



OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F18-06

BC LOTTERY CORPORATION

Lisa Siew
Adjudicator

February 8, 2018

CanLII Cite: 2018 BCIPC 08
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 08

Summary: A journalist requested a copy of a cheque as proof that certain funds had been repaid by a former BC Lottery Corporation executive. He also requested copies of related correspondence including the agreement between the parties regarding the repayment. BCLC withheld information and records under s. 14 (solicitor client privilege) and s. 22 (disclosure harmful to personal privacy) of FIPPA and common law settlement privilege. Except for the cheque number and the memo line, the adjudicator determined BCLC was required to withhold information under s. 22 and it was authorized to withhold information under s. 14 of FIPPA and settlement privilege.

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

Authorities Considered: BC: Order 02-23, 2002 CanLII 42448 (BC IPC); Order F05-18, 2005 CanLII 24734 (BC IPC); Order F06-19, 2006 CanLII 37939 (BC IPC); Order F07-03, 2007 CanLII 30393 (BC IPC); Order F07-18, 2007 CanLII 42407 (BC IPC); Order F09-14, [2009] BCIPC No. 19; Order F10-44, 2010 BCIPC No. 65; Order F11-28, 2011 BCIPC No. 34; Order F12-12, 2012 BCIPC 17; Order F14-12, 2014 BCIPC 15; Order F14-34, 2014 BCIPC 37; Order F14-41, 2014 BCIPC 44; Order F15-23, 2015 BCIPC 25; Order F15-29, 2015 BCIPC No. 32; Order F15-30, 2015 BCIPC 33; Order F16-14, 2016 BCIPC 16; Order F16-36, 2016 BCIPC 40; Order 16-46, 2016 BCIPC 51; Order F17-35, 2017 BCIPC 37; Order F17-39, 2017 BCIPC 43; Order F17-42, 2017 BCIPC 46; Order F17-43, 2017 BCIPC 47.

Cases Considered: SCC: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37; **BC:** *Belanger v. Gilbert*, 1984 CanLII 355 (BCCA); *College of Physicians*

of *B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665; *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131 (CanLII); *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498; *Langley (Township) v. Witschel*, 2015 BCSC 123; *Nguyen v. Dang*, 2017 BCSC 1409; *Richmond (City) v. Campbell*, 2017 BCSC 331; *The Owners, Strata Plan BCSC 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988; **AB**: *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10.

INTRODUCTION

[1] A journalist (applicant) requested access under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to records related to the repayment of money to the BC Lottery Corporation (BCLC) by its former Chief Executive Officer (CEO). The applicant specifically asked for both sides of a cheque and a copy of the agreement between the parties to resolve the repayment. BCLC withheld all of the requested records on the basis that s. 14 (solicitor client privilege) and s. 22 (disclosure harmful to personal privacy) of FIPPA applied.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review BCLC's decision to withhold the records. As a result of mediation, BCLC provided portions of the front of the cheque. However, the remaining issues were not resolved and the applicant requested that the matter proceed to inquiry under Part 5 of FIPPA. During the inquiry process, BCLC reconsidered its severing decision and provided the applicant with a copy of a letter, but withheld a small amount of information under s. 22 of FIPPA.

PRELIMINARY MATTERS

The back of the cheque

[3] The Investigator's Fact Report clarifies that the back of the cheque is not one of the records in dispute for this inquiry. The Fact Report states that BCLC has informed the applicant it does not have a copy of the back of the cheque. This issue was not included in the Notice of Inquiry sent to the parties. In his inquiry submission, however, the applicant argues BCLC's claims regarding the back of the cheque are not believable.¹

[4] The issue of whether BCLC has custody and control over the back of the cheque is not an issue in this inquiry. Prior to this inquiry, the applicant was

¹ Applicant's submission at paras. 3-4.

informed by the OIPC that his concerns regarding the back of the cheque would not be addressed in this inquiry and he was advised of the proper OIPC process for pursuing such a complaint. Therefore, I will not consider that issue or make any determination regarding the back of the cheque.

Late addition of an issue

[5] In its inquiry submission, BCLC relies on settlement privilege to withhold information from some of the records.² BCLC originally relied on s. 14 of FIPPA to withhold this information.³ Settlement privilege was not set out in the Notice of Inquiry or the Fact Report as an issue for consideration in this inquiry and s. 14 of FIPPA (solicitor client privilege) does not encompass settlement privilege.⁴

[6] Past orders and decisions of the OIPC have said parties may raise new issues at the inquiry stage only if permitted to do so and only in certain circumstances.⁵

[7] BCLC did not seek permission to add this issue to the inquiry and did not provide an explanation as to why it only raised it at this late stage and why it should be permitted to do so now. However, I will consider settlement privilege in this inquiry since the applicant did not object to the addition and there is no prejudice or unfairness since the applicant made reply submissions on the matter.

ISSUES

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

1. Whether BCLC is required to refuse to disclose the information in dispute under s. 22 of FIPPA;
2. Whether BCLC is authorized to refuse to disclose the information in dispute under s. 14 of FIPPA; and
3. Whether BCLC is authorized to refuse to disclose the information in dispute under common law settlement privilege.

² BCLC's initial submission at para. 24 outlines the documents it now applies settlement privilege: part of document 3, all of document 12 and it asserts both legal advice privilege and settlement privilege over documents 13, 15 and 16.

³ See affidavit of BCLC's Manager of FOI and Information Governance, Corporate Security & Compliance at para. 11.

⁴ *Richmond (City) v. Campbell*, 2017 BCSC 331 at para. 96.

⁵ Order F07-03, 2007 CanLII 30393 (BC IPC) and Order F11-28, 2011 BCIPC No. 34 at para. 11.

[9] Where access to information has been refused under s. 22 of FIPPA, s. 57(2) places the burden on the applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy. However, where access to information has been refused under s. 14 of FIPPA, section 57(1) places the burden on the public body to prove that the applicant has no right of access to all or part of the records in dispute. FIPPA does not have an exception for withholding information based on settlement privilege. However, at common law the burden of proof is on the party asserting settlement privilege and I adopt that standard here.⁶

DISCUSSION

Background

[10] BCLC is a crown corporation, governed by a government-appointed board of directors, with responsibility for the conduct and management of gaming in British Columbia.⁷ A government review was conducted into the resignation of BCLC's former CEO who left to take on a position in the private sector with a casino service provider. The review resulted in a report which concluded that the former CEO had been in a conflict of interest as the CEO of BCLC while in negotiation for employment with a gaming service provider.⁸

[11] After the release of the report, BCLC requested the former CEO pay back funds it would not have paid him, as part of his resignation if it had known of the information contained in the report.⁹ BCLC says the former CEO paid back \$55,171.20 of the funds he received upon his departure from BCLC.¹⁰ Thereafter, BCLC released a public statement regarding the review of the former CEO's resignation and stated that it had received repayment in full.

Records in dispute

[12] The applicant requested the following records from BCLC:

- A) Proof the \$55,171.20 was repaid by the former CEO (specifically, a copy of the front and back of the cheque); and
- B) Correspondence, including, but not limited to, the agreement between the former CEO and BCLC regarding the resolution of the amount owing.¹¹

⁶ *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 at para. 9, leave to appeal dismissed at 2009 BCCA 452 (CanLII).

⁷ BCLC's initial submission at para. 5.

⁸ *Ibid* at para. 9(b).

⁹ *Ibid* at para. 11.

¹⁰ *Ibid*.

¹¹ *Ibid* at para. 12.

[13] BCLC located 17 responsive records consisting of a copy of the front of the cheque, four letters, ten emails and two documents. These are the records now in dispute.

Section 22 – Disclosure harmful to personal privacy

[14] Section 22 of FIPPA provides that a public body must refuse to disclose personal information the disclosure of which would unreasonably invade a third party's personal privacy. Previous OIPC orders have considered the application of s. 22 and I will apply the same approach in this inquiry.¹²

[15] BCLC states that "the OIPC recognized that one goal of *FIPPA* 'is to minimize intrusiveness in the lives of individuals in this province'" and information such as "cheque information," as well as the other information it has withheld, should "not be routinely disclosed."¹³ BCLC also submits that "there is no compelling reason in these circumstances to conclude that disclosure of the personal information is reasonable or necessary."¹⁴

[16] However, BCLC's comment is not a correct statement of FIPPA's purposes, which are explicitly set out in s. 2 of FIPPA and includes giving the public a right of access to records subject only to limited exceptions.¹⁵ Nor does BCLC's suggested approach to the disclosure of personal information accurately reflect the analysis required under s. 22 of FIPPA. Under s. 22, the question to be determined is whether disclosing the personal information at issue would constitute an *unreasonable* invasion of a third party's personal privacy. Section 22 does not prohibit the disclosure of all personal information.¹⁶ Whether the disclosure of personal information will be an unreasonable invasion of third party privacy will depend on the circumstances of each case.¹⁷

Personal information

[17] The first step in any s. 22 analysis is to determine if the information is personal information. "Personal information" is defined as "recorded information about an identifiable individual other than contact information."¹⁸ Information is about an identifiable individual when it is reasonably capable of identifying

¹² See Order F17-39, 2017 BCIPC 43 at paras. 71-138; Order F16-36, 2016 BCIPC 40; Order F14-41, 2014 BCIPC 44 at para. 10.

¹³ BCLC's initial submission at para. 63 relying on Order No. 161-1997, [1997] BCIPD No. 19 at paras. 26-27 and *R. v. Skakun*, 2014 BCCA 223 at para. 1.

¹⁴ BCLC's initial submission at para. 63.

¹⁵ For a full discussion of FIPPA's purposes, see Order F15-23, 2015 BCIPC 25 at paras. 27-31.

¹⁶ Order 02-23, 2002 CanLII 42448 (BC IPC) at para. 31 where former Commissioner Loukidelis noted that s. 22 does not guard against all invasions of personal privacy.

¹⁷ *Ibid* at paras. 29-31 where former Commissioner Loukidelis rejected a public body's reliance on Order No. 161-1997.

¹⁸ See Schedule 1 of FIPPA for this definition.

a particular individual, either alone or when combined with other available sources of information.¹⁹ Contact information is defined as “information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.”²⁰

[18] BCLC withheld information on the face of the cheque and a letter under s. 22 of FIPPA. It severed the following information from the cheque: the name of a third party who shares the account with the CEO, the CEO’s phone number, home address and signature, the account and cheque number, the memo line and the financial institution’s name, address and branch/transit number.²¹ BCLC provided the applicant with a copy of a letter from BCLC’s external legal counsel to the former CEO, but it severed the former CEO’s email and home address.²²

[19] BCLC submits that the information it has severed is personal information within the meaning of s. 22 because it is about an identifiable individual. It also says this information is not contact information as defined under FIPPA since “the email address is a personal email address and the address is a home address.”²³ The applicant does not address whether the withheld information is personal information.

[20] I find some of the severed information directly identifies an individual such as the personal email address in the letter and the other third party’s name on the face of the cheque.²⁴ The remainder of the information is reasonably capable of being attributed to a particular individual, on its own or when combined with other available sources of information, such as the CEO’s home address, phone number, signature and account number.²⁵ The applicant specifically requested a copy of the former CEO’s cheque and BCLC disclosed his name on the cheque; therefore, this information is directly linked to the former CEO.

[21] While the cheque number, memo line, and the financial institution’s name, address and transit number on its own may not be personal information, I find in this case it is the personal information of the former CEO as it identifies how many cheques he has used, what information is on his cheque and where he

¹⁹ Order F16-36, 2016 BCIPC 40 at para. 17.

²⁰ See Schedule 1 of FIPPA for this definition.

²¹ Affidavit of BCLC’s Manager of FOI and Information Governance, Corporate Security & Compliance at para. 14.

²² BCLC’s initial submission at para. 55.

²³ *Ibid* at para. 57.

²⁴ For a similar conclusion, see Order F16-14, 2016 BCIPC 16 at paras. 17, 28 (names and signatures).

²⁵ For a similar conclusion, see Order 02-23, 2002 CanLII 42448 (BC IPC) at para. 7 (home address); Order F14-41, 2014 BCIPC 44 at para. 14 (home contact details); Order F15-30, 2015 BCIPC 33 at para. 78 (names and personal contact information); Order 16-46, 2016 BCIPC 51 at para. 16 (email address); Order F06-19, 2006 CanLII 37939 (BC IPC) at para. 156 (address and banking information); Order F07-18, 2007 CanLII 42407 (BC IPC) at para. 46 (banking records).

does his banking. Most of this information is also the personal information of the individual that shares the account with the former CEO. Therefore, I conclude the information in dispute is personal information within the meaning of s. 22 as it identifies third parties or is about third parties and it is not contact information.

Section 22(4) – disclosure not unreasonable

[22] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information or circumstances listed in s. 22(4). If it does, then the disclosure of the personal information is deemed not to be an unreasonable invasion of a third party's personal privacy and the information should be disclosed.

[23] BCLC submits that s. 22(4) does not apply to the withheld information. The applicant does not provide any submissions on s. 22(4). I have considered the types of information and factors listed under s. 22(4) and find that none apply to the withheld information.

Section 22(3) – presumptions in favour of withholding

[24] The third step in the s. 22 analysis is to determine whether any of the presumptions in s. 22(3) apply. "Section 22(3) creates a rebuttable presumption that the disclosure of personal information of certain kinds or in certain circumstances would be an unreasonable invasion of third party personal privacy."²⁶ BCLC submits that none of the s. 22(3) presumptions apply to the withheld information. The applicant does not provide any submissions on s. 22(3).

[25] I have considered whether some of the withheld information falls under s. 22(3)(f) which says disclosing personal information is presumed to be an unreasonable invasion of third party privacy if the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness. Previous OIPC orders have found s. 22(3)(f) applies to the following information:

- Credit card and account information of a third party;²⁷
- Detailed information about third parties' payments made to settle insurance claims;²⁸ and
- The amount a public body paid to a third party to settle an employment dispute.²⁹

²⁶ *B.C. Teachers' Federation, Nanaimo District Teachers' Association et al. v. Information and Privacy Commissioner (B.C.) et al.*, 2006 BCSC 131 (CanLII) at para. 45.

²⁷ Order F14-12, 2014 BCIPC 15 at para. 45.

²⁸ Order F14-34, 2014 BCIPC 37 at para. 56.

[26] A past OIPC order also determined that the presumption in s. 22(3)(f) is “aimed at personal information describing finances.”³⁰ Considering these previous orders, I am satisfied s. 22(3)(f) applies to the personal information on the cheque. Therefore, the disclosure of this information is presumed to be an unreasonable invasion of third party privacy.

[27] I have considered whether any s. 22(3) presumptions apply to the personal information in the letter and did not find any that would apply to this information.

Section 22(2) – relevant circumstances

[28] The final step in the s. 22 analysis is to consider the impact of disclosing the personal information at issue in light of all relevant circumstances, including those listed under s. 22(2). It is at this step, after considering all relevant circumstances, that the s. 22(3)(f) presumption which I found applies to the personal information on the cheque may be rebutted.

[29] Although not referenced by section number, I can deduce from BCLC’s submissions that it has considered ss. 22(2)(a) and (e), which states:

(2) In determining under subsection (1) or (3) 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

(a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny;

(e) the third party will be exposed unfairly to financial or other harm.

[30] The applicant does not identify any relevant circumstances for consideration nor does he address BCLC’s submissions on s. 22(2).

Scrutiny of the public body – s. 22(2)(a)

[31] Section 22(2)(a) requires consideration of whether disclosing the third party’s personal information is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny. If so, then “this may in some circumstances provide the foundation for

²⁹ Order F10-44, 2010 BCIPC No. 65 at para. 18.

³⁰ Order F09-14, [2009] BCIPC No. 19 at para. 19.

a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.”³¹

[32] BCLC submits there is no public interest in the withheld information and states this third party personal information would not enable public scrutiny of its activities nor further the other purposes of FIPPA.³²

[33] Section 22(2)(a) relates to the scrutiny of a public body’s activities rather than subjecting a third party’s activities to public scrutiny.³³ I do not see how disclosing the third party personal information at issue would shine a light on BCLC’s activities in general or during the relevant period. From the materials before me, I am aware that the applicant questions whether the cheque was cashed by BCLC.³⁴ However, the personal information withheld from the face of the cheque will not assist the applicant to determine whether BCLC deposited the cheque into its bank account.

[34] Further, I do not see how the small amount of personal information withheld from the letter would subject BCLC’s activities to public scrutiny considering the rest of the letter was publicly disclosed by BCLC, including that it was addressed to the former CEO.³⁵ The withheld information only reveals that BCLC addressed the letter to the former CEO’s home address and personal email address. In this case, I am not persuaded that disclosing any of the withheld personal information is desirable for the purpose of subjecting the activities of BCLC to public scrutiny.

Unfairly exposing the third party to harm – s. 22(2)(e)

[35] Section 22(2)(e) requires a public body to consider whether disclosure of a third party’s personal information will unfairly expose the third party to financial or other harm. Previous OIPC orders have held that “other harm” for the purposes of s. 22(2)(e) consists of “serious mental distress or anguish or harassment.”³⁶

[36] BCLC only discusses financial harm in relation to the personal information on the cheque and focuses on the risk to the former CEO even though the bank account is shared with another third party. It says disclosing this withheld information “would risk exposing the third party unfairly to financial harm, as his

³¹ Order F05-18, 2005 CanLII 24734 (BC IPC) at para. 49.

³² BCLC’s initial submission at para. 63.

³³ Order F16-14, 2016 BCIPC 16 at para. 40 and Order F12-12, 2012 BCIPC 17 at para. 38.

³⁴ Applicant’s August 10, 2017 email to BCLC’s representative and OIPC’s Registrar of Inquiries.

³⁵ Globe and Mail article with copy of redacted letter at issue published July 17, 2014, cited by applicant in his October 1, 2014 email to the OIPC to request a review of BCLC’s decision to withhold information and records.

³⁶ Order F15-29, 2015 BCIPC 32 at para. 33.

address, banking information and signature would be a matter of public record.”³⁷ Aside from its assertion, BCLC does not explain or provide evidence as to what financial harm the former CEO could be unfairly exposed to and the likelihood and unfairness of such exposure.

[37] Based on the materials before me, I am not persuaded that disclosing the personal information at issue will unfairly expose the third parties to financial or other harm. Cheques are commonly issued to others as a form of payment and there is no evidence that the level of exposure to harm in this case is different from the risk everyone else faces when they use a cheque. Further, there is no evidence that the measures used by financial institutions to protect their customers and ensure security of banking will not be sufficient to protect the third parties in the case of this cheque. Therefore, based on the materials before me, I am not convinced that disclosure of the personal information at issue would expose the third parties unfairly to financial or other harm.

Other circumstances

[38] I have considered whether there are any circumstances which weigh in favour of disclosure.³⁸ In the context of this case, the disclosure of the cheque number and the memo line will not reveal sensitive third party personal information. The memo line is blank and the cheque number only identifies the number of cheques written by the third parties.³⁹

[39] The remainder of the personal information in the cheque and the letter contains more detailed personal information about the third parties. Based on the materials before me, I am unable to identify a circumstance which supports disclosing the remainder of the personal information to the applicant. I also note that in his request for review to the OIPC, the applicant did not object to the redaction of the former CEO’s street address and bank account number.⁴⁰

Is the presumption rebutted for the personal information on the cheque?

[40] I found that s. 22(3)(f) applies to personal information on the cheque since it describes a third party’s finances, financial history and activities. In this case, I find the presumption is rebutted for the cheque number and the blank memo line since no sensitive third party personal information would be revealed by

³⁷ BCLC’s initial submission at para. 63.

³⁸ Sections 22(a) to (d) are examples of some circumstances that may weigh in favour of disclosure to an applicant.

³⁹ The memo line on a cheque can be used by the payor to write an unofficial note such as the reason for the payment.

⁴⁰ October 1, 2014 email from the applicant to the OIPC to request a review of BCLC’s decision to withhold records, where the applicant states: “...BCLC can and should disclose the cheque after making reasonable redactions to withhold [the former CEO’s] street address and bank account number.”

disclosing this information. In my view, the disclosure of this personal information would not constitute an unreasonable invasion of the third parties' personal privacy. For the remainder of the information on the cheque, I considered whether there were circumstances which would rebut the presumption under s. 22(3)(f) and find there are none in this case.

Conclusion on s. 22(1)

[41] To summarize, I find the information withheld from the cheque and the letter under s. 22 is personal information. I conclude s. 22(4) does not apply to this information, but find that the presumption under s. 22(3)(f) does apply to the personal financial information on the cheque and there is no s. 22(3) presumption which applies to the personal information in the letter.

[42] Considering all the relevant circumstances, I find that the s. 22(3)(f) presumption is rebutted for the cheque number and the memo line, but not for the remainder of the personal information on the cheque. For this information and the personal information in the letter, I find the relevant circumstances tip the balance in favour of non-disclosure. In the context of this case, I find disclosing this personal information to the applicant would be an unreasonable invasion of the third parties' personal privacy. Therefore, except for the cheque number and the memo line, I conclude BCLC is required to withhold the personal information it has severed from the cheque and the letter under s. 22(1) of FIPPA.

Section 14 – Solicitor client privilege

[43] Section 14 of FIPPA states that the head of a public body may refuse to disclose information that is subject to solicitor client privilege. The law is well established that s. 14 encompasses legal advice privilege and litigation privilege.⁴¹ BCLC is claiming legal advice privilege over information it has withheld in the letters, emails and two related documents referred to by BCLC as “unsigned settlement documentation.”⁴²

[44] Legal advice privilege applies to confidential communications between solicitor and client for the purposes of obtaining and giving legal advice.⁴³ However, not every communication between client and solicitor is protected by solicitor client privilege.⁴⁴ The test for determining whether legal advice privilege applies has been articulated by the courts and has been consistently applied in previous OIPC orders as follows:

⁴¹ *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 [*College*] at para. 26.

⁴² See “Table of Records” in BCLC’s initial submission.

⁴³ *College*, *supra* note 41 at paras. 26-31.

⁴⁴ Order F17-42, 2017 BCIPC 46 at para. 16.

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.

If these four conditions are satisfied then the communications (and papers relating to it) are privileged.⁴⁵

The records withheld under s. 14

[45] BCLC did not provide the records for my review. Instead, it provided a list of the records it is withholding under s. 14 and/or settlement privilege, referred to as the “Table of Records.” This table individually lists the relevant records from number 2 to 16 and identifies the nature of the communication as a letter, email or unsigned settlement documentation.

[46] BCLC also relies on a sworn affidavit provided by its general counsel who is familiar with the records and the related events (General Counsel). In her affidavit, General Counsel deposes as to the date of the record, provides a description of the document and its subject matter and identifies the parties to the communication. A brief description of the records is provided below.

[47] **Document 2:** Email from a BCLC employee to General Counsel where the employee forwards her two other emails that contain legal advice obtained by BCLC from its previous general counsel and from its outside counsel on certain matters of employment law.

[48] **Document 3:** Email from BCLC’s outside counsel to General Counsel providing legal advice regarding a settlement offer and forwarding a copy of an email sent by the former CEO’s lawyer which contains proposed settlement terms. BCLC is also claiming settlement privilege over the email from the former CEO’s lawyer.

[49] **Documents 4-5:** An email exchange between General Counsel and BCLC employees where General Counsel provides legal advice about taxation issues.

[50] **Documents 6-10:** A series of emails between General Counsel and BCLC employees, including the chair of the BCLC board of directors, and emails

⁴⁵ Order F17-43, 2017 BCIPC 47 at paras. 38-39 citing *R. v. B*, 1995 CanLII 2007 (BC SC) at para. 22.

between BCLC's lawyers all related to the seeking, discussing or giving of legal advice regarding the repayment demand and settlement terms and obligations.

[51] **Document 11:** An email exchange between General Counsel and BCLC's outside counsel where outside counsel gives legal advice to General Counsel regarding the repayment demand.

[52] **Document 13:** A letter from BCLC's outside counsel to BCLC where outside counsel gives legal advice regarding the settlement funds. BCLC also claims settlement privilege over this letter.

[53] **Document 14:** A legal opinion in the form of a letter from BCLC's outside counsel to BCLC regarding the former CEO's employment.

[54] **Documents 15 and 16:** Unsigned copies of two different versions of settlement documentation provided to BCLC by its outside counsel to provide legal advice about proposed settlement terms. BCLC is also claiming settlement privilege over these two documents.

The parties' position on the application of s. 14

[55] BCLC cites previous OIPC orders and court decisions to establish that legal advice privilege protects the information at issue. BCLC states that it is apparent from the nature of the information request and the description of the records by General Counsel that the evidence establishes that the conditions for the application of legal advice privilege have been met.⁴⁶ General Counsel describes the records as confidential emails, letters and settlement documentation between BCLC employees and BCLC's lawyers or between BCLC's lawyers only. She says that these records were directly related to the seeking, formulating or giving of legal advice in relation to the CEO's employment, resignation, the findings in the report and the repayment demand.⁴⁷

[56] The applicant submits that not all communications between lawyers and their clients are covered by privilege. He cites a previous OIPC order and a court decision to establish that "to the extent that a lawyer provides advice other than legal advice, those communications are not caught by the privilege."⁴⁸ He provides some general examples such as "where an in-house lawyer provides business advice or a government lawyer provides general policy advice."⁴⁹ However, the applicant does not discuss how the principles set out in these decisions apply to the relevant records in this inquiry.

⁴⁶ BCLC's initial submission at paras. 40-45.

⁴⁷ Affidavit of General Counsel at paras. 25-42.

⁴⁸ Applicant's submission at para. 16 citing Order F10-18, 2010 BCIPC 29 and *Cushing v. Hood*, 2007 NSSC 97, affirmed on appeal at 2008 NSCA 47.

⁴⁹ *Ibid.*

Analysis and conclusion on s. 14

[57] I have reviewed the evidence provided by BCLC and I am persuaded that the records at issue are communications protected by solicitor client privilege. These records consist of emails, letters and documents which I find are communications of a confidential character between solicitor and client. Considering the subject matter of the correspondence, I am persuaded that these communications were conducted in confidence between the participants and intended to be kept confidential. General Counsel's affidavit identifies with whom BCLC's lawyers communicated and they are all BCLC personnel. There is nothing before me to indicate that anyone else was involved in these communications. I also find the communications were between a client and a legal advisor since the communications were between BCLC employees and BCLC's lawyers in their professional legal capacity. I am also satisfied based on the evidence provided by BCLC that these records were related to the seeking, formulating or giving of legal advice. Therefore, I conclude BCLC is authorized to withhold the information at issue in these records pursuant to s. 14 of FIPPA.

Settlement Privilege

[58] Settlement privilege is not an exception to an applicant's right of access to a record provided under FIPPA.⁵⁰ However, the BC Supreme Court recently held that settlement privilege cannot be abrogated in legislation unless there is clear and explicit statutory language.⁵¹ FIPPA does not contain express language abrogating settlement privilege and as a result public bodies may rely on settlement privilege to withhold information.⁵²

[59] Settlement privilege is a common law rule that protects communications exchanged by parties as they try to settle a dispute, including communications or documents that are reasonably connected to the parties' negotiation, whether or not a settlement is achieved.⁵³ The purpose of settlement privilege is to promote settlement by wrapping "a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible."⁵⁴

⁵⁰ Section 4 of FIPPA gives applicants a right of access to a record in the custody or control of a public body subject only to the exceptions to disclosure in Division 2, Part 2 of FIPPA. Division 2 does not provide an exception for settlement privilege.

⁵¹ *Richmond (City) v. Campbell*, 2017 BCSC 331 at paras. 71-73.

⁵² *Ibid* at para. 72.

⁵³ Order F17-35, 2017 BCIPC 37 at para. 24 and *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] at paras. 16-17 and *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 at para. 26.

⁵⁴ *Sable*, *supra* note 53 at para. 2.

[60] The test for determining whether settlement privilege applies has been articulated by the courts and applied in previous OIPC orders. It requires the following conditions be present for the privilege to apply:

1. A litigious dispute must be in existence or within contemplation (although it is not necessary for proceedings to have actually been commenced);
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 of the dispute between the parties.⁵⁵

[61] If these three conditions are satisfied, there is a presumption of non-disclosure, subject to certain exceptions which may be found “when the justice of the case requires it.”⁵⁶ I will apply the above principles for this inquiry.

The records withheld under settlement privilege

[62] BCLC relies on settlement privilege to withhold information in document 3 and all of documents 12, 13, 15 and 16. However, BCLC has also claimed legal advice privilege over all of documents 13, 15 and 16. Having found that legal advice privilege applies to these documents, I do not need to consider whether settlement privilege also applies and I will only consider documents 3 and 12.

[63] General Counsel describes the information withheld on the basis of settlement privilege as follows:

- Document 3 is described as an email chain which consists of emails from the former CEO’s lawyer to BCLC’s outside counsel with a settlement offer.⁵⁷
- Document 12 is described as a letter from the former CEO’s lawyer to BCLC’s outside counsel regarding settlement funds and “includes confidential communication regarding some settlement terms.”⁵⁸

The parties’ position on the application of settlement privilege

[64] General Counsel deposes the records “were created in a context that BCLC regarded as a potentially litigious dispute pertaining to [the former CEO’s]

⁵⁵ Order F17-35, 2017 BCIPC 37 at para. 25 and *Nguyen v. Dang*, 2017 BCSC 1409 at para. 22 (cited in BCLC’s initial submission).

⁵⁶ Order F17-35, 2017 BCIPC 37 at para. 28 quoting *Sable* at para. 12.

⁵⁷ Affidavit of General Counsel at paras. 26-27.

⁵⁸ *Ibid* at para. 38.

departure from BCLC and the payment he received from BCLC in that regard.”⁵⁹ BCLC also submits the remaining requirements of the test are met since the purpose of the records was to attempt a settlement of the demand for repayment and there was an implied intention of non-disclosure.⁶⁰

[65] In response, the applicant agrees that settlement privilege exists at common law, but he says that except for one document, the records do “not include communications exchanged by the parties.”⁶¹ However, the applicant does not explain his comment or discuss whether and how BCLC has improperly applied settlement privilege to the information at issue in the disputed records.

Analysis and conclusion on settlement privilege

[66] To satisfy the first part of the test, the Courts have said that it is sufficient that the parties are in “a dispute or negotiation.”⁶² I am satisfied that the disputed records were created when the parties were in a dispute or negotiation regarding the repayment of the funds.

[67] As to the second requirement, General Counsel deposes that documents 3 and 12 were sent with the implied intention that these records would not be disclosed in the event that the parties failed to reach a settlement.⁶³ I am satisfied from the description of the records by General Counsel that there was an implicit understanding between the parties for the information in these records to remain confidential and undisclosed to any individuals outside of the negotiation process.

[68] Further, I find the purpose of documents 3 and 12 was to settle a dispute in relation to the former CEO’s entitlement to the funds he received upon his departure from BCLC. Therefore I am satisfied that the third requirement of the test has also been met. As a result, I find BCLC has met its burden to establish that settlement privilege applies to these records.

⁵⁹ Affidavit of General Counsel at para. 24.

⁶⁰ *Ibid* at paras. 47-52.

⁶¹ Applicant’s submission at para. 15. The record he identifies as a communication between the parties is document 2 which BCLC has claimed legal advice privilege and not settlement privilege. Therefore, I will not consider whether settlement privilege applies to document 2.

⁶² *Langley (Township) v. Witschel*, 2015 BCSC 123 at paras. 35 and 38 and see *The Owners, Strata Plan BCSC 4006 v. Jameson House Ventures Ltd.*, 2017 BCSC 1988 at para. 22; both courts follow *Belanger v. Gilbert*, 1984 CanLII 355 (BCCA) where the Court of Appeal adopted a more expansive test for assessing whether settlement privilege applies. For the same approach, see also Order F17-35, 2017 BCIPC 37.

⁶³ Affidavit of General Counsel at paras. 27 and 38.

CONCLUSION

[69] For the reasons given above, pursuant to s. 58 of FIPPA, I make the following order:

1. I confirm BCLC's decision to refuse access to information under s. 22 of FIPPA, subject only to paragraph #2 below.
2. BCLC is not authorized to refuse to give the applicant access to the cheque number and memo line under s. 22 of FIPPA. BCLC must give the applicant access to that information by March 23, 2018. BCLC must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a revised copy of the relevant record.
3. I confirm BCLC's decision to refuse access to information under s. 14 of FIPPA and common law settlement privilege.

February 8, 2018

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

OIPC File No.: F14-59208