



OFFICE OF THE
INFORMATION & PRIVACY
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Order F19-20

WORKERS' COMPENSATION BOARD

Erika Syrotuck
Adjudicator

May 3, 2019

CanLII Cite: 2019 BCIPC 22
Quicklaw Cite: [2018] B.C.I.P.C.D. No. 22

Summary: The applicant requested records relating to WorkSafeBC's settlement with a former WorkSafeBC employee. WorkSafeBC identified a Memorandum of Settlement as responsive but withheld it on the basis of common law settlement privilege and ss. 14 (solicitor client privilege) and 17(1) (harm to the financial or economic interests of a public body). The adjudicator found that WorkSafeBC was authorized to withhold the record on the basis of settlement privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14 and 17(1).

INTRODUCTION

[1] The applicant requested records from the Workers' Compensation Board (WorkSafeBC) relating to its negotiation and settlement with a former WorkSafeBC employee. In response, WorkSafeBC identified a Memorandum of Settlement, but withheld it in its entirety under common law settlement privilege and ss. 14 (solicitor client privilege) and 17(1) (harm to the financial or economic interests of a public body) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review WorkSafeBC's decision. Mediation failed to resolve the issues and the matter proceeded to inquiry.

[2] During the inquiry, WorkSafeBC raised s. 22 (unreasonable invasion of personal privacy), as an issue. However, it was not included in the notice

of inquiry. Given my conclusion below, I do not need to decide whether to permit WorkSafeBC to add s. 22 as a new issue in this inquiry.

ISSUES

[3] The issues in this inquiry are:

1. Is WorkSafeBC authorized to withhold the Memorandum of Settlement under common law settlement privilege?
2. Is WorkSafeBC authorized to withhold the Memorandum of Settlement under ss. 14 or 17(1) of FIPPA?

[4] WorkSafeBC bears the burden of proving that the applicant has no right to access the information.¹

DISCUSSION

Record in Dispute

[5] The record in dispute is a two page Memorandum of Settlement (Memorandum) between WorkSafeBC, the union and a former employee (third party). The Memorandum outlines all matters relating to the termination of the third party's employment with WorkSafeBC.

Settlement Privilege

[6] WorkSafeBC withheld the entire Memorandum under settlement privilege.

[7] Settlement privilege is not an exception to an applicant's right of access under Part 2 of FIPPA.² However, settlement privilege is a fundamental privilege at common law. Therefore, the BC Supreme Court has said that since FIPPA does not contain express language abrogating it, public bodies may rely on settlement privilege to refuse to disclose information.³

[8] The purpose of settlement privilege is to promote settlement.⁴ Settlement privilege is based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed.⁵ The privilege protects negotiations, whether or not a settlement

¹ Section 57(1) of FIPPA.

² In *Richmond (City) v Campbell*, 2017 BCSC 331 at para. 68 the BC Supreme Court confirmed that solicitor client privilege does not include settlement privilege.

³ *Ibid* at para 71. See also Order F18-06, 2018 BCIPC 8, at para. 58.

⁴ *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 SCR 623, 2013 SCC 37 [Sable] at para. 12.

⁵ *Ibid* at para. 13.

is reached, meaning that successful negotiations receive the same protection as ones that do not result in settlement.⁶ The Supreme Court of Canada has confirmed that settlement privilege applies to the content of successful negotiations, including any monetary amount negotiated.⁷

[9] Past OIPC orders have applied the following test when dealing with claims of settlement privilege:

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.⁸

[10] In *Langley (Township) v. Witschel*, the BC Supreme Court concluded that in order to satisfy the “litigious dispute” element of the test, it is sufficient to be in “a dispute or negotiation” rather than a “litigious dispute.”⁹

Parties Submissions

[11] WorkSafeBC says that after the third party’s employment with WorkSafeBC was terminated, WorkSafeBC, the third party and the union participated in a confidential mediation process to settle all matters relating to the third party’s termination. It says that the parties reached an agreement that is set out in the Memorandum.

[12] WorkSafeBC points to provisions in the Memorandum stating that the terms of the Memorandum are confidential.

[13] The applicant says that settlement privilege does not apply. He says that WorkSafeBC is speculating about a grievance or labour relations issue.

⁶ *Ibid*, at para 17, citing *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CanLII 4039 (BC CA) at para. 20.

⁷ *Ibid* at paras. 16 - 18.

⁸ Lederman, Sidney N, Alan W. Bryant and Michelle K Fuerst, *The Law of Evidence in Canada* (Markham: LexisNexis Canada), 2014 at 14.325.

⁹ *Langley (Township) v. Witschel*, 2015 BCSC 123, at paras. 34-37. *Witschel* follows *Belanger v. Gilbert*, 1984 CanLII 355 (BCCA) where the BC Court of Appeal adopted this more expansive test. For the same approach see also Order F17-35, 2017 BCIPC 37 and Order F18-06, 2018 BCIPC 08.

Analysis

[14] I am satisfied that the Memorandum meets the criteria for settlement privilege.

[15] The Memorandum reflects the content of successful negotiations about the third party's departure from WorkSafeBC. I am satisfied that there was a dispute about the third party's departure from WorkSafeBC and that the purpose of the Memorandum was to effect a settlement. The Memorandum contains a clause clearly indicating that the parties agreed to keep its terms confidential.

[16] I will now consider whether any exceptions to settlement privilege apply.

Exceptions to Settlement Privilege

[17] There are some exceptions to settlement privilege. To establish that an exception applies, the applicant must show that "a competing public interest outweighs the public interest in encouraging settlement."¹⁰ These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence.¹¹

[18] The applicant says that disclosure of the Memorandum is in the interests of natural justice. He says that the level of effort put into resisting disclosure of the Memorandum suggests that WorkSafeBC did something improper that may reach the level of fraud. He also questions whether WorkSafeBC breached its fiduciary duty.

[19] WorkSafeBC says that the applicant has not identified any basis for his concerns. It says that the applicant must have a strong factual basis to support such a serious allegation. It says that the applicant has not provided any evidence or factual information that could amount to fraud. WorkSafeBC also says that the applicant has not identified any basis for his concern about a possible breach of fiduciary duty.

[20] In my view, the applicant has not provided sufficient detail to support his concerns that WorkSafeBC committed fraud or a breach of fiduciary duty. As a result, I am not persuaded that there is a public interest that outweighs the interest in encouraging settlement.

[21] I find that no exceptions to settlement privilege apply. WorkSafeBC is authorized to withhold the Memorandum under settlement privilege.

¹⁰ *Sable*, supra note 4 at para. 19 citing *Dos Santos v Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 20.

¹¹ *Ibid.* See also *Accredit Mortgage Ltd. v Cook Roberts*, 2017 BCSC 1078 at para. 54.

Sections 14 and 17(1)

[22] WorkSafeBC also refused to disclose information in the Memorandum under ss. 14 and 17(1)(e) and (f). I have found that settlement privilege applies to the entire Memorandum. Therefore, I do not need to consider whether ss. 14 or 17(1) also apply.

CONCLUSION

[23] Under s. 58(2) of FIPPA, I confirm WorkSafeBC's decision to refuse to disclose the Memorandum of Settlement.

May 3, 2019

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: 17-73041