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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 159-1997
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INQUIRY RE: A decision of the Insurance Corporation of British Columbia to sever and withhold from the Trial Lawyers Association of British Columbia records that relate to proposed or draft "no-fault" automobile insurance in British Columbia

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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 January 21, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a decision by the Insurance Corporation of British Columbia (ICBC) to sever and withhold access to records related to proposed or draft "no-fault" automobile insurance in British Columbia. This decision was made in response to a request for such records by the Trial Lawyers Association of British Columbia (TLABC).

2. Documentation of the inquiry process

On April 26, 1996 the applicant requested from ICBC copies of records regarding proposed or draft "no-fault" information as it relates to automobile insurance in British Columbia. ICBC responded on August 26, 1996 by releasing a portion of the requested records, withholding another portion under sections 13, 14, 17, and 22 of the Act, and refusing access to a final portion that was determined to be "not responsive" to the request.

The applicant requested a review of these decisions on August 29, 1996. Approximately 2,879 pages were at issue. At the outset of mediation it was agreed by the parties that the records ICBC considered to be "not responsive" to the requests would not form part of the current request for review. On December 16, 1996 the applicant requested an inquiry to resolve the issues in dispute. On December 18, 1996 the applicant made a further request that the entire inquiry be oral or, if it was written, that it at least have an oral component to it. On December 20, 1996 I informed both parties that the

inquiry would follow a written format. My decision to hold a written inquiry was based on section D.6 of my Office's Policies and Procedures (June 1996 edition).

On January 2, 1997 my Office issued a notice to the applicant and ICBC that a written inquiry would take place on January 21, 1997. On January 7, 1997 ICBC released further records to the applicant.

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

The issues to be reviewed at this inquiry are ICBC's decision to apply sections 13(1), 14, 17(1)(a),(b),(c),(d), and (e), 22(1) and 22(3)(d) to the records in dispute.

These sections read as follows:

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.

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

(a) any factual material,

(b) a public opinion poll,

(c) a statistical survey,

(e) an economic forecast,

...

(g) a final report or final audit on the performance or efficiency of a public body or on any of its programs or policies,

...

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,

(j) a report on the results of field research undertaken before a policy proposal is formulated,

(k) a report of a task force, committee, council or similar body that has been established to consider any matter and make reports or recommendations to a public body,

(l) a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of the public body,

....

Legal advice

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

Disclosure harmful to 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:

(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.

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.

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

...

> (d) the personal information relates to employment, occupational or educational history,
>
> ....

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1), at an inquiry into a decision to refuse an applicant access to all or part of a record, it is up to the public body to prove that the applicant has no right of access to the record or part of the record. In this case, ICBC has to prove that under sections 13(1), 14, and 17(1)(a),(b),(c),(d), and (e), the applicant has no right of access to the records in dispute.

If the record or part of the record that the applicant is refused access to contains personal information about a third party, it is up to the applicant to prove that disclosure would not be an unreasonable invasion of the third party's personal privacy under section 22 of the Act.

4. The records in dispute

The records in dispute are approximately 1,935 pages of information that have either been severed or withheld in their entirety. The records include reports, minutes of meetings, e-mails, and memoranda that relate to the applicant's request for proposed or draft "no-fault" information as it relates to automobile insurance in British Columbia.

5. ICBC's case

ICBC made both *in camera* and open submissions; the description that follows is based on the open submissions. It is worth noting that the *in camera* submission is less than two pages (four paragraphs) longer than the fifteen pages of the open submission. ICBC also submitted open and *in camera* versions of the affidavit of H. Graham Reid; again, most of the evidence has been provided to the applicant.

ICBC emphasizes that there are a variety of ways whereby it is held accountable for its activities, including under the Act:

> The Act's exceptions to the rights of access recognize that public institutions such as ICBC often have an important policy-making function - and the function of developing competitive strategies - that cannot be conducted in a fishbowl. (Submission of ICBC, paragraph 7)

In fact, ICBC continually reviews its product options in order to fulfill its legislative duties: "The identification and study of these options cannot be carried out efficiently or in a sound manner if the glare of public scrutiny is unrestricted. Moreover, ICBC carries on business in a competitive environment." (Submission of ICBC, paragraph 8; and Affidavit of H. Graham Reid, passim)

ICBC continually evaluates the options for its insurance products in order to be able to advise government, especially in light of losses that ICBC may be incurring. (Submission of ICBC, paragraphs 14-16) In May 1993 ICBC initiated a Product Task Force, which completed its work late in 1993, and produced many of the records still at issue in this inquiry. (Submission of ICBC, paragraph 17)

ICBC emphasizes that KPMG Consulting Group is carrying out an ongoing process of consultation and study of various insurance product options for ICBC. The first volume of its study was made available to the public on December 19, 1996. A second volume is imminent. ICBC further indicated that the government appointed Douglas Allen to prepare a report on options for government. (Affidavit of Steve Heather, paragraph 14) This work is now completed.

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

6. The Trial Lawyers Association of British Columbia's case

The TLABC submits that there is "evident public interest in disclosure of the documents sought, as they bear on ICBC's proposals or plans for future changes to automobile insurance in the Province of British Columbia which if implemented would impact upon each and every person who travels on the roadways, sidewalks and thoroughfares of this Province. The imposition of either a threshold or pure no-fault system of auto insurance would also invariably impact on an individual's right of access to the courts, a right that is a fundamental element of our free and democratic society, and not to be lightly discarded." (Submission of the TLABC, paragraph 21) This public interest is further reflected in the creation of "a wide-ranging group of concerned British Columbians who have joined together in opposition to the introduction of no-fault insurance in British Columbia as partners in the Coalition Against No-Fault in British Columbia." The TLABC states:

> Accordingly, although TLABC is the named applicant in this Inquiry, the information and documents sought are for the benefit of the Coalition and British Columbians as a whole, to ensure that the public is properly informed as to ICBC's initiative to implement significant changes in the automobile insurance system in B.C. (Submission of the TLABC, paragraphs 22 to 24)

The TLABC argues that ICBC's general strategy with respect to no-fault insurance "reflects a desire to keep the public in the dark about potential product changes, so that there would be little opportunity for the public to mount an effective opposition to its plans." (Reply Submission of the TLABC, p. 1)

The TLABC's submissions that deal with specific sections of the Act are discussed below.

7. Discussion

The representation of the public interest

While accepting its responsibilities for accountability to the public, ICBC submits that the applicant in this inquiry is a private association of trial lawyers, "many of whose members are on record as being opposed to introduction of no-fault motor vehicle liability insurance in British Columbia." Further, a recent study by the KPMG Consulting Group estimates that lawyers receive approximately $223 million each year from the present insurance system. (Submission of ICBC, paragraph 9) The TLABC disagrees with this point of view and the misleading and inaccurate dollar figures and argues that its Coalition broadly reflects the public interest, which ought to be given considerable weight against the interests of ICBC in preventing disclosure of the records in dispute. (Submission of the TLABC, paragraphs 25-31, 34; Reply Submission of the TLABC, p. 2)

It is important for both parties to realize that my role is simply to make a decision on access to records under the Act; the broad issue of the merits and demerits of no-fault automobile insurance is mercifully beyond my purview. But I am satisfied that ICBC has intelligently considered the "public interest" as such in reaching its current decision on the disclosure of the records in this access request. (See Reply Submission of ICBC, paragraphs 24, 25; and Affidavit of Steve Heather, paragraphs 12-14)

Section 13: Policy advice or recommendations

ICBC submits that certain itemized information in the records in dispute "contain advice and recommendations of ICBC personnel to ICBC management and, in turn, to government." (Submission of ICBC, paragraphs 47-51) I agree that section 13(1) of the Act does apply to such records in dispute.

The TLABC submits that ICBC has ignored section 13(2) of the Act, which specifies that a public body has to disclose "any factual material," public opinion polls, statistical surveys, and feasibility or technical studies: "It is submitted that the exceptions enumerated under section 13(2) would apply to most of the documents withheld in this matter." The TLABC refers in particular to the products of the work of the Product Task Force at ICBC in 1993. (Submission of the TLABC, paragraphs 19, 20) On the basis of my own review of the records in dispute, I find that section 13(2) does not apply to them.

Section 14: Legal advice

ICBC wishes to withhold a "relatively small amount" of information in the records in dispute that was prepared by ICBC lawyers and qualifies as legal advice to ICBC." (Submission of ICBC, paragraph 50)

For reasons that others will appreciate, I quote the following statement by the TLABC about the appropriate scope of solicitor-client privilege in relation to the legal advice component of privilege:

> ... the solicitor-client privilege exclusion ought only to apply in circumstances where there is truly a solicitor-client relationship and where the information imparted would legitimately be considered 'legal advice.' The mere fact that a document is created by an employee of the public body who also happens to be a lawyer is not, it is submitted, sufficient basis to withhold the document as a matter of course. (Submission of the TLABC, paragraph 15)

As ICBC indicated, it is only attempting to withhold a small amount of information under section 14. When it claims the latter, it also applies sections 13 and 17, and I have not found it essential to determine which section is best applied to which paragraphs or pages, because of my general finding of non-disclosure in this inquiry.

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

ICBC argues that there is a competitive market for at least certain aspects of motor vehicle insurance in this province:

> Second, some of the information withheld by ICBC is actuarial information regarding ICBC's product pricing and costs. Release of this financial and commercial information would harm ICBC's competitive position in the competitive portion of the existing insurance market. Further, the records also contain narrative information that identifies, analyzes and makes recommendations on various insurance product options. Disclosure of this information would - in the policy content described above - both limit policy choices for motor vehicle liability insurance in British Columbia and hamper ICBC's ability to offer whichever product option is selected. It would also lead to harm to ICBC's financial interests, since it would hamper ICBC's ability to negotiate any necessary ICBC staffing changes and its ability to negotiate service contract changes - or new service contracts - with new or existing service providers. (Submission of ICBC, paragraphs 21, 22)

Thus ICBC submits that the records in dispute, especially actuarial information as specifically identified by it, contain trade secrets, largely because disclosure would benefit competitors and harm ICBC's financial interests. It relies for this purpose on the definition of "trade secret" in Schedule 1 of the Act. (Submission of ICBC, paragraphs 25-27; Affidavit of Steve Heather, paragraph 9) The TLABC holds that ICBC has submitted no real evidence to support this assertion. (Reply Submission of the TLABC, p. 1) ICBC further argues that the actuarial records in dispute contain financial and commercial information belonging to it, relying on my Order No. 15-1994, July 7, 1994, even though much of the information at issue in this inquiry is narrative and not

numerical data. (Submission of ICBC, paragraphs 28-32; and Affidavit of Harry Pylman, paragraph 5, 6)

ICBC also submits, with respect to section 17(1)(c), that some of the information in dispute reveals "plans that relate to the management of personnel of or the administration of a public body," especially with respect to staffing issues. Under section 17(1)(d), disclosure of the proposals for insurance product changes in this province would be "premature disclosure" within the language of the section:

> Premature release of details of the product options also can reasonably be expected to cause harm because it would enable trial lawyers - perhaps the group with the most at stake financially - to mobilize resistance to the various choices by creating fear and anxiety among those who might, or might not be, affected by changes. This could easily limit the number of options which government can realistically consider for adoption. (Submission of ICBC, paragraph 33-37; and Affidavit of Steve Heather, paragraph 11)

One consequence could be "undue financial loss" to ICBC in the language of section 17(1)(d).

ICBC's position is that it has to have implementation plans in place to comply with decisions that government may make with respect to changes in insurance products. Disclosure of such "shelf-ready" plans at this time, including detailed costing and benefit levels for the various product options, would harm the financial interests of ICBC under section 17 of the Act, not least at the hands of competitors. (Submission of ICBC, paragraphs 42-46)

Relying on my Order No. 1-1994, January 11, 1994, the TLABC submits that ICBC must meet standards of "detailed and convincing evidence of harm" in order to invoke section 17. In its view, the risk of disclosure in this inquiry is that ICBC "will have greater difficulty in co-opting groups in opposition to no-fault, and greater difficulty in selling its no-fault proposal to an informed public, as opposed to a public whose opinion has been 'moulded' by a sophisticated media campaign ...." (Submission of the TLABC, paragraphs 35-38) The TLABC is generally of the view that ICBC has led no evidence to support its fears of harm to its financial interests. (Submission of the TLABC, paragraph 39-41; and Reply Submission, p. 1) The partial response of ICBC is that it has submitted *in camera* evidence on at least one of these two points. (Reply submission of ICBC, paragraph 3)

In its response to the latter argument, I agree with ICBC's submission that the detailed and convincing evidence standard of Order No. 1-1994 has been moderated somewhat in later decisions into a reasonable expectation of harm. ICBC has accurately pointed out the influence in this regard of a decision by the Ontario Divisional Court in a 1995 decision involving Ontario's equivalent legislation. (Reply Submission of ICBC,

paragraph 22) The court rejected the "detailed and convincing evidence" standard in favour of the reasonable expectation of probable harm. (See Ontario (Worker's Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1995), 125 D.L.R. (4th) 171; leave to appeal granted, [1995] O.J. No. 2548 (Ont. C.A.)

Section 22: Disclosure harmful to personal privacy

The personal information that ICBC refuses to disclose to the applicant contains names of particular individuals who have been injured in motor vehicle accidents and whose accident-related statistics are found in certain portions of the records. (Submission of ICBC, paragraphs 52, 53) The application of this section is in fact moot since the TLABC "does not question ICBC's deletion of the names of identifiable individuals to preserve their privacy." (Submission of the TLABC, paragraph 18)

Review of the records in dispute

ICBC thoughtfully and intelligently provided me and the TLABC with a very detailed description and analysis of what records it has severed from the several thousand pages in dispute. Entitled "Guide to Release," and prepared in tabular form, this twenty-nine page guide to severing is the best that I can remember reviewing. It provides a description of each separate record, a narrative explanation of its contents, and the general reason for the application of each exception under the Act. A separate box lists the sections being claimed, usually sections 13 and 17.

I have reviewed every page of the records in dispute on the basis of the Guide to Release and am satisfied that ICBC has appropriately applied the relevant sections of the Act. I accept the basic fact that ICBC has the right to operate in a zone of confidentiality as it develops its information, choices, recommendations, and actuarial data for its insurance products. These materials are protected from disclosure under sections 13 and 17 in particular. It is worth noting that much of the severed material is extremely repetitious, being either drafts of basic reports, or material that appears again and again in later deliberations within ICBC about no-fault insurance.

Preliminary objections

I note from the record that this inquiry has on occasion threatened to turn into a battle of submission and rebuttal in a never ending spiral. At a certain point in late January 1997, I ended this process on the grounds that both parties had had a substantial opportunity to make their respective cases. The TLABC objected to much of the affidavit material submitted by ICBC on two grounds. First, it says that substantial portions of the material contain arguments, assertions, or conclusions unsupported by evidence. ICBC submits that the information is proper for a number of reasons and, in any event, that I have the discretion to receive such affidavit or other evidence that I consider necessary or desirable. Secondly, the TLABC objects to assertions made in one affidavit that rely on

affidavits submitted in an earlier inquiry and not provided to them in this inquiry. ICBC submitted these earlier affidavits in this inquiry on an *in camera* basis.

I have accepted all of the affidavit material submitted in this inquiry, since I agree with counsel for ICBC that I have the discretion to do so. I have evaluated their contents and treated them like any other affidavit submitted in an inquiry. I have also accepted portions of ICBC's submission and affidavits on an *in camera* basis, as permitted under the Act and in accordance with the Notice of Inquiry and my Office's Policies and Procedures. (See Submission of the TLABC, paragraphs 11, 12; Reply Submission of ICBC, paragraphs 3-18; Reply Submission of the TLABC, pp. 1-3)

Further, I have found no need to cross-examine orally those who submitted affidavits for ICBC, just as I determined some time ago that an oral inquiry was not appropriate in this instance.

8. Order

I find that the head of the Insurance Corporation of British Columbia is authorized to refuse access to the records in dispute under sections 13 and 17 of the Act. Under section 58(2)(b), I confirm the decision of the head of ICBC to refuse access to those records.

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David H. Flaherty
Commissioner

April 17, 1997