriate statute. In this inquiry, records of both the Ombudsman and my Office are at issue. The legislative intent is to protect the investigative and quasi-judicial core functions of an Independent Officer of the Legislature. (Submission of ICBC, paragraphs 16, 18; and Order No. 152-1997, March 4, 1997) In this regard, I agree with the submission of ICBC that "regardless of who has the custody or control of a record created by an officer of the legislature, s. 3(1)(c) applies so long as the record was created by that officer," or, I would add, a member of his or her staff. (Submission of ICBC, paragraph 20) I further accept

that it is "appropriate to interpret the term 'custody" to include constructive possession and not just actual possession of a record." (Submission of ICBC, paragraph 21)

Interpreting this section becomes more challenging in this inquiry with respect to records created by an ICBC employee in the course of mediation efforts with a member of my staff in connection with the applicant's May 1995 access request. According to ICBC:

> ... the broad interpretation that should be given to s. 3(1)(c) leads to the conclusion that where notes of a conversation with a portfolio officer are taken by an employee of another public body, those notes are 'created' in connection with the functions of the officer of the Legislature for the purposes of s. 3(1)(c). (Submission of ICBC, paragraph 25)

ICBC quotes with approval the reasons given by then Chief Justice Esson of the Supreme Court of British Columbia in an adjudication under the Act dated September 6, 1996. (In the matter of the *Freedom of Information and Protection of Privacy Act* and in the matter of an adjudication under section 62, requested by Martin Havey on November 17, 1995, unreported decision of the Chief Justice of the Supreme Court as adjudicator, September 6, 1996.) At page 10 of his reasons, the Chief Justice stated that where I delegate my functions under the Act to a staff member or consultant, records created by those delegates are covered by section 3(1)(c). (Submission of ICBC, paragraph 26) I obviously follow the Chief Justice and agree with the Ombudsman, to paraphrase my Order No. 152-1997, March 4, 1997, that "a record of an Officer of the Legislature is a record written by or to an Officer of the Legislature about a matter that relates to his or her functions as an Officer of the Legislature."

The remaining problem is that ICBC wishes section 3(1)(c) to cover records created by its staff member in working with a member of my staff:

> The legislative intent underlying s. 3(1)(c) can only be respected if this section is interpreted to extend so as to cover records 'created' in such circumstances. Otherwise, mere chance would dictate whether s. 3(1)(c) applied or not. For example, if the Commissioner's portfolio officer created the records by writing down the recommendations, s. 3(1)(c) would clearly apply. On the other hand, notes of such recommendations taken by a public body employee would not be covered. (Submission of ICBC, paragraph 27)

ICBC's evidence is that the particular records at issue in this inquiry concern recommendations made by a Portfolio Officer with my Office, which an employee of ICBC wrote down. (Affidavit of Mark Francis, paragraph 12)

Clearly, records created by the Officer of the Legislature and his or her staff or consultants, such as lawyers, are referred to in the Act and specifically excluded from its

application. An exchange of correspondence between such a staff member and an employee of a public body can be protected as well. I now find that views of an employee of an Officer of the Legislature, made into a record under the Act by an employee of a public body, can be protected from disclosure under section 3(1)(c).

Section 14: Legal advice

ICBC submits that certain records identified in its release guide as having been withheld under this section "disclose certain details as to the nature of legal services rendered in respect to the applicant's labour relations complaint against the OTEU [Office and Technical Employees' Union]." (Submission of ICBC, paragraph 29) I will determine this matter on the basis of my review of the records in dispute.

The records in dispute

With the valued assistance of ICBC's very detailed grid of the application of specific sections of the Act to the various records in dispute, I have carefully reviewed all of the records in dispute. I find that ICBC has appropriately withheld and severed records under sections 3, 13, 14, 17, 19, and 22 of the Act.

Adequacy of ICBC's search for records

In this evidently contentious matter, ICBC kept finding more and more records as the applicant pressed his search. This concerns me. While I have considerable sympathy with the demands that access requests place on public bodies, it is important that members of the public not be paranoid in terms of what they are likely to receive in response to a request for records. Promoting careful records management in public bodies in order to be able to find records is thus an essential aspect of complying with the goals and obligations established by the Act.

In Order No. 12-1994, I instructed ICBC to keep searching for records responsive to the applicant's original request. It did so, reported nil results to me after three months, and I wrote to the applicant to the effect that ICBC had complied with that Order. ICBC now submits that this exchange bars the applicant from revisiting matters already ruled upon in Order No. 12-1994. (Submission of ICBC, paragraphs 8-11) I accept this position in the peculiar circumstances of this particular case.

ICBC holds the view that it has made reasonable efforts to find all records that responded to the applicant's (May 1995) request. Its sense of what remains at issue is "unspecified separate individual files about the applicant, and a second set of briefing notes about the applicant (one set of briefing notes having previously been released to the applicant)." The affidavit of Mark Francis discloses that "ICBC is not aware of any such responsive records, having made exhaustive efforts to determine if such records are in the custody or under the control of ICBC." (Submission of ICBC, paragraph 33)

ICBC'S evidence of reasonable search efforts is contained in the affidavits of Mark Francis and Steve Heather. (Submission of ICBC, paragraphs 34-36) I have read these affidavits and the accompanying documentation carefully and am satisfied by their detailed contents that ICBC has in fact made every *reasonable* effort to be responsive to the applicant and to search diligently for records concerning him. I am pleased that this evidence has now been provided to the applicant as well, so that he can see what ICBC has actually done. ICBC describes as well the tangled chain of events associated with the various access requests made by the applicant; I find no need to revisit this chronology for purposes of this Order, since it has been given to the applicant. (See, especially, the Affidavit of Mark Francis, paragraphs 6-25)

In the course of reviewing Mark Francis' description of his many efforts to find records responsive to the needs of the applicant, I learned how certain files had been located in a labour relations file that had been added to the file since the initial disclosure to the applicant in December 1993. These particular records have now been disclosed to the applicant. (Affidavit of Mark Francis, paragraph 24) It is highly evident that ICBC has expended considerable resources in trying to assist this particular applicant, and I am satisfied that it has met its burden under section 6 of the Act.

9. Order

I find that ICBC has properly applied section 3(1)(c) of the Act and is authorized to refuse access to the records withheld under that section. Under section 58(2)(b), I confirm the decision of ICBC to refuse access.

I also find that ICBC was authorized to refuse access to information in the records in dispute under sections 13, 14, 15, 17, and 19. Under section 58(2)(b), I confirm the decision of ICBC to refuse access.

I also find that ICBC was required to refuse access to the information in the records in dispute under section 22. Under section 58(2)(c), I require ICBC to refuse access to the applicant.

I also find that the search conducted by ICBC was adequate within the meaning of section 6(1) of the Act. Under section 58(3)(a), I require ICBC to perform its duty to assist the applicant; however, since I have found that ICBC has made every reasonable effort to search for records, I find that ICBC has complied with this Order and has discharged its duty under section 6(1).

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David H. Flaherty
Commissioner

June 12, 1997