OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for
British Columbia

August 5, 2008

Mike Farnworth, MLA
Opposition Critic for Public Safety
& Solicitor General
Parliament Buildings
Victoria, BC V8V 1X4

Dear Mike Farnworth:

Insurance Corporation of British Columbia ("ICBC")––report respecting ICBC's Material Damage Research and Training Facility––OIPC File No. F08-35649

Thank you for your July 24, 2008 letter, received July 25. Your letter requested my

> ...advice on a review of ICBC's decision not to disclose information on employee termination and severance stemming from the investigation of the Material Damage Research and Training Facility. ICBC is claiming that the *Freedom of Information and Protection of Privacy Act* prevents the Corporation from disclosing any details about whether anyone was fired in relation to the investigation or whether any compensation was paid to any employees who were dismissed.

Your letter quoted portions of the legal opinion given to ICBC by its legal advisors, Harris & Company LLP, and provided a copy of that opinion. Citing two situations involving City of Victoria and Victoria Police Board employees, you asked me to "advise whether ICBC is legitimately able to refuse disclosure, and if so, upon what basis."

I am aware, through media inquiries made to our office in relation to this matter, that ICBC has received several access-to-information requests under FIPPA relating to the Material Damage Research and Training Facility. It would, in this light, not be appropriate for me to comment on the matters you have raised because of the possibility that one or more of these access requests will lead to a request for review by this office under Part 5 of FIPPA. My functions under Part 5 are, ultimately adjudicative, meaning it would not be appropriate for me to comment on the merits of the questions you have asked.

That said, I can say, without commenting on the ICBC situation, that FIPPA's rules governing public bodies' disclosure of personal information do differ according to whether the disclosure is at the instance of the public body (*i.e.*, the personal information is disclosed without access request) or is in response to an access request made to the public body.

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In the former case, the public body must adhere to the disclosure rules in Part 3 of FIPPA. In the latter case, the public body must apply the disclosure exceptions under Part 2 of FIPPA, notably s. 22 (which requires a public body to withhold information the disclosure of which would be an unreasonable invasion of personal privacy).

Unlike s. 22(2)(a), Part 3 of FIPPA does not authorize public bodies to consider, when deciding whether to disclose personal information without access request, whether disclosure "is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny". This absence of accountability considerations is in my view reinforced by the broadly supported amendment earlier this year of s. 33.1, to permit pro-active public body disclosure of personal information described in ss. 22(4)(e), (f), (h), (i) or (j). This limited and very specific incorporation of aspects of s. 22 under Part 3 underscores the absence in Part 3, in general, of accountability and transparency considerations when pro-actively disclosing personal information under that Part.[1]

Again without commenting on the ICBC situation, I should also note that s. 25 of FIPPA contains a public interest override that prevails over all other FIPPA provisions, including those in Part 3 and s. 22. Section 25(1)(b) requires public bodies to disclose information, including personal information, where disclosure is "clearly in the public interest" and disclosure must be made "without delay". Section 25(1)(b) public interest disclosure is, however, required only

> ...where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.[2]

None of the approximately 35 decisions in which s. 25(1)(b) has been considered has held that disclosure was required in the public interest.

You asked me to consider making recommendations for changes to FIPPA if necessary to ensure "greater accountability and transparency of public sector employers".

In 2004, the all-party Special Committee to Review the Freedom of Information and Protection of Privacy Act reported on its statutorily-mandated review of FIPPA. Advocacy groups had asked the Special Committee to recommend a strengthening of s. 25(1) and the Special Committee had this to say:

> The final section of Part 2 is commonly known as the override clause. Section 25(1) permits the head of a public body to disclose, without any formal request, "information (a) about a risk of significant harm to the environment or to

[1] Another significant difference between disclosures under Part 3 and disclosures in response to access requests is that, in the latter case, third parties whose "personal privacy" interests might be affected by disclosure have rights of participation under ss. 23 and 24. These rights do not exist in the case of disclosure under s. 33.1 or s. 33.2 of Part 3 (with one exception that is not relevant here).
[2] Order 02-38, [2002] B.C.I.P.C.D. No. 38, at para. 53.

> the health or safety of the public or a group of people, or (b) the disclosure of which is, for any other reason, clearly in the public interest." The main FOI advocacy groups suggested strengthening this section, claiming that it is underutilized. The Committee, however, thinks it is unnecessary to use section 25 as the spur for greater release of information, because there are other, more appropriate provisions in Part 2 of the Act. As well, we believe that the right balance is struck in the override clause between the competing principles of openness and privacy protection.[3]

Again without commenting on the ICBC matter, it is fair to speculate that other public bodies that have disclosed similar reports voluntarily and without access request may have, for reasons given above, found themselves constrained by Part 3 of FIPPA as regards disclosure of personal information in the interests of public accountability and transparency. With deference to the Special Committee's excellent 2004 report, I would be open to suggestions for reform to address—in a manner that appropriately respects the delicate and dynamic balance between openness and personal privacy—the differences in approach between Part 3 and s. 22 of FIPPA.

Again, I regret that, for the reasons given above, it is not possible for me to respond to your questions about the ICBC matter specifically and trust you will understand my position.

Thank you for bringing your questions to my attention.

Yours sincerely,

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia

copy: Steve Heather
Manager, Privacy & Fair Practices, ICBC

[3] Special Committee to Review the Freedom of Information and Protection of Privacy Act, *Enhancing the Province's Public Sector Access & Privacy Law* (2004), at p. 23. http://www.leg.bc.ca/cmt/37thparl/session-5/foi/reports/Rpt-FOIPPA37-5.pdf.