

ISSN 1198-6182

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 177-1997
July 22, 1997**

INQUIRY RE: A decision by the Insurance Corporation of British Columbia to withhold personnel and other records from an employee

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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 May 26, 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 from an applicant with respect to personnel records in the custody of the Insurance Corporation of British Columbia (ICBC), the public body. The applicant is an employee of ICBC.

2. Documentation of the inquiry process

On December 6, 1996 the applicant requested the following records from ICBC:

- the applicant's Corporate Personnel File;
- the applicant's Department Personnel File or Claim Centre Personnel File;
- all documents relating to the applicant, the applicant's employment, or relating to any personal information gathered about the applicant by ICBC for any reason;
- all information about the applicant contained in a computer or E-mail by the applicant's Manager, Supervisor, Acting Supervisor(s), or anyone else;
- the applicant's Claims information; and
- the applicant's Payroll and Occupational Health Records

ICBC responded to the applicant's request on February 10, 1997 with a package of records. There are approximately 492 pages of records in the file, some of which were severed or fully withheld by the public body. The applicant requested a review of ICBC's

decision on February 20, 1997. Mediation efforts narrowed the scope of records under review. The applicant then requested an inquiry by the Information and Privacy Commissioner to review some of the remaining withheld and severed records.

On May 5, 1997 my Office gave notice to the applicant and ICBC of the written inquiry to be held on May 26, 1997.

3. Issue under review at the inquiry

The issue in this inquiry is whether ICBC properly applied sections 13, 17, and 22 of the Act to the records listed above. The relevant sections of the Act are the following:

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.

13(2) The head of a public body must not refuse to disclose under subsection (1)

(a) any factual material,

....

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:

...

(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;

....

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.

22(2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third

party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

(c) the personal information is relevant to a fair determination of the applicant's rights,

...

(e) the third party will be exposed unfairly to financial or other harm,

(f) the personal information has been supplied in confidence,

....

22(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

...

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations about the third party,

....

22(5) On refusing, under this section, to disclose personal information supplied in confidence about an applicant, the head of the public body must give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(1), where access to information in the record has been refused under sections 13 or 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.

Under section 57(2), if the record or part thereof that 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.

4. The records in dispute

The applicant has received 464 pages of records; this inquiry deals with 28 pages of records which ICBC either withheld or partially severed. According to ICBC, these records were produced during either the review and mediation of a personal harassment complaint, or the management of two human resource policy issues: an expense reimbursement matter and a staffing issue. (Submission of ICBC, paragraph 2)

The applicant has requested an inquiry with respect to ICBC's decision to sever the following seven pages of records: 23, 25-27, 51, 54-55.

In addition, the applicant requested an inquiry with respect to ICBC's decision to withhold the following 21 entire pages of records: 1, 28-30, 32, 33, 36-39, 43, 351-353, 373, 374, 383, 387, 396-398.

5. The applicant's case

I have presented below, as I found it appropriate to do so, the applicant's submissions on the application of specific sections of the Act. I note, in addition, the applicant's belief that ICBC is deliberately withholding documents from the Corporate Personnel File that the applicant is entitled to view and respond to in the form of requests for correction.

6. ICBC's case

ICBC has submitted considerable detail concerning a personal harassment complaint brought by the applicant against management of one of its claims centres. Although I have reviewed this background material carefully, there is no public interest in rehearsing its details here. It essentially concerns what ICBC perceives to have been successful efforts to settle the matter. (See Submission of ICBC, paragraphs 9-21, 37-40)

I have reviewed below ICBC's submissions on the applicability of certain sections of the Act to this particular category of records, which comprise most of the documents at issue in this inquiry.

7. Discussion

The applicant's initial submission for the right of access to records from ICBC is based on the Collective Agreement that ICBC has with the Office and Professional Employees International Union, local 378. An application for access to information under the Act is not a venue in which I can adjudicate claims made under a Collective Agreement. There are other avenues open to the applicant to exercise the applicant's union rights in this regard, and ICBC is well aware of them. (See Reply Submission of ICBC)

In a reply submission, the applicant's version of events in a particular Claims Office of ICBC is set out in considerable detail. It is clear that the applicant does not believe that the human resources issues in that particular environment are as settled as ICBC suggests. I have read this material carefully and am aware of the applicant's views on the source of the problems in that particular office. However, the Act is not a suitable mechanism for settling human resource issues, especially when there are exceptions under

it that must be applied to the records that the applicant is seeking. (See also the Reply Submission of ICBC, *passim*)

Section 13: Policy advice, recommendations or draft regulations

The applicant submits that the documents withheld under this section pertain to expenses incurred by the applicant in the course of employment, which should have been reimbursed, and that their disclosure would not cause any financial hardship to ICBC.

ICBC's general position is that certain of the personal harassment records in dispute "contain information that would reveal advice or recommendations developed for ICBC to effectively manage a sensitive human resource and labour relations issue with possible disciplinary consequences, namely a personal harassment complaint." I agree with its submissions "that ICBC has a right to operate in a zone of confidentiality as it develops information, choices, recommendations, and advice" on such matters. (See my Order No. 159-1997, April 17, 1997, p. 9; and Order No. 12-1994, June 22, 1994, pp. 3-4) (Submission of ICBC, paragraphs 55-61)

Section 17: Disclosure harmful to the financial or economic interests of a public body

The applicant submits that the nature of the records in dispute "are not of such significant information as to cause financial hardship to the Insurance Corporation of British Columbia or result in premature disclosure of any proposal or project or cause financial loss or gain to any other person."

ICBC relies on section 17(1)(c) of the Act to protect the personal harassment records in dispute from disclosure because of the reasonable expectation of harm to its interests. It interprets the reference in this subsection to "plans that relate to the management of personnel of or the administration of a public body" to cover the type of human resource and labour relations issues in dispute in this request for review; I agree with this submission. (Submission of ICBC, paragraph 66)

In this connection, I have considerable sympathy with ICBC's submission to the effect that disclosure of certain of the records in dispute would have the effect of reopening a matter that has been "settled" after the expenditure of approximately \$12,000 in mediation costs and at least 10 days of staff time. (Submission of ICBC, paragraphs 68, 69)

Section 22: Disclosure harmful to personal privacy

The applicant submits that disclosure of the requested information will not cause any harm to the privacy of third parties. Furthermore:

If the information does not pertain to the Applicant then it should not have been put on the Applicant's personnel file. Any third party making a

submission to the Applicant's personnel file should be made aware that it is possible that the Applicant will view same

ICBC's position is that the personal information in dispute concerns someone other than the applicant and the opinions of others about the applicant. It has specifically identified how section 22 does or does not apply to certain of the records in dispute that the applicant has requested, relying in particular on sections 22(3)(g) and 22(2)(h) and my Order No. 138-1996, December 18, 1996, p. 8. (Submission of ICBC, paragraphs 27-33)

With respect to the charge of personal harassment, ICBC emphasizes that it treated this as a "sensitive human resource and labour relations issue. The personal information in these records includes evaluative material about the Applicant and the recollections of third parties concerning the events in question." (Submission of ICBC, paragraph 35)

ICBC further submits that section 22(2)(c) has no relevance to this application for access because the complaint at issue has already been settled. (Submission of ICBC, paragraphs 37-40) I agree with ICBC on this particular point. In addition, disclosure of the identities of the third parties in the records in dispute will expose them unfairly to "financial or other harm," in the language of section 22(2)(e), by re-opening the matter and setting back efforts currently underway "to make the workplace more positive and respectful." (Submission of ICBC, paragraphs 41, 42)

Finally, ICBC submits that the personal information in the records in dispute was supplied in confidence and thus should not be disclosed on the basis of section 22(2)(f) of the Act, especially in the context of a sensitive human resource and labour relations issue. (Submission of ICBC, paragraphs 43-46) Again, I agree with ICBC about the applicability of this particular section in this inquiry to the effect that much of the information severed or withheld was supplied in confidence during the process of trying to settle the matter.

I have considerable empathy with the general argument of ICBC that the review, investigation, and mediation of personal harassment complaints requires that assurances of privacy and confidentiality be given to the various parties involved in trying to settle the matter. (See Order No. 138-1996, pp. 4-5; Submission of ICBC, paragraphs 47-50) In this connection, I have had the benefit of reviewing a number of affidavits from ICBC staff and management, including two that I accepted on an *in camera* basis.

Review of the records in dispute

Most of the records in dispute concern the complaint of personal harassment. Ten records concern the human resource issues noted above; ICBC made essentially the same arguments, under sections 13, 17, and 22 of the Act, that I have reviewed above in connection with the harassment matter. (See Submission of ICBC, paragraphs 70-75)

In reviewing all of the records in dispute, I have benefitted greatly from the “Guide to Release” prepared by ICBC, which lists each document and the section of the Act depended upon for the specific severance or decision not to release. Since the applicant has also received this Guide, there is no reason to replicate its contents in the body of this Order.

For the 18 sets of records in dispute, sometimes comprising only a single page, ICBC has applied at least two exceptions under the Act in every instance except one. On one occasion, it claimed as many as five. I have seen no need to disentangle, in a detailed way, the specific exception that has the most probative force, in my view, for each of these records.

I find that ICBC has sufficiently demonstrated the relevance of sections 13, 17, and 22 of the Act to each of the records in dispute and is required to refuse access to them. With respect to section 22 in particular, I find that the applicant has not met the burden of proof.

8. Order

Under section 58(2)(c), I require the head of Insurance Corporation of British Columbia to refuse access to information in the records in dispute that have been withheld or severed under section 22 of the Act.

Under section 58(2)(b), I confirm the decision of the head of Insurance Corporation of British Columbia to refuse access to information in the records in dispute which have been withheld or severed under sections 13 and 17 of the Act.

David H. Flaherty
Commissioner

July 22, 1997