



OFFICE OF THE  
INFORMATION & PRIVACY  
COMMISSIONER  
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Order F18-12

## REAL ESTATE ERRORS AND OMISSIONS INSURANCE CORPORATION

Lisa Siew  
Adjudicator

May 10, 2018

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Quicklaw Cite: [2018] B.C.I.P.C.D. No. 15

**Summary:** An applicant requested access to a settlement agreement involving an individual, two real estate agents and other parties. The Real Estate Errors and Omissions Insurance Corporation (REEOIC) provided the applicant with a copy of the settlement agreement, but it withheld information under settlement privilege, s. 17 (harm to financial or economic interests of a public body), s. 21 (harm to business interests of a third party) and s. 22 (harm to third party personal privacy) of FIPPA. The adjudicator found REEOIC was authorized under common law settlement privilege to withhold the information. Given this finding, the adjudicator did not consider whether ss. 17, 21 or 22 also applied to the withheld information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act.*

### INTRODUCTION

[1] An applicant requested REEOIC provide access, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to a settlement agreement involving an individual, two real estate agents and other parties (the Agreement). REEOIC refused to disclose the record relying on s. 14 (solicitor client privilege), s. 17 (harm to financial or economic interests of a public body), s. 21 (harm to business interests of a third party) and s. 22 (harm to third party personal privacy) of FIPPA.

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review REEOIC's decision. Mediation failed to resolve the matter and the applicant requested that the matter proceed to an inquiry

under Part 5 of FIPPA. REEOIC requested that the Commissioner exercise his discretion under s. 56 of FIPPA to not hold an inquiry.

[3] The OIPC received submissions from the parties regarding the s. 56 issue. As part of its s. 56 submission, REEOIC provided the applicant with a redacted copy of the Agreement and claimed settlement privilege in its s. 14 arguments. The Commissioner's delegate clarified that settlement privilege is not encompassed within the term "solicitor client privilege" under s. 14 of FIPPA, but REEOIC could rely on it to withhold information.<sup>1</sup> After reviewing both parties' submissions, the Commissioner's delegate determined that an inquiry would proceed in order to determine whether REEOIC is authorized or required to refuse access to information in the Agreement under settlement privilege, ss. 14, 17, 21 or 22 of FIPPA.

[4] Both REEOIC and the applicant made submissions for this inquiry. REEOIC provided *in camera* materials as part of its submission<sup>2</sup> and withdrew its reliance on s. 14 of FIPPA; therefore, I will not consider s. 14 in this inquiry. During the inquiry process, REEOIC also disclosed additional information in the Agreement to the applicant.<sup>3</sup>

## ISSUES

[5] The issues I must decide in this inquiry are as follows:

1. Is REEOIC authorized to refuse to disclose the information in dispute under common law settlement privilege?
2. If not, is REEOIC authorized or required to refuse to disclose the information in dispute under ss. 17, 21 or 22 of FIPPA?

[6] At common law, the burden of proof is on the party asserting settlement privilege and I adopt that standard here.<sup>4</sup>

[7] Section 57(1) of FIPPA places the burden on REEOIC to prove that the applicant has no right of access to all or part of the records in dispute under ss. 17 and 21. However, 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 under s. 22 of FIPPA.

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<sup>1</sup> His decision was informed by *Richmond (City) v. Campbell*, 2017 BCSC 331 at paras. 41-73.

<sup>2</sup> The *in camera* materials were provided with the OIPC's prior approval.

<sup>3</sup> REEOIC also withheld information related to the person who witnessed the signing of the Agreement (i.e. the name, address, occupation and signature of the witness) and the name of the city in which the plaintiffs signed the Agreement. However, during the inquiry process, REEOIC disclosed this information to the applicant with the consent of the witness.

<sup>4</sup> *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.

## DISCUSSION

### ***Background***

[8] REEOIC is a non-profit organization that provides professional liability insurance to real estate licensees in British Columbia. REEOIC “receives and pools the assessments paid by its insureds and uses those funds to pay the cost of defending, settling, and/or paying claims made against its insureds by members of the public.”<sup>5</sup> If a person believes they have suffered a loss “due to an error, omission or negligent act committed by a real estate licensee in BC, he or she may make a claim against the real estate licensee or file an action in court, seeking monetary damages.”<sup>6</sup> It is up to the licensees to report the claim or potential claim to REEOIC who will determine whether the matter falls within coverage. If so, a REEOIC staff lawyer is appointed to handle the claim and may do so directly or refer the matter to outside counsel.<sup>7</sup>

[9] In this case, an individual and a company (the plaintiffs) filed an action in court against two real estate licensees, a real estate brokerage firm, a real estate developer and a real estate development corporation (the defendants). The law suit related to a proposed property development project.<sup>8</sup> REEOIC’s settlement of this legal claim resulted in the Agreement.<sup>9</sup> The individual plaintiff is now deceased and the applicant says he is seeking access to the Agreement in order to make a claim against this person’s estate.<sup>10</sup>

### ***Records and information in dispute***

[10] The record in dispute is the Agreement. REEOIC withheld the names of the third parties (i.e. the plaintiffs and defendants), the settlement amount, the court action number and the location of the court registry where the civil claim was filed.

### ***Settlement privilege***

[11] Settlement privilege is not an exception provided under FIPPA to an applicant’s right of access to a record.<sup>11</sup> However, the BC Supreme Court recently held that public bodies may rely on settlement privilege as a basis

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<sup>5</sup> REEOIC’s initial submission at paras. 16-17.

<sup>6</sup> *Ibid* at para. 18.

<sup>7</sup> *Ibid* at para. 19.

<sup>8</sup> REEOIC’s initial submission at para. 12 and applicant’s submission at page 6.

<sup>9</sup> REEOIC’s initial submission at para. 12.

<sup>10</sup> Applicant’s submission.

<sup>11</sup> 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.

to withhold information because FIPPA does not contain express language abrogating settlement privilege.<sup>12</sup>

[12] Settlement privilege is a fundamental common law rule that protects communications exchanged by parties as they try to settle a dispute, including the “content of successful negotiations” such as the concluded agreement and any monetary amount negotiated.<sup>13</sup> The purpose of settlement privilege is to promote settlement and it allows parties “to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation.”<sup>14</sup>

[13] 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.<sup>15</sup>

[14] 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.”<sup>16</sup> I will consider whether the conditions are satisfied and then whether there are any exceptions that may apply.

#### *The parties’ position*

[15] REEOIC submits that the withheld information is protected by settlement privilege because:

- A legal dispute had been commenced by the plaintiffs;

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<sup>12</sup> *Richmond (City) v. Campbell*, 2017 BCSC 331 at paras. 71-73. See also Order F17-35, 2017 BCIPC 37 at paras. 22-69 for a full discussion of this common law exception.

<sup>13</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] at paras. 16 - 18.

<sup>14</sup> *Ibid* at paras. 2 and 11.

<sup>15</sup> Order F17-35, 2017 BCIPC 37 at para. 25 and *Nguyen v. Dang*, 2017 BCSC 1409 at para. 22.

<sup>16</sup> Order F17-35, 2017 BCIPC 37 at para. 28 quoting *Sable* at para. 12.

- The defendants participated in the settlement on the express or implied understanding that the withheld information would be protected from disclosure; and
- The Agreement was necessary to effect the settlement.<sup>17</sup>

[16] The applicant disputes the confidentiality of the settlement and says there is no confidentiality clause in the Agreement. He also says the Agreement “was not going to be a private matter” since the real estate community knew that the real estate licensees had been questioned as part of the litigation process and the information from this questioning would have resulted in a court-ordered or pre-trial settlement which would have been published on the REEOIC website.<sup>18</sup> The applicant also submits that he should have been a part of any settlement agreement since he was involved in the events giving rise to the legal dispute and suffered a loss from the defendants’ actions.<sup>19</sup>

[17] In response, REEOIC says that the actual contents of the Agreement would not have been made public since REEOIC “does not publish details of or documents evidencing settlements of civil claims against real estate licensees on its website or in any other public forum.”<sup>20</sup> It says “the only document normally available to the public regarding the conclusion of a Supreme Court lawsuit would be an entered consent dismissal order” which only says the case has been dismissed.<sup>21</sup> REEOIC relies on the affidavit of its executive officer to show that it considers settlements to be confidential and treats them as confidential.<sup>22</sup>

[18] REEOIC also says that the applicant was not a party to the lawsuit and was therefore not a party to the Agreement which means he is not included in the privilege created under the settlement.<sup>23</sup> It says the issue of whether the applicant *should* have been added as a party to the lawsuit is a matter between the applicant and the estate of the individual third party, which does not affect REEOIC’s obligations under FIPPA to protect the privacy interests of the parties to the Agreement.<sup>24</sup>

### *Analysis and findings*

[19] Neither party disputes that there was a legal proceeding underway or that the Agreement settled the legal dispute between the third parties. It is clear from

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<sup>17</sup> The REEOIC’s initial submission at paras. 35-43.

<sup>18</sup> Applicant’s submission at page 2.

<sup>19</sup> Applicant’s submission.

<sup>20</sup> The REEOIC’s reply submission at para. 4 and affidavit #3 of the REEOIC’s executive officer (and privacy officer) at para. 2.

<sup>21</sup> The REEOIC’s reply submission at para. 4.

<sup>22</sup> Affidavit #3 of the REEOIC’s executive officer at para. 3 in the REEOIC’s reply submission.

<sup>23</sup> The REEOIC’s reply submission at para. 5.

<sup>24</sup> The REEOIC’s reply submission at paras. 5-6 [emphasis in original].

the Agreement that a litigious dispute had been commenced since the third party plaintiffs filed a civil claim against the third party defendants. It is also evident from the parties' submissions that the purpose of the Agreement was an attempt to effect a settlement of the dispute between them. I am therefore satisfied that the first and third conditions of the test have been met.

[20] With regards to confidentiality, there is no express statement of confidentiality in the Agreement and REEOIC did not provide any persuasive evidence which establishes that the third parties expressly discussed or addressed the confidentiality of the Agreement's contents. However, I must also consider whether there was an implied intention to keep the information in the Agreement confidential.

[21] REEOIC provided *in camera* affidavit evidence which speaks to what some of the third party defendants expected and understood regarding the settlement discussions.<sup>25</sup> REEOIC also notes that the applicant himself told REEOIC that the individual plaintiff refused to disclose the settlement amount to the applicant.<sup>26</sup> Further, aside from his assertions, the applicant provided no evidence to support his claims that REEOIC makes the contents of its settlements publicly available or that the Agreement was disclosed to others outside the negotiation process.

[22] Considering the materials before me, I accept that the third parties entered into settlement discussions, which resulted in the Agreement, with the implied intention that any discussions or documents connected to this settlement would be kept confidential. Therefore, subject to any exceptions which I will address below, I find REEOIC has established that settlement privilege applies and there is a presumption of non-disclosure for the withheld information in the Agreement.

#### *Exceptions to settlement privilege*

[23] As noted by the BC Court of Appeal, "maintaining settlement privilege promotes and fosters settlement of matters that might otherwise cause extensive hardship and cost to the public and to public bodies" and exceptions are "narrowly defined and seldom applied."<sup>27</sup> A party seeking to override settlement privilege may establish an exception if they can show and provide evidence to demonstrate that the records sought are both relevant and necessary in the circumstances of the case to achieve "a compelling or overriding interest of

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<sup>25</sup> The REEOIC's initial submission at para. 36.

<sup>26</sup> See REEOIC's initial submission for affidavit #1 of the REEOIC's executive officer at para. 39 and Exhibit "A" to her affidavit (email from applicant to executive officer where applicant says the third party plaintiff "will not disclose the amount she received"). See also applicant's submission (page 4 and Exhibit D).

<sup>27</sup> *Heritage Duty Free Shop Inc. v. Attorney General for Canada*, 2005 BCCA 188 at para. 25.

justice.”<sup>28</sup> Courts have found a compelling and competing public interest in certain circumstances such as when the matter involves allegations of fraud.<sup>29</sup> However, exceptions to settlement privilege are not limited to the circumstances already identified by the courts<sup>30</sup> and an exception may be found where there is a competing public interest which outweighs the public interest in encouraging settlement.<sup>31</sup>

[24] In this case, the applicant says he needs the settlement amount to start legal action against the estate of the individual plaintiff. He submits that he is entitled to a share of the settlement proceeds she received and he cannot begin his legal action without this withheld information.<sup>32</sup> REEOIC submits that the applicant does not need this information to begin his legal action against the estate of the individual third party. It says there is no legal requirement for the applicant to have this information before commencing a civil claim in the BC courts.<sup>33</sup> REEOIC also submits that the applicant has not explained why he cannot start a civil claim against the estate and seek production of the Agreement through the court process.

[25] Based on the materials before me, I find the applicant has not provided sufficient evidence or argument to demonstrate why an exception to settlement privilege should apply in this case. It is not necessary or in the interests of justice for the applicant to know the settlement amount in order to begin his legal action against the estate. It may make it easier for the applicant to calculate the amount of his claim or assess whether legal action is worth pursuing; however, I am not persuaded that personal convenience or interest amounts to a compelling public interest which overrides the public interest in encouraging settlements between litigating parties. Further, the applicant has not asserted that any judicially recognized exception to settlement privilege applies in this case and none are self-evident. I therefore find the applicant has not proven that the information at issue is both relevant and necessary in this case to achieve a compelling public interest which outweighs the public interest in encouraging settlement. As a result, I conclude that there are no exceptions which arise in this case to override the settlement privilege which I found applies to the disputed information.

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<sup>28</sup> *Dos Santos v Sun Life Assurance Co. of Canada*, 2005 BCCA 4 [*Dos Santos*] at para. 20; Order 17-35, 2017 BCIPC 37 at para. 46.

<sup>29</sup> For a full list of circumstances, see *Accredit Mortgage Ltd. v Cook Roberts*, 2017 BCSC 1078 at para. 54.

<sup>30</sup> *Heritage Duty Free Shop Inc. v. Attorney General for Canada*, 2005 BCCA 188 at paras. 21-25.

<sup>31</sup> *Dos Santos* at para. 20; *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CanLII 4039 (BC CA) at para. 21.

<sup>32</sup> Applicant's submission at pages 5 and 6.

<sup>33</sup> The REEOIC's reply submission at para. 7.

### *Waiver of settlement privilege*

[26] Privilege may be waived if the possessor of the privilege knows of the existence of the privilege and has demonstrated a clear intention to forego that privilege or where fairness and consistency require a finding that there was an implied waiver.<sup>34</sup> Once privilege is established, the onus of showing it has been waived is on the party seeking to displace it.<sup>35</sup>

[27] I note that the applicant has not asserted that waiver of settlement privilege occurred or provided any argument or supporting evidence demonstrating that the third parties waived privilege. Therefore, I will not consider whether there was a waiver of settlement privilege in this case.

### **Sections 17, 21 and 22 of FIPPA**

[28] The parties also provided submissions on s. 17 (harm to financial or economic interests of a public body), s. 21 (harm to business interests of a third party) and s. 22 (harm to third party personal privacy) of FIPPA. Since I have found settlement privilege applies to the withheld information, I do not find it necessary to consider whether those FIPPA exceptions to disclosure also apply.

### **CONCLUSION**

[29] For the reasons given above, under s. 58 of FIPPA, I confirm the REEOIC's decision to refuse access to the disputed information under common law settlement privilege.

May 10, 2018

### **ORIGINAL SIGNED BY**

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Lisa Siew, Adjudicator

OIPC File No.: F16-66992

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<sup>34</sup> *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) [*S. & K. Processors Ltd.*] at para. 6; Order 17-35, 2017 BCIPC 37 at paras. 55-57; *Hallman Estate (Re)*, 2009 CanLII 49643 (ON SC) at paras. 14-16.

<sup>35</sup> *S. & K. Processors Ltd.* at para. 6; Order 17-35, 2017 BCIPC 37 at para. 57; *Hallman Estate (Re)*, 2009 CanLII 49643 (ON SC) at para. 15.