Order F17-35

CITY OF VANCOUVER

Carol Whittome
Adjudicator

July 10, 2017

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Summary: Applicants requested information about a settlement agreement between the City of Vancouver and an individual who had been wrongfully incarcerated. The City provided the responsive records but withheld most of the information under s. 14 (solicitor client privilege), s. 17 (harm to financial or economic interests), s. 21 (harm to business interests of a third party), s. 22 (unreasonable invasion of personal privacy) of FIPPA and under common law settlement privilege. The adjudicator found that the City was authorized under s. 14 of FIPPA and under common law settlement privilege to withhold the information. Given these findings, the adjudicator did not have to consider whether ss. 17, 21 or 22 applied to the records.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 17, 21 and 22.

Authorities Considered: BC: OIPC Order F08-02, 2008 CanLII 1647 (BC IPC); Order F07-03, [2007] B.C.I.P.C.D. No. 14; Order F12-07, 2012 BCIPC 10 (CanLII); Order F16-28, 2016 BCIPC 30 (CanLII); Order F15-52, 2015 BCIPC 55 (CanLII); Order F15-67, 2015 BCIPC 73 (CanLII).

Cases Considered: *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 (CanLII), leave to appeal ref'd 2009 BCCA 452 (CanLII); *Richmond (City) v. Campbell*, 2017 BCSC 331; *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 (CanLII); *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022 (CanLII); *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII); *Belanger v. Gilbert*, 1984 CanLII 355 (BC CA); *Langley (Township) v. Witschel*, 2015 BCSC 123 (CanLII); *Richmond (City) v. Campbell*, 2017 BCSC 331; *Ross River Dena Counsel v. Canada (Attorney General)*, 2009 YKSC 4, aff'd 2009

YKCA 8; *312630 British Columbia Ltd. v. Alta Surety Co.*, 1995 CanLII 3442 (BC CA); *Jetport Inc. v. Global Aerospace Underwriting Managers (Canada) Ltd.*, 2013 ONSC 235; *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII); *Accredit Mortgage Ltd. v Cook Roberts*, 2017 BCSC 1078 (CanLII); *Heritage Duty Free Shop Inc. v. Attorney General for Canada*, 2005 BCCA 188 (CanLII); *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC); *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 (CanLII); *Komengo Systems Inc. v. Seabulk Systems Inc.*, 1998 CanLII 4548 (BCSC); *B.C. Children's Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177; *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 (CanLII); *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII); *Ashcroft v. Dhaliwal*, 2008 BCCA 352; *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII); *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII); *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *R. v. B.*, 1995 CanLII 2007 (BC SC); *Stone v. Ellerman*, 2009 BCCA 294; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII); *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII); *Simcoff v. Simcoff*, 2009 MBCA 80; *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821.

Secondary Sources Considered: J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 4th ed. (Toronto: Butterworths, 2014).

INTRODUCTION

[1] Applicants requested that the City of Vancouver (City) disclose records about a settlement reached between the City and an individual (Plaintiff) who had sued the City and the Provincial and Federal governments for wrongful incarceration. The City released some records but withheld other records and information pursuant to s. 13 (advice and recommendations), s. 14 (solicitor client privilege), s. 17 (harm to financial or economic interests), s. 21 (harm to business interests of a third party) and s. 22 (unreasonable invasion of personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA), and pursuant to common law settlement privilege.

[2] The applicants asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision to withhold information. Mediation failed to resolve all the issues in dispute and they proceeded to inquiry.

[3] During the inquiry process, the City withdrew its reliance on s. 13. However, it continued to withhold information under ss. 14, 17, 21, 22 and common law settlement privilege. It provided inquiry submissions on ss. 14 and 17 and common law settlement privilege.

[4] Pursuant to s. 54, the OIPC invited two third parties to make submissions in the inquiry. The Plaintiff provided submissions with respect to s. 22 of FIPPA. The City's insurance company (Insurance Company), which provided the City

with liability insurance and was involved in the settlement process, provided submissions with respect to s. 21 of FIPPA and settlement privilege.

ISSUES

[5] The issues to be decided in this inquiry are as follows:

1. Whether the City is authorized to refuse to disclose the information at issue under common law settlement privilege;

2. Whether the City is authorized to refuse to disclose the information at issue under ss. 14 and 17; and

3. Whether the City is required to refuse to disclose the information at issue under ss. 21 and 22 of FIPPA.

[6] Section 57 of FIPPA governs the burden of proof in an inquiry. The City has the burden of proving that the applicants have no right of access to the information it is refusing to disclose under ss. 14 and 17. The Insurance Company has the burden to prove that the applicants have no right of access to the information withheld under s. 21. The applicants have the burden of proving that disclosure of any personal information in the requested records would not be an unreasonable invasion of The Plaintiff's personal privacy under s. 22.

[7] FIPPA does not have an exception for withholding information based on common law settlement privilege. However, courts have stated that the burden of proof is on the party asserting the privilege, and I adopt that standard here.[1]

DISCUSSION

Background

[8] In 1983, the Plaintiff was convicted of sexual offences, declared a dangerous offender, and sentenced to an indefinite period of incarceration. He remained imprisoned for almost 27 years until the BC Court of Appeal quashed all of the convictions and substituted acquittals. Subsequently, the Plaintiff commenced a legal action against the Attorney General of Canada (Federal AG), the Province of BC, and the City.

[9] The Plaintiff's claims against the City were for the acts and omissions of members of the Vancouver Police Department (VPD) and some City employees who were involved in the criminal investigation.[2] Although the VPD is a separate legal entity from the City, the City is liable for any torts committed by VPD

[1] See, for example, *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 (CanLII), para. 9, leave to appeal ref'd 2009 BCCA 452 (CanLII).
[2] City's submissions, paras. 2, 3 and 5.

members, pursuant to the *Police Act*.[3] During the legal proceeding, the City and the Plaintiff came to a settlement agreement (City settlement), which included confidentiality terms. The Plaintiff then withdrew his action against the City and the VPD members.[4]

[10] The City's in-house lawyers represented it in the legal proceeding and the settlement process. During this time, the City had a liability insurance policy through the Insurance Company, and the City made a claim for coverage under the insurance policy.[5] The Insurance Company was also significantly involved in the settlement process.[6]

[11] Only two aspects of the City settlement have been made public. The City publicly revealed the existence of the settlement and the fact that it was made "on the basis of insurance proceeds."[7] In addition, a BC Supreme Court decision states the combined total of the Plaintiff's settlements with the City and the Attorney General of Canada (Federal settlement).[8]

Records

[12] The applicants requested all records related to the City settlement. The City found 820 pages of responsive records but heavily redacted them, mainly pursuant to s. 14 and common law settlement privilege.

[13] There is no overlap between the information severed under s. 14 and under settlement privilege. The City provided the OIPC with the records severed pursuant to settlement privilege, but did not provide the records severed under s. 14 of FIPPA. I will discuss this further when I address the s. 14 records, below.

[14] The City also withheld some information under ss. 17, 21 and 22. This same information was also withheld under s. 14 and settlement privilege.

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[3] Assistant Director affidavit #1, para. 4.
[4] City's submissions, paras. 12 and 13.
[5] City's submissions, paras. 10 and 11; the Insurance Company's Head Office Claims Specialist affidavit, para. 3.
[6] the Insurance Company's Head Office Claims Specialist affidavit, paras. 4 and 5.
[7] City's submissions, paras. 15 – 17.
[8] The Province did not settle with the Plaintiff and so the legal action as against the Province continued. Chief Justice Hinkson issued a decision and granted damages against the Province for over $8 million. In a supplementary judgement, Chief Justice Hinkson ordered that the amount of the City settlement and the Federal settlement be deducted from the damages payable to the Plaintiff. It is my understanding that this supplementary decision is currently under appeal. In an oral decision from the bench, Chief Justice Hinkson determined that the aggregate amounts, as opposed to the two individual amounts, of the Federal and City settlements should be included in the order: City's submissions, para. 24.

Preliminary Issue – Expanding the Inquiry

[15] The applicants submit that this inquiry should be expanded to include a complaint that the City:

- Failed to fulfill its duty to assist the applicants under s. 6 of FIPPA;
- Failed to tell the applicants whether they were entitled to access records, as required by s. 8 of FIPPA;[9] and
- Interpreted their access request too narrowly and, therefore, did not include responsive records that were "related to the settlement" (for example, the City's insurance policy with the Insurance Company and "pre-negotiation records").[10]

[16] The applicants acknowledge that ss. 6 and 8 were not listed in the Notice of Inquiry. They also acknowledge that they contacted the OIPC in April 2016 regarding their complaint and were told to, in the applicants' words, "gather evidence" and address these issues with the City before making a formal OIPC complaint.[11] The applicants did not do this because they say "there was no evidence for the applicants to gather" and the City "failed to provide the applicants with an index of records" at the time it made its disclosure decisions.[12]

[17] The City opposes expanding the inquiry to include ss. 6 and 8, and it makes the following arguments in its response:

- The applicants have been represented by legal counsel throughout the OIPC's request for review and inquiry process;
- The applicants raised ss. 6 and 8 in their initial Request for Review but elected not to proceed on these grounds and the sections were not included in the Notice of Inquiry;
- The applicants never raised the ss. 6 and 8 concerns with the City prior to this inquiry;
- The applicants have not identified any special or unusual circumstances to warrant expanding the inquiry;

[9] Applicants' submissions, para. 34.
[10] Applicants' submissions, paras. 28 – 30.
[11] Applicants' submissions, para. 32.
[12] Applicants' submissions, para. 33.

- The applicants do not point to any specific information in the Index of Records it provided at inquiry that warrants further review of the City's response; and

- The City reasonably interpreted the access request for records.[13]

[18] An administrative tribunal has the authority to control its own procedures, and there are circumstances where OIPC adjudicators have allowed a party to add issues at the inquiry stage. Typically, this is where a party has discovered relevant facts that it did not know prior to the inquiry and that it could not have known despite exercising due diligence.[14]

[19] These are not the circumstances before me in this inquiry. Rather, the evidence before me is that the applicants did not take the steps that the OIPC informed them were required before the OIPC would accept a complaint (*i.e.*, to raise the issue with the City first and consider its response, and then file a formal complaint with the OIPC if they still had concerns about the City's compliance with ss. 6 and 8 of FIPPA).[15] I am not persuaded by their arguments about why they did not take these steps and that the inquiry should now be expanded to include those sections.

[20] Furthermore, there is insufficient material before me to make a reasonable finding as to whether the City complied with its ss. 6 and 8 duties.[16] Expanding the inquiry at this point in order to seek submissions on those issues would result in a lengthy delay and would not be conducive to the fair, efficient and timely resolution of disputes under FIPPA. As well, this finding does not prejudice the applicants, as there is nothing precluding them from raising these issues with the City now and, once it receives a response, requesting that the OIPC investigate the complaint. Furthermore, the applicants could make a new access request for records it outlines in its submission, such as City's insurance policy with the Insurance Company and any other "pre-negotiation material."

[21] For the above reasons, I decline to exercise my discretion to add ss. 6 and 8 as issues for this inquiry.

Settlement Privilege

[22] In this case, the City and the Insurance Company are claiming settlement privilege over two types of records: those related to settling the Plaintiff's lawsuit

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[13] City's final response submissions, paras. 4 – 13, citing *in camera* affidavit evidence and OIPC Order F08-02, 2008 CanLII 1647 (BC IPC); Order F07-03, [2007] B.C.I.P.C.D. No. 14.
[14] See for example, Order F07-03, [2007] B.C.I.P.C.D. No. 14.
[15] See Order F08-02, 2008 CanLII 1647 (BC IPC), para. 38 for a more detailed outline of the s. 6 complaint process.
[16] Order F12-07, 2012 BCIPC 10 (CanLII), para. 6.

against the City and those related to how the City and the Insurance Company settled their own differences regarding insurance coverage.

[23] Section 4 of FIPPA gives applicants a right of access to a record in the custody or control of a public body, but that does not extend to information excepted from disclosure under Division 2 of that Part of FIPPA. Division 2 does not provide an exception for settlement privilege. Further, the BC Supreme Court recently acknowledged that the term "solicitor client privilege" in s. 14 of FIPPA does not include settlement privilege. However, Madame Justice Gray also said that settlement privilege is a fundamental common law privilege that is not abrogated absent clear and explicit statutory language, which FIPPA does not have. She stated that it would be "unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by the government, of the settlement privilege available to all other litigants."[17] I will, therefore, consider whether settlement privilege applies in this case.

[24] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. The purpose of settlement privilege is to promote honest and frank discussions during negotiation, which can make it easier to settle the dispute.[18] That purpose is achieved "by the parties having confidence, from the outset, that negotiations will not be disclosed, whether or not a settlement is achieved."[19]

[25] The generally accepted test for the application of settlement privilege is set out in *The Law of Evidence in Canada* and involves establishing the following three factors:

1. A litigious dispute must be in existence or within contemplation;

2. The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

3. The purpose of the communication must be to attempt to effect a settlement.[20]

[26] The "litigious dispute" element of the three-part test above was considered relatively recently by the BC Supreme Court in *Langley (Township) v. Witschel*.[21]

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[17] *Richmond (City) v. Campbell*, 2017 BCSC 331, paras. 71 – 73.
[18] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 (CanLII), para. 31.
[19] *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022 (CanLII), para. 56, citing *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII), paras. 13 – 15.
[20] J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 4th ed. (Toronto: Butterworths, 2014) at para. 14.325. The same test is referenced in the 1999 2nd ed. at para. 14.207.
[21] 2015 BCSC 123 (CanLII), paras. 26 – 42.

In that case, Blok J. extensively reviewed the jurisprudence and concluded that the "litigious dispute" test has not been endorsed by the BC Court of Appeal. Instead, he followed the more expansive test outlined by the BC Court of Appeal in *Belanger v. Gilbert*,[22] which only requires the parties to be "in a dispute or negotiation."[23] Blok J. concluded that this test "is more in harmony with the public interest in encouraging the settlement of disputes more generally, not just 'litigious' disputes."[24]

[27] Settlement privilege is a class privilege and forms a "protective veil" around efforts parties make to settle their disputes, including all communications created for or in the course of settlement negotiations.[25] This also includes any monetary amount negotiated, as this is a key component of the content of successful negotiations and reflects admissions, offers or compromises made in the course of the negotiations.[26]

[28] As with other class privileges, there is a *prima facie* presumption of inadmissibility and non-disclosure but exceptions will be found "when the justice of the case requires it."[27] Furthermore, parties may waive privilege over the records in particular circumstances, which I discuss below.

Analysis and Conclusion on Settlement Privilege

[29] The information withheld pursuant to settlement privilege can be categorized as follows:

- Category A: communications between the Plaintiff's lawyer and the City's lawyer about the negotiation of the settlement, and two emails that consist of communications between the Plaintiff's lawyer and the City's lawyer after the settlement concluded;[28]

- Category B: communications between the Plaintiff's lawyer and the City's lawyer and the Insurance Company regarding the negotiation and execution of the City settlement;

- Category C: communications between the City's lawyer and the Insurance Company in relation to the settlement of the litigation with the Plaintiff; and

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[22] 1984 CanLII 355 (BC CA), paras. 6 and 7.
[23] *Langley (Township) v. Witschel*, 2015 BCSC 123 (CanLII) [*Witschel*], paras. 34 – 37.
[24] *Witschel*, *supra*, para. 38.
[25] *Richmond (City) v. Campbell*, 2017 BCSC 331, paras. 43 and 44, citing *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 (CanLII) [*Sable*], para. 2.
[26] *Sable*, *supra*, para. 18.
[27] *Sable*, *supra*, para. 12.
[28] These two emails are also being withheld pursuant to litigation privilege under s. 14.

- Category D: communications between the City's lawyer and the Insurance Company about how they settled their own differences regarding insurance coverage.

[30] For the reasons that follow, I find that the City has established that settlement privilege applies to all of this information.

Categories A and B

[31] I will first address categories A and B, which involve communications between the Plaintiff's legal counsel and the City, or between the Plaintiff's legal counsel, the City and the Insurance Company.

[32] The City submits that settlement privilege applies to all of this information. In an affidavit, the Assistant Director of Regulatory Litigation (Assistant Director) sets out evidence regarding the negotiation of the settlement agreement. This evidence was all properly provided on an *in camera* basis, so I am limited in how much information I can disclose regarding the settlement process.[29] Suffice it to say, it was a complex process involving multiple parties with significantly varying interests and it took place over a considerable period of time.

[33] The applicants submit that the City is not authorized to refuse to produce records in categories A and B, as it disclosed at least some of the records in question to third parties, namely the BC Supreme Court and non-settling litigants.[30] This argument raises issues regarding exceptions to, and waiver of, settlement privilege. I will address those in more detail below.

[34] I have reviewed the information that was withheld from records in categories A and B, and I can readily conclude that settlement privilege applies to all of the withheld information. The dispute was clearly in existence, as litigation was ongoing, and all of the communication directly relates to settlement negotiations. I find that the City, the Insurance Company and the Plaintiff did not intend that this information would be disclosed to the court, or to anyone else. This is clear from explicit statements in many of the emails that their content is intended to remain in confidence in perpetuity. Further, given the nature and tenor of the exchanges, I find there is an implicit understanding between the parties that the information would remain confidential and would not be disclosed to any individuals outside of the negotiation process.

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[29] Assistant Director affidavit #1, paras. 32 – 35 and 38.

[30] Applicants' submissions, para. 49. I note that the applicants state that the City has disclosed some records in category A; however, I have assumed this is a typo and the applicants are referring to records in category B and D, as the submission is under that heading. Further, this argument pertains to the settlement agreement itself which was withheld under categories B, C and D.

[35] In my view, the type of information in the category A and B records is exactly the kind of information that settlement privilege is meant to protect. I find that the City has met its burden to establish that settlement privilege applies to these records.

Category C

[36] The records in category C consist of communications between the City's lawyer and the Insurance Company in relation to the settlement of litigation with the Plaintiff.

[37] I have reviewed the evidence and records regarding the settlement of litigation with the Plaintiff. The evidence before me is that the Insurance Company's legal counsel engaged, with the City's consent and knowledge, in "initial independent negotiations with the Plaintiff and his legal counsel seeking to resolve the portion of the Claim against the Insurance Company's Insured, the City…."[31] As the settlement negotiations proceeded, the City and its legal counsel became involved in those discussions directly.[32] There is also *in camera* evidence that outlines the communication between the City and the Insurance Company about settlement negotiations with the Plaintiff. While I cannot divulge this evidence, it is clear that the Insurance Company and the City were both extensively involved in the negotiations to settle the Plaintiff's lawsuit against the City.

[38] Addressing the test for settlement privilege, a litigious dispute was clearly in existence as there was ongoing litigation. The category C communications all directly relate to settlement negotiations concerning the Plaintiff's litigation against the City and named VPD members. For example, the communications included details of each party's position with regards to the settlement negotiations. The City and the Insurance Company, as the City's insurer, were significant parties to these negotiations, and it is clear from the withheld information itself that neither would have had such discussions in writing if they anticipated they may be disclosed in the future.

[39] Therefore, I find that settlement privilege applies to all of the withheld information from the category C records.

Category D

[40] Deciding if settlement privilege applies to the communications regarding the settlement of insurance coverage issues is more complex. The applicants submit that the first part of the test for settlement privilege has not been met, as a litigious dispute must already exist or be contemplated in the sense that litigation is "more than a mere possibility" and that "a reasonable person, with the

[31] the Insurance Company's Head Office Claims Specialist affidavit, paras. 4 and 5.
[32] the Insurance Company's Head Office Claims Specialist affidavit, para. 6.

same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it."[33]

[41] Further, the applicants submit that, "in relation to communications between an insured and its insurer over a claim that could become litigious, initial claim discussions do not attract settlement privilege."[34] The applicants also note that the City acknowledges that no litigation between the City and the Insurance Company ever ensued and submits that just because the issues were contentious and the City retained external legal counsel to help with those issues, the City has not established that settlement privilege applies to the records.[35]

[42] Much of the evidence before me on this issue is set out in affidavits on an *in camera* basis or comes from the withheld information itself, so I am limited as to how much detail I can provide in this decision. However, it is clear to me from that evidence that the City and the Insurance Company had a significant dispute about insurance coverage and that they negotiated a resolution to their dispute.

[43] There is persuasive evidence that a dispute was present and that litigation was, at the very least, within contemplation. The City's evidence on this point is that: it hired outside counsel with experience in insurance law; it did not usually retain outside legal counsel despite regularly facing significant legal claims triggering insurance coverage; the claim was unusual, it was for millions of dollars, and it could potentially trigger several different insurance policies; the communications between the City and the Insurance Company were contentious; and no single insurer would acknowledge full responsibility for indemnifying and defending the City when it came to the Plaintiff's claim.[36] I find that the first part of the test is met.

[44] I also find that the second and third parts of the test have been met. The contents of the withheld information itself is evidence that there was an implied intention on the part of the City and the Insurance Company that this information would not be disclosed, and that the purpose of the communication was clearly an attempt to effect a settlement with regard to the insurance issues. Therefore, I find that settlement privilege applies to the category D records.

[45] In conclusion, I find that settlement privilege applies to all of the information withheld from records in categories A, B, C and D.

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[33] Applicants' submissions, paras. 55 and 58, citing *Ross River Dena Counsel v. Canada (Attorney General)*, 2009 YKSC 4 [*Ross River*], paras. 41 and 42, aff'd 2009 YKCA 8.
[34] Applicants' submissions, para. 56, citing *312630 British Columbia Ltd. v. Alta Surety Co.*, 1995 CanLII 3442 (BC CA).
[35] Applicants' submissions, para. 58, citing *Jetport Inc. v. Global Aerospace Underwriting Managers (Canada) Ltd.*, 2013 ONSC 235, paras. 25 and 26.
[36] City's final response, para. 40; Assistant Director's affidavit #3, para. 11.

Exceptions to Settlement Privilege

[46] Although settlement privilege is a class privilege, there are exceptions to it. In order to establish an exception, the person asserting that the exception applies must show that a competing public interest outweighs the public interest in encouraging settlement.[37] This involves providing evidence that the records sought are both relevant and necessary in the circumstances of the case to achieve a compelling or overriding interest of justice.[38]

[47] According to the BC Court of Appeal, exemptions to settlement privilege are "narrowly defined" and "seldom applied."[39]

[48] In a recent decision, the BC Supreme Court reviewed cases where courts applied an exception to settlement privilege, and set out the following examples:

1. the agreement's existence could cast light on the quality of the evidence or motivation of a witness, or could affect the weight a court might give to the evidence;

2. the agreement's existence could be relevant to decisions regarding the conduct of trial;

3. the court or opposing party could otherwise be misled about the position of the parties in the adversarial process;

4. the settling parties agree that evidence will be furnished in connection with the litigation in which the application is made. In that case, the public interest in the proper disposition of litigation assumes paramountcy, and opposite parties are entitled to know about any arrangements which are made about evidence;

5. the matter involves fraud; or

6. production may be required to meet a defence of laches, want of notice, passage of a limitation period, or other similar matters.[40]

[49] The applicants say that there is a significant public interest in the severed information. They explain that the City originally asserted that the Plaintiff was guilty of the crimes, yet it unequivocally withdrew these assertions after the City settlement was executed.[41] The applicants state that "the City has never given

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[37] *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII) [*Dos Santos*], para. 20.
[38] *Dos Santos*, *supra*, para. 20.
[39] *Heritage Duty Free Shop Inc. v. Attorney General for Canada*, 2005 BCCA 188 (CanLII), para. 25.
[40] *Accredit Mortgage Ltd. v Cook Roberts*, 2017 BCSC 1078 (CanLII), para. 54.
[41] Applicants' reply, para. 5.

any public explanation for this shocking and total reversal of position."[42] I take these submissions to mean that the applicants believe there is a compelling public interest in the information, as it would shed light on the City's decision to settle and withdraw the allegations made in court, and, therefore, an exception to the privilege applies.

[50] The City responds that the information that explains why the City withdrew a particular defence and chose to settle the claim is the "very core of the information" protected by settlement privilege. Further, it submits that, where there is a conflict, the "public interest in fundamental common law privileges trumps the public interest in transparency" because protection of privileged information is fundamental to the proper working of the justice system.[43]

[51] I find that the applicants have not provided any compelling arguments or evidence as to why disclosure of this information is necessary to address a competing public interest. In my view, the applicants' arguments about why there needs to be a public explanation for the City's "reversal of position" do not withstand scrutiny. A party to litigation has the right to put forward its best defence during court proceedings and it would have been highly unusual, not to mention potentially incompetent, for the City to have done otherwise at the outset of such complex litigation involving multiple parties and potentially millions of dollars in damages.

[52] I also note that situations where courts have determined that an exception to settlement privilege applies appear to be in the context of litigation, where disclosure is required to ensure fairness to the parties involved. To my knowledge, the applicants were not involved in any aspect of litigation of this matter. In my view, it would be an unusual case where an FOI access request trumps settlement privilege. To be clear, this is not to say there could not be an access request situation where it would be reasonable to find that an exception existed. However, to my mind, the threshold of evidence to establish that the public interest requires disclosure of information protected by settlement privilege is high. Any such evidence would have to be significant and compelling.

[53] Given the importance of settlement privilege, I am not able to find that something that has piqued the public's attention is enough to outweigh the public interest in protecting communications reflecting settlement discussions. The applicants have not provided sufficient evidence or argument as to why an exception to settlement privilege should apply in this case. Therefore, I find that there are no exceptions here to the general rule that communications arising from settlement discussions are privileged.

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[42] Applicants' reply, para. 7.
[43] City's final response, para. 3.

Waiver of Settlement Privilege

[54] The applicants submit that the City has waived privilege, as it disclosed at least some of the records in question to third parties, namely the BC Supreme Court and non-settling litigants.[44]

[55] Waiver of privilege can be explicit or implicit and is established where it is shown that the privilege holder knows of the existence of the privilege and voluntarily shows an intention to waive that privilege.[45] As the BC Court of Appeal recently stated, "the foundation of waiver is knowledge and intention."[46]

[56] The principles of fairness and consistency may require a finding that there has been an implied waiver. This can occur, for example, where part of a privileged communication has been disclosed and fairness requires that the opposing party be permitted to examine the entire communication.[47] However, in circumstances where fairness has been held to require implied waiver, there must still be some "manifestation of voluntary intention to waive privilege."[48]

[57] Settlement privilege is a jointly held privilege and it cannot be waived without the consent of all parties.[49] With regard to the City settlement communications, the privilege belongs to both the Plaintiff and the City/the Insurance Company. With regard to the settlement communications related to the insurance coverage issues, the privilege belongs to the City and the Insurance Company. Since the applicants assert that waiver has occurred, they bear the onus of proving it.[50]

[58] The applicants submit that the City waived privilege over at least the City settlement agreement because the City disclosed it to third parties that the applicants say are "outside the scope of privilege", namely the BC Supreme Court and non-settling litigants.[51] The applicants also submit the City has "cherry

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[44] Applicants' submissions, para. 49.
[45] *S&K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) [*S&K Processors*], para. 6; I note that courts use the words "expressly" and "explicitly" interchangeably with the word "voluntarily".
[46] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 (CanLII), para. 54.
[47] *Komengo Systems Inc. v. Seabulk Systems Inc.*, 1998 CanLII 4548 (BCSC) [*Komengo*], para. 16.
[48] *S&K Processors*, *supra*, para. 10.
[49] *B.C. Children's Hospital v. Air Products Canada Ltd.*, 2003 BCCA 177, para. 16.
[50] Order F16-28, 2016 BCIPC 30 (CanLII), para. 41, citing *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 (CanLII), para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII), para. 40.
[51] Applicants' submissions, paras. 49 and 50. I note that the applicants state that the City has disclosed some records withheld under s. 14, legal advice privilege. However, I have assumed this is a typo and the applicants are referring to records withheld under settlement privilege, as the submission is made under the heading "City Not Authorized to Refuse to Produce Records … on Grounds of Settlement Privilege." Further, this argument pertains to the settlement agreement itself which was withheld under settlement privilege, not s. 14.

picked" certain information and made a "strategic disclosure that is unfair, inconsistent or misleading"; therefore, it should disclose the "underlying information relating to the settlement."[52]

[59] The City admits it disclosed the City settlement to certain parties in two specific instances. However, it denies that either instance was a waiver of privilege over that information.[53]

[60] In the first instance of disclosure, the City/Insurance Company and the Plaintiff agreed to disclose a redacted copy of the City settlement, with the settlement amount severed, to the Province and the Federal AG because they were still parties to the litigation at that time. The Assistant Director deposes that it was disclosed to the Province and the Federal AG on the condition that it was to be treated as "a document produced pursuant to the discovery of documents rule, and subject to the same implied undertaking as to further disclosure."[54]

[61] The second instance where the City settlement information was disclosed took place after judgement was awarded against the Province. The City and the Federal AG agreed to give the Province un-redacted copies of both the City and Federal settlement agreements. The following conditions were placed on this disclosure:

- The Province would use the information for the sole purpose of determining what amount to pay the Plaintiff to satisfy the trial judgement and prevent double recovery;
- The Province would not store or keep information of the settlement amounts in databases or files (other than the litigation file);
- A note would be placed in a prominent location on the Province's litigation file noting the confidentiality of the settlement amounts;
- All parties would limit access to the settlement amounts to those officials who need to know to advise, instruct and make payment; and
- There would be no public disclosure of the settlement amounts by any party.

[62] Previous court decisions have held that providing a privileged document to a third party on a confidential basis does not amount to a waiver of privilege. In those cases, the stipulation that the privileged document be treated "in confidence" was found to be sufficient to demonstrate a lack of intention to waive

[52] Applicants' submissions, para. 51, citing *Ross River*, *supra*.
[53] Assistant Director affidavit #3, paras. 4 – 8.
[54] Assistant Director affidavit #3, para. 5.

the privilege.[55] In my view, this is precisely what occurred in this situation. The evidence before me is that the City has consistently treated the records with the utmost care in order to avoid waiver and to ensure that disclosure to the Court and non-settling litigants was protected by strict confidentiality terms.

[63] As well, I find that the disclosure of the aggregate City and Federal settlement amounts was to prevent double recovery. The Court ordered the aggregate amounts of the City and Federal settlements to be set out in the order. It is apparent, therefore, that this aggregate amount was disclosed to the Court.[56] This was done explicitly to address the issue of double recovery and I am unable to find that waiver occurred due to this limited, confidential disclosure in the context of the litigation.

[64] Moreover, there was nothing unfair, inconsistent or misleading about the City's disclosure to the Court, or to the Province or the Federal AG. The applicants are and were, to my knowledge, not parties to the litigation. It is difficult to see how they or any other individual not a party to the litigation could possibly be prejudiced by the limited, confidential disclosure of the City settlement in this context.

[65] Given the importance of privilege to the functioning of the legal system, evidence justifying a finding of waiver must be clear and unambiguous.[57] I do not have clear and unambiguous evidence in this case, and I therefore find that the applicants have not met their burden to prove that there was any voluntary intention to waive privilege.

Discretion

[66] The applicants submit that the City must demonstrate that it has exercised its discretion in relying on settlement privilege to withhold information.[58]

[67] FIPPA has several discretionary exceptions which confer on the head of a public body the discretion to disclose information that can be technically be withheld. The Commissioner can require a public body to consider the exercise of discretion where that has not been done, or to reconsider if it has not been exercised appropriately. Because withholding information under these provisions involves using discretion, public bodies must be prepared to demonstrate that they have exercised its discretion appropriately. Assessing proper exercise of discretion requires consideration of any evidence of bad faith, the public body

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[55] *Komengo*, *supra*, paras. 15 – 19.
[56] However, the City's evidence is that the specific terms of the City settlement were never disclosed to the Court and it was not entered as an exhibit in Court.
[57] Order F16-28, 2016 BCIPC 30 (CanLII), para. 44, citing *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 (CanLII), para. 40.
[58] Applicants' submissions, paras. 44, 52 and 59.

taking into account irrelevant circumstances, or the public body failing to take in account relevant circumstances.[59]

[68] As previously discussed, settlement privilege is not an enumerated exception under FIPPA but, rather, it is a common law class-based privilege. There is no requirement under common law settlement privilege for the person or public body asserting it to exercise discretion when determining whether records subject to settlement privilege should be disclosed.

[69] In this case, the City has successfully established that the information in dispute is protected by settlement privilege. It is not obliged to also demonstrate if, or how, it exercised discretion in deciding not to disclose that information to the applicants.

Section 14 – Legal Advice Privilege

[70] Section 14 of FIPPA states that a public body may refuse to disclose information that is subject to solicitor client privilege. Section 14 includes both types of solicitor client privilege found at common law: legal advice privilege and litigation privilege.[60] The City is claiming legal advice privilege over the remaining information it withheld.[61] The test for determining whether legal advice privilege applies has been articulated as follows:

> [T]he privilege does not apply to every communication between a solicitor and his client but only to certain ones. In order for the privilege to apply, a further four conditions must be established. Those conditions may be put as follows:
>
> 1. there must be a communication, whether oral or written;
>
> 2. the communication must be of a confidential character;
>
> 3. the communication must be between a client (or his agent) and a legal advisor; and
>
> 4. the communication must be directly related to the seeking, formulating, or giving of legal advice.

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[59] *John Doe v. Ontario (Finance)*, 2014 SCC 36 (CanLII) [*John Doe*], para. 52; see also *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII) [*Criminal Lawyers' Association*], para. 71.

[60] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665, para. 26

[61] The City withheld two records pursuant to litigation privilege; however, I do not have to consider litigation privilege, as I have already determined that the City can withhold that same information pursuant to common law settlement privilege.

> If these four conditions are satisfied then the communications (and papers relating to it) are privileged.[62]

[71] The above criteria have been consistently applied in OIPC orders, and I will consider the same criteria here.[63]

Section 14 Records

[72] The City did not provide me with copies of the records to which it applied s. 14. Instead, the City relies on the contents of affidavits sworn by the Assistant Director and the Index of Records it provided at inquiry.

[73] The City submits that it has provided as much information as it possibly can in order to establish privilege without disclosing any privileged information, and that it has complied with the requirements of BC civil litigation practice for listing records to which legal advice privilege applies.[64] The City states that unless there is evidence or argument establishing the necessity for review, courts and tribunals should decline to review records over which legal advice privilege have been asserted as a matter of course.[65]

[74] The Assistant Director deposes that all of the records withheld under legal advice privilege consist "primarily of communications either between legal counsel for the City or between senior management and legal counsel for the City."[66] He goes on to state that there are a small number of records that "consist of communication between legal counsel and members of the VPD and notes taken by legal counsel for the City."[67]

[75] The Assistant Director also states that "it appears based on my review that in each of the records legal counsel is acting in their capacity as legal counsel either for the City or for the VPD and not in a business or managerial capacity."[68] The City concedes that this is not definitive proof that privilege applies to the records; however, it submits that "courts lean toward finding that such a privilege exists whenever a lawyer acts in their professional capacity as opposed to acting in a business advisor or some other non-legal role."[69]

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[62] *R. v. B.*, 1995 CanLII 2007 (BC SC), para. 22
[63] See, for example, Order F15-52, 2015 BCIPC 55 (CanLII), para. 10; Order F15-67, 2015 BCIPC 73 (CanLII), para. 12.
[64] City's final response, paras. 16 and 17, citing *Stone v. Ellerman*, 2009 BCCA 294, paras. 22 – 27.
[65] City's final response, paras. 14 and 15, citing *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII) and *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 (CanLII).
[66] Assistant Director affidavit #1, para. 40.
[67] Assistant Director affidavit #1, para. 40. I note that the Assistant Director states, at para. 5, that the City's in-house counsel took on the defence work for the City and the named VPD members.
[68] Assistant Director affidavit #1, para. 41.
[69] Assistant Director affidavit #3, para. 20, citing *Simcoff v. Simcoff*, 2009 MBCA 80, para. 19, citing *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 S.C.R. 821 at 835.

[76] The City also provided an Index of Records, which sets out the following information: pages numbers; date(s) of the record; parties to the communications (such as "City Legal Counsel, City Senior Management and City Staff"); description of the type of document (such as "email chain between legal counsel and client" or "email chain between legal counsel with attachment"); FIPPA provision applied to the withheld information; and the type of privilege claimed. The Assistant Director deposes that he has reviewed the records withheld under s. 14 and confirms that the records are accurately described in the Index of Records.[70]

[77] In my view, the Assistant Director's sworn affidavit evidence, along with the description of the records contained in the City's Index of Records, describes the contents of the documents in sufficient detail such that I can make a determination as to whether s. 14 applies to the withheld information. Furthermore, there is no evidence or argument that the City has falsely claimed privilege over the records at issue. Therefore, I do not find it necessary to exercise the authority, pursuant to s. 44 of FIPPA, to order production of these records.

Parties' Positions on Section 14

[78] The applicants submit that the City has not established a sufficient evidentiary basis for its assertion of legal advice privilege. Specifically, the applicants state that the City is required to provide evidence that "each and every record … was directly related (or within a continuum of communications) to seeking, formulating or giving legal advice."[71] They state that the Assistant Director's assertion that the information directly relates to seeking, formulating or giving legal advice is not sufficient evidence that privilege attaches to the records.

[79] The applicants also submit that it is unclear on what basis the Assistant Director's assertion is based as "he does not appear to have been privy to all of the communications himself."[72] In its final reply, the City provided another affidavit from the Assistant Director. In it, he deposes that he was directly involved in negotiation of the City settlement and was either a party to, or made aware of, "nearly all emails" classified as s. 14 records in the Index of Records. [73]

[80] The applicants also take issue with the City applying privilege to the notes that the Assistant Director deposes were taken by one of the City's lawyers and subsequently used by that legal counsel to formulate legal advice. They state that the fact that a record is used by legal counsel to formulate legal advice does not establish that legal advice privilege applies. As they explain it, legal counsel

[70] Assistant Director affidavit #1, para. 39.
[71] Applicants' submissions, para. 41.
[72] Applicants' submissions, para. 42.
[73] Assistant Director affidavit #3, para. 9.

"might rely on a variety of materials in formulating legal advice, but it does not follow that all of those materials are themselves subject to solicitor-client privilege."[74]

[81] The City's Assistant Director deposes that the City's Assistant Director of General Litigation took the notes and advised the Assistant Director that he used these to later formulate legal advice.[75] The Assistant Director further deposes that disclosure of the notes would reveal the contents of the legal advice later given to the client.[76]

Analysis and Conclusion – Section 14

[82] I am persuaded by the affidavit evidence and the Index of Records that the City has established a sufficient evidentiary basis for its assertion of legal advice privilege over the s. 14 records. According to the evidence, all of the emails were communications between the City's lawyers or with their client the City (generally described in the Index of Records by their names or as "City Senior Management"). The affidavit evidence is that these communications were made in confidence for the purpose of seeking, formulating or providing legal advice related to the litigation and settlement.

[83] It is preferable to have legal counsel who provided the legal advice or was otherwise involved in the communications swear evidence in support of a public body's claims to privilege. This, in my view, will generally provide the best evidence upon which the OIPC can determine whether s. 14 applies to the withheld information without having to order production. That type of evidence was not provided. However, in this case, the Assistant Director was involved in the litigation and settlement and he deposed that he reviewed all of the s. 14 records and confirmed that they are accurately described in the Index of Records. Therefore, I give significant weight to the Assistant Director's sworn evidence.

[84] I also find that the notes taken by the City's Assistant Director of General Litigation that were subsequently used by other lawyers are privileged. Just because legal counsel used a document to formulate legal advice does not make it subject to legal advice privilege on that basis alone. However, in this case, the notes were taken by the City's Assistant Director of General Litigation and there is evidence that disclosing those notes would reveal the legal advice he provided. These notes, in my view, fall squarely into the category of information that is protected by legal advice privilege.

[85] In conclusion, I find that the City has established that legal advice privilege applies to all of the s. 14 records.

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[74] Applicants' submissions, para. 43.
[75] Assistant Director affidavit #1, para. 42.
[76] Assistant Director affidavit #3, para. 10.

Discretion

[86] The applicants submit that s. 14 is discretionary and the City has not provided evidence "as to the considerations on which it exercised its discretion…." They note that the City's sole submission regarding discretion is that it "is not prepared to waive this privilege" and submit that this "bald assertion" does not discharge the City's obligation to apply its discretion, and that it fails to give any consideration to the "significant public interest in understanding why the City Defendants settled the claims against them given the gravity of the facts they asserted by way of defence."[77]

[87] The City says it is not required to exercise discretion in refusing to disclose records to which s. 14 applies. The City asserts that the requirement for exercising discretion in applying s. 14 is based on the use of the word "may" rather than "must" and this is not sufficient language to abrogate privilege.[78]

[88] I do not agree with the City that it has no obligation to exercise its discretion when applying s. 14. One cannot ignore the explicit language in s. 14 (its use of "may" rather than "must"). The Supreme Court of Canada has held that the use of the word "may" in privacy legislation exceptions does confer a discretion on the head of the public body to make the decision on whether to disclose the information, and the public body needs to consider other interests, public and private, when it exercises this discretion.[79] Public bodies must exercise their discretion lawfully, and a privacy commissioner may quash a discretionary decision not to disclose information and return the matter to the public body for reconsideration where the public body's decision: was made in bad faith or for an improper purpose; took into account irrelevant considerations; or failed to take into account relevant considerations.[80]

[89] However, the Supreme Court of Canada also stated that discretion is to be exercised "with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case."[81]

[90] In this case, legal advice privilege is a class privilege and must be as close to absolute as possible in recognition of the strong public interest in maintaining the confidentiality of the solicitor-client relationship.[82] I do not accept the applicants' assertion that the public's interest in understanding why the City decided to settle the lawsuit is significant enough that it would be reasonable to

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[77] Applicants' submissions, para. 44.
[78] City's final response, paras. 21 and 22.
[79] *Criminal Lawyers' Association*, *supra*, paras. 45 – 47 and 54.
[80] *John Doe*, *supra*, para. 52; see also *Criminal Lawyers' Association*, *supra*, para. 71.
[81] *Criminal Lawyers' Association*, *supra*, para. 66.
[82] *Criminal Lawyers' Association*, *supra*, paras. 53 and 75, citing *R. v. McClure*, 2001 SCC 14 (CanLII).

remit the issue back to the City for fresh consideration. This evidence and argument falls significantly short of what would be required in order to find that a public body failed to exercise its discretion to waive privilege over information. In my view, it would be extremely rare to encounter a situation where there was significantly compelling evidence that a public body failed to properly exercise its discretion to refuse to waive privilege over records.

[91] In summary, under the established rules on solicitor-client privilege, and based on the facts and interests at stake in this situation, I find that there is no compelling evidence or argument that the circumstances in this case warrant any interference with the City's decision to decline to waive privilege over the information it withheld pursuant to s. 14.

Section 17 (harm to financial interests), Section 21 (harm to business interests) and 22 (harm to personal privacy)

[92] The City provided submissions on s. 17, and the Plaintiff's legal counsel and the Insurance Company provided comprehensive submissions with regards to ss. 21 and 22. However, I have determined that the City is authorized to withhold all of the information pursuant to s. 14 and common law settlement privilege. Therefore, I do not need to address ss. 17, 21 or 22 of FIPPA.

CONCLUSION

[93] Pursuant to s. 58(2)(b), I confirm the City of Vancouver's decision and find that the City is authorized by s. 14 and common law settlement privilege to withhold all of the information in dispute.

July 10, 2017

ORIGINAL SIGNED BY

Carol Whittome, Adjudicator

OIPC File No.: F16-65774