Order F20-24

INSURANCE CORPORATION OF BRITISH COLUMBIA

Laylí Antinuk
Adjudicator

June 8, 2020

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Summary: An applicant requested information related to a specific motor vehicle accident claim from ICBC. ICBC provided some information in response, but withheld other information under several exceptions to access in FIPPA. At inquiry, the adjudicator considered ss. 13 (advice and recommendations), 14 (solicitor client privilege), 15(1)(g) (exercise of prosecutorial discretion), 17 (harm to financial or economic interests) and 22 (unreasonable invasion of personal privacy) of FIPPA. The adjudicator confirmed ICBC's decision to apply these FIPPA exceptions to most of the information in dispute and ordered ICBC to disclose the rest to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2), 14, 15(1)(g), 15(4), 17(1), 22(1), 22(2), 22(3)(b) and 22(4).

INTRODUCTION

[1] The applicant requested that the Insurance Corporation of British Columbia (ICBC) provide him with information related to one of his motor vehicle accident claims (the 2006 claim). ICBC located over 5,600 pages of responsive records and released or partially released many of these to the applicant. ICBC withheld some information under several exceptions to access in the *Freedom of Information and Protection of Privacy Act* (FIPPA). This order addresses ICBC's application of five FIPPA exceptions to the information in dispute – namely: ss. 13 (advice and recommendations), 14 (solicitor client privilege), 15(1)(g) (exercise of prosecutorial discretion), 17 (harm to financial or economic interests) and 22 (unreasonable invasion of personal privacy).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review ICBC's decision to withhold information under FIPPA. Mediation did not resolve the issues in dispute and the applicant requested an inquiry.

[3] ICBC provided submissions for the inquiry, but the applicant did not.

PRELIMINARY MATTERS

New issues – sections 15(1)(g) and 15(4)

[4] The notice of inquiry (notice) and the OIPC investigator's fact report (fact report) set out the inquiry issues. These two documents identify ss. 13, 14, 16, 17, 20 and 22 as the issues in this inquiry. However, during the inquiry, ICBC abandoned its reliance on ss. 16 and 20 and instead made arguments about the application of s. 15(1)(g) to some of the information in dispute. ICBC also requested the OIPC's permission to add this as an inquiry issue.[1]

[5] As described in the notice received by both parties, the fact report sets out the issues for the inquiry and OIPC adjudicators will not generally consider issues that do not appear in the fact report. If a party wants to add a new inquiry issue, it must request and receive permission to do so.[2] The OIPC grants such permission in exceptional circumstances only. To allow otherwise would undermine the effectiveness of the mediation process which exists, in part, to assist the parties in identifying, defining and crystallizing the issues prior to inquiry.[3]

[6] The notice does not identify s. 15(1)(g) as an inquiry issue and the applicant objects to its addition.[4] Section 15(1)(g) allows public bodies to withhold information that relates to the exercise of prosecutorial discretion. Having carefully reviewed the records ICBC says s. 15(1)(g) applies to, as well as ICBC's submissions and affidavit evidence, I find it appropriate to add this FIPPA exception as an inquiry issue for the following reasons.

[7] Upon reviewing the information that ICBC initially withheld under ss. 16 and 20, I found it readily apparent that those two exceptions do not apply, but I cannot say the same about s. 15(1)(g). I find it understandable that ICBC did not initially identify s. 15(1)(g) as the most applicable exception given the complex context of this access request. The applicant has made numerous access requests to ICBC and the evidence shows these requests were interconnected

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[1] ICBC's July 22, 2019 letter to the OIPC. I note that ICBC also cited s. 3(1)(j) as a reason for withholding information at pp. 4837-4842 in its index of records. However, during the inquiry, ICBC confirmed that it is not relying on s. 3 in relation to those pages of records (March 16, 2020 email to the OIPC). I will not consider s. 3 in this inquiry.

[2] Order F12-07, 2012 BCIPC 10 at para. 6; see Order F12-07, 2012 BCIPC 10 at para. 6; Order F10-37, 2010 BCIPC 55 at para. 10; Decision F07-03, 2007 CanLII 30393 (BC IPC) at paras. 6-11, and Decision F08-02, 2008 CanLII 1647 (BC IPC).

[3] Order 15-15, 2015 BCIPC 16 at para. 10; Order F08-02, 2008 CanLII 1647 (BC IPC) at paras. 28-30.

[4] The applicant raised his objections in a telephone call to the OIPC Registrar of Inquiries on October 23, 2018.

and often proceeded concurrently.[5] All the requests were broad-sweeping and involve unusually large volumes of records (this case alone has 5,600 responsive pages).[6] Additionally, the applicant initiated several lawsuits against ICBC that relate to the same matters as his access requests. In short, ICBC has dealt with a myriad of complex, interrelated issues in the context of this particular access request.

[8] In these exceptional circumstances, I have decided it is appropriate to add s. 15(1)(g) as an inquiry issue. I have also decided to consider s. 15(4), which the applicant raised in correspondence he sent to ICBC during the inquiry.[7] Section 15(4) sets out circumstances in which a public body cannot refuse to disclose information under s. 15(1). To my mind, it makes sense to consider all the s. 15 issues raised by the parties at the same time.

[9] To ensure procedural fairness, I offered the applicant the opportunity to provide submissions respecting s. 15(1)(g) and offered ICBC the opportunity to provide submissions respecting s. 15(4).[8]

Complaints – section 6

[10] As mentioned previously, the applicant did not provide submissions for this inquiry, but he did send several letters to the OIPC and counsel for ICBC during the inquiry process. In his correspondence, he makes several complaints about ICBC. For instance, the applicant complains that ICBC provided certain individuals with a photocopy of his driver's license.[9] He characterizes this as a breach of his privacy.[10] He also claims that ICBC has not produced numerous responsive records for this inquiry and has intentionally failed to disclose certain records to him in violation of s. 6.[11]

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[5] ICBC's initial submission at paras. 1-4.
[6] *Ibid*. Additionally, I note that a previous OIPC order dealt with the applicant's request for all his personal information from ICBC – another broad-sweeping request when one considers the numerous claims the applicant has made with ICBC over the years. See Order F18-04, 2018 BCIPC 04.
[7] Applicant's September 5, 2019 letter to ICBC at pp. 1-2.
[8] On March 13, 2020, I sent a letter to the parties informing them of my decision to allow ICBC to add s. 15(1)(g) as an inquiry issue and inviting the applicant to make submissions in light of this new issue. He chose not to make submissions. On April 9, 2020, I sent a letter to ICBC providing it the opportunity to make submissions respecting s. 15(4). It did so.
[9] Applicant's July 4, 2019 letter to the OIPC at p. 3.
[10] *Ibid* at p. 4.
[11] *Ibid* at p. 2 and the applicant's August 23, 2019 letter to ICBC at p. 1. I also note that in his September 5, 2019 letter to the OIPC's registrar of inquiries, the applicant alleges that certain evidence in his possession "meets the criteria for section 25 of the Act." Accordingly, he requested that the OIPC registrar of inquiries forward his letter to the OIPC's case review team, which she did. I will not discuss s. 25 in this order for the reasons set out in paragraph 11.

[11] None of these complaints appear in the fact report or notice as inquiry issues. The applicant did not request permission to add these complaints into the inquiry nor did he explain what circumstances would justify doing so at this late stage. Nothing in the evidence before me indicates that he informed the OIPC that the fact report and the notice did not accurately reflect the inquiry issues.

[12] The OIPC does not commence complaints at the inquiry stage. In the normal course, when an individual raises a complaint, the OIPC requires them to first make the complaint to the public body in writing in an attempt to resolve it. If the individual is not satisfied with the public body's response, then the OIPC may accept their written complaint. The OIPC concludes most complaints at investigation and mediation and they rarely get sent to inquiry.[12]

[13] Given that the fact report and notice do not mention these complaints, I conclude that they were not properly made or were resolved at investigation and mediation. I decline to add them into this inquiry.[13]

ISSUES

[14] In this inquiry, I will decide:

1) Whether ss. 13, 14, 15(1)(g) or 17 authorize ICBC to withhold the information in dispute; and
2) Whether s. 22 requires ICBC to withhold the information in dispute.

[15] ICBC bears the burden of proving that ss. 13, 14, 15(1)(g) and 17 apply.[14] It also bears the burden of proving that any information withheld under s. 22 qualifies as personal information.[15] However, the applicant bears the burden of proving that disclosure of any personal information withheld under s. 22 would not constitute an unreasonable invasion of third party personal privacy.[16]

DISCUSSION

Background

[16] As previously mentioned, the applicant made a claim with ICBC related to a 2006 motor vehicle accident. Ongoing litigation between the applicant and

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[12] Order F18-11, 2018 BCIPC 14 at para. 6; Order F17-26, 2017 BCIPC 27 at para. 7.
[13] I note that the OIPC has repeatedly informed the parties that ICBC's handing of the applicant's access requests and its disclosure of his personal information (i.e. the applicant's complaints) are outside the scope of this inquiry: the OIPC's July 9, 2019 letter to the parties and the OIPC's August 23, 2019 letter to the parties.
[14] Section 57(1) of FIPPA. Whenever I refer to section numbers throughout the remainder of this order, I am referring to a section of FIPPA.
[15] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para.143.
[16] Section 57(2).

ICBC related to the 2006 claim remains active.[17] A previous OIPC order also addresses the 2006 claim and some information related to it.[18] The applicant has also made other claims with ICBC that involved or continue to involve litigation.[19] Information related to these other claims appears in some of the responsive records.

Information in dispute

[17] The responsive records in this case total over 5,600 pages, all of which ICBC provided to the OIPC for the purposes of this inquiry. The information in dispute appears on approximately 1,400 pages, some of which ICBC withheld entirely, others partially.[20] Examples of the types of records involved include:

- emails, letters and faxes;
- ICBC claim file folders and claim history folders;
- ICBC employee notes;
- various types of ICBC forms and reports;[21]
- driver licence information; and
- various types of invoices.

[18] Before this matter moved to inquiry, the OIPC's senior investigator prepared a table (the OIPC table) that lists the specific pages of the records that remained in dispute following investigation and mediation. Both parties received the OIPC table during the inquiry process and ICBC confirmed that it correctly identifies the information in dispute.[22] During the inquiry, I informed the parties that I would make my decision on the basis that the OIPC table exhaustively lists the only information in dispute in this inquiry.[23]

[19] In addition to providing the responsive records for my review, ICBC included an index of records (index) with its submissions. ICBC says the index correctly identifies the FIPPA exceptions ICBC relies on for its severing in

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[17] FOI Manager's Affidavit at para. 2; ICBC's initial submissions at paras. 3 and 26.
[18] Order F18-04, *supra* note 6. I note that the applicant requested that the OIPC reopen Order F18-04 so that he could present new evidence. By letter dated October 8, 2019, the Director of Adjudication declined to reopen Order F18-04.
[19] ICBC's initial submission at paras. 1-3.
[20] OIPC investigator's fact report at para. 8.
[21] For example, worksheets respecting claim status, bodily injury reserves, low velocity impact collisions and future damages.
[22] ICBC's July 22, 2019 letter to the OIPC. I note that the applicant asserts that he wishes to "challenge all redactions made to any and all pages released by ICBC" (applicant's July 22, 2019 letter to the OIPC) but I do not understand him to be saying the OIPC table is incorrect. Nothing in the evidence suggests that the OIPC table does not accurately list the information in dispute.
[23] March 13, 2020 letter to the parties.

relation to the information in dispute.[24] I note that ICBC's index sometimes contradicts the FIPPA exceptions noted directly on the responsive records. Given that ICBC has explicitly stated that the index correctly identifies the FIPPA exceptions ICBC relies on to withhold information, I have made my decision based on the index rather than the FIPPA exceptions listed on each page. However, the index does not include every page of the records at issue. Wherever this occurred, I made my decision based on the FIPPA exception(s) identified directly on the specific record at issue.

[20] In many cases, ICBC applied multiple FIPPA exceptions to the same information. In going through my analysis, if I found that one exception applied, I did not consider the other cited exceptions.

[21] ICBC withheld the majority of the information in dispute under s. 14, so I will begin by considering s. 14.

Solicitor client privilege – section 14

[22] Section 14 allows public bodies to refuse to disclose information protected by solicitor client privilege. Section 14 encompasses two kinds of privilege recognized at common law: legal advice privilege and litigation privilege.[25] Legal advice privilege protects confidential communications between a solicitor and client made for the purpose of obtaining and giving legal advice; litigation privilege applies to materials gathered or prepared for the dominant purpose of litigation.[26] ICBC claims one or both types of privilege over the information in dispute.[27]

[23] For the reasons that follow, I find that legal advice privilege or litigation privilege applies to much, but not all, of the information in dispute.

Approach to the evidence

[24] ICBC has not clearly or consistently stated which type of privilege it claims over each record. ICBC's privilege submissions make reference to only a few specific examples of each type of privilege in the records. Additionally, its index does not explicitly state the type of privilege claimed for each record, or provide consistently detailed descriptions that allow for easy inferences about this. Therefore, because of the vital importance of solicitor client privilege to the justice system, I have considered whether ICBC provided sufficient evidence to establish that *either* type of privilege applies to *each* record withheld under s. 14.

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[24] ICBC's July 22, 2019 letter to the OIPC.
[25] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26 [*College of Physicians*].
[26] *Ibid*.
[27] ICBC's initial submission at para. 6.

Legal advice privilege

[25] Legal advice privilege arises out of the unique relationship between client and lawyer.[28] The Supreme Court of Canada describes its purpose in the following terms:

> Clients seeking advice must be able to speak freely to their lawyers secure in the knowledge that what they say will not be divulged without their consent… The privilege is essential if sound legal advice is to be given in every field… Without this privilege clients could never be candid and furnish all the relevant information that must be provided to lawyers if they are to properly advise their clients.[29]

[26] To this end, legal advice privilege protects confidential communications between a solicitor and client made for the purpose of seeking, formulating and giving legal advice. In order for legal advice privilege to apply to a communication (and records related to it),[30] the communication must:

1) be between a solicitor and client;
2) entail the seeking or giving of legal advice; and
3) the parties must have intended it to be confidential.[31]

[27] The scope of legal advice privilege extends beyond the explicit seeking and giving of legal advice to include communications that make up "part of the continuum of information exchanged [between solicitor and client], provided the object is the seeking or giving of legal advice."[32]

ICBC's position on legal advice privilege

[28] When it comes to legal advice privilege, ICBC says it withheld information related to communications between ICBC and external counsel retained to defend insured defendants against the applicant's various claims, as well as communications between ICBC adjusters and in-house legal counsel respecting legal advice.[33] ICBC submits that the withheld information includes legal advice and opinions, instructions to counsel, legal billing information and information that reflects ICBC's litigation strategy.

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[28] *Solosky v. The Queen*, 1979 CanLII 9 (SCC) at p. 839 [*Solosky*].
[29] *Smith v. Jones*, 1999 CanLII 674 (SCC) at para. 46.
[30] *R. v. B.*, 1995 CanLII 2007 (BC SC) at para. 22.
[31] *Solosky*, *supra* note 28 at p. 837.
[32] *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 83.
[33] The information in this paragraph comes from ICBC's initial submissions at paras. 13, 14 and 23.

Legal advice privilege analysis

[29] For the reasons that follow, I find that legal advice privilege applies to some, but not all, of the records withheld under s. 14. Broadly speaking, the categories of records withheld under s. 14 comprise the following:

- exclusive communications between ICBC and its lawyers;
- internal ICBC communications;
- communications involving third parties;
- legal billing information; and
- ICBC employee notes and reports.

A discussion of each category follows.

Exclusive communications between ICBC and its lawyers

[30] Much of the information ICBC withheld under s. 14 consists of direct, exclusive communications between ICBC and its lawyers.[34] These records comprise emails and letters sent between ICBC and its lawyers that contain:

- legal advice or requests for legal advice;[35]
- instructions or requests for instructions;[36]
- questions and information sharing related to legal advice;[37]
- information about administrative matters, such as meeting arrangements and the payment of legal fees;[38]
- discussions about legal defence strategy and litigation including advice related to upcoming court hearings and case settlement.[39]

[31] I find that that all these communications clearly meet the three criteria required for legal advice privilege to apply. They are all written communications between ICBC and its lawyers that entail the seeking and giving of legal advice or otherwise fall within the continuum of communications related to that advice. As the Supreme Court of Canada has made clear, all confidential solicitor client

[34] The evidence shows that ICBC's lawyers include in-house counsel and external counsel retained by ICBC. For clarity, when referring to ICBC's lawyers throughout this order, I am referring either to ICBC's in-house counsel or external defence counsel retained by ICBC, or both.
[35] For example, pp. 2580-2586, 2513-2516, 2623-2630 and 3828-3830 of the records. All future references to page numbers refer to pages of the records unless otherwise specified.
[36] For example, pp. 2418, 2733 and 2738.
[37] For example, pp. 42 and 2476-2478.
[38] For example, pp. 2292-2295 and 2466.
[39] For example, p. 109.

communications made in order to obtain legal advice, even those dealing with administrative matters, fall under the protection of legal advice privilege.[40] I conclude that these communications were made in confidence because they exclusively involve ICBC and its lawyers and arose in the context of multiple pieces of litigation. Several communications also contain explicit markers of confidentiality.[41]

[32] Taking all this into account, I find that legal advice privilege protects these direct, exclusive solicitor client communications; accordingly, s. 14 applies.

Internal ICBC emails

[33] ICBC also applied s. 14 to several internal emails in which ICBC employees share, discuss and comment on legal advice they received from ICBC's lawyers.[42] The courts have consistently held that legal advice privilege extends to internal client communications that discuss legal advice and its implications.[43] Given this, I find that legal advice privilege extends to these internal ICBC emails wherever they contain or would reveal privileged communications ICBC had with its lawyers.

[34] However, my review of the records leads me to conclude that not every internal ICBC email withheld under s. 14 reveals communications between ICBC and its lawyers about legal advice. Where internal emails do not mention or in any way allow for accurate inferences as to legal advice, legal advice privilege does not apply.

Communications with third parties

[35] ICBC claims that s. 14 applies to communications involving a variety of third parties, namely:

- communications between ICBC's lawyers and the insured defendants;[44]
- communications between ICBC and/or its lawyers and third parties;[45]
- a communication from the applicant to one of ICBC's lawyers;[46] and
- a communication between two third parties.[47]

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[40] *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC) at pp. 892-893.
[41] For example, pp. 294, 1229 and 1291.
[42] For example, pp. 72, 2323-2328, 2331 and 2406.
[43] *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at para. 12; *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District,* 2013 BCSC 1893 at paras. 22-24.
[44] For example, pp. 2747, 2985 and 2998. The defendants in this case are the individuals insured by ICBC and named in the applicant's legal actions.
[45] For example, pp. 383-394, 733-741, 1969-1987 and 2312-2313.
[46] At p. 3882.
[47] At p. 2310.

[36] I will begin with the communications between ICBC's lawyers and the insured defendants. Legal advice privilege extends to confidential communications between an insured (i.e. the defendants), insurer (i.e. ICBC) and solicitor (i.e. defence counsel) when those communications relate to legal advice because of the special, tripartite relationship between these parties.[48] With this in mind, I find that all the communications involving the insured defendants meet the requirements for legal advice privilege to apply. These communications involve only ICBC, its lawyers, and the insured defendants (or some combination of these three parties). The participants in these communications discuss the upcoming litigation and either seek, give or talk about legal advice. Additionally, the nature, context and content of these communications indicates to me that the participants intended to converse confidentially. Therefore, I find that legal advice privilege applies and s. 14 authorizes ICBC to withhold these communications.

[37] Turning to the communications that involve ICBC and/or its lawyers and third parties, I note that the majority of these communications comprise emails or letters sent between ICBC's lawyers and third party experts retained for the various pieces of litigation. Legal advice privilege only extends to communications involving third parties in limited circumstances.[49] Briefly, legal advice privilege will apply if the communication meets the criteria for legal advice privilege and the third party either:

1) serves as a channel of communication between client and solicitor; or
2) performs a function integral to the solicitor client relationship.[50]

[38] A third party serves as a channel of communication if it acts as an "agent of transmission," carrying information between the solicitor and client, or if its expertise is required to interpret information provided by the client so that the solicitor can understand it.[51]

[39] A third party's function is integral to the solicitor client relationship if the third party has the client's authorization to direct the solicitor to act on the client's behalf, or to seek legal advice from the solicitor on the client's behalf.[52] Conversely, a third party's function is not integral to the solicitor client relationship if the third party is authorized only to gather information from outside

[48] *Corp. of the District of North Vancouver v. BC (The Information and Privacy Commissioner)*, 1996 CanLII 521 (BC SC) at para. 22; *Chersinoff v. Allstate Insurance Co.*, 1968 CanLII 671 (BC SC) at p. 660-663; Order F18-33, 2018 BCIPC 36 at paras. 20 and 22.
[49] *College of Physicians*, *supra* note 25 at para. 32.
[50] *College of Physicians*, *supra* note 25 at para. 47-50.
[51] *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 532 at para. 27, item (b).
[52] *College of Physicians*, *supra* note 25 at para. 48 quoting with approval from *General Accident Assurance Company v. Chrusz*, 1999 CanLII 7320 (ON CA) at para. 121.

sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor.[53]

[40] I have considered whether any of the third parties involved here acted as a channel of communications between ICBC and its lawyers. ICBC has not claimed that any third parties acted in this way and I see no evidence of this in the records themselves. Nothing in the evidence or submissions indicates that any of the third parties' services were necessary to enable ICBC and its lawyers to understand and communicate with one another. Furthermore, in the records I do not see any third parties acting as an "agent of transmission" by carrying information between ICBC and its lawyers. Therefore, I am not satisfied that any third party involved in communications with ICBC and/or its lawyers acted as a channel of communication.

[41] I have also considered whether any of the third parties performed a function integral to the relationship between the client and solicitor. Based on the content of the records in dispute, I am not satisfied that ICBC authorized any third party to seek legal advice from, or direct, ICBC's lawyers. Nothing in the communications themselves or ICBC's submissions indicates that ICBC authorized any third party to do either of these things. There is also nothing to indicate that any third parties were retained to act on legal instructions from ICBC's lawyers. Therefore, I am not satisfied that legal advice privilege applies to these communications. I will revisit these third party communications in my litigation privilege analysis.

[42] ICBC also applied s. 14 to a fax the applicant sent to one of ICBC's lawyers. This fax is a hand-written letter from the applicant to external counsel retained by ICBC to represent the insured defendant in the litigation for the 2006 claim. Legal advice privilege does not apply to this record because it is not a confidential solicitor client communication that entails legal advice.[54] However, I will consider whether litigation privilege applies to this fax in my analysis below.

[43] Lastly, in one instance, ICBC applied s. 14 to a communication between two third parties. This communication is an access request from a third party individual to a third party organization. However, elsewhere in the records, ICBC applied only s. 22 to a duplicate of this same record.[55] Nothing in ICBC's submissions or evidence explains how this record meets the requirements for legal advice privilege and I am not satisfied that it does.

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[53] *Ibid*; *Bilfinger Berger*, *supra* note 51 at para. 27, item (c); *Potash Corporation of Saskatchewan Inc. v. Mosaic Potash Esterhazy Limited Partnership*, 2010 SKQB 460 at paras. 24 and 27.
[54] For similar reasoning, see *Flack v. Pacific Press Ltd*., 1970 CanLII 752 (BC CA) at pp. 341-342.
[55] Index's description of the record at p. 2315. Compare this to the generalized description of the records at pp. 2268-2313 (which includes the record at 2310) which the index says are "email communications with ICBC defence counsel."

Legal billing information

[44] ICBC also asserts that legal advice privilege applies to legal invoices and billing information withheld under s. 14.

[45] The Supreme Court of Canada has established that a rebuttable presumption of privilege applies to a lawyer's billing information.[56] A party that wants access to a lawyer's fee information can rebut the presumption by proving that there is no reasonable possibility that production will permit the deduction or acquisition of communications protected by solicitor client privilege.[57] For present purposes, this means that the applicant must rebut the presumption of privilege by way of evidence or argument.[58] The question in such an inquiry becomes: could an assiduous inquirer, aware of background information,[59] deduce, infer or otherwise acquire communications protected by solicitor client privilege?[60]

[46] ICBC says that legal advice privilege protects the records that contain its lawyers' billing information. ICBC argues that the presumption that legal advice privilege applies to this kind of information has not been rebutted. ICBC further contends that the applicant is an assiduous, prolific and well-informed inquirer who could use the legal billing information to deduce privileged communications.

[47] With one exception, ICBC's evidence establishes that the information it has characterized and withheld as legal billing information relates to legal fees.[61] This information consists of:

- amounts of time ICBC's lawyers spent working on specific tasks;
- disbursements paid by ICBC's lawyers to third parties;
- fees paid to ICBC's lawyers for specific time periods;
- total litigation expenses for particular files as of specific dates;
- invoices and cover letters from ICBC's lawyers; and
- dates and amounts ICBC paid its lawyers after receiving invoices.

The presumption of privilege applies to all this information. The applicant has not provided any submissions for this inquiry, so I have no evidence or argument

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[56] *Maranda v. Richer*, 2003 SCC 67 at para. 33.
[57] *Donell v. GJB Enterprises Inc.*, 2012 BCCA 135 at para. 59 [*Donell*].
[58] *British Columbia (Attorney General) v. British Columbia (Information and Privacy Commissioner),* 2019 BCSC 1132 at para. 55.
[59] *School District No. 49 (Central Coast) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 427 at para. 112.
[60] *Donell*, *supra* note 57 at para. 58; see also *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 at para. 37.
[61] For example, pp. 2417, 3158-3186 and 3192-3242.

before me to rebut this presumption. Therefore, legal advice privilege applies and ICBC can withhold the information related to legal fees under s. 14.

[48] However, one record listed in ICBC's index as containing legal billing information does not in fact contain any legal billing information.[62] Instead, this record comprises a brief bullet-form list of generic internal ICBC instructions about what to do in a certain circumstance. ICBC has not explained how this information reveals anything about legal billing or otherwise relates to privileged communications and I am not satisfied that it does. Therefore, legal advice privilege does not apply.

ICBC employee notes and reports

[49] ICBC also claims s. 14 applies to notes and reports written or collected by ICBC employees. Based on my review of the records, I find that legal advice privilege protects all the notes taken during or following meetings or telephone conversations between ICBC employees and ICBC's lawyers in which participants discussed legal advice.[63] These notes reveal privileged communications that ICBC had with its lawyers about legal advice. Additionally, I find it reasonable to infer that these notes record confidential communications given the litigious circumstances. ICBC can withhold these types of notes under s. 14.

[50] However, other notes and reports withheld under s. 14 do not contain or allow for accurate inferences as to confidential solicitor client communications about legal advice. Instead, these notes and reports contain information related to the applicant's various ICBC claims such as:

- file updates including updates respecting impending litigation;
- lists of completed or upcoming tasks;
- questions and instructions to and from managers;
- work performed by non-legal third party service providers;
- details about alleged bodily injuries, wage loss and vehicle damage;
- details about insurance coverage and finances; and
- details about ICBC's investigations work.

Having carefully reviewed this information, I am not satisfied that legal advice privilege applies to it because it does not pertain to or reveal confidential solicitor client communications about legal advice.

[62] Pages 3261 and 3278 (duplicates of the same record).
[63] For example, pp. 70-71, 73, 76, 96 and 99.

[51] I will now turn to litigation privilege.

Litigation privilege

[52] Litigation privilege protects materials created or collected as part of the process of preparing for and engaging in litigation.[64] Unlike legal advice privilege, litigation privilege "is not directed at, still less, restricted to, communications between solicitor and client" meaning that it can apply to communications between a solicitor and third parties.[65] Litigation privilege creates a zone of privacy in relation to pending or apprehended litigation to allow litigants to prepare for trial without intrusion from the opposing party.[66] Once the litigation ends, the privilege ceases to exist.[67]

[53] In order for litigation privilege to protect a document, the party asserting privilege – in this case ICBC – must prove two facts:[68]

1) Litigation was ongoing or in reasonable prospect at the time the document was created; and
2) The dominant purpose of creating the document was to prepare for that litigation.

[54] Litigation is in reasonable prospect if "a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it."[69] According to the BC Court of Appeal, this test is not particularly difficult to meet.[70] The test involves an objective assessment based on reasonableness and, while it does not require certainty, it is "not enough that litigation was simply considered a possibility."[71] A bare assertion that litigation is in reasonable prospect will not suffice.[72]

[55] To establish that the information in dispute passes the dominant purpose part of the test, ICBC must prove that the individuals who wrote, prepared or collected the information did so for the dominant purpose of seeking legal advice or aiding in the conduct of litigation.[73] When a document has dual or multiple

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[64] *College of Physicians*, *supra* note 25 at para. 28
[65] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 27 [*Blank*].
[66] *Ibid* at paras. 27 and 34.
[67] *Ibid.*
[68] *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 at para. 32, quoting with approval from *Keefer Laundry Ltd. v. Pellerin Milnor Corp.,* 2006 BCSC 1180 at para. 96.
[69] *College of Physicians*, *supra* note 25 at para. 83, quoting with approval from *Hamalainen v. Sippola*, 1991 CanLII 440 (BC CA) at para. 20.
[70] *Ibid*.
[71] *Fitzpatrick v. Wang et al.*, 2014 ONSC 4251 at para. 68.
[72] *Raj v. Khosravi*, 2015 BCCA 49 at para. 10 [*Raj*].
[73] *Ibid* at para. 12.

purposes, including litigation, but none of the purposes are dominant, litigation privilege does not apply.[74] Similarly, litigation privilege does not apply to documents created for the substantial (but not dominant) purpose of litigation – only the dominant purpose will suffice to establish litigation privilege.[75] Additionally, the courts have made clear that an awareness of the possibility of impending litigation is distinct from the purpose for which a document was prepared.[76]

ICBC's position on litigation privilege

[56] ICBC submits that the records it claims litigation privilege over were all created for the dominant purpose of litigation that was in reasonable prospect.[77] ICBC says that these records reveal negotiation and defence strategies, quantum assessments, updates about the litigation and communications between ICBC defence counsel and third party experts.

Analysis and findings – reasonable prospect

[57] In my litigation privilege analysis, I will consider only the information withheld under s. 14 that I have not already found legal advice privilege applies to. This remaining information contains material related to three ICBC claims that have led to ongoing litigation between the applicant and ICBC.[78] The first is the 2006 claim. The other two claims arose in 2011 and 2015 (the 2011 claim and the 2015 claim, respectively).[79]

[58] The first question I need to answer is when litigation respecting each of these claims came into reasonable prospect.

[59] In Order F18-04, Adjudicator Lott found that litigation respecting the 2006 claim was in reasonable prospect by February 2007.[80] I agree with her reasoning and, based on the submissions and evidence before me, I make the same finding here.

[60] When it comes to the 2011 and 2015 claims, I find that litigation for these matters came into reasonable prospect shortly after ICBC received each claim. I make this finding because the content of the responsive records confirms ICBC's characterization of the applicant as having "litigious tendencies."[81] As described

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[74] *Ibid* at para. 16.
[75] *Blank*, *supra* note 65 at paras. 59-60; *Fitzpatrick v. Wang et al.*, *supra* note 71.
[76] *Grand Rapids First Nation v. Canada,* 2014 FCA 201 at para. 31.
[77] The information in this paragraph comes from ICBC's initial submission at paras. 29 and 31-33.
[78] Litigation for all three of these claims remains ongoing. FOI Manager's Affidavit at para. 2.
[79] The 2011 claim relates to an accident that occurred on January 8, 2011. The 2015 claim relates to an accident that occurred on January 28, 2015. ICBC's initial submission at paras. 2-3.
[80] Order F18-04, *supra* note 6 at para. 42.
[81] ICBC's initial submission at para. 29.

in ICBC's uncontested submissions, discussed in Order F18-04, and borne out in records before me, the applicant has an extensive history of litigation with ICBC.[82] Therefore, I find it more likely than not that these claims would not be resolved without litigation and I also find that this was obvious right from the start – i.e. when ICBC first received these claims.

[61] To summarize, litigation for the 2006 claim was in reasonable prospect in February 2007; litigation for the 2011 claim was in reasonable prospect in early 2011; and litigation for the 2015 claim was in reasonable prospect in early 2015. Having reviewed the remaining information with these findings in mind, I conclude that all of it came into existence after litigation for the applicable claim was in reasonable prospect.

[62] Next, I must determine whether the dominant purpose of the remaining information was to prepare for the applicable piece of litigation.

Analysis and findings – dominant purpose

[63] Based on my review, I find that the majority of the remaining information was created for the dominant purpose of litigation. Most of it specifically references the impending litigation for the applicant's 2006, 2011 or 2015 claims. This information appears in the internal ICBC emails, the communications between ICBC's lawyers and third parties and in some of the ICBC notes and reports. It includes details about:

- possible defences;
- the findings of third party experts;
- key legal issues;
- defence tactics and strategies;
- defence counsel pre-trial planning;
- quantum assessments;
- updates about the litigation; and
- work planning necessary for defending against the applicant's claims.[83]

[64] Were it not for the impending litigation, most of the remaining information would not have come into existence. In other words, while not required to do so, ICBC has established that the *sole* purpose of the majority of the remaining information was preparing for impending litigation with the applicant. Therefore, I

[82] Order F18-04, *supra* note 6 at paras. 42-43.
[83] Out of an abundance of caution, in order to ensure I have not revealed information protected by privilege, I have used phrasing from paragraphs 32-22 of ICBC's initial submission here. ICBC did not provide these submissions *in camera*.

find that most of the remaining information passes the dominant purpose requirement. Litigation privilege applies to this information.

[65] However, based on my review, I am not satisfied that balance of the remaining information passes the dominant purpose test. Specifically, and for the reasons that follow, I find that litigation privilege does not apply to:

- the access request from an unrelated third party;[84]
- the bullet-form list of generic internal ICBC instructions;[85]
- the fax from the applicant to one of ICBC's lawyers;[86]
- ICBC injury assessment information;[87]
- some information in an ICBC claim status worksheet;[88] and
- an internal ICBC email that does not relate to litigation.[89]

Access request and ICBC instructions

[66] Starting with the access request and the ICBC instructions, on their face neither of these records has anything whatsoever to do with litigation. ICBC has not claimed that either one was created for the dominant purpose of litigation or to seek legal advice. Neither of these records passes the dominant purpose test. Therefore, I find that s. 14 does not apply.

Fax from the applicant

[67] Turning to the fax, I find it self-evident that litigation privilege does not apply to a document written by the applicant – the plaintiff in the litigation at issue – to the lawyer retained by ICBC to represent the insured defendant. The courts have long said that litigation privilege cannot restrict disclosure of an opposing party's statements.[90] In other words, litigation privilege does not allow one party to withhold evidence, information or statements obtained from the opposing party. As stated by the BC Court of Appeal, litigation privilege exists in order to:

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[84] At p. 2310.
[85] At pp. 3261 and 3278.
[86] At p. 3882.
[87] At pp. 4745-4746.
[88] At pp. 4923-4925 and 4940. For clarity, I am satisfied that litigation privilege does apply to the information withheld on p. 4982-4984 of the claim status worksheet because I find it obvious that the dominant purpose of this information was to prepare for litigation.
[89] At pp. 5362-5365. ICBC's index says these records are email communications between ICBC defence counsel and an ICBC employee. However, the internal email repeated at pp. 5362-5365 does not involve ICBC defence counsel. It involves two ICBC employees neither of whom work as lawyers.
[90] *Hart v. (Canada) Attorney General*, 2012 ONSC 6067 at para. 36-40. See also *Flack v. Pacific Press Ltd.*, 1970 CanLII 752 (BC CA).

> … carve out a protected space in which those engaged in the adversarial process of litigation can investigate, prepare and develop their respective positions and strategies, free from the intrusion of their adversary.[91]

Allowing the applicant to have access to a letter he penned himself does not intrude on the protected space defence counsel needs in order to prepare for litigation with the applicant. I find that litigation privilege does not protect this record, so s. 14 does not apply.

ICBC injury assessment information

[68] The ICBC injury assessment information appears in two records.[92] ICBC has not claimed or provided evidence to show that this assessment information was created for the dominant purpose of litigation. Without evidence to establish otherwise, my review of this record leads me to conclude that ICBC created this assessment information for the purpose of assessing the applicant's bodily injuries, not preparing for litigation or seeking legal advice. ICBC has not discharged its burden of proof when it comes to this information and I find that s. 14 does not apply.

Information in an ICBC claim status worksheet

[69] ICBC applied s. 14 to information on several pages of a claim status worksheet. For the reasons expressed in paragraphs 63-64, I have found that litigation privilege applies to some of the information in this worksheet. However, the balance of the information withheld in this worksheet appears to simply provide a broad overview of the status of the 2015 claim.[93] Nothing in this information relates specifically to the litigation for the applicant's 2015 claim. The word "litigation" does appear in one of the worksheet's headings, but without any input information under the heading. Without any explanation or evidence from ICBC to establish otherwise, I am not satisfied that this information was created for the dominant purpose of litigation or to seek legal advice respecting the 2015 claim. Given this, I find that s. 14 does not apply.

An internal ICBC email that does not relate to litigation

[70] I am not satisfied that litigation privilege applies to one internal ICBC email withheld under s. 14. In this email, an ICBC research assistant shares the results of her non-legal research with an ICBC investigator. The email does not mention litigation or legal advice or appear related to litigation in any way. ICBC has not explained what the dominant purpose of this email was, but on my review, it appears that the purpose of this email was to assist ICBC in its investigation of

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[91] *Raj v. Khosravi*, *supra* note 72 at para. 7.
[92] At pp. 4745-4746.
[93] *Supra* note 88.

the applicant's 2006 claim, not prepare for litigation or seek legal advice. Given this, I find that s. 14 does not apply.

Summary – solicitor client privilege

[71] Legal advice privilege and litigation privilege apply to much of the information in dispute. As a result, I have found that s. 14 applies to most, but not all, of the information withheld under this exception.

[72] I now turn to s. 15(1)(g).

Exercise of prosecutorial discretion – section 15

[73] ICBC relies on s. 15(1)(g) to withhold some of the information in dispute.[94]

[74] Section 15(1)(g) allows public bodies to withhold information if its disclosure could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion. Like several other FIPPA exceptions, s. 15(1)(g) contains the "could reasonably be expected to" language. The Supreme Court of Canada has characterized the standard of proof imposed by this language as "a middle ground between that which is probable and that which is merely possible."[95]

[75] Section 15(4) sets out circumstances in which a public body must not refuse to disclose the reasons for a decision not to prosecute. I will begin by considering whether s. 15(1)(g) applies, then I will turn to s. 15(4).

ICBC's position on prosecutorial discretion

[76] ICBC submits that it withheld some information in the records that "was used to make a decision about whether or not to approve a prosecution."[96] For example, ICBC withheld communications between Crown counsel and an ICBC investigator about one of the applicant's claims as well as a Report to Crown Counsel (Crown Report) and an ICBC report. According to ICBC, this information "was relevant to the exercise of prosecutorial discretion."[97]

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[94] ICBC's initial submission at paras. 42-45. I note that in its index, ICBC often cites s. 15 broadly, without reference to any specific subsection. However, ICBC's submissions focus exclusively on s. 15(1)(g), therefore I have not considered any other subsections of s. 15(1). As noted above, I informed the parties during the inquiry that I would allow ICBC to add s. 15(1)(g) specifically as an inquiry issue.

[95] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

[96] The information in this paragraph comes from ICBC's initial submissions at para. 43 and ICBC's index of records.

[97] ICBC's initial submission at para. 43.

[77] To support its s. 15(1)(g) arguments, ICBC provided affidavit evidence explaining the work of its Special Investigation Unit (Investigation Unit) and how it relates to prosecutorial discretion.[98] According to this evidence, the Investigation Unit investigates and makes recommendations about suspected fraud or exaggeration in insurance claims made to ICBC. Typically, if an ICBC adjuster suspects that someone made a fraudulent or exaggerated claim, the adjuster will refer the claim to the Investigation Unit. An Investigation Unit employee (investigator) will then investigate and make recommendations to the adjuster, such as whether to disallow or reduce the claim. In the course of this work, investigators may also recommend criminal charges to Crown counsel by preparing a Crown Report. ICBC says that this aspect of the Investigation Unit's work has led to many criminal charges and convictions.

Analysis and findings

[78] As noted, s. 15(1)(g) applies to information related to or used in the exercise of prosecutorial discretion. FIPPA defines "exercise of prosecutorial discretion" in part as follows:[99]

> "**exercise of prosecutorial discretion**" means the exercise by
>
> (a) Crown counsel, or a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power
>
> (i) to approve or not to approve a prosecution,
>
> …

[79] I have reviewed the information that ICBC says s. 15(1)(g) applies to. On its face, much of it clearly reveals information that relates to or was used in the exercise of prosecutorial discretion. For instance, in the communications between Crown counsel and the investigator, the two discuss the decision about whether or not to approve a prosecution. Additionally, from these communications, I can tell that Crown counsel reviewed the information in the Crown Report and considered it when exercising his prosecutorial discretion.[100] Therefore, s. 15(1)(g) applies to the Crown Report and the communications between Crown counsel and the investigator. I also note that *some* of the information in an Investigation Unit report and activity log withheld under s. 15(1)(g) also appears in the Crown Report and the communications with Crown counsel.[101] As such, the disclosure of this information would reveal information related to the exercise of prosecutorial discretion. Section 15(1)(g) applies to all this information.

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[98] The information in this paragraph comes from the Investigation Unit Manager's Affidavit at paras. 5, 8, 10, 12 and 13.
[99] Schedule 1 of FIPPA contains its definitions.
[100] For example, the emails at pp. 5513 and 5518.
[101] At pp. 5509-5511 (report) and 5514-5521 (activity log).

[80] However, I am not satisfied that the remaining information in the Investigation Unit report and activity log, or in the other records that ICBC withheld under s. 15(1)(g), constitutes information related to or used in the exercise of prosecutorial discretion. Instead, I find that this information summarizes the investigator's investigation activities. As outlined above, the Investigation Unit makes recommendations to adjusters about whether to disallow or reduce claims. In my view, some of the information withheld under s. 15(1)(g) relates directly to this aspect of the Investigation Unit's investigatory work, rather than its recommendations to Crown counsel respecting criminal charges.

[81] For example, ICBC's affidavit evidence says pp. 5513-5522 of the records "constitute communications between an ICBC [investigator] and Crown counsel about a recommendation to lay charges."[102] Having carefully reviewed these pages, I find that they do contain some communications as described by ICBC, so s. 15(1)(g) applies.[103] However, the rest of the information on these pages simply documents the work an investigator did in relation to a specific file. ICBC has not satisfactorily explained how this information could reasonably be expected to reveal information relating to or used in the exercise of prosecutorial discretion and I am not satisfied that it does.

Disclosing information after a police investigation is complete – s. 15(4)

[82] Section 15(4) precludes a public body from withholding the reasons for a decision not to prosecute after a police investigation closes. It states:

> (4) The head of a public body must not refuse, after a police investigation is completed, to disclose under this section the reasons for a decision not to prosecute
>
> > (a) to a person who knew of and was significantly interested in the investigation, including a victim or a relative or friend of a victim, or
> >
> > (b) to any other member of the public, if the fact of the investigation was made public.

[83] ICBC made the following submission respecting s. 15(4):[104]

> The access request reaches back many years, and the records relating to the sharing of information by external law enforcement almost 10 years ago. The employee who was communicating with external law enforcement left ICBC many years ago. It is ICBC's best understanding at this late juncture that the those [*sic*] records were provided by the police and the

[102] Investigation Unit Manager's Affidavit at para. 13.
[103] For instance, p. 5513 contains an email communication between Crown counsel and an investigator that clearly contains information related to the exercise of Crown counsel's prosecutorial discretion.
[104] ICBC's April 27, 2020 email to the OIPC.

> Crown on a confidential basis under the third party rule and were withheld in accordance with that understanding.

[84] Section 15(4) does not contain any references to the passage of time or the third party rule.[105] Consequently, I do not see the relevance of ICBC's submissions. None of FIPPA's exceptions to access authorize or require public bodies to withhold information on the basis of the "third party rule" nor do an applicant's access rights dissipate over time.

[85] Turning to the applicant's assertions on this issue, I have had some difficulty understanding his claims about s. 15(4). Suffice it to say, the applicant seems to believe ICBC contravened s. 15(4) by failing to disclose a specific email between an investigator and the Vancouver Police Department.[106] It appears as though the applicant may have received a copy of this email through some other access request.

[86] Taken together, I find the parties' submissions about s. 15(4) unclear. Despite this, I have considered the information in dispute in light of s. 15(4). As the text of FIPPA makes clear, this particular subsection only applies "after a police investigation is completed." As described above, the records show that an ICBC investigation occurred, but without clear submissions or evidence to suggest otherwise, I am not satisfied that an ICBC investigation fits within the meaning of "police investigation" under FIPPA.

[87] Furthermore, nothing in the evidence before me indicates that the requirements of subsections (a) or (b) have been met. Subsection (a) requires that the applicant "knew of" the police investigation. Nothing in the evidence indicates that the applicant "knew of" any specific police investigation, completed or otherwise, in which a decision not to prosecute occurred. Subsection (b) requires that the police investigation at issue must have been made public. Nothing before me indicates that any specific police investigations were made public.

[88] With all this in mind, the evidence does not persuade me that s. 15(4) has any bearing in this case.

[89] I will now turn to ICBC's application of s. 17 to the information in dispute.

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[105] While ICBC does not explain this, from what I understand, parties entering into information sharing agreements sometimes will agree to the "third party rule" which requires that when one party shares information with the other, the receiving party must not disclose the source or content of the information without permission from the party that shared the information.
[106] Applicant's September 5, 2019 letter to ICBC.

Harm to financial or economic interests – section 17

[90] Section 17 serves to protect the financial interests of public bodies from harm.[107] The relevant portions of s. 17 state:

> 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;
> >
> > …

[91] Previous orders describe subsections 17(1)(a) to (f) as examples of information that may result in harm under s. 17.[108] Past orders have also stated that the subsections do not function as stand-alone provisions; therefore, even if information falls into one of the subsections, a public body must still prove the harm described in the opening words of s. 17.[109] ICBC's submissions on s. 17 do not refer to any specific subsection of s. 17, but its index contains some references to ss. 17(1)(a) and (b).

[92] Section 17 contains one of the harms-based exceptions to disclosure under FIPPA. In discussing these exceptions, former Commissioner Loukidelis explained:

> … harms-based exceptions to disclosure operate on a rational basis that considers the interests at stake. What is a reasonable expectation of harm is affected by the nature and gravity of the harm in the particular disclosure exception. There is a sharp distinction between protecting personal safety or health and protecting commercial and financial interests.[110]

[93] Section 17 contains the same "could reasonably be expected to" language contained in s. 15(1)(g). Thus, the standard of proof imposed by this language is "a middle ground between that which is probable and that which is merely

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[107] *Architectural Institute of B.C. v. Information and Privacy Commissioner for B.C.*, 2004 BCSC 217 at para. 14.
[108] For examples, see Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 43 and Order F09-13, 2009 CanLII 42409 (BC IPC) at para. 38.
[109] For examples, see Order F19-03, 2019 BCIPC 4 at para. 22; Order F18-49, 2018 BCIPC 53 at para. 46; and Order F05-06, 2005 CanLII 11957 (BC IPC) at para 36.
[110] Order F08-22, 2008 CanLII 70316 (BC IPC) at para. 48.

possible."[111] To meet this standard, ICBC must prove that disclosure of the specific information at issue will result in a risk of harm that goes "well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."[112] The evidence ICBC provides must demonstrate "a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."[113] In discussing the evidence needed to establish harm under s. 17, former Commissioner Loukidelis explained:

> General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case… The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm… There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.[114]

Analysis and findings – financial harm

[94] ICBC's s. 17 submissions address only three categories of information:[115]

1) financial reserve information;
2) information exchanged between ICBC and other law enforcement agencies (the police); and
3) information related to ICBC's defence strategies, which ICBC says it also withheld under s. 14.

I will begin by discussing these three categories of information. I note that some of the information ICBC withheld under s. 17 does not fall into any of the categories it made submissions about. I will address this information last.

Reserve information

[95] Reserve information is the dollar amount that an insurer notionally sets aside based on its assessment of the potential cost to settle a claim.[116] ICBC adjusters and examiners calculate reserve amounts for all claims and change those amounts as necessary. ICBC argues that reserve information has independent monetary value where a claim has not closed or where litigation

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[111] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[112] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206 [*Merck Frosst*].
[113] *Ibid* at para. 219.
[114] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 137.
[115] ICBC's initial submission at paras. 38-41.
[116] The information in this paragraph comes from ICBC's initial submission at paras. 38-39.

remains ongoing because applicants would gain significant bargaining leverage if they knew ICBC's view of the potential upper range of damages.

[96] Previous orders have found that s. 17 applies to reserve information for open claims or when ongoing litigation exists because it would harm a public body's negotiating position and litigation strategy if an opposing party knew the public body's views about risk.[117] However, once litigation ends or claims have settled, or where reserve information is merely a default, generic amount rather than a case-specific amount, past orders have found that s. 17 does not apply.[118]

[97] I agree with the reasoning in past orders and have applied it here. Wherever the withheld information contains case-specific reserve information related to any of the applicant's ongoing claims, I find that s. 17 applies. I make this finding because I am satisfied that disclosure of the reserve information related to any of the applicant's ongoing claims could reasonably be expected to harm ICBC's financial interests.

[98] However, some of the reserve information is not about ongoing claims, so s. 17 does not apply. For example, ICBC says that it withheld "some reserve information" in a series of 21 pages that all relate to a claim that has now closed.[119] Only one of these pages contains reserve information and, because the claim has closed, I find that s. 17 does not apply.[120] ICBC has not explained how disclosing reserve information for a closed claim could reasonably be expected to harm its financial position and I am not satisfied that it could.

[99] In addition, some of the information ICBC has characterized as "reserve information" in its index is not, in fact, reserve information. For example, ICBC's index says it withheld "some reserve information" under s. 17 in parts of the records that actually contain the following:

- File updates about interactions ICBC adjusters had with an insured defendant.[121]
- The dollar amount of non-pecuniary damages offered to and demanded by the applicant for a claim he made in 2003 and the dates of those demands/offers.[122]

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[117] For examples, see Order F06-19, 2006 CanLII 37939 (BC IPC) at para. 130; Order F08-19, 2008 CanLII 66913 (BC IPC) at para. 55; and Order F18-04, *supra* note 6 at paras. 99-100.
[118] Order 01-46, 2001 CanLII 21600 (BC IPC) at para. 19; Order F14-34, 2014 BCIPC 37 at para. 48.
[119] At pp. 4691-4694, 4696-4704 and 4706-4713. These pages all relate to claim N334912-1, which has closed according to ICBC's initial submission at para. 3.
[120] Additionally, ICBC provided no other argument or evidence capable of establishing the requisite harm when it comes to any information about this closed claim. As such, I find that s. 17 does not apply.
[121] At p. 4610.
[122] At p. 4459 (bottom).

- Information about ICBC's assessment of the applicant's injuries respecting the 2003 claim.[123]

This information clearly does not constitute reserve information. I fail to see how s. 17 applies to this information and ICBC has not explained.

Information exchanged between ICBC and the police

[100] ICBC argues that disclosure of information exchanged between police and an investigator could reasonably be expected to harm its financial interests.[124]

[101] As described above, investigators investigate and make recommendations about suspected fraud or exaggeration in insurance claims made to ICBC.[125] ICBC says that a limited number of its investigators have access to sensitive law enforcement information. ICBC also says that the Investigation Unit has a long-standing understanding with the police that the Investigation Unit will treat all information police provide to it confidentially and will not disclose that information. ICBC argues that there is a "serious risk" that police will stop sharing information with ICBC if it discloses the information exchanged between the Investigation Unit and police. This, ICBC contends, would be detrimental to the ability of the Investigation Unit to investigate insurance fraud claims. ICBC's evidence shows that fraudulent and exaggerated claims cost a significant amount of money every year.

[102] I accept that fraudulent and exaggerated claims represent a significant cost to ICBC. I also accept that ICBC needs to investigate these claims and that information received from police may assist with this work. However, I do not accept that disclosure of the specific information at issue here could reasonably be expected to cause the harm ICBC alleges for the following reasons.

[103] The specific information that remains for consideration under s. 17 consists of three brief emails between an investigator and two different police organizations.[126] These emails contain two requests for specific files or information and one very short response to one of these requests. The emails do not include actual police files or the type of sensitive information that one would expect police to guard as highly confidential, such as witness statements or the identity of informants. Given this, I do not accept that the disclosure of the specific information at issue could reasonably be expected to lead to a serious risk that police will stop sharing information with ICBC.

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[123] At p. 4459 (top).
[124] ICBC's initial submission at para. 41.
[125] The information in this paragraph and the one that follows comes from the Investigation Unit Manager's Affidavit at paras. 5, 8, 9-10, and 12-13.
[126] At pp. 2622, 2663, 2918, 3884 (all duplicates of the same email) and 5389.

[104] Accordingly, I find that ICBC has not established the requisite "direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."[127] Therefore, I find that s. 17 does not apply to the information exchanged between ICBC and police.

Information respecting litigation strategies

[105] ICBC also says that it withheld some information under both ss. 14 and 17 because it reveals ICBC's defence strategies. Given the ongoing litigation with the applicant, ICBC argues that information regarding its litigation strategies for handling the applicant's claims could reasonably be expected to harm ICBC's financial interests if disclosed.[128]

[106] I have found that s. 14 applies to the majority of the information ICBC withheld under both ss. 14 and 17. The remaining information consists of:

- the ICBC injury assessment information discussed at paragraph 68;
- the information in the ICBC claim status worksheet discussed at paragraph 69; and
- the internal ICBC email discussed at paragraph 70.

[107] Starting with the injury assessment information, I note that this information relates to the 2015 claim. Litigation remains ongoing in respect of this claim. Given this, I find that the disclosure of this injury assessment information could harm ICBC's financial interests because it would be detrimental to ICBC's negotiating position and litigation strategy if the applicant knew ICBC's views about his injuries. Therefore, I find that s. 17 applies.

[108] However, the internal email and the information in the worksheet do not reveal ICBC's litigation strategies. As canvassed in paragraphs 69 - 70 above, the internal email does not appear related to litigation in any way and the remaining information in the worksheet appears to merely provide a broad overview of the status of the 2015 claim. I do not see how any of this information reveals ICBC's litigation strategies and ICBC has not explained. As a result, I find that s. 17 does not apply to this information.

Information ICBC did not make submissions about

[109] As set out above, ICBC also applied s. 17 to several types of information that do not fall into the three categories it made submissions about. For example, ICBC withheld the following types of information under s. 17 without any explanation:

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[127] *Merck Frosst*, *supra* note 112 at para. 219.
[128] ICBC's initial submission at para. 40.

- a letter sent by a third party organization to a third party individual respecting an unrelated access request;[129]
- internal ICBC emails that discuss meeting arrangements;[130]
- file folder labels;[131]
- blank ICBC forms;[132]
- information about third party ICBC customers;[133]
- notes or reports written by ICBC adjustors and investigators about the applicant's various claims that clearly do not reveal litigation strategies, reserve information, or information exchanged between ICBC and police;[134]
- information related to ICBC's processing of the applicant's access requests;[135]
- driver licence and customer directory information;[136] and
- a hand-written title page that contains a few words.[137]

[110] I do not understand how the disclosure of any of this information could reasonably be expected to harm ICBC's financial position. ICBC bears the burden of proof and it did not provide argument and evidence to support its position. Having no submissions or evidence from ICBC respecting its decision to withhold these types of information under s. 17, I find that s. 17 does not apply.

[111] I now turn to a discussion of s. 13.

Advice and recommendations – section 13

[112] Section 13 serves to protect a public body's internal decision-making and policy-making processes by encouraging the free and frank flow of advice and recommendations.[138] In doing so, s. 13 preserves an effective and neutral public service.[139] To this end, s. 13 allows public bodies to refuse to disclose information that contains or would reveal advice or recommendations developed by or for it.

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[129] At p. 2317.
[130] At pp. 2471-2475.
[131] At pp. 4714 and 5294.
[132] For example, at p. 5501.
[133] At pp. 5342-5356.
[134] For example, pp. 5299-5302 and 5334-5335.
[135] At pp. 5296-5298 and 5305.
[136] For example, pp. 5322-5323, 5326 and 5337.
[137] At p. 3827.
[138] *Insurance Corporation of British Columbia v. Automotive Retailers Association*, 2013 BCSC 2025 at para. 65.
[139] *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 43.

[113] The relevant parts of s. 13 state:

> 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,…

[114] Section 13 applies both to information that explicitly contains advice and recommendations and to information that would enable an individual to make accurate inferences about underlying advice or recommendations.[140]

[115] The s. 13 analysis involves two steps.[141]

1) First, I must determine if disclosure of the information at issue would reveal advice or recommendations developed by or for the public body.
2) If it would, then I must determine whether the information falls into any of the categories listed in s. 13(2). If it does, the public body must not refuse to disclose it.

Analysis and findings – advice and recommendations

[116] ICBC says that the information withheld under s. 13 constitutes advice and recommendations made by ICBC adjusters or investigators in relation to the handling of the applicant's claims. ICBC also says it withheld advice or recommendations about proposed or actual reserve amounts.[142]

[117] Based on my review, I find that most of the information withheld under s. 13 does not constitute advice or recommendations developed by or for ICBC. For instance, I am not satisfied that any of the following information reveals or would allow for accurate inferences about advice or recommendations:

- factual information about the applicant's various claims;[143]
- factual information about work performed or to be performed by ICBC employees respecting the applicant's various claims;[144]

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[140] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 135; Order F15-12, 2015 BCIPC 12 at para. 42; and Order F16-28, 2016 BCIPC 30 at para. 22.
[141] For example, see Order F07-17, 2007 CanLII 35478 (BC IPC) at para. 18 and Order F17-01, 2017 BCIPC 01 at para. 14.
[142] ICBC's initial submission at para. 39.
[143] For example, pp. 4696, 4834-4535, 4850, most of the information on 5300-5301, and 5389.
[144] *Ibid*.

- instructions to staff;[145]
- emails about meeting arrangements;[146] and
- emails containing fact-based questions and answers.[147]

[118] However, in a few instances, some of the information withheld under s. 13 does reveal advice or recommendations sent between ICBC employees about how to handle the applicant's claims.[148] For example, I find that ICBC correctly applied s. 13 to recommendations made by an investigator to an adjuster respecting what to do about the applicant's claims.

Exceptions – section 13(2)

[119] ICBC did not make submissions specifically related to the exceptions contained in s. 13(2). I have considered whether the information that qualifies as advice or recommendations falls within any of the circumstances described in s. 13(2). In my view, s. 13(2) does not apply.

[120] I will now discuss ICBC's application of s. 22 to the information in dispute.

Unreasonable invasion of third party personal privacy – section 22

[121] Section 22 requires public bodies to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of a third party's personal privacy. This section does not guard against all invasions of personal privacy; instead, it explicitly aims to prevent only those invasions of personal privacy that would be unreasonable in the circumstances of a given case.[149]

[122] In its very brief submissions on s. 22, ICBC simply says that the third party personal information withheld under s. 22:

> … includes contact information, insurance claims information, addresses, driver/vehicle licence information, claims limits, medical information and information provided to the [Investigation Unit] by another law enforcement agency. This type of information is clearly protected from disclosure under section 22 and ICBC was therefore required to withhold it.[150]

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[145] For example, the email at p. 2472 (repeated at p. 2475). Previous orders have found that instructions to staff do not fit within the meaning of advice and recommendations under s. 13. For example, see Order F19-27, 2019 BCIPC 29 at para. 32.
[146] For example, pp. 2471 and 2473-2474.
[147] Email at p. 5389.
[148] For example, the note dated August 18, 2009 on p. 4702, the final bullet point in the note taken on August 20, 2009 on p. 4703, the emails withheld on p. 4708, the brief recommendations in the Investigation Unit report on pp. 5300-5301 and a small portion of the email at p. 5512.
[149] Order 01-37, 2001 CanLII 21591 (BC IPC) at para. 14.
[150] ICBC's initial submission at para. 46.

[123] As mentioned previously, the applicant – who bears the burden of proof when it comes to proving that disclosure of personal information would not represent an unreasonable invasion of third party privacy – made no inquiry submissions.

Personal information

[124] Section 22 only applies to personal information. Therefore, the first step in any s. 22 analysis requires a determination as to whether the information at issue qualifies as personal information.

[125] FIPPA defines personal information as recorded information about an identifiable individual other than contact information.[151] Previous orders have held that information is about an identifiable individual when it is reasonably capable of identifying an individual alone or when combined with information from other available sources.[152]

[126] As noted, FIPPA excludes contact information from the definition of personal information. FIPPA defines contact information as information to enable an individual at a place of business to be contacted. Contact information includes an individual's name, position or title, business telephone number, address, email or fax number.

[127] Based on my review, I find that some of the information withheld under s. 22 qualifies as personal information. Broadly speaking, this information includes names of third parties, home addresses, personal telephone numbers and information that relates to the driving and vehicle insurance history of identifiable individuals.

[128] However, some of the information withheld under s. 22 does not qualify as personal information, including:

- contact information;[153]
- stock headings on ICBC print-outs and forms,[154]
- general information about vehicle valuation;[155] and

[151] Schedule 1 of FIPPA contains its definitions.
[152] For examples, see Order F16-38, 2016 BCIPC 42 at para. 112; and Order F13-04, 2013 BCIPC 4 at para. 23.
[153] For example, pp. 5352-5356. I note that the names and addresses listed for corporate officers in BC Company Summaries filed with the BC Corporate Registry fit within the definition of "contact information" under FIPPA. This is the case even if the addresses listed are home addresses because they are being used for business purposes.
[154] For example, the headings in Customer Directory and Drivers Licence Display print-outs are not personal information. Similar examples appear at pp. 5253-5254.
[155] For example, pp. 4302, 5240, 5242, 5244, 5246 and 5281-5293.

- information that does not specifically relate to identifiable individuals on its own or when combined with information from other available sources.[156]

For example, ICBC withheld invoices for vehicle-related services under s. 22 when only a few lines of these invoices contain an address block with personal information.[157] Without the name and address, the remaining information on these invoices does not relate to an identifiable individual. The same goes for information in broadly worded letters sent by ICBC to various individuals.[158] In some cases, ICBC withheld blank pages under s. 22, which obviously contain no information whatsoever.[159] Section 22 only applies to personal information, so I will not discuss these types of information again.

Not an unreasonable invasion of privacy – section 22(4)

[129] The next step in the s. 22 analysis requires a consideration of whether s. 22(4) applies to the personal information at issue. Section. 22(4) lists situations in which disclosure of personal information is not an unreasonable invasion of personal privacy. I have considered the various subsections of s. 22(4) and do not find any applicable here.

Presumed unreasonable invasion of privacy – section 22(3)

[130] The third step in the s. 22 analysis requires a determination as to whether any of the presumptions in s. 22(3) apply to the personal information at issue. Section 22(3) lists circumstances in which disclosure of personal information is presumed to constitute an unreasonable invasion of personal privacy.

[131] In my view, the presumption in s. 22(3)(b) applies to a small amount of the personal information at issue. This particular subsection says that disclosure of personal information compiled and identifiable as part of an investigation into a possible violation of the law is presumed to constitute an unreasonable invasion of third party personal privacy. The information withheld under s. 22 contains a few references to a witness consulted in relation to an investigation performed by the Investigation Unit into a possible violation of the law. I find that s. 22(3)(b) applies to this information, meaning that its disclosure is presumed to constitute an unreasonable invasion of personal privacy.

[132] I am not satisfied that any of the other presumptions in s. 22(3) apply to the information remaining for consideration in my s. 22 analysis.

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[156] For example, p. 4536.
[157] At pp. 4632 and 4640.
[158] For example, pp. 1661, 4831 and 5255.
[159] For example, pp. 5241, 5243 and 5245.

Relevant circumstances – section 22(2)

[133] The last step in the s. 22 analysis requires a consideration of all relevant circumstances to determine whether disclosure of personal information constitutes an unreasonable invasion of personal privacy. The relevant circumstances might rebut the presumption discussed immediately above.

[134] Section 22(2) lists some relevant circumstances to consider at this stage. I have considered all the circumstances listed in s. 22(2) but, in the absence of submissions from the parties on this issue, I am not satisfied that any of them apply. It is possible that some of the personal information may have been supplied in confidence or that some of it might arguably be relevant to a fair determination of the applicant's rights given the ongoing litigation respecting his ICBC claims.[160] However, nothing in the records themselves persuades me that either of these, or any other, relevant circumstances weigh in favour of or against the disclosure of the personal information at issue.

Conclusion – section 22

[135] I find that some of the information withheld under s. 22(1) is personal information.

[136] The presumption against releasing personal information compiled and identifiable as part of an investigation into a possible violation of the law applies to a small amount of the personal information in this case. I am not satisfied that any relevant circumstances weigh in favour of the disclosure of this personal information, therefore the presumption has not been rebutted.

[137] When it comes to the remaining personal information withheld under s. 22, I do not see any relevant circumstances that would weigh in favour of the release of this personal information and the applicant chose not to provide submissions. As a result, I find that the applicant has not discharged his burden of proof under s. 22.

[138] In short, ICBC must withhold some but not all of the information under s. 22(1).

CONCLUSION

[139] For the reasons given above, I make the following orders under s. 58 of FIPPA:

[160] Relevant considerations under s. 22(2)(f) and (c), respectively.

1. Subject to item 2 below, I confirm in part ICBC's decision to refuse to disclose information to the applicant under ss. 13, 14, 15(1)(g), 17 and 22(1).

2. ICBC is not authorized or required under ss. 13, 14, 15(1)(g), 17 or 22(1) to refuse to disclose the information highlighted in the copy of the records it receives with this order.

I require ICBC to give the applicant access to the highlighted information by July 21, 2020. ICBC must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

June 8, 2020

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

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