Order F22-52

PROVINCIAL HEALTH SERVICES AUTHORITY
(BC Emergency Health Services)

David S. Adams
Adjudicator

October 27, 2022

CanLII Cite: 2022 BCIPC 59
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 59

Summary: The applicant requested records about himself from his employer, BC Emergency Health Services (BCEHS). BCEHS provided 6,121 pages of responsive records, but withheld information in the records under ss. 3(3)(h) (scope of FIPPA), 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 22 (unreasonable invasion of a third party's personal privacy). BCEHS also withheld a small amount of information under common law settlement privilege. The adjudicator confirmed BCEHS's decisions with respect to ss. 3(3)(h), 13(1), 14, and (with one exception) s. 22. The adjudicator ordered BCEHS, under s. 44(1)(b), to produce the records withheld under settlement privilege for the purpose of deciding this issue on the merits.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, ss. 3(3)(h), 13(1), 13(2), 13(3), 14, 22(1), 22(2), 22(3), 22(4), 44(1)(b), and 44(3).

INTRODUCTION

[1] The applicant made a request, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), for records about himself held by BC Emergency Health Services (BCEHS) and the Provincial Health Services Authority (PHSA) dated between June 1, 2017 and December 18, 2018. BCEHS located over 6,100 pages of responsive records and provided some of them to the applicant. However, BCEHS withheld much of the information in these records under ss. 3(3)(h) (scope of FIPPA), 13(1) (advice and recommendations), 14 (solicitor-client privilege) and 22(1) (unreasonable invasion of a third party's personal privacy). BCEHS also withheld a small amount of information under common law settlement privilege.

[2] The applicant asked the OIPC to review BCEHS's decision to withhold information under FIPPA. Mediation did not resolve the issues and the matter proceeded to this inquiry. The applicant and BCEHS each provided submissions.

Preliminary Matter – Non-Responsive Records

[3] BCEHS is withholding about 366 pages of records that it has flagged as non-responsive to the applicant's request.[1] Neither party made submissions on this point, and it is not listed as an issue in the Notice of Inquiry, but I will briefly address it for the sake of completeness.

[4] A recent order summarized the principles relating to whether records are responsive to an access request:

> Whether records are responsive to an access request depends on how the request is interpreted. Access requests should be interpreted in a manner "that a fair and rational person would consider appropriate in the circumstances", consistent with FIPPA's purpose of ensuring public accountability through a public right of access to records. Records are responsive to an access request when they "reasonably relate" to the request. Access requests should not be interpreted in an "overly literal or narrow" manner.[2]

[5] I am satisfied that the records BCEHS has flagged as non-responsive are so. I say this because the applicant's request was for "emails, working notes, letters and other data storage sources" *about himself*. On my review of the alleged non-responsive records, it is readily apparent that they are not in any sense *about* or *pertaining to* the applicant. They consist mainly of memoranda and agreements between BCEHS and the applicant's union. No construction I can give to the access request would bring these records into its scope, such that they would "reasonably relate" to it. I therefore conclude that they are not responsive.

ISSUES

[6] The issues to be decided in this inquiry are:

1. Whether BCEHS is required to refuse to disclose the information at issue under s. 22(1) of FIPPA;
2. Whether BCEHS is authorized to refuse to disclose the information at issue under ss. 13(1) and 14 of FIPPA;
3. Whether some of the records requested by the applicant fall outside the scope of FIPPA because s. 3(3)(h) applies; and

[1] Consolidated records package at 4574-4939.
[2] Order F21-43, 2021 BCIPC 51 (CanLII) at para 25.

4. Whether BCEHS is authorized to refuse to disclose the information in dispute under common law settlement privilege.

[7] Under FIPPA, BCEHS bears the burden of proving that ss. 3(3)(h), 13(1), and 14 apply.[3] The applicant bears the burden of proving that disclosure of the personal information withheld under s. 22 would not be an unreasonable invasion of third party personal privacy.[4]

DISCUSSION

Background

[8] The applicant is a paramedic employed by BCEHS. In 2015, he was injured at work and became unable to continue in his paramedic role. He and BCEHS then began a lengthy process of searching for alternative work for him, which has continued to the present. This process has often been contentious.[5]

[9] BCEHS is a statutory body governed by the BC *Emergency Health Services Act.* It is responsible for providing ambulance and emergency health services to the province. The affidavit of a PHSA in-house lawyer (the PHSA Lawyer) provides that "[a]lthough BCEHS and PHSA are separate legal entities, BCEHS is part of and falls under the jurisdiction of PHSA, which provides administrative and operational supports and oversight to BCEHS". PHSA is responsible for receiving and responding to FIPPA access requests made to BCEHS.[6]

[10] Some of the parties' disputes related to the process of accommodation have become litigious. Of most relevance for this inquiry are a pair of labour grievances begun in 2017 and 2018 (the 2017 and 2018 Grievances). BCEHS says that these Grievances substantially overlap, and that the 2018 Grievance remains outstanding. There is also the applicant's complaint to the BC Human Rights Tribunal (the HRT Complaint), begun in 2017 and dismissed by the Tribunal in 2019. The applicant has filed a petition for judicial review of this decision (the Petition), but it has not yet been heard.[7]

Records in dispute

[11] In 2018, when the access request was made, the applicant and BCEHS were (and had been for some time) engaged in several disputes, as noted above. As might be expected, there were many records responsive to the applicant's

[3] FIPPA s. 57(1); Order F17-13, 2017 BCIPC 14 (CanLII) at para 5.
[4] FIPPA s. 57(2).
[5] Affidavit of PHSA Lawyer at paras 6-12.
[6] *Ibid* at paras 3-5.
[7] *Ibid* at paras 8-12.

request. BCEHS says it located 6,121 pages of responsive records. Of these, it fully released about 1,600 pages to the applicant, partially disclosed about 700 pages, and completely withheld about 3,800 pages under various heads of privilege.

[12] The records in dispute consist mostly of emails to or from various BCEHS and PHSA employees, including correspondence with in-house and external legal counsel, and also correspondence with the applicant. There are also several disputed documents relating to the employee accommodation process.

Record of a question or answer – s. 3(3)(h)

[13] BCEHS withheld several records that it says are outside the scope of FIPPA because they comprise questions and answers that are currently being used to screen job applicants.

[14] At the time of BCEHS's decision letter to the applicant, the relevant provision was known as s. 3(1)(d). In light of recent FIPPA amendments, this provision has since become s. 3(3)(h) but is otherwise substantially identical. It now reads:

> 3(3) This Act does not apply to the following:
> …
> (h) a record of a question or answer to be used on an examination or test;

[15] Section 3(3)(h) protects the integrity of a public body's examination or testing process by preventing disclosure of information that would reveal the questions in advance to candidates.[8]

[16] The PHSA Lawyer says in his affidavit that BCEHS's human resources manager informed him that the questions and answers BCEHS is withholding remain in use.[9]

[17] The applicant says that the material should be disclosed because "the work processes are no longer used", the questions are "extremely outdated due to information advancements", and the public body has already disclosed similar examination information.[10]

[18] BCEHS says in reply that the affidavit evidence clearly establishes that the materials withheld under s. 3(3)(h) are still in use.[11]

---

[8] Order F17-13, *supra* note 3 at para 13.
[9] Affidavit of PHSA Lawyer at para 43.
[10] Applicant's response submission at 6.
[11] BCEHS's reply submission at para 23.

[19] Having examined the records withheld under s. 3(3)(h), and having reviewed the evidence and arguments, I am satisfied that the records are outside the scope of FIPPA. They plainly consist of examination questions, and the correct answers are noted for the majority of the questions. In addition, BCEHS's evidence satisfies me that these questions and answers are still in use. The applicant's assertions to the contrary lack specificity and are not supported by any evidence. I therefore conclude that s. (3)(3)(h) applies to these records to exclude them from the scope of FIPPA.

Policy advice or recommendations – s. 13(1)

[20] BCEHS is withholding a small amount of information under s. 13(1) of FIPPA. There is some overlap in information withheld under s. 13 with that withheld under s. 22. As I will discuss below, I have found that s. 22 applies to all of that overlapping information, so there is no need to also consider the application of s. 13 with respect to it.

[21] Section 13(1) authorizes the head of a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body or a minister. The purpose of s. 13(1) is to allow "full and frank discussion of advice or recommendations of a proposed course of action by preventing the harm that would occur if the deliberative process of government decision and policy-making were subject to excessive scrutiny". Previous orders have held that it applies both where the disclosure of the information would directly reveal advice and/or recommendations, and where it would allow someone to draw accurate inferences about the advice and/or recommendations.[12]

[22] Section 13(2) sets out categories of information that cannot be withheld under s. 13(1), such as a public opinion poll or statistical survey. Section 13(3) provides that s. 13(1) does not apply to information in a record that has been in existence for 10 or more years.

Parties' submissions

[23] BCEHS says that the records withheld under s. 13(1) are part of a deliberative exercise involving a "free, open and confidential dialogue within BCEHS and PHSA about how best to manage the employment" of the applicant and others.[13]

[24] The applicant does not say anything about s. 13(1) in his submission.

---

[12] Order F17-13, *supra* note 3 at paras 17-18.
[13] BCEHS's initial submission at para 81.

Analysis

[25] I must first decide if disclosure of the information in question would reveal advice or recommendations. Then I must consider whether ss. 13(2) or 13(3) apply. If one or both do, BCEHS may not refuse to disclose the information under s. 13(1).

[26] BCEHS is refusing access to a portion of an email advising on an employee's suitability for a job.[14] I find that since it is a recommendation to the public body on a course of action, s. 13(1) applies to it.

[27] BCEHS is also withholding a handwritten note.[15] The PHSA Lawyer's affidavit describes it as: "Test administrator's evaluation comments following administration of paramedic test".[16] I find that all of the information in this note is a recommendation, such that s. 13(1) applies.

[28] None of the information that I find would reveal advice or recommendations falls into any of the categories of information listed in s. 13(2). Further, the information dates back only to 2017 and 2018, so s. 13(3) does not apply. Therefore, I conclude that BCEHS is authorized to refuse to disclose the information it has withheld under s. 13(1).

Solicitor-client privilege – s. 14

[29] Section 14 of FIPPA provides that the head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. Section 14 has been held to include two types of privilege found at common law: legal advice privilege and litigation privilege.[17] BCEHS is relying on both legal advice privilege and litigation privilege.

Production of records claimed to be privileged

[30] BCEHS did not provide me with access to the records it severed under s. 14. Instead, it relies on the affidavit evidence of the PHSA Lawyer, which includes a descriptive table of records over which BCEHS claims privilege (the Table). I must therefore decide whether I need to see the records themselves in order to assess BCEHS's claims of solicitor-client privilege.

Parties' submissions

[14] Consolidated records package at 78-79 with repeats at 2906 and 2908-09.
[15] Consolidated records package at 5526 with repeat at 5559.
[16] Exhibit D of PHSA Lawyer's Affidavit at 37.
[17] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para 26.

[31] BCEHS says that privacy adjudicators should not inspect privileged material "unless it is absolutely necessary to do so and production minimally impairs the privilege".[18] It says that the PHSA Lawyer's affidavit provides a clear basis on which to decide BCEHS's claims of privilege.[19]

[32] The applicant says that fairness requires that BCEHS produce all the records over which it claims privilege for my review. He submits that I must review each document line by line to decide whether privilege applies. He says that BCEHS is not trustworthy, and has a "track record" of orders against it.[20] However, he does not identify the orders he means or explain how their circumstances are relevant to the issue of whether I need to see the records in order to decide if they are protected by solicitor-client privilege.

[33] BCEHS says in reply that its decision not to produce the privileged records is based on well-established legal principles and OIPC practices. It submits the authorities have set out a test of absolute necessity for production and requiring a restrictive interpretation of legislation that could allow incursions on solicitor-client privilege and litigation privilege. It submits that the PHSA Lawyer's affidavit is a sufficient basis on which to decide on privilege, since the affidavit sets out the legal and factual bases on which privilege over each record is claimed.[21]

Analysis

[34] Section 44(1)(b) of FIPPA gives the Commissioner the power to order production of records. Previous orders have noted that the Commissioner exercises this authority with caution and restraint, and only orders production of records claimed under solicitor-client privilege where it is absolutely necessary to decide the issues in dispute.[22] This aligns with the practice of courts. The Supreme Court of Canada said that "[e]ven courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless evidence or argument establishes the necessity of doing so to fairly decide the issue".[23]

[35] In a recent BC order, the adjudicator reviewed the jurisprudence and provided examples of circumstances where production may be necessary:

- Where there is some evidence that the party claiming privilege has done so "falsely" or "inappropriately".

---

[18] BCEHS's initial submission at para 29.
[19] *Ibid* at paras 30-31.
[20] Applicant's response submission at 1-2 and 6-8.
[21] BCEHS's reply submission at paras 2-9.
[22] See, e.g., Order F22-23, 2022 BCIPC 25 (CanLII) at para 13.
[23] *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII) at para 17 [*Blood Tribe*].

- When the party claiming privilege cannot provide the information required to establish privilege, such as affidavit evidence, without revealing the privileged information itself.
- When the evidence describing the records is not sufficient to adjudicate the privilege claim.[24]

[36] Courts have also urged caution with respect to the severance of privileged records due to the risk of revealing privileged information.[25] The threshold is again high. The BC Court of Appeal has held that "severance should only be considered when it can be accomplished without any risk that the privileged legal advice will be revealed or capable of ascertainment".[26]

[37] As for the adequacy of affidavit evidence, the BC Supreme Court has expressed its preference for an affidavit from a lawyer to assist in deciding whether a party claiming privilege has made out its claim, saying that "[t]he task before an adjudicator is not to get to the bottom of the matter [of solicitor-client privilege] and some deference is owed to the lawyer claiming the privilege".[27]

[38] In this case, I am satisfied that the PHSA Lawyer's affidavit, sworn by a lawyer who has personally examined all the records over which solicitor-client privilege is claimed, provides a sufficient evidentiary basis on which to make my decision. The affidavit includes the Table noted above, which provides dates and descriptions for each record. The applicant's assertions on BCEHS's trustworthiness lack specificity and are not supported by evidence. I am not persuaded that it is absolutely necessary for me to examine the records withheld under s. 14, so I decline to exercise my authority under s. 44 to order production of them.

[39] I turn next to the question of whether, on the evidence it has provided, BCEHS has made out its claim of privilege under s. 14.

Legal advice privilege

[40] Of the records withheld under s. 14, the majority are withheld under legal advice privilege.

[41] Legal advice privilege applies to communications that:

---

[24] Order F22-23, *supra* note 22 at para 14, citing *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para 70 [*University of Calgary*]; *Gichuru v. British Columbia (Information and Privacy Commissioner)*, 2014 BCCA 259 at para 43; and *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 at para 75.
[25] Order F22-36, 2022 BCIPC 40 (CanLII) at para 39.
[26] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para 40.
[27] *British Columbia (Minister of Finance v. British Columbia (Information and Privacy Commissioner)*, 2021 BCSC 266 at paras 85-86.

1. are between solicitor and client;
2. entail the seeking or giving of legal advice; and
3. are intended by the parties to be confidential.[28]

[42] Not every communication between a solicitor and their client is privileged; however, if the conditions above are satisfied, then legal advice privilege applies.[29] Furthermore, it is not only the direct communication of advice between solicitor and client that may be privileged: the "continuum of communications" related to the advice, including information furnished by the client, that would reveal the substance of the advice, also attracts the privilege.[30]

BCEHS's position on legal advice privilege

[43] As I noted above, the PHSA Lawyer's affidavit includes the Table. The Table sets out, for each alleged privileged record, a description of the record and the ground(s) on which privilege is claimed.

[44] The PHSA Lawyer's affidavit says that many of the records over which BCEHS claims privilege are direct communications between BCEHS or PHSA staff and in-house or outside counsel. It says that these took place within the solicitor-client relationship, that they had as their object the seeking and giving of legal advice, and that they were intended to be confidential.[31]

[45] The affidavit says that certain internal communications that comment on the advice received or were made to compile information at the request of counsel attract legal advice privilege because disclosure of them would reveal confidential legal advice.[32]

[46] The affidavit also says one of the records in dispute is a report known as the Privileged and Confidential Litigation Summary (the Summary), which was prepared at the direction of PHSA's general counsel, who used it to provide legal advice to PHSA's board of directors. The PHSA Lawyer's affidavit says that the Summary contains both the PHSA general counsel's assessment of, and advice about, BCEHS's various disputes with the applicant, as well as a summary of advice provided by outside counsel. The PHSA Lawyer says that the Summary and the internal communications compiling it are protected by legal advice privilege because disclosure of them would reveal the advice itself.[33]

---

[28] *Solosky v. The Queen*, 1979 CanLII 9 (SCC), [1980] 1 SCR 821 at 837 [*Solosky*]; Order F22-36, 2022 BCIPC 40 (CanLII) at para 22.
[29] *Solosky*, *supra* note 28 at 829 and 837.
[30] *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1893 at paras 22-24.
[31] Affidavit of PHSA Lawyer at paras 28-29.
[32] *Ibid* at paras 29-30.
[33] *Ibid* at paras 39-41.

Applicant's position on legal advice privilege

[47] The applicant disputes that legal advice privilege applies to the records. He says that a communication at a meeting with a lawyer present, but in which legal advice is not discussed, will not automatically attract privilege. He also says that copying a lawyer on an email will not, without more, make the email privileged.[34] The applicant asserts that only direct communications between a solicitor and client will attract legal advice privilege.[35]

Records and analysis

[48] The Table provides a description of each record claimed to be privileged, a date or range of dates, and the head of privilege under which the record is being withheld. For the purposes of this analysis, I have divided them into several groups based on their participants, substance, and intent:

1. Direct client communications with counsel for the purposes of seeking and receiving advice;
2. Internal client communications commenting on or forwarding the advice received;
3. Internal client communications made for the purpose of gathering information at the request of counsel;
4. The Summary and related emails; and
5. Miscellaneous communications.

1. *Direct client communications with counsel*

[49] I turn first to the majority of the records – those that the PHSA Lawyer describes as communications between BCEHS and/or PHSA (as the client) and external and/or in-house counsel (as the solicitor) for the purpose of obtaining legal advice. The PHSA Lawyer says that these communications were not copied to or shared with third parties, and were confidential in nature, and that they were for the purposes of requesting or providing legal advice.[36] I accept the PHSA Lawyer's evidence that both BCEHS and PHSA are clients of in-house and external counsel, and that, as discussed above, BCEHS is "part of" PHSA. The PHSA Lawyer, when discussing solicitor-client privilege, refers to the two organizations as "PHSA/BCEHS", suggesting that they are joint clients of in-house and external counsel,[37] and I accept that they are. I also accept the PHSA Lawyer's evidence that the emails are between solicitor and client, that they entail the seeking and giving of legal advice, and that the parties intended to

[34] Applicant's response submission at 3-4.
[35] *Ibid* at 7.
[36] Affidavit of PHSA Lawyer at paras 28-29.
[37] *Ibid* at paras 24-31.

keep them confidential. I am therefore satisfied that they are protected by legal advice privilege.

2. *Internal client communications about advice received*

[50] Next, I turn to the internal BCEHS and PHSA internal communications that the PHSA Lawyer says discuss or follow up on the advice received. As noted above, legal advice privilege does not apply only to direct communications between a solicitor and client. It also applies to communications that, if disclosed, would reveal or allow an accurate inference to be drawn about privileged information – for example, internal client communications that convey or comment on privileged communications with lawyers. I accept the PHSA Lawyer's evidence that disclosure of these communications would allow someone to draw accurate inferences about the privileged advice itself, so I conclude that they attract legal advice privilege.

3. *Internal client communications made to gather information*

[51] I turn next to the internal BCEHS and PHSA communications that the PHSA Lawyer says were made in order to gather information at the request of counsel. Legal advice privilege has been held to encompass communications made in order to gather information at the request of counsel for the purpose of providing advice.[38] The PHSA Lawyer's evidence satisfies me that these communications were made for such a purpose, and that they therefore attract legal advice privilege.

[52] Another record[39] is dated January 25, 2017 to October 10, 2018, and is described in the Table as consisting of "Confidential internal email made for the purposes of preparing for ongoing litigation and compiling documents and materials needed for ongoing litigation (HRT complaint), and to be provided to legal counsel for the purposes of receiving legal advice and related services". In my view, while this email is not expressly described as gathering information at the request of counsel, it is clear from the context that it was part of the continuum of communications flowing between solicitor and client, was related to the seeking and provision of advice, and was confidential.

4. *The Summary and related emails*

[53] As for the Summary, I accept the PHSA Lawyer's evidence that it was created at the direction of PHSA's general counsel for the purpose of providing confidential legal advice to PHSA's board. I also accept his evidence that the Summary contains external counsel's legal advice. I am also satisfied that the

[38] Order F22-16, 2022 BCIPC 18 at para 29, citing *Bank of Montreal v. Tortora*, 2010 BCSC 1430 at paras 16 and 44.
[39] Consolidated records package at 2242-2250.

internal emails that are not part of the Summary itself, but were exchanged for the purposes of compiling it, would reveal the substance of the advice, such that they attract privilege as well.

5. *Miscellaneous communications*

[54] One record,[40] dated April 19, 2017, is described in the Table as a "Confidential internal email for the purposes of preparing for ongoing litigation (HRT Complaint), and for the seeking [of] legal advice". There is no description given in the Table of how this internal email is related to the seeking or provision of legal advice, other than the bare assertion that it is "for" that purpose. There is also no evidence that its disclosure would reveal privileged advice. Without more, I cannot conclude that this record attracts legal advice privilege.

[55] Finally, two records[41] are described by the PHSA Lawyer as being confidential internal emails "for the purposes of litigation". I am not satisfied that these are protected by legal advice privilege. There is no evidence that they entail the giving or seeking of legal advice, or were prepared in order to seek advice, nor is there any evidence that they would reveal privileged communications.

Conclusion on legal advice privilege

[56] I find that BCEHS has made out its claim of legal advice privilege with respect to most, but not all, of the records for which it claims the privilege.

Litigation privilege

[57] There was some overlap between BCEHS's application of legal advice privilege and litigation privilege. I do not need to consider whether litigation privilege applies to the majority of the alleged privileged records because I have found that legal advice privilege applies to them. However, I must consider the application of litigation privilege where that is the only head of privilege claimed, or where BCEHS claims both heads of privilege and I have found that legal advice privilege does not apply.

[58] The purpose of litigation privilege is to create a "'zone of privacy' in relation to pending or apprehended litigation".[42] It protects documents or communications made for the dominant purpose of litigation from disclosure, and can extend beyond the solicitor-client relationship to communications with a third

[40] Consolidated records package at 2477-2510.
[41] Consolidated records package at 3992 and 3994-5.
[42] *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para 34 [*Blank*].

party.[43] Once the litigation ends, so does the privilege, unless related litigation is ongoing or reasonably apprehended.[44]

[59] Two elements are required to establish a claim of litigation privilege:

1. Litigation must have been ongoing, or reasonably contemplated, at the time the document was created; and
2. The dominant purpose of creating the document was to prepare for that litigation.[45]

[60] Litigation privilege applies to documents created for court proceedings, but it also extends to documents created for other types of litigious disputes. Previous orders have held that "litigation", for the purposes of s. 14, encompasses Human Rights Tribunal complaints[46] and grievance arbitration proceedings (including unresolved grievances that may proceed to arbitration).[47]

When was litigation reasonably contemplated?

[61] The threshold for this part of the test is low. Litigation has been held to be in "reasonable prospect" when a reasonable person, fully informed, would conclude it is unlikely that the claim in question will be resolved without litigation. Litigation does not need to be a certainty, but a claimant must establish more than mere speculation.[48] Litigation may be in reasonable prospect "at any point along the continuum between the information-gathering and litigation stages of an inquiry."[49]

[62] BCEHS says that litigation privilege applies to all materials prepared internally for the purposes of responding to or preparing for the disputes noted above.[50]

[63] The disputes most relevant to this inquiry are the 2017 and 2018 Grievances and the HRT Complaint. The PHSA Lawyer's affidavit says that the HRT Complaint was dismissed by the Human Rights Tribunal in 2019, but the applicant has filed the Petition seeking judicial review of this decision; the Petition has not been heard and remains outstanding.[51] BCEHS provided me with a copy

[43] Order F18-17, 2018 BCIPC 20 at para 10.
[44] *Blank*, *supra* note 42 at paras 34-39.
[45] *Raj v. Khosravi*, 2015 BCCA 49 at para 8 [*Raj*].
[46] E.g., Order F11-01, 2011 BCIPC No. 11 (CanLII) at paras 21-22; and Order F17-13, *supra* note 3 at para 40.
[47] Order F11-29, 2011 BCIPC No. 35 (CanLII) at paras 13-14; Order F22-24, 2022 BCIPC 26 at paras 55-57.
[48] *Raj*, *supra* note 45 at paras 10-11.
[49] *Ibid* at para 50.
[50] BCEHS's initial submission at para 55.
[51] Affidavit of PHSA Lawyer at paras 7-12.

of the Petition, filed November 1, 2019, which I will discuss below in my assessment of whether the litigation giving rise to the privilege has ended.

[64] The PHSA Lawyer's affidavit says that BCEHS and PHSA believed as early as January 2017 that the applicant would file a grievance, a human rights complaint, or both, referring to "internal reports" that the applicant intended to pursue a legal complaint against his employer.[52]

[65] The applicant says in response that BCEHS has not shown how and when it reasonably came to believe that litigation was in view. He says that the PHSA Lawyer's affidavit is an insufficient basis on which to make such a finding because it is based on hearsay. He also says that in any event, a public body cannot anticipate litigation from an individual employee because the employees' union "own[s] all legal rights of the applicant with regards to the public body workplace".[53]

[66] The earliest records over which BCEHS claims litigation privilege are those dated January 25, 2017. I am persuaded that BCEHS has met the threshold of showing that it reasonably contemplated various types of litigation (i.e., a human rights complaint and/or labour grievances) involving the applicant and his union as early as January 2017. The PHSA Lawyer's evidence on this point is cogent, and the applicant does not dispute the substance of it.

Dominant purpose – records and analysis

[67] In order to be protected by litigation privilege, a document must have been created for the dominant purpose of preparing for litigation.

[68] The applicant says that BCEHS must show that the records it seeks to protect under litigation privilege were generated "solely" for the anticipated litigation (though elsewhere he adopts the "dominant purpose" formulation).[54] I cannot accept this argument. It is well established that a record does not need to be created *solely* for litigation; having litigation as its dominant purpose suffices.[55]

[69] I turn first to the records I have found are not covered by legal advice privilege, which are emails dated April 19, 2017 and December 3, 2018.[56] I accept the PHSA Lawyer's evidence (provided in the Table) that they are confidential internal emails created for the purpose of preparing for the HRT complaint.

---

[52] *Ibid* at paras 32-35.
[53] Applicant's response submission at 3.
[54] *Ibid.*
[55] See, e.g., *Raj*, *supra* note 45 at paras 14-18 for a review of developments in the case law that conclusively rejected the "sole purpose" test.
[56] Consolidated records package at 2477-2510, 3992 and 3994-5.

[70] I turn next to consider the records for which only litigation privilege is claimed. One of these is an internal email created in January 2018 and described in the Table as being for the purpose of preparing for the 2017 and 2018 Grievances, whose substance the PHSA Lawyer says overlaps with the HRT Complaint.[57] Based on this evidence, I am satisfied that this internal email was created for the dominant purpose of preparing for the 2017 and 2018 Grievances.

[71] Another set of communications was created in January 2017.[58] The Table provides that these were created in order to prepare for an anticipated complaint from the applicant, which in March 2017 materialized as the HRT Complaint. Still another set of communications was created from January to March 2017 and is described in the Table as containing "discussion of PHSA's position with respect to anticipated litigation".[59] Because I have accepted that litigation was reasonably in view by January 2017, and because I accept the PHSA Lawyer's evidence on this point, I am satisfied that these records were created for the dominant purpose of preparing for that litigation.

[72] Another record is dated November 14, but the year is not given.[60] Because the surrounding records are mostly from October and November 2018, and because the record is described in the Table as a confidential internal communication made for the purpose of responding to the 2018 Grievance, I think it is reasonable to infer that the year 2018 was meant. I accept the PHSA Lawyer's evidence that this communication was made for the dominant purpose of preparing for the 2018 Grievance.

[73] There is one record,[61] dated October 25-26, 2018 that the Table describes as "Confidential communications with External Legal Counsel…for the purposes of receiving legal advice and preparing for ongoing litigation (HRT Complaint)". I accept this evidence that this communication was made for the dominant purpose of preparing for the HRT Complaint.

Has the litigation ended?

[74] As noted above, litigation privilege continues to operate while the litigation that prompted the creation of the records is ongoing or reasonably apprehended. The privilege ends when the litigation ends. The Supreme Court of Canada has held that litigation, for the purposes of litigation privilege, "includes separate proceedings that involve the same or related parties and arise from the same or

[57] *Ibid* at 29-39.
[58] *Ibid* at 1434-1453.
[59] *Ibid* at 2429-2437, 2444-2452, and 3460-2468.
[60] *Ibid* at 3514-3515.
[61] *Ibid* at 3771-3774.

a related cause of action (or 'juridical source'). Proceedings that raise issues common to the initial action and share its essential purpose would in my view qualify as well."[62]

[75] BCEHS says that "litigation privilege continues to apply where, as here, there are appeal, judicial review or closely related proceedings still ongoing".[63]

[76] The applicant says that the HRT Complaint has been decided, and that the Petition for judicial review has not extended it. He says, essentially, that there is nothing more in dispute in that proceeding. He says that on judicial review, there is no "ability to raise new arguments or reinterpret evidence".[64]

[77] I cannot accept the applicant's characterization of the Petition. It alleges that the HRT committed various errors (of law, of fact, and of mixed fact and law), and requests that the main findings of the HRT decision be overturned and remitted back to the Tribunal. It seeks, in the alternative, for the entire decision to be quashed and a new hearing ordered. In my view, given the status of the Petition (it was filed in November 2019 and has not yet been heard, and there is no evidence that it has been abandoned), the HRT Complaint is still ongoing.

[78] As for the 2018 Grievance, the PHSA Lawyer's affidavit says that it is still ongoing.[65] The applicant does not make a submission on this point. I am satisfied that this Grievance is still ongoing.

Conclusion on litigation privilege

[79] To summarize, I conclude that BCEHS has established, for each of the records it is withholding under litigation privilege, that litigation was reasonably in view, and that the record was created for the dominant purpose of preparing for that litigation, and that the litigation for which the record was created has not concluded.

Waiver of privilege

[80] The applicant says that some of the records BCEHS is withholding as privileged were disclosed during the HRT Complaint proceedings.[66] This raises the issue of waiver. BCEHS disputes that there was a waiver of privilege over the records at issue in this inquiry.[67]

---

[62] *Blank, supra* note 42 at para 39.
[63] BCEHS's reply submission at paras 16-17/
[64] Applicant's response submission at 4.
[65] Affidavit of PHSA Lawyer at para 38.
[66] Applicant's response submission at 4.
[67] BCEHS's reply submission at paras 19-22.

[81] Solicitor-client privilege belongs to, and can only be waived by, the client.[68] To establish waiver, the party asserting it must show:

1. the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or
2. in the absence of an intention to waive, fairness and consistency require disclosure.[69]

[82] Due to the overall importance of solicitor-client privilege to the functioning of the legal system, waiver, whether express or implied, must be clear and unambiguous.[70] The party asserting waiver bears the burden of showing that there has been a waiver.[71]

[83] I am not persuaded by what the applicant says about how the information that BCHEHS is claiming is protected by solicitor-client privilege was previously disclosed. There is insufficient evidence to find that there has been a waiver of privilege over the information at issue in this case.

Summary of s. 14 findings

[84] I conclude that BCEHS has discharged its burden of showing that all of the records it seeks to withhold under s. 14 are protected by solicitor-client privilege.

Disclosure harmful to personal privacy – s. 22

[85] Section 22 of FIPPA is a mandatory exception to disclosure that provides that a public body must refuse to disclose personal information whose disclosure would be an unreasonable invasion of a third party's personal privacy. The analytical framework for s. 22 is well-established:

1. The section applies only to "personal information" as defined in FIPPA.
2. Section 22(4) provides a list of circumstances where s. 22 does not apply because disclosure of the personal information would not be an unreasonable invasion of a third party's personal privacy.
3. If s. 22(4) does not apply, s. 22(3) outlines circumstances where disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy.
4. The adjudicator must consider all relevant circumstances, including those set out in s. 22(2), to determine whether disclosure of the personal

[68] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para 39.
[69] *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.,* 1983 CanLII 407 (BC SC), 45 BCLR 218 at para 6.
[70] *Maximum Ventures Inc. v. de Graaf et al.*, 2007 BCSC 1215 at para 40.
[71] *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para 22.

> information would be an unreasonable invasion of a third party's personal privacy. It is at this stage that any s. 22(3) presumptions may be rebutted.[72]

[86] BCEHS is withholding a significant amount of information in spreadsheets and emails under s. 22(1). The majority of the information relates to employee injuries and disabilities, and BCEHS's efforts to accommodate these.

Is the information "personal information"? – s. 22(1)

[87] FIPPA defines "personal information" in Schedule 1:

> "personal information" means recorded information about an identifiable individual other than contact information;
>
> "contact information" means 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;

[88] BCEHS says that all of the withheld information is information about individual, identifiable BCEHS employees.

[89] The applicant says that he does not request the personal information of "third parties outside the workplace". However, I understand him to be saying that the personal information of BCEHS employees should not be withheld. He says, for example, that successful candidates for jobs are normally identified by name. He suggests that BCEHS should contact the employees whose personal information has been withheld to "see if they consent to release".[73]

[90] In reply, BCEHS argues that the applicant "appears to have conceded that the withholding of identifiable third party personal information is not in dispute in these proceedings".[74] Although the applicant's submission on this point is somewhat unclear, I do not think he has made so broad a concession. In my view, he has not conceded that the personal information of third parties who are BCEHS employees may be withheld.

[91] I find that the information withheld under s. 22 is about identifiable employees of BCEHS and, in one case, a non-employee. None of the information is contact information, because, viewed in its context, none of it is information that would allow someone to contact the employees at work. I therefore find that this information is the personal information of third parties. In addition, I find that

---

[72] Order F15-03, 2015 BCIPC 3 (CanLII) at para 58.
[73] Applicant's response submission at 7.
[74] BCEHS's reply submission at para 24.

the email string on page 40 of the consolidated records is the personal information of the email authors and also of the applicant, because the emails are about him.

[92] Having found that all of the information withheld under s. 22 is personal information, I will now determine whether disclosure of the personal information would be an unreasonable invasion of a third party's personal privacy.

Not an unreasonable invasion – s. 22(4)

[93] Section 22(4) sets out circumstances where disclosure of personal information would not be an unreasonable invasion of privacy. BCEHS says that none of these circumstances apply. It says that while s. 22(4)(e) applies to information about a third party's "position, functions or remuneration" as a public body employee, the information withheld here is "of a much more sensitive nature" because it relates to "their personal medical and physical capabilities, and to their employment status, skills, performance, aptitudes and prospects". BCEHS submits that this information is "uniquely sensitive and personal, and is not the general or routine functional information that is intended to be caught by section 22(4)(e)".

[94] I do not think that any of the s. 22(4) circumstances apply to any of the personal information. Having reviewed the personal information, I find that none of it relates to a third party's position, functions, or remuneration, so it is not captured by s. 22(4)(e). I also do not find that any other s. 22(4) circumstance applies.

Presumption of unreasonable invasion – s. 22(3)

[95] The next step in the analysis is to determine whether any of the circumstances in s. 22(3) apply. Section 22(3) sets out circumstances where disclosure of personal information is presumed to be an unreasonable invasion of privacy.

[96] BCEHS says that ss. 22(3)(a) and (d) apply.

[97] Section 22(3)(a) applies where the personal information relates to medical, psychiatric or psychological history, diagnosis, condition, treatment, or evaluation. Section 22(3)(d) applies where the personal information relates to employment, occupational, or educational history. I find that the majority of the withheld information relates to those circumstances because much of it is about the third parties' medical history, limitations, and outlook, and much of it is about the third parties' employment history. However, I find that the information in two email strings[75] does not contain such information. One of these email strings is a

[75] Consolidated records package at 40 and 1496.

brief exchange of lighthearted comments between BCEHS staff about an email from the applicant. The other is a disparaging comment about a non-employee of BCEHS. I find that none of the s. 22(3) presumptions apply to these two email strings.

Relevant circumstances – s. 22(2)

[98] The final step in the s. 22 analysis is to consider all relevant circumstances, including those set out in s. 22(2).

[99] BCEHS says that none of the factors set out in s. 22(2) supports disclosure, and that all relevant factors weigh against disclosure. In particular, it says that the information, if disclosed, would expose the third parties to financial or other harm as contemplated by s. 22(2)(e). It also says that the information has been supplied in confidence within the meaning of s. 22(2)(f). The applicant has not made a submission about this point.

Section 22(2)(e) – unfair exposure to financial or other harm

[100] BCEHS says that disclosure of information about its employees' functional or occupational limitations would be likely to impair the employees' employment prospects, causing financial harm. I agree with respect to the majority of the information, but I do not find that s. 22(2)(e) applies to either of the two email strings discussed above.

Section 22(2)(f) – supplied in confidence

[101] The PHSA Lawyer's affidavit states:

> Within PHSA and BCEHS, information about employees and their leave status, their need for medical accommodation and their candidacy for placement in a position, is information that is considered to be sensitive and inherently confidential. Such information is generally shared only on a need-to-know basis for the purposes of managing the individual's employment. It is also my understanding and belief that employees generally expect that information that they supply in relation to such matters will be received and held in confidence by BCEHS and PHSA.[76]

[102] I am satisfied that the personal information that relates to employee disabilities and accommodation was supplied in confidence, because of the confidential nature of the information itself, and because I accept the PHSA Lawyer's evidence that the employees supplied their disability- and leave-related information in confidence. I therefore find that s. 22(2)(f) favours withholding it. However, I do not find that either of the two email strings discussed above were

[76] Affidavit of PHSA Lawyer at para 48.

supplied in confidence. Rather, I find that they are emails sent in the normal course of business, without any expectation of confidentiality expressed or implied.

Section 22(2)(h) – unfair damage to reputation

[103] Although neither party raised the application of s. 22(2)(h), I think it is relevant to consider with respect to the email on page 1496 of the consolidated records package. Previous orders have found comments that are disparaging of an individual's workplace conduct may cause reputational harm under s. 22(2)(h), especially where the subject of the comment has not had a chance to respond.[77] In my view, the same considerations apply here. The email consists of a disparaging remark about a third party who is not an employee of BCEHS. The third party was not copied on the email and had no chance to respond. I therefore find that s. 22(2)(h) weighs against disclosure with respect to the email. I do not find that it applies to any of the other information withheld under s. 22.

Other circumstances

[104] In Order F19-48, the adjudicator found that it would not be an unreasonable invasion of a third party's personal privacy to disclose the third party's opinions or comments about an applicant where the comments were "not particularly sensitive".[78] I think this reasoning is applicable to the email string on page 40 of the consolidated package, where the comments are likewise not particularly sensitive. I find this circumstance favours disclosure of the email string. Another circumstance favouring disclosure is the fact that, as I have found above, the email string consists of the applicant's own personal information.[79]

Conclusion on s. 22

[105] To summarize, I have found that all of the information withheld by BCEHS under s. 22(1) is personal information. I have found that no provision of s. 22(4) applies to any of the personal information.

[106] For the majority of the personal information that relates to disability, leaves, and accommodations, I have found that disclosure would be a presumptively unreasonable invasion of third parties' privacy under ss. 22(3)(a) and (d). However, I have not found that such a presumption applies to the email strings at pages 40 and 1496 of the consolidated package.

---

[77] For instance, in Order F16-50, 2016 BCIPC 55 (CanLII) at paras 53-54, the adjudicator reviewed a similar set of circumstances and found that s. 22(2)(h) weighed significantly against disclosure.
[78] 2019 BCIPC 54 (CanLII) at para 111.
[79] *Ibid* at para 108.

[107] I have also found that several circumstances weigh against disclosure of the majority of the personal information. In particular, I have found that disclosure of the majority of the personal information would likely expose the third parties to financial harm (under s. 22(2)(e)) and that the information was supplied in confidence (under s. 22(2)(f)). I have also found that s. 22(2)(h) weighs against disclosure of the email on page 1496 of the consolidated package. I therefore conclude that BCEHS is required to refuse to disclose this information.

[108] On the other hand, I have found that the circumstances favour disclosure of the email string on page 40 of the consolidated package. The personal information is the applicant's own, and the contents of the email are not particularly sensitive.

[109] I conclude that BCEHS is required to refuse to disclose the information it has withheld under s. 22, with the exception of the information it withheld on page 40 of the consolidated package.

Settlement privilege

[110] BCEHS is withholding three pages in their entirety on the basis that they are protected by settlement privilege.[80] BCEHS is not relying on any other basis for refusing access to those pages. BCEHS did not make a submission specifically about the application of settlement privilege to these pages. What it says about them is restricted to the Table, where they are described as an "[i]nternal email at BCEHS/PHSA discussing the terms of a settlement offer of the Applicant's grievance" (their date is also provided).

[111] FIPPA does not have an exception to disclosure for settlement privilege. Settlement privilege is, rather, a common law rule of evidence that protects communications made for the purpose of settling a dispute. Its purpose is to promote settlements. It is not absolute; its scope can be changed by contract, and it is subject to several exceptions.[81]

[112] The BC Supreme Court in *Richmond (City) v. Campbell*, 2017 BCSC 331 [*Richmond*] has held that public bodies may rely on settlement privilege to withhold information because it is "a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit statutory language", which FIPPA does not have.[82]

Production of records over which settlement privilege is claimed

[80] Consolidated records package at 5757-59.
[81] E.g., *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para 31; *Association de mediation familiale du Quebec v. Bouvier*, 2021 SCC 54 at paras 95-98 [*Bouvier*].
[82] *Richmond (City) v. Campbell*, 2017 BCSC 331 at paras 71-73 [*Richmond*].

[113] BCEHS did not produce the three pages for my review. Therefore, I will first consider if it is appropriate to decide whether settlement privilege applies without reviewing the three pages.

[114] BCEHS submits that it has provided evidence sufficient to establish the factual and evidentiary basis for settlement privilege and the Commissioner should not review the records.

[115] BCEHS says that the Commissioner should use the same approach to reviewing records covered by settlement privilege as it uses for records protected by solicitor-client privilege. Specifically, BCEHS submits that "even where authority is given to a regulatory body to pierce a category of class based privilege, that power should not be exercised unless absolutely necessary, and wherever possible less intrusive alternatives should be employed before compelling production".[83] In support, BCEHS cites *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 [*Goodis*], *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 [*Blood Tribe*], *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 [*Lizotte*], *Ross v. Bragg*, 2020 BCSC 337 [*Ross*] and *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 [*Magnotta*], which I will address in more detail below.[84]

[116] Recently, in Order F22-34, the adjudicator explained the differences between how the Commissioner approaches production of records protected by solicitor client privilege and settlement privilege. She said:

> The privileges [solicitor-client privilege and settlement privilege] serve important, but fundamentally different purposes.
>
> *Solicitor-client privilege is of central importance to the legal system as a whole*. The privilege protects a broad range of communications between a lawyer and their client…Solicitor-client privilege is not "merely a rule of evidence", it is also "an important civil and legal right and a principle of fundamental justice in Canadian law". In other words, clients have a substantive right not to have confidential communications with their lawyers disclosed.
>
> To ensure public confidence, [solicitor-client] privilege must be "as close to absolute as possible". Solicitor-client privilege is "jealously guarded and should only be set aside in the most unusual circumstances, such as a genuine risk of wrongful conviction". The privilege "will only yield in certain clearly defined circumstances and does not involve a balancing of interests

[83] BCEHS's August 19, 2022 letter at 1.
[84] *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31 [*Goodis*]; *Blood Tribe*, *supra* note 23; *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 [*Lizotte*]; *Ross v. Bragg*, 2020 BCSC 337 [*Ross*]; *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681 [*Magnotta*].

> on a case-by-case basis". In addition, any legislative incursions on solicitor-client privilege must be strictly construed.
>
> Due to the importance of solicitor-client privilege as a fundamental right, the OIPC makes an exception to its usual practice of reviewing the records in dispute. While s. 44(2.1) makes it clear that solicitor-client privilege of a record disclosed to the Commissioner is not affected by the disclosure, the OIPC's practice is to decide whether solicitor-client privilege applies without reviewing the record unless it is necessary to do so in order to fairly decide…
>
> *In contrast, settlement privilege is a rule of evidence rooted in the public interest in promoting settlements.* It recognizes that settlement discussions will be more fruitful if parties have space to settle a dispute without worrying that what they say will be later disclosed. In this way, settlement privilege plays a vital role in improving access to justice.
>
> *Unlike solicitor-client privilege, settlement privilege is not as close to absolute as possible*. It can be set aside where "a competing public interest outweighs the public interest in encouraging settlement". For example, courts set aside settlement privilege if it is necessary to prove the existence or scope of the settlement. Also, unlike solicitor-client privilege, settlement privilege does not confer a substantive right.
>
> *Given the fundamentally different principles behind the two privileges and their overall status in the legal system*, I am not satisfied that the rationale for excluding records from the Commissioner's review where solicitor-client privilege has been claimed extends to settlement privilege, as the Ministry argues.[85] (emphasis added)

[117] Ultimately, the adjudicator decided that it was appropriate to order that the records be produced for her review so she could determine whether settlement privilege applied. She explained that an independent review of the records was important for public confidence in the inquiry process and that deciding an inquiry in the absence of the records is the exception, not the rule. She concluded that decisions regarding settlement privilege do not warrant the kind of exception made for solicitor-client privilege.[86]

[118] For the reasons that follow, I agree with the approach taken in F22-34, and I am not persuaded by BCEHS's submission that the Commissioner is required to treat records withheld under settlement privilege in the same way as those withheld under solicitor-client privilege. Settlement privilege and solicitor-client privilege are fundamentally different, serve different purposes, and occupy different places in the legal system.

---

[85] Order F22-34, 2022 BCIPC 38 (CanLII) at paras 82-88. BCEHS submits in its August 19, 2022 letter that F22-34 was wrongly decided.
[86] *Ibid* at paras 92-94.

[119] I do not think what the Court said in *Goodis*, *Blood Tribe* and *Lizotte* was as broad as BCEHS asserts. First, in both *Goodis* and *Blood Tribe*, the Court dealt solely with solicitor-client privilege, and did not consider settlement privilege even in passing. I also do not think *Lizotte* supports what BCEHS says, because it dealt with the character of litigation privilege as distinguished from solicitor-client privilege, and it did not address settlement privilege in any substantive way. In my view, none of these cases, separately or together, support the proposition that the statutory power to examine records claimed under settlement privilege "should not be exercised unless absolutely necessary".

[120] BCEHS also relies on *Ross*,[87] which it says demonstrates that settlement privilege prevents production of the privileged material to parties to the settlement negotiations and third parties. However, that case did not deal with production to an independent administrative decision-maker; rather, it dealt with production of privileged documents to other interested parties, or to strangers who have no right to them. That is a very different matter from production to the Commissioner, who has the express statutory authority, under s. 44(3), to order production for the Commissioner's review, despite any privilege of the law of evidence.

[121] BCEHS submits that settlement privilege has "evolved" from a rule of evidence to a "substantive right", relying on *Magnotta*, which it says demonstrates that settlement privilege is a "fundamental common law privilege" similar to solicitor-client privilege. In *Magnotta*, the Ontario Court of Appeal said:

> Further, based on recent judgments of the Supreme Court of Canada, I understand that fundamental common law privileges, such as settlement privilege, ought not to be taken as having been abrogated absent clear and explicit statutory language: see *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 (CanLII), [2008] 2 S.C.R. 574, [2008] S.C.J. No. 45, at para. 11; and *Lavallee, Rackel & Heintz v. Canada (Attorney General*), 2002 SCC 61 (CanLII), [2002] 3 S.C.R. 209, [2002] S.C.J. No. 61, at para. 18. While both of these cases relate to solicitor-client privilege, many of the same considerations apply to settlement privilege.[88]

[122] *Magnotta* unfortunately did not explain which were the "many" considerations that applied, or why they applied to settlement privilege. Nevertheless, the BC Supreme Court in *Richmond* relied on the quoted passage from *Magnotta* to conclude that:

> settlement privilege is a fundamental common law privilege, and it ought not to be taken as having been abrogated absent clear and explicit

[87] *Ross*, *supra* note 84 at para 16.
[88] *Magnotta*, *supra* note 84 at para 38.

> statutory language. There is an overriding public interest in settlement. It would be unreasonable and unjust to deprive government litigants, and litigants with claims against government or subject to claims by government, of the settlement privilege available to all other litigants. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions.[89]

[123] I do not think these passages from *Magnotta* and *Richmond* are helpful in deciding whether or not it is appropriate to order production of records claimed under settlement privilege. It seems to me that they are about the abrogation or non-abrogation of settlement privilege by statute. Those cases do not provide a detailed consideration of the character of the two privileges, or in what circumstances an administrative decision-maker with the statutory power to order production of records may exercize that power over records claimed under settlement privilege.

[124] The Supreme Court of Canada refers to settlement privilege as a rule of evidence and has not said that it has "evolved" beyond a rule of evidence into a substantive right in the way that solicitor-client privilege has. For instance, in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, the Court said:

> Given that this Court has consistently and repeatedly described solicitor-client privilege as a substantive rule rather than merely an evidentiary rule, I am of the view that the expression "privilege of the law of evidence" does not adequately identify the broader substantive interests protected by solicitor-client privilege. This expression is therefore not sufficiently clear, explicit and unequivocal to evince legislative intent to set aside solicitor-client privilege. In contrast, some categories of privilege, such as…the privilege over settlement discussions, only operate in the evidentiary context of a court proceeding. Such privileges clearly fall squarely within the scope of "privilege of the law of evidence".[90]

[125] Moreover, settlement privilege is not as close to absolute as possible, but is subject to a balancing of interests. The Supreme Court has commented on exceptions to the privilege, noting that a party who wishes to overcome the privilege "must show that, on balance, 'a competing public interest outweighs the public interest in encouraging settlement'".[91]

[126] I cannot see that there is any risk to BCEHS, or to the integrity of the settlement process generally, if the records are produced to the Commissioner for review. Nor would such production amount to a waiver of settlement privilege,

---

[89] At para 71.
[90] *University of Calgary*, *supra* note 24 at para 44. See also *Bouvier, supra* note 81 at paras 94-95.
[91] *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 at para 19.

since settlement privilege belongs to both parties and cannot be waived unilaterally.[92]

Conclusion on production

[127] I am satisfied that it is appropriate to order BCEHS to produce the three pages that BCEHS claims are covered by settlement privilege so that I can review them and decide if settlement privilege applies.

CONCLUSION

[128] For the reasons given above, I make the following order under s. 58 of FIPPA:

1. I confirm BCEHS's decision to withhold information as being outside the scope of FIPPA under s. 3(3)(h);

2. I confirm BCEHS's decision to withhold information under s. 13(1);

3. I confirm BCEHS's decision to withhold information under s. 14;

4. Subject to item 5 below, BCEHS is required to refuse access to some of the information it has withheld under s. 22.

5. BCEHS is not required under s. 22 to refuse access to the information on page 40 of the consolidated package. It is required to give the applicant access to this information.

6. BCEHS must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

[129] Pursuant to s. 59(1) of FIPPA, BCEHS is required to comply with the above order by December 9, 2022.

[130] In addition, under s. 44(1)(b), I require BCEHS to produce to me pages 5757 to 5759 of the consolidated package of records, which it is withholding on the basis of settlement privilege. Pursuant to s. 44(3), BCEHS must produce these records by November 10, 2022.

October 27, 2022

ORIGINAL SIGNED BY

David S. Adams, Adjudicator

[92] E.g., Order F20-21, 2020 BCIPC 25 (CanLII) at para 80.

OIPC File No.: F19-79877