ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2009-015

November 4, 2009

CITY OF ST. ALBERT

Case File Number F4031

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Summary: An Applicant made a request to the City of St. Albert under the *Freedom of Information and Protection of Privacy Act* for "any and all reports, investigation results, correspondence, or documents of any kind related to or arising from the fire on January 4, 2004 at [a residential address], which was attended by the St Albert Fire Department".

The Public Body released certain records to the Applicant, but withheld others, relying on sections 16, 17 and 27(2) of the Act.

The Adjudicator held that the provisions that the Public Body had relied on did not apply to most of the records. She found that part of one of the records consisting of the personal financial information of the homeowners could be withheld under section 17. She ordered the Public Body to disclose the remainder of that record, as well as the remaining records, to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 5, 5(2), 16, 16(1), 16(1)(c), 16(1)(c)(ii), 17, 17(2)(j), 17(3), 17(4)(g)(i), 17(5), 17(5)(c), 17(5)(f), 27, 27(2), 40, 40(1), 40(1)(d), 72; *Safety Codes Act*, R.S.A. 2000, c. S-1, ss. 33, 34, 35, 48, 63, 63(1), 63(1)(c), 63(1)(d), 63(1)(e); *Administrative Items Regulation*, Alta. Reg. 16/2004, s. 8(2); *Release of Information Regulation*, Alta. Reg. 83/2001, s. 2.

Authorities Cited: AB: 96-013, 96-015, 97-009, 99-018, 99-028, 2000-014, 2000-017, 2001-026, F2007-029; **ON:** PO-2490, PO-2818, M-285, M-502, MO-1571, MO-2124-I.

Court Cases Cited: *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169; *Moseley v. Spray Lakes Sawmills (1980) Ltd.*, [1996] A.J. 380 (C.A.); *Sydor's Hardware Co. v. Saskatchewan Power Corp.*, [1989] S.J. No. 104 (Q.B.); *Kaiser v. Bufton's Flowers* [1993] B.C.J. No. 1695 (S.C.); *Barickman Colony Farms Ltd. v. 3075479 Manitoba Ltd.* [2000] M.J. No 488 (Q.B.); *Trask v. Canada Life Assurance Co.*, [2002] B.C.J. No. 2823 (S.C.); *Ng v. Royal & Sun Alliance Insurance Co.*, [2003] B.C.J. No. 1771 (S.C.); *British Columbia (Minister of Forests) v. Canadian National Railway Co.*, [2004] B.C.J. No. 407 (S.C.).

I. BACKGROUND

[para 1] On August 4, 2005, the Applicant made a request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the Act or the FOIP Act) for "any and all reports, investigation results, correspondence, or documents of any kind related to or arising from the fire on January 4, 2004 at [a residential address], which was attended by the St Albert Fire Department".

[para 2] The Public Body located responsive records and asked third parties to whom the records related whether they consented to the release. The Public Body subsequently released certain records to the Applicant, but withheld others, relying on sections 16, 17 and 27(2) of the Act.

[para 3] The Applicant requested a review by this office. Mediation was authorized, but was unsuccessful, and the matter proceeded to inquiry. The owners of the residence at which the fire occurred (the homeowners) and the homeowners' insurers were named as Affected Parties.

[para 4] The Applicant, the Public Body and the Affected Parties provided initial submissions. The Applicant and the Affected Parties provided rebuttal submissions. The Affected Parties' submissions were joint submissions in each case.

II. RECORDS AT ISSUE

[para 5] The records at issue, which all relate to a fire that occurred at the residence of the homeowners, were provided by one of the Affected Parties (the homeowners' insurer) to the Public Body's fire investigators in the course of the Public Body's investigation of the cause of the fire. They are:

1. Origin and Cause Investigation Report prepared by Beaubien Glover Maskell Engineering (Document 1)
2. Statement by [one of the homeowners] regarding the incident (Document 2)
3. Fax from the Alberta Motor Association regarding fire damage (Document 3)

4. Statement of activities of [one of the homeowners] for January 4, 2004 (Document 4)
5. Statement of activities of [another one of the homeowners] for January 4, 2004 (Document 5).

III. ISSUES

[para 6] The issues, as stated in the Notice of Inquiry, are:

> Issue A: Does section 5 of the Act apply to the records/information?
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> Issue B: Does section 16 of the Act (business interests) apply to the records/information?
>
> Issue C: Does section 17 of the Act (third party personal information) apply to the records/information?
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> Issue D: Does section 27(2) of the Act (privileged information of a person other than a public body) apply to the records/information?

IV. DISCUSSION OF ISSUES

Issue A: Does section 5 of the Act apply to the records/information?

[para 7] Section 5 of the Act provides:

> *5 If a provision of this Act is inconsistent or in conflict with a provision of another enactment, the provision of this Act prevails unless*
>
> *(a) another Act, or*
>
> *(b) a regulation under this Act*
>
> *expressly provides that the other Act or regulation, or a provision of it, prevails despite this Act.*

[para 8] The *Safety Codes Act* (SCA) governs the activities of the Public Body's fire investigators, and contains provisions relating to the confidentiality of information obtained in the administration of that act. According to the evidence of the Public Body, the information at issue was obtained by the Public Body's fire investigators, (who are safety codes officers) in the course of administering the SCA.

[para 9] Section 63(1) of the SCA provides that information and documents obtained by persons employed in its administration are to be kept confidential except, amongst a number of other conditions, "if the release of the information or a document is required by another Act" (section 63(1)(d)), or "if the release of the information or a document is authorized by the [Safety Codes] Act" (section 63(1)(e)).[1]

[1] *63(1) The Minister, members of the Council, Administrators, accredited municipalities, accredited regional services commissions, accredited corporations, accredited agencies, safety codes officers and any*

[para 10] Section 2 of the *Release of Information Regulation,* Alta.Reg. 83/2001, a regulation under the SCA, authorizes release of section 63 information and documents in the custody or control of the Minister [who administers the Act] by the Minister when "in the opinion of the Minister it is in the public interest to do so" *and* "if the release of the information meets requirements for disclosure of information under the *Freedom of Information and Protection of Privacy Act*".

[para 11] The Affected Parties argue, by reference to the *Release of Information Regulation,* that even if the requirements for disclosure under the FOIP Act are met in this case, an order by the Commissioner to grant access under the FOIP Act could still be subject to review by the Minister – in other words, that disclosure requires both the Commissioner's and the Minister's approval. It says that even if this inquiry determines that the FOIP Act requires disclosure of the Documents, the Minister must still determine whether this benefits the public interest.

[para 12] In contrast, the Public Body concedes that the SCA does not contain a provision expressly providing that it prevails despite the FOIP Act. It also points to the part of section 63 of the *Safety Codes Act* that says that information and documents are to be kept confidential except where their release is required by another Act. Thus the Public Body accepts that the FOIP Act, operating in harmony with section 63(1)(d) of the SCA, governs the disclosure of information in this case.

[para 13] The Applicant makes the same argument with respect to this question - that there is no conflict between the FOIP Act and the *Safety Codes Act* because section 63 of the latter Act creates an exception to the requisite confidentiality where disclosure is required by another act – which includes the FOIP Act.

[para 14] I agree with the position that in circumstances in which an access request has been made under the FOIP Act and disclosure is required by that Act, disclosure will be in accordance with section 63(1)(d) of the SCA rather than in conflict with it. The fact that another of the exceptions to confidentiality is where the SCA itself authorizes disclosure of information obtained under the Act (as supplemented by the *Release of Information Regulation*, which defines the circumstances under which the Minister may release information in his or her custody or control) does not detract from the effect of section 63(1)(d).

[para 15] As noted, the Affected Parties' argument is based on section 2 of the *Release of Information Regulation*, described above.

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person employed in the administration of this Act shall preserve confidentiality with respect to all information and documents that come to their knowledge from employment in the administration of this Act except …

> *(d) if the release of information or a document is required by another Act,*
>
> *(e) if the release of information or a document is authorized by this Act, … .*

[para 16] On one reading, this regulation provision appears to conflict with both section 63(1)(d) of the SCA and with the FOIP Act. As just stated, where an access request has been made and the FOIP Act *requires* disclosure of the information, the information must be disclosed by virtue of the FOIP Act. If the extra condition - the opinion of the Minister as to the public interest in disclosure - were meant to apply in the situation of an access request (whether to the ministry or to another public body that is in possession of the information), then in circumstances in which the FOIP Act required disclosure to the access requestor, there would be a conflict between the regulation provision and section 63(1)(d) of the SCA, as well as between the regulation provision and the FOIP Act. This is because disclosure, even though required by the FOIP Act, would be precluded by the SCA unless the Minister held the requisite opinion.

[para 17] However, conflict between the statutory provisions can be avoided if section 2 of the *Regulation* is read as though it is intended to apply only to disclosures made pursuant to section 63(1)(e) at the instance of the Minister who administers the Act (or the Minister's officials), rather than to disclosures made in response to access requests made pursuant to the FOIP Act (whether made to the ministry or to some other public body). In saying this, I acknowledge that the second condition in section 2 says: "if the release of the information meets the *requirements* for disclosure of information under the FOIP Act". However, this can be read as though it said "if the release of the information meets the *preconditions* for disclosure of information under the FOIP Act" – in other words, as referring to situations in which disclosure is *permitted* by the FOIP Act rather than required by it. Thus, for example, if personal information is collected in the course of administering the SCA, and one of the sub-clauses of section 40(1) of the FOIP Act authorizes its disclosure (for example, if disclosure is to a law enforcement agency for the purpose of law enforcement proceedings, or if disclosure is for some other purpose of the public body but would not unreasonably invade anyone's personal privacy), section 2 of the *Regulation* authorizes such a disclosure if the Minister regards this as being in the public interest.[2]

[para 18] Even if section 2 of the *Release of Information Regulation* were applicable to access requests, and if there were consequently a conflict between the FOIP Act and the regulation provision, there is no provision in either the SCA or the *Regulation* that says that the *Regulation* prevails over the FOIP Act. Furthermore, even if there were such a provision, section 5 of the FOIP Act does not contemplate provisions that prevail that are

[2] It is a separate question – and not one directly relevant in this case - whether the regulation provision, by adding the extra condition, creates a more restrictive rule for disclosure of personal information at the instance of the Minister pursuant to section 63(1)(e) than does section 40 of the FOIP Act (which outlines the conditions under which a public body is permitted to disclose personal information), and whether there is accordingly a conflict between these two provisions. In my view, there is unlikely to be any conflict in practice. Most of the conditions in the FOIP Act for voluntary disclosure of personal information by public bodies reflect the public interest, and even where they do not necessarily do so (for example, section 40(1)(d) - which permits a public body to disclose an individual's personal information where that person consents) - a Minister would presumably not disclose personal information on his or her own motion without having a reason for doing so that is consonant with the public interest.

found in regulations other than regulations under the FOIP Act. Therefore the FOIP Act would prevail over the regulation provision in any event.

[para 19] Thus, I conclude that that the provisions of the FOIP Act govern the question of the disclosure of the information, obtained in the course of administering the SCA, to an applicant requesting access pursuant to the FOIP Act, including in this case, and that the Minister's opinion as to public interest is not a precondition for providing the requested access to such information.

[para 20] I note that in his rebuttal, the Applicant points out that the *Release of Information Regulation* applies only to information that is in the custody and control of the Minister, whereas in this case the access request was made to a municipality, for information in its possession. The Applicant argues that on this basis, the *Regulation* has no application in this case.

[para 21] In this regard, I note that the *Release of Information Regulation* speaks of "custody *or* control" of the Minister rather than "custody *and* control", and that section 63 of the SCA applies to safety codes officers regardless of who "provided for" their employment under the terms of section 33 of the SCA, and that it also applies to "accredited municipalities". It is at least arguable that information obtained by safety codes officers in the course of administering the SCA, even if obtained by an officer who is appointed and/or employed by a municipality rather than by the Ministry, is still within the *control*, if not the custody, of the Minister who administers the SCA. (The combined rebuttal submission of the Affected Parties makes this very argument (at page 2).) Whether this is correct would require an analysis of the relationship among safety codes officers, the ministry that administers the SCA, and the municipality in this case. As well, though it has not been demonstrated to me that the Public Body is an "accredited municipality"[3], if it is, it is, on the face of the provision, subject to section 63.

[para 22] However, given the conclusion I have just reached that section 2 of the *Regulation* applies only to disclosures by the Ministry made pursuant to section 63(1)(e) of the SCA and not to responses to access requests under FOIP (which fall, within the scheme of the SCA, under section 63(1)(d)), I do not need to interpret this aspect of the *Regulation* in this case.

Issue B: Does section 16 of the Act (business interests) apply to the records/information?

[para 23] Section 16 provides:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*

[3] The Affected Parties assert this in their rebuttal but do not explain the basis for this assertion.

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[para 24] The test for the application of section 16, set out in Order 96-013, is as follows:

> For a record to qualify for exemption under section 15(1) [now section 16(1], the public body in this case, or the third party in other cases, must satisfy the following three-part test:
>
> - Part 1: Does the information contain trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party?
> - Part 2: Is the information supplied, explicitly or implicitly, in confidence?
> - Part 3: Could disclosure be reasonably expected to bring about one of the outcomes set out in section 15(1)(c)?

All parts of this test must be met in order for the exception to apply.

Does the information contain trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party?

[para 25] The Public Body submits that section 16(1) of the Act applies to Documents 1 and 3.

[para 26] With respect to Document 1 (the Report) it says that an engineering firm prepared the document, and that it is an analysis of the origin and cause of the fire at the home of the individual Affected Parties (the homeowners), and that its contents meet the definitions of "scientific" and "technical" information set out in Order 2000-017, which are as follows:

> "scientific information" is information exhibiting the principles or methods of science, and "technical information" is information relating to a particular subject, craft or technique.

[para 27] The evidence indicates that the insurer retained the engineering firm to prepare the Report in this case.

[para 28] I agree that some of the information in the Report is scientific or technical information – that part of it which uses and explains scientific or technological knowledge that permitted a conclusion as to the cause of the fire. This is found in pages 40 and 41 of the Report, in parts of para 3.1 and 3.3.

[para 29] However, I do not agree that the greatest part of the Report is scientific or technical information.

[para 30] Most of the body of the Report consists of photographic images of various items and attendant brief descriptions, usually of two to four words. The only exception is that some of the attendant descriptions (the same phrase repeated at pages 14, 15, 17,18, 19, 20, 21, 30, and 31, and some of the words at pages 22, 23, 25, 26, 29 and 38) could be described as scientific or technical information.

[para 31] As well, while the Appendices to the Report contain information that appears to be scientific or technical information, this is not the information of the Affected Parties, but rather is information created by other third parties. This consists of:

- an Appendix consisting of a document that is available for purchase on the internet and is distributed by an association in the United States
- an Appendix consisting of a document issued by an organization in the United States, apparently (by reference to the line at the foot of the document) downloaded from the internet
- an Appendix consisting of another document that was apparently, by reference to a line at the foot of the document, downloaded from the internet.

References in the Report to scientific or technical information derived from the Appendices are also not, in my view, information of the Affected Parties, except to the extent that they apply the scientific or technical information to the facts at hand.

[para 32] With respect to ownership of the information, in my view, to the extent the information in the Report is scientific or technical information of a third party, it is the scientific or technical information of the Affected Party insurer that procured the Report. While the members of the engineering company that prepared the Report contributed their scientific or technical expertise to make observations and reach conclusions, there is nothing in the Report that discloses any techniques they applied beyond that of examining the material, and of reviewing the material in the Appendices and extracting pertinent points. The scientific and technical information consists of the concluding observations or conclusions about the condition of the items and the cause of the fire. As this information was commissioned by the insurer, in my view it now belongs to the insurer.

[para 33] Before leaving the question of whether the information in the Report is the scientific or technical information of the Affected Parties within the terms of section 16, I note a line of cases that hold that the purpose of provisions such as section 16 are to protect the "informational assets" of third parties. It is not clear to me that information that forms the basis for conclusions as to the cause of a fire, and the conclusions themselves, even though having a "scientific or technical" element, are "informational assets" of a type that, according to this line of cases, the Act seeks to protect. This is because, according to these cases (discussed more fully in the section dealing with 'harm' below), the purpose of provisions such as section 16 is to protect the information of businesses, in the competitive context of the marketplace, from exploitation by market competitors. A report which collects and interprets data to reach a conclusion about the cause of an event such as a fire is not an "informational asset" in this sense. (As well, as will also be discussed more fully later, the section is not intended to protect information the disclosure of which might have an adverse effect for a third party in the context of civil court proceedings.)

[para 34] With respect to Document 3, which is a fax sent from the insurer to the City Fire Department, the Public Body submits that this document contains the financial information of the homeowners, in that it sets out information relating to the assets of the homeowners, and the homeowners' insurance coverage, including policy numbers and coverage amounts. The Public Body concedes that only a part of the document consists of the homeowners' financial information. I accept that the information about the homeowners' assets and insurance policies is their financial information.

Was the information supplied, explicitly or implicitly, in confidence?

[para 35] The scientific or technical information in the Report was supplied to the Public Body by the Affected Party the insurer. The parties did not provide information in their submissions as to the circumstances surrounding the supply. While there is evidence that the Affected Party retained an expert who participated in the investigation of the fire along with the Public Body's investigators, I was not told whether there were any conditions attached to this participation in terms of provision of the results, or whether there was any prior agreement about whether it would be provided, nor whether there was any request made by the Public Body after the fact that the information be supplied. I was told by Public Body that the information was supplied "voluntarily". While I can conclude on the basis of the evidence that the information was "supplied" to the Public Body by the third party within the terms of the Act, it not clear that the information was supplied "in confidence".

[para 36] With regard to this question, the Public Body again points to section 63(1) of the SCA, and the requirement therein that information obtained in the course of administering that act be kept confidential. It states:

> As stated above, the information at issue was provided to the city's Fire Investigators, who are Safety Codes Officers. Given the wording of section 63 of

> the *Safety Codes Act*, any one who supplies information to a safety codes officer in the course of the work of that safety codes officer knows the safety codes officer is statutorily obligated to keep the information that is supplied to the officer confidential.

The Public Body argues that in consequence of this provision, information provided to safety codes officers is implicitly supplied with the understanding that it will be kept confidential.

[para 37] The Affected Parties' submission under its heading "Disclosure in Confidence to the Public Body" also cites section 63 of the SCA, as well as sections 34 and 35 (which create the power of safety codes officers to compel information), the *Release of Information Regulation* (described above), and section 5(2) of the FOIP Act (which sets out the conditions under which either the FOIP Act prevails over conflicting legislation, or the reverse). However, it does not explain how, in its view, these provisions combine to support its assertion that the documents at issue were provided by the insurer and the homeowners in confidence.

[para 38] I note with respect to the Public Body's and Affected Parties' arguments respecting confidentiality that they seem to ignore the lengthy list of exceptions to confidentiality in section 63. This list includes: where the owner of the thing, process or activity that is the subject-matter of the information consents (section 63(1)(a)); where a court requires the release of the information (section 63(1)(c)); as well as the two exceptions just discussed (sections 63(1)(d) and (e)). Information can be supplied to safety codes officers with the understanding that it will be kept confidential only to the extent the supplier can be confident that none of the exceptions in section 63 will apply. The parties did not make any suggestion that an analysis had been done, and conclusions drawn that none of the exceptions could apply, prior to the provision of the information to the Public Body in this case. Thus, even if (which is not the case) I thought that it would be correct to conclude that the exceptions to confidentiality could not ever apply, I cannot accept that the Affected Parties supplied the information implicitly in confidence in this case by reference to section 63 of the SCA.

[para 39] In rejecting the argument about confidentiality that is based on section 63 of the SCA, I note that if the Report had been prepared for the dominant purpose of litigation, it could be privileged. If that were the case, arguably, the party providing the Report could, if it were to undertake an analysis of the combined effect of section 63 and the FOIP Act, possibly anticipate that because none of the exceptions to the confidentiality requirements under section 63 of the SCA would apply to a privileged document, confidentiality would be maintained by virtue of section 63. However, neither the Public Body nor the Affected Party provided any evidence that this had actually happened. The Public Body did suggest that "it is *arguable*[4] that Document 1 was provided with the expectation that the Document would remain confidential and that litigation privilege with respect to Document 1 would be maintained even if a request was made under the [FOIP] Act for its disclosure". However, it did not assert that the

[4] Emphasis added.

Affected Party insurer actually had performed such an analysis or that it had this idea in mind in supplying the Report. Moreover, as I discuss more fully below, I do not accept that in this case the Report had been prepared for the dominant purpose of litigation, and accordingly I reject the claim that the Report was subject to litigation privilege. I could not give credence to the idea that a party anticipated confidential treatment of a document because it believed a document was privileged when the document is not, in my view, privileged in fact. Furthermore, there is at least some possibility that one of the other exceptions to confidentiality could apply, for example, section 63(1)(a) (which creates an exception where the owner of the subject-matter of the information consents).

[para 40] In view of the absence of any evidence as to the factual circumstances surrounding the supply of the Report in terms of its confidential supply or confidential treatment, nor of a purpose that would not entail disclosure[5], as well as the absence of any indicators of confidentiality on its face, and in light of the content of the applicable statutory provision (which creates exceptions to confidentiality in a wide range of circumstances), I cannot conclude that the Report was provided to the Public Body by the Affected Party the insurer either explicitly or implicitly in confidence.

[para 41] With respect to Document 3 (relative to which section 16 was also applied), the Public Body did not provide any information about the circumstances in which this document was supplied, nor does the document itself contain any indicators of confidentiality. Beyond asserting that the same analysis as to the "in confidence" requirement as it put forward with respect to Document 1 applies to Document 3, the Public Body offered no basis to support its assertion that this document was provided in confidence. As I have said above, a person providing information that falls within section 63 cannot be said to have had an expectation of confidentiality simply by reference to that provision, given the many potentially-applicable circumstances set out in the provision under which such information is to be released.

[para 42] The combined submissions of the Affected Parties do not appear to address the question of whether Document 3 specifically was provided to the Public Body "in confidence". The submissions do address the question of whether "the Documents" were

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[5] In Order 99-018, the former Commissioner said:

> In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:
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> (1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
>
> (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization.
>
> (3) Not otherwise disclosed or available from sources to which the public has access.
>
> (4) Prepared for a purpose which would not entail disclosure.

As discussed further below, I reject the idea that the Report was prepared for the dominant purpose of litigation, and thus that it "would not entail disclosure" on the basis that it was privileged.

provided in confidence by relying, as the Public Body did, on the confidentiality provisions in the SCA (the analysis that I have already rejected with respect to Document 1, and equally reject with respect to the remaining documents). Thus I cannot conclude that Document 3 was provided to the Public Body in confidence.

Can disclosure reasonably be expected to occasion any of the harms contemplated by section 16?

[para 43] With respect to Document I (the Report) The Public Body argues that the harms contemplated by section 16(1)(c) can come about by the disclosure of Document 1 in two ways.

[para 44] First, it says that its disclosure can reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the homeowners. It does not elaborate as to how this would happen, but says that it accepted the representations of the homeowners' legal counsel on this question, and it appends these representations. These representations suggest (at page 3 of counsel's letter of January 19, 2007) that as litigation was ongoing regarding the fire, disclosure of the Report, which had not been produced in those proceedings,

> … could reasonably be expected to harm the competitive position of [the homeowners], and would interfere significantly with their bargaining position in the litigation. The report specifically considers the origin of the fire, which is in dispute, and which underlies [the homeowners'] bargaining position.

[para 45] The same argument is reflected in the submission of the Affected Parties, in that it refers to harm to the bargaining position of the homeowners in litigation against the Applicant's client.

[para 46] With respect to this argument, I note that in Order PO-2490, a decision of an Adjudicator of the Office of the Information and Privacy Commissioner of Ontario, the Adjudicator decided that "competitive position" in section 17 of the *Freedom of Information and Protection of Privacy Act* of Ontario, which is equivalent to section 16 of the FOIP Act, does not include a litigant's competitive position, as the provision is intended to protection confidential informational assets of businesses. He said:

> In my opinion, the reference to "competitive position" in section 17(1)(a) of the *Act* was not intended to include a litigant's competitive position in civil litigation. As noted above, previous orders of this office have found that section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, and the Divisional Court endorsed this view in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.). In my view, this is aimed at protecting such assets in the competitive context of the marketplace, rather than before the courts.
>
> …

The interpretation that "competitive position" does not include the position of the parties to civil litigation is further supported by the legislative history of section 17. The Williams Commission report entitled Public Government for Private People (Toronto: Queen's Printer, 1980) (the Williams Commission report) described the purpose of the third party information exemption found in section 17 of the Act and made the following comment:

> ... It is accepted that a broad exemption for all information relating to businesses would be both unnecessary and undesirable ... . Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be preserved. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as is practicable, form part of the public record.
>
> ...
>
> The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information.

It is clear from a review of the discussion in the Williams Commission report that the intent of the provision was to protect the information assets of business that might be exploited by competitors in the marketplace, rather than other litigants.

Previous orders of this office have consistently adopted this view. For example, in Order PO-2293, former Assistant Commissioner Tom Mitchinson stated:

> Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO- 2184, and MO-1706].

Even if I had concluded otherwise, and found that litigation qualified as a suitable venue for "competition" in the context of section 17(1)(a), I would not have found that the appellant had established this harm in the present circumstances. In my view, the appellant's representations on this point do not explain how its position would be harmed by disclosure. Beyond providing a basic description of the litigation, and saying that the records "in part respond" to the requester's claim, no explanation is provided of how disclosure of these particular records could reasonably be expected to harm the appellant's competitive position. In addition, such a reasonable expectation is not self-evident from even a careful review of their contents… .

[para 47] I agree with the reasoning of the Adjudicator in that order, and find that harm to competitive or negotiating positions within the context of section 16 refers to harm to

competitive or negotiating positions in commercial or business transactions, as opposed to in litigation. Further, in the case before me, I have been told that the homeowners are involved in litigation, but I have not been told how the information in the records at issue could be expected to harm their position in that litigation, nor is the likelihood of harm to its position in litigation resulting from disclosure evident from the contents of the records. Therefore, even if I were to consider section 16 as applying to litigation, I would be unable to find that the homeowners or their counsel had established harm to their negotiating position in litigation.

[para 48] The Public Body's second argument under section 16(1)(c) is that disclosure would reasonably be expected to result in similar information no longer being supplied to the City (the Public Body). It points out that the document was provided to the Public Body by the insurer on a voluntary basis. While noting that section 35 of the SCA provides safety codes officers with authority to compel production of documents, it points out that that authority is limited to documents that pertain to a determination of whether or not there has been compliance with the SCA.

Section 35 provides, in part, as follows:

> *35(1) For the purpose of ensuring that this Act and any thing issued under this Act are complied with, a safety codes officer may demand the production, within a reasonable time, of any record or document pertaining in any manner to compliance with this Act and may on giving a receipt for it remove it for not more than 48 hours for the purpose of making copies of it.*
>
> *(2) If a person on whom a demand is made under subsection (1) refuses or fails to comply, the safety codes officer may apply to a judge of the Court of Queen's Bench by way of originating notice and the judge may make any order that the judge considers necessary to enforce compliance with subsection (1).*

[para 49] The Public Body argues that this provision does not apply to information of the kind at issue in this case because Document 1 is not a record that the Public Body could compel under this section. As noted above, it points to the fact that the authority to compel is limited to documents that pertain to a determination of whether or not there has been compliance with the SCA. However, it does not explain why it regards Document 1 as being outside this category. In the alternative, it argues that even if such documents are compellable under the provision, voluntary compliance is more desirable from the standpoint of the Public Body. It says that the compulsion of records is a cumbersome process that is costly in terms of time, which can negatively impact the timely payment of insurance proceeds, and that an adversarial approach to document production would harm the collaborative relationships that often develop between the Public Body's fire investigators and insurance company investigators.

[para 50] In contrast, the Affected Parties assert that the document would be compellable under the section. (While the Affected Parties also argue that an order for disclosure "could foster an environment of non-co-operation between litigants and public bodies", this argument does not address the possibility that (according to their own assertion) the documents could be compelled.)

[para 51] In addressing these arguments, I note that previous orders of this office (Order 2000-014 at paras 43 to 45, and Order 2001-026, at paras 40 to 42) have held that if information is compellable, the "chilling effect" argument with respect to such information does not apply. Thus I must decide whether Record 1 would or would not be compellable. As just noted, the Public Body and the Affected Parties have taken opposing positions on this question, without providing adequate explanations.

[para 52] The scope of section 35 is very broad, permitting a demand for "any record or document *pertaining in any manner* to compliance with this Act". In the present context, in which it was necessary to determine the cause of a fire, the provision could be taken to apply to any document that provides information with respect to the cause of any fire that could potentially have been caused by non-compliance with the SCA (as a hypothetical example, by faulty wiring of the garage). Any record that suggests or reveals that a fire originated from non-compliance with the SCA could be covered by the provision, but so, equally, could any record that suggests or reveals that something other than non-compliance with the Act caused it, as the latter record "pertains … to compliance with" the Act. On this reasoning I would not need to be concerned with whether the particular cause or causes for the fire that were considered in the Report involved non-compliance with the SCA.

[para 53] At the same time, however, the provision is housed in a part of the SCA that deals with inspections to *ensure* compliance, and includes powers of officers to take such steps as reviewing designs and examining and evaluating quality management systems. I questioned, therefore, whether the power was meant to be regulatory and preventive in the sense of enabling officers to identify non-compliance in order to require compliance, rather than investigative in the sense of enabling after-the fact determination of the cause of a problem such as a fire, once it was already too late to comply with the Act. The use of the phrase "ensuring compliance", together with the fact that the public body who appears to employ the safety codes officer who conducted the fire inspection argued that the officer could not have compelled the Report in the present case, lent support to the latter interpretation.

[para 54] However, a more complete reading of the SCA settles the question. Section 48 makes it clear that section 35 can be used to compel the production of documents that assist in determining the cause of a fire, after the fact. Section 48 states that safety codes officers can investigate fires to determine their cause (indeed they are under a duty to do so in the circumstances set out in section 8(2) of the *Administrative Items Regulation* under the Safety Codes Act, Alta. Reg. 16/2004[6]) and that any of the powers of a safety codes officer under section 35 can be used, whenever necessary, for the purpose of the investigation. Where a report exists that was prepared for determining the cause of a fire,

[6] 8(2). *A safety codes officer for the fire discipline must investigate the cause, origin and circumstances of every fire within the safety codes officer's jurisdiction in which a person dies or suffers injury that requires professional medical attention or in which property is damaged or destroyed.*

it is, in my view, reasonable for a safety codes officer to treat its production as necessary for the officer to have in order to conduct as full an investigation as possible.[7]

[para 55] Consequently, I agree with the Affected Parties that the Report, although provided voluntarily in the present case, was compellable. I take the Public Body's point that concluding that such records cannot be withheld under section 16(1)(c)(ii) might have the effect that voluntary production will be less likely. Nonetheless, in my view, where the record can be compelled where it is not voluntarily supplied, ordering disclosure cannot have the result that similar information will no longer be supplied. Presumably, if it is desirable to have such information and it is not provided voluntarily, a safety codes officer will require it pursuant to the powers under the section, and, if necessary, obtain a court order for its production. Thus I find, in accordance with Orders 2000-014 and 2001-026, that the Report cannot be withheld in reliance on section 16(1)(c)(ii).

[para 56] As I find that only parts of the Report meet the first part of the three-part test under section 16, and that none of the Report meets the remaining two parts of the test, I conclude that the Report cannot be withheld under section 16.

[para 57] As noted above, the Public Body also argued that section 16 applies to Document 3, which contains financial information of the homeowners. It says that the analysis that it provided with respect to the third part of the test under section 16(1) applies equally to Document 3.

[para 58] Possibly, the Public Body is referring to the "chilling effect" argument - that that release of this document could be expected to result in similar information no longer being supplied to the public body when it is in the public interest that such information continue to be supplied. With regard to this argument, I have no basis on which to conclude that disclosure of the type of financial information that is contained in Document 3 to the Public Body would have a chilling effect on the future supply of similar information. None of the parties has explained to me how this disclosure would have an adverse effect on the supplier such that parties in parallel circumstances would be dissuaded by the prospect of similar adverse effects from providing such information.

[para 59] Neither have I been told how any of the other harms under section 16(1)(c) could result from disclosure of this financial information to the Applicant.

[para 60] Therefore, I find that neither the second nor the third parts of the test under section 16(1) have been met with respect to Document 3, and consequently that it cannot be withheld under this section.

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[7] I acknowledge the Public Body's point that there was no requirement that the insurer prepare the Report. However, once it had been prepared, in my view, it became compellable. I also note that the Public Body and the Affected Parties claim the Report is subject to litigation privilege. Sections 35 and 48 of the SCA make no mention of exceptions to compellability for privileged documents, but an argument could conceivably made that privileged documents could not be compelled under these provisions. However, as already noted, and discussed further below, I do not accept that the Report is covered by litigation privilege.

Issue C: Does section 17 of the Act (third party personal information) apply to the records/information?

[para 61] The relevant parts of section 17 provide as follows:

> *17(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy ….*
>
> *(2) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if …*
>
> *(c) an Act of Alberta or Canada authorizes or requires the disclosure, … .*
>
> *(4) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if …*
>
> *(g) the personal information consists of the third party's name when*
>
> *(i) it appears with other personal information about the third party, …*
>
> *(5) In determining under subsections (1) and (4) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether …*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights, …*
>
> *(f) the personal information has been supplied in confidence … .*

[para 62] Part of the information in the records at issue is the personal information of the homeowners.[8] This includes written statements provided by them to the Public Body's fire investigator(s) (Documents 2, 4 and 5), which contain information about their activities, and observations of events. As well, the information just discussed about the homeowners' assets and insurance coverage, contained in a fax transmission (Document 3), is their personal financial information.

[para 63] Section 17 of the Act requires that I consider whether any of the presumptions apply under which disclosure of the personal information at issue is presumed to be an unreasonable invasion of personal privacy. In this case, the presumption under section

[8] "Personal information" is defined under the Act as "recorded information about an identifiable individual". The Affected Parties argue that *all* the Documents contain personal information of the homeowners, which would include the Report. However, the Public Body did not rely on section 17 in withholding the Report, on the basis that section 17 does not apply to it. Presumably this was because it did not regard the Report as containing personal information. I agree with the Public Body that the Report does not contain personal information of the homeowners (other than their names as the homeowners on the covering and introductory pages).

17(4)(g)(i) (name together with other personal information) applies to Documents 2, 3, 4 and 5.

[para 64] Under section 17(5), I must also consider all the relevant circumstances, so as to determine whether there are any factors which outweigh the presumption just mentioned.

[para 65] In this case, the Applicant argues that all the criteria for establishing that the information meets the terms of section 17(5)(c) – the personal information is relevant to a fair determination of the applicant's rights - have been met. These criteria, as adopted by the former Commissioner in Order 99-028, are:

- the right in question is a legal right which is drawn from the concepts of common law or statute law, as opposed to a non-legal right based solely on moral or ethical grounds;
- the right is related to a proceeding which is either existing or contemplated, not one which has already been completed;
- the personal information which the appellant is seeking access to has some bearing on or is significant to the determination of the right in question; and
- the personal information is required in order to prepare for the proceeding or to ensure an impartial hearing.

The Applicant provides evidence that his client, on whose behalf he has made the access request, is the defendant in a civil law suit brought by the homeowners in relation to the damage from the fire, and argues that the three statements, relating to events leading up to the fire (Documents 2, 4 and 5), are directly relevant to a fair determination of his client's rights in the ongoing litigation, within the terms of section 17(5)(c). I agree that the information in these records would be relevant to the court proceeding and thus that it meets the last two elements of the test just stated.

[para 66] The Affected Parties' combined rebuttal submission argues, under the heading of section 17, that privacy rights are not (as the Applicant has suggested) diminished by commencing litigation, and that in any event it is the insurer and not the homeowners that is driving the litigation in this case. This submission also points out that the "rights of 'discovery' are granted and refined by the courts and legislation, in particular the *Alberta Rules of Court*", and points out in detail the ways in which the applicant can obtain information relevant to the litigation by way of the rules relating to expert evidence as well as through examinations for discovery and affidavit of records processes (with the exception of privileged documents[9]).

[para 67] Former orders of this office have addressed this type of argument. For example, in Order 97-009, the former Commissioner said, at paras 97 and 98:

> The Act provides in section 3(a) that "This Act is in addition to and does not replace existing procedures for access to information or records." I was not referred to any

[9] It goes on to assert, as discussed below, that Document 1 (the Report) is privileged.

> authority, either in the Rules of Court or elsewhere, that would restrict an applicant to obtaining information only in the discovery process under the Rules of Court when the applicant has commenced that process in the court.
>
> In my view, the Freedom of Information and Protection of Privacy Act, which is a substantive body of legislation, operates independently of the Rules of Court, which is a regulation. The Rules of Court do not prevent an applicant from making an application for information under the Act, nor does the Act prevent an applicant from making an application for information when the applicant has used the discovery process under the Rules of Court to get that same information. Furthermore, the Rules of Court do not affect my jurisdiction to apply the Act where there is an issue of whether information in the custody or control of a public body is subject to a privilege to which the Rules of Court may also apply.

The same point was made more recently by the current Commissioner in order F2007-029, at paras 55 to 57.

[para 68] In accordance with the rulings just cited, I reject the idea that an access request need not be met simply on the basis that other avenues exist for accessing the same information. However, if I were convinced that such other means were available to obtain the particular documents at issue, it might affect the weight of the argument that the records are relevant to a fair determination of the Applicant's rights: though the records might still be "relevant' in the sense of being relevant to the matters at issue in the litigation, the fact they could be obtained through other means could make this a less compelling point.

[para 69] In this case, the Affected Parties' statements that the Applicant's client could obtain information from the homeowners about the events they observed surrounding the fire through the examinations for discovery process, and that it could obtain any relevant documents (other than privileged documents) through the affidavit of records process, do not entirely satisfy me that the Applicant would necessarily be able to obtain Documents 2, 4 and 5, which consist of the homeowners' statements, and Document 3, consisting of their assets and insurance information, (all of which are in the possession of the Public Body) through these processes, or that he could obtain them at a time when they would be most useful to him. I have been told that litigation has commenced, but I do not know why the Applicant is seeking these particular records if he could readily obtain them, at the time he needs them, by other means.

[para 70] As well, if it is true the particular records that are being sought can readily be obtained in some other way, this weighs against the idea that obtaining them would be an unreasonable invasion of personal privacy. By engaging the litigation process the homeowners accept (regardless who is "driving the litigation") that they must submit to discovery and production of documents through that process. If Documents 2, 3, 4 and 5 are available through that process, it would be odd to conclude that permitting access to the same documents, for the same purpose, by way of access legislation, would unreasonably invade the homeowners' privacy. In other words, the idea that the personal information could be obtained through the discovery process, in which the plaintiffs must necessarily participate as part of their claim against the Applicant, diminishes the

argument that disclosure would unreasonably invade their privacy to a similar degree as it diminishes the argument that disclosure is needed to fairly determine the Applicant's rights.

[para 71] In deciding how to balance the factors under section 17, I also take into account that though Documents 2, 4 and 5 are personal because they are statements made by individuals about their activities and observations, they are not personal in the sense that they consist of private personal matters – rather, they are the description by these persons of an objective set of events that involved them only as observers.

[para 72] As well, I reject the idea that section 17(5)(f) ("information supplied in confidence") is a relevant factor in this case. As described above, there is no evidence to indicate that the homeowners gave their statements to the Public Body in confidence, and I have not accepted the theory that the related legislation provided an expectation of confidentiality in this transaction.

[para 73] I find, on balance, that the interest of the Applicant in accessing information that could be useful to his client in preparing for the lawsuit which the Affected Parties have brought against it outweighs the privacy interests of the homeowners in their statements contained in Documents 2, 4 and 5. Thus I conclude that disclosure of these records would not unreasonably invade the homeowners' personal privacy, and they cannot be withheld on this account.

[para 74] However, I note that the Applicant has not argued that access to the homeowners' financial information in Document 3 is important to his client for the same purpose. I grant that the Applicant may have done so had he known more about the contents of the records. However, it is not obvious to me from reviewing the record how knowing this information could help the Applicant's client with achieving a fair determination of its rights in the litigation. There is a possible exception for a small part of the personal information in this document – the reference to some assets of the homeowners that were present in the garage - but is seems clear that this information would necessarily be disclosed in the course of litigation. Thus I find that the presumption that disclosure of the financial information in Document 3 would be an unreasonable invasion of the personal privacy of the Applicants is not outweighed by any other factors under section 17, and that the information can accordingly be withheld under this section. However, as the remaining parts of that record do not (as the Public Body has conceded), consist of the homeowners' personal information, the remainder of the record must be disclosed.

[para 75] Before concluding the discussion of section 17, I note that I accept the Applicant's point, made in his rebuttal submission, that the Public Body's argument that section 17(3) applies is incorrect, as that provision is referable to section 17(2)(j), which has no relevance in this case

Issue D: Does section 27(2) of the Act (privileged information of a person other than a public body) apply to the records/information?

[para 76] The final exception relied on by the Public Body in this case is section 27(2). It relies on this exception only in relation to the Report, and not in relation to the remaining documents. It points to the test for the application of litigation privilege, which was set out in Order 96-015 as follows:

> The "dominant purpose" test consists of three requirements, each of which must be met … .. Those requirements are:
>
> > (i) the documents must have been produced with existing or contemplated litigation in mind,
> >
> > (ii) the documents must have been produced for the dominant purpose of existing or contemplated litigation, and
> >
> > (iii) if litigation is contemplated, the prospect of litigation must be reasonable.
>
> The intent of the maker of the document or the person under whose authority the document was made is to be considered when determining "dominant purpose"… .
>
> Furthermore, the maker of the document or the person under whose authority the document was made must have intended the document to be confidential (the one possible exception, not applicable in this case, being the "work product" or "lawyer's brief"rule) … .

[para 77] In support of its assertion that this test applies in this case, the Public Body says the following:

> Document 1 [the Report] was prepared at the request of [the insurance company], the insurer of [the homeowners]. … The purpose for the investigation that led up to the preparation of the written report was to determine the cause of the fire at [the homeowners'] home. The title of Document 1 makes this clear. It is the City's submission that these facts along with the fact that it is not at all unusual for litigation to result following the investigation into the cause of a fire satisfy the "dominant purpose" test requirements.

[para 78] With respect to the requirement for confidentiality, the Public Body states:

> The correspondence from … a member of the Legal Department of [the insurer], legal counsel for [the homeowners] specifically establishes that this requirement is met with respect to Document 1.

The letter referred to asserts that confidentiality is to be inferred from the fact that the Report was required by the SCA, and that section 63 of the SCA contains provisions related to confidentiality.

[para 79] The Affected Parties also argue that section 27 applies, on the basis of their assertion that the insurer "requested that the Report be created for the purpose of pursuing

at fault parties". The Affected Parties also point out that prior to the creation of the Report at issue, the Public Body's fire investigators had already issued a report which, in the words of their submission

> … already alluded to the reasonable prospect that the Applicant's client could be legally liable for the [homeowners'] house fire. It is fairly obvious that the dominant purpose of the Report was in preparation for litigation against the Applicant's client. The fact that a lawsuit has been commenced and the very notion that the Applicant is attempting to obtain a copy of the Investigation Report through the FOIP access to records process also goes to affirm this.

I note that the concluding page of that other, earlier report, which was provided to me by the Applicant, states:

> CAUSE DETERMINATION
>
> Based on the information learned during the investigation, there are two possible causes for this fire:
>
> 1. The fire started in the garbage can, spread to the work bench, and eventually to a pile of waste paper and cardboard on the floor, due to the improper disposal of smoking materials
>
>   Even though [the homeowner] is certain that he disposed of the cigar before he got home, the fact that a cigar butt was found in the garbage makes this a possibility
>
> 2. The fire started due to the overheating of the Black & Decker batteries and spread to the garbage can and waste papers
>
>   The recall notices on the drill batteries indicates that they can overheat and cause a fire hazard if the drill switch malfunctioned.
>
> CONCLUSION
>
> This fire started in the area of the workbench and was accidental. Pending receipt of the engineer's report, the cause of this fire is undetermined.

[para 80] The Applicant responds to the arguments outlined above by saying that where insurers are simply gathering information in order to assess potential liability, litigation privilege does not apply, citing *Moseley v. Spray Lakes Sawmills (1980) Ltd.,* [1996] A.J. 380 (C.A.).

[para 81] The application of litigation privilege to records associated with determining the cause of a fire (or accidents) has been the subject of much tribunal and judicial comment. A number of relevant points can be drawn from these cases.

[para 82] First, it is not enough that anticipated litigation is one of other equal purposes for creating the information. In the key case of *Waugh v. British Railways Board*, [1979]

2 All E.R. 1169, a report was prepared for two purposes: to establish the cause of the accident to enable appropriate safety measures to be implemented, and to enable the Board's solicitor to advise with respect to litigation that was almost certain to ensue. The House of Lords decided that the report should be disclosed because its use in anticipated litigation was merely one of its purposes, but not the dominant purpose.

[para 83] In the 1980 decision of the Alberta Court of Appeal that was cited by the Applicant (*Moseley v. Spray Lakes Sawmills)*, the Court recognized that making safety recommendations is not typically among the purposes of an insurer, and considered whether in a case in which there was no such concern, litigation was necessarily the dominant purpose for an insurance adjuster's report. The court said:

> The key is, and has been since this Court adopted the dominant purpose test in Nova, that statements and documents will only fall within the protection of the litigation privilege where the dominant purpose for their creation was, at the time they were made, for use in contemplated or pending litigation. While a lawsuit need not have been initiated, and while a lawyer need not have been retained at the time the statement or document was made, the party claiming privilege must establish that at the time of creation the dominant purpose was use in litigation. The words "by reason of an intention to provide information to solicitors" are not superfluous. The test is a strict one. As has often been stated, it is not enough that contemplated litigation is one of the purposes. So litigation privilege will not automatically apply to statements taken or reports made by insurance adjusters investigating serious personal injury accidents.

The Court discussed several other cases, and at a later point continued as follows:

> These two lines of authorities indicate different approaches to the investigation of accidents where there is no parallel interest such as general safety. These Saskatchewan cases seem to suggest that there is no distinction between assessing liability and preparation for litigation. In my view there can be one without the other. Each case will turn on its own facts. I do accept that an investigation can occur for reasons other than preparation for litigation. It can be done to avoid litigation, or determine whether litigation will be a likelihood, or it can be done simply because there is an obligation under a contract of insurance that requires it. It depends on the facts. The litigation privilege has been carefully confined to narrow limits in order to preserve the public interest in full disclosure.

[para 84] A decision of the Manitoba Court of Queen's Bench, *Barickman Colony Farms Ltd. v. 3075479 Manitoba Ltd.* [2000] M.J. No 488, is closely parallel to the present one on its facts. An expert was retained by an insurer to determine the cause of a fire for which there were a number of possible causes. The defendant, a supplier of electrical systems, sought disclosure of the report. The Court said, at paras 8 and 10 to 12:

> As regards the remainder of the documents which do in fact pertain to substantive investigation of the loss, it is my view, having read them, that they were generated or created pursuant to and within the scope of the mandate of Mr. Gillman's retainer, namely, to attempt to determine the probable cause of the fire. The documents clearly disclose that there were many possible causes considered and investigated, such as

> whether the fire had been deliberately set, whether it was due to faulty or negligent electrical wiring (which work was performed by a member of the plaintiffs' colony), or other faulty construction or installation, or whether it was due to faulty equipment, such as any of that supplied by Monitrol.
> …
>
> While there was no suggestion in the material I read of arson, these notes in document 94 in my view underscore my interpretation of that which Mr. Gillman was about, namely to investigate and report upon the probable cause of the loss, whether that might be a fire wilfully started, a fire caused by reason of inadequate electrical installation, a fire caused by reason of faulty equipment, or for that matter any other cause.
>
> In short, while it may well have been the intention of the plaintiffs' insurer and the plaintiffs to make use of the Gillman report in support of any litigation which it might commence, that was only one purpose; in my view it clearly was not the dominant purpose at the time the report was prepared, nor at the time the subject documents were prepared.
>
> For that reason, the plaintiffs' claim for privilege must fail.

[para 85] A number of other cases from other jurisdictions are based on similar reasoning. See *Sydor's Hardware Co. v. Saskatchewan Power Corp.,* [1989] S.J. No. 104 (Q.B.); *Kaiser v. Bufton's Flowers* [1993] B.C.J. No. 1695; *Trask v. Canada Life Assurance Co.,* [2002] B.C.J. No. 2823 (S.C.); *Ng v. Royal & Sun Alliance Insurance Co.,* [2003] B.C.J. No. 1771 (S.C.); *British Columbia (Minister of Forests) v. Canadian National Railway Co.,* [2004] B.C.J. No. 407. The outcomes in these cases depend on their facts, but litigation privilege is found only in those of them in which it is clear that anticipated litigation was the dominant purpose for creation of the information, rather than one purpose among others.

[para 86] I note as well a series of decisions relating to insurance adjuster's reports of the Office of the Information and Privacy Commissioner in Ontario. These cases variously hold that such reports are or are not subject to litigation privilege, depending primarily on whether or not at the time the report was commissioned or undertaken, the party claiming the privilege and commissioning the report had or had not been notified of the claim. In the recent Order PO-2818, Adjudicator Cropley's review of the facts as outlined in the submissions as to the timing of the records at issue included the following:

> The Manager continues:
>
> > … I indicated that I interpreted his September 27th letter as a formal demand for damages and that RMIS [Risk Management and Insurance Services] would institute its normal process for responding to such claims, including the appointment of an adjuster and a determination of whether the Crown was liable for the damages claimed. These steps were undertaken in the context of defending the Crown against the claim being asserted by [the appellant].
>
> The Manager then outlines the steps that were subsequently taken in processing the appellant's claim, which resulted in the records at issue being created.

The Adjudicator noted that the appellant expressed the position that he did not himself regard his correspondence as "a formal demand". Despite this, the Adjudicator reviewed some earlier decisions and then stated the following:

> Having reviewed the representations submitted by the parties and the records at issue, I am satisfied that common law litigation privilege … attaches to the Adjuster's report and notes. I find that the records at issue were prepared on behalf of RMIS for the dominant purpose of using the records in reasonably contemplated litigation against the Ministry of Transportation. It is clear that RMIS sought the report to assess the Ministry of Transportation's liability, in possible future litigation, for damages caused by the flooding of the appellant's property, which he claims was a result of prior road construction and the construction of a culvert. Moreover, I find that there was a reasonable prospect of litigation at the time the report was prepared and that litigation continues to be reasonably contemplated as the matter is not yet resolved.
>
> Although the appellant appears to be somewhat confused about the claims process, it is clear from the evidence that he has been pressing a claim for damages to his property. The wording of his access request reflects his understanding that he had made a claim. Although I accept that he may have wished to have it amicably resolved, the description of the Province's liability insurance program makes it clear that once certain actions are taken by an individual, in this case, a letter from the appellant stating that he was seeking compensation, RMIS "treats this notice as an explicit notice that a statement of claim will be issued if the matter is not resolved …"

See also Orders M-285, M-502, MO-1571 and MO-2124-I. The common thread of these decisions is that litigation privilege is found to apply on the basis that it was clear that a claim had been or would be made at the time of the preparation of the adjuster's or consultant's report at issue.[10]

---

[10] In M-285 (1994) the Adjudicator said:

> I have reviewed all four reports and find that they fit within the litigation privilege. They were created *as a direct result of the claims filed with the City* and provide the city with the results of their investigation into the alleged damages caused to the homes." [emphasis added]

M-502 (1995) describes M-285 as follows:

> In Order M-285, Inquiry Officer Holly Big Canoe found that reports prepared by Adjusters Canada for the City of Kitchener in response to damage claims for flooded homes by homeowners fit within the litigation privilege. In that case, as in the present appeal, the City had been put on notice by the homeowners that they intended to hold the City responsible for the damage caused to their property. The *Adjusters Canada reports, like the record at issue in this appeal, were prepared following the communication of this fact to the City.* Inquiry Officer Big Canoe found that the dominant purpose for the preparation of the reports in that case was in preparation for anticipated litigation between the City and the homeowners. [emphasis added]

The Adjudicator then continues:

> In the instant appeal, I find that anticipated litigation was also the dominant purpose behind the creation of the record. It is clear on its face that the report was intended to inform the adjuster retained by the City's insurer of the occurrence and the possible cause of problems with the sewer on the appellant's street. *As the City had been put on notice by the appellant that a claim*

[para 87] In this case, the Affected Parties' submission concedes in terms that the purpose of the report was to determine the cause of the fire. It appears from the Public Body's investigator's own report that at the time the report was commissioned by the insurer, the possibility that the power tool battery manufactured by the Applicant's client was the cause was one of two possibilities. Litigation against the client was thus also a possibility, but there was also the possibility of another cause, from which litigation against that client would not ensue. It is not possible to judge from the earlier report, which is the only evidence before me as to what was known at that time about the likely cause, whether one possibility was greater than the other. Thus, in my view, at the time the Report was created, it cannot be said that it was created, in the words of the Alberta Court of Appeal "by reason of an intention to provide information to solicitors", as there was also a distinct possibility that this would not happen. The investigation on which the Report is based was undertaken to determine whether it would, *or would not.*

[para 88] I note as well that according to the Applicant, his client did not receive notice of its potential liability until the month following the one in which the Report was created. In line with the authorities from the Ontario Information and Privacy Commissioner's Office, this is another reason to conclude that the Report was not subject to litigation privilege. It appears that the Report gave rise to the claim rather than the reverse – that the claim and the need to prepare for it gave rise to the Report.

[para 89] Finally, with respect to the requirement that the maker of the document or the person under whose authority the document was made must have intended the document to be confidential, I find that as the Report was voluntarily provided by the insurer to the Public Body's fire investigators, it is more likely than not that it was created with the intention on the part of the insurer (under whose authority the document was created), that it be so provided. I have already rejected the argument that confidentiality in this transaction can be inferred from the fact that the Report was provided pursuant to section

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> *was being made*, there was a reasonable prospect of litigation at the time the report was prepared. [emphasis added]

Order MO-1571 (2002) cites the foregoing decisions as authority for its conclusion that a consultant's report could be withheld on the basis of litigation privilege, but it is not clear from that decision whether the claim had been made at the time the report as to the City's liability for damages caused by a storm was ought by the insurer. However, in a subsequent order (Order MO-2124-I, the same Adjudicator references MO-1571 as well as MO-502 and M-285) and then continues:

> Turning then to this case, the report addendum was prepared in December 2000. The evidence before me indicates that the appellant's counsel sent a letter to the City in May 2000 requesting it to take certain steps in regard to the appellant's property, threatening legal action if the City did not meet the appellant's demands. The appellant then delivered a Notice of Action to the City in October 2000. While the original consultant's report is dated August 29, 2000 and predates the Notice of Action, I am satisfied that at the time the original report was prepared *there was a reasonable prospect of litigation in light of the appellant's demand letter. And, by December 2000 there was actual litigation because the appellant had served his Notice of Action.* Therefore, I am satisfied that the December 2000 report addendum, and the opinion contained within it, were prepared for use in litigation and that at the time the addendum was prepared there was actual litigation. [emphasis added]

63. As I stated above, even though that provision contains requirements for confidentiality, there is a list of exceptions, some of which were potentially applicable at the time the Report was created. There is no evidence that confidentiality was explicitly considered, and also none on which to base a finding that the engineering firm that created the Report intended it to be confidential. Thus I find that the Report was not created as a confidential document.

[para 90] Thus I conclude, on these facts, that the Report is not subject to litigation privilege, and cannot be withheld under section 27(2). As I have found the record was not subject to privilege, I do not need to consider whether the privilege was waived.

[para 91] Before concluding this section I will address the possible contention that as this matter is the subject of a legal proceeding, it is for the court and not for me to decide whether the Report is subject to privilege. In this regard, I note first that although the Affected Parties have asserted that the Report is privileged in those proceedings, they have not pointed me to any judicial decision that says that this is so. I note second that the former Commissioner has decided that he had the power to make the decision as to whether information is privileged even if a matter is before the courts (though he may be influenced in his decision by a decision by a court that the privilege applies to the documents). (See the discussion in Order 97-009, at paras 90 to 100.) Thus I have proceeded to make this decision.

V. ORDER

[para 92] I make this Order under section 72 of the Act.

[para 93] I find that sections 16 and 27(2) do not apply to any of the records, and that none of the records can be withheld under these provisions.

[para 94] I find that section 17 applies to part of Document 3, consisting of the personal financial information of the homeowners, and that this part of the record was properly withheld. I find that section 17 does not apply to the remainder of that record, nor to any of the other records.

[para 95] I Order the Public Body to disclose all the records at issue to the Applicant, with the exception of the personal information of the homeowners contained in Document 3.

Christina Gauk, Ph.D.
Director of Adjudication