



OFFICE OF THE
INFORMATION &
PRIVACY COMMISSIONER
FOR BRITISH COLUMBIA

Order F24-18

CITY OF VANCOUVER

Alexander Corley
Adjudicator

March 12, 2024

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Summary: An applicant made a request to the City of Vancouver (City) under the *Freedom of Information and Protection of Privacy Act* for the total amount of compensation paid to a former City employee during a specified date range. The City withheld the information on the basis that releasing it would reveal information that is protected by common law settlement privilege. The adjudicator found that settlement privilege applied to the information in dispute and that there was no overriding public interest that justified finding an exception to the privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 at ss. 5, 6(1), and Part 2; *Financial Information Act*, RSBC 1996, c. 140 at ss. 1 and 2.

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an individual (applicant) requested from the City of Vancouver (City) the total amount of compensation paid to a former City employee (employee) during a specified date range. In response, the City advised the applicant that it was withholding the information under common law settlement privilege.

[2] The applicant was not satisfied with the City's response and requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision to withhold the information. Mediation by the OIPC did not resolve the matter and the applicant requested that it proceed to an inquiry.

[3] Given the nature of the information requested by the applicant, the OIPC, under s. 54 of FIPPA, invited the employee to participate in this inquiry as an

appropriate person.¹ The employee, by way of their legal counsel, made submissions in the inquiry.²

[4] The City requested, and received, permission from the OIPC to provide some information in its submissions and affidavit evidence *in camera* (that is, for only the Commissioner and not the applicant, to see).³

Preliminary Issue – S. 6(1) of FIPPA

[5] The applicant alleges that the City did not fulfill their FIPPA s. 6(1) duty to assist the applicant when responding to the access request.⁴ Section 6(1) was not included as an issue in the Investigator's Fact Report or the Notice of Inquiry.

[6] Past OIPC orders have consistently held that parties may only add new issues at the inquiry stage with the permission of the OIPC.⁵ Further, the Notice of Inquiry was sent to all parties prior to the submissions phase of this inquiry and clearly explains the process for adding new issues. There is no indication in the record that the applicant sought the OIPC's permission to add s. 6(1) as an issue in this inquiry. Further, there is nothing in the record which persuades me that it would be fair to add this new issue or that there are any exceptional circumstances which warrant me doing so at this late stage. Therefore, I decline to consider whether the City fulfilled its duty to assist the applicant under s. 6(1) of FIPPA.

ISSUE

[7] The issue to be decided in this inquiry is whether the City is authorized to withhold the information in dispute under common law settlement privilege.

[8] As the party seeking to rely on settlement privilege, the City bears the burden of proving its claim.⁶

DISCUSSION

Background

[9] Several years ago, the City publicly announced that the employee would be leaving their role with the City.⁷ Around the same time, the City and the employee entered into an agreement (agreement) which set out the terms under

¹ OIPC letter to employee's counsel dated May 18, 2023.

² See employee's initial submission dated July 27, 2023, and employee's reply submission dated September 1, 2023.

³ OIPC *in camera* decision letter, dated July 21, 2023.

⁴ Applicant's submission at pp. 1-2.

⁵ See, for example, Order F12-07, 2012 BCIPC 10 at para. 6.

⁶ Order F18-06, 2018 BCIPC 8 at para. 9.

⁷ Affidavit of the City's Chief Human Resources Officer (HR Officer) at para. 3.

which the employee's employment with the City would conclude, including the amount of certain payments the employee would receive (agreement payments). The City paid the employee the agreement payments within the date range specified in the applicant's access request.⁸

[10] The applicant, who is a resident of the City, says that they made the access request to increase transparency regarding the City's financial expenditures.⁹

Information in dispute

[11] The only information in dispute is the total amount, in Canadian dollars, that the City paid to the employee during the specified date range. To be clear, the agreement is not a record in dispute here. In fact, the applicant did not request access to an actual record under s. 5 of FIPPA. For the purposes of this inquiry, the City provided the OIPC with a letter that contains the requested information.¹⁰

Settlement Privilege

[12] Settlement privilege is a common law privilege which protects communications made for the purpose of settling a dispute.

[13] Settlement privilege is not an exception to disclosure set out in Part 2 of FIPPA. However, the BC Supreme Court has found that FIPPA contains no clear legislative intent to abrogate settlement privilege.¹¹ Therefore, public bodies are entitled to rely on settlement privilege to refuse to disclose information responsive to an access request made under FIPPA.¹²

[14] Settlement privilege is a class privilege which applies to communications which meet the following criteria:

1. A litigious dispute must be in existence or within contemplation (although it is not necessary that any proceedings have been commenced);
2. The communication must have been made with the express or implied intention that it would be kept confidential, particularly that it would not be disclosed to the court if negotiations between the parties failed to resolve the dispute; and
3. The purpose of the communication must have been to attempt to effect a settlement of the dispute.¹³

⁸ HR Officer's affidavit at paras. 6 and 17.

⁹ Applicant's submission at p. 1.

¹⁰ City's letter to OIPC Registrar of Inquiries dated October 12, 2023, and marked confidential.

¹¹ *Richmond (City) v. Campbell*, 2017 BCSC 331 [*Richmond*] at paras. 71-73.

¹² *Richmond, Ibid.*

¹³ Order F18-06, *supra* note 6 at para. 60.

[15] Settlement privilege applies to negotiations between parties, regardless of whether the parties ultimately reached an agreement to settle the dispute.¹⁴ It also applies to concluded agreements and settlement amounts.¹⁵

[16] However, even if the above requirements are met, settlement privilege can be set aside where there is a competing public interest which outweighs the public interest in encouraging the settlement of disputes.¹⁶

Positions of the parties

[17] As noted above, some information in the City's submissions and evidence was submitted to the OIPC *in camera*, so I am limited in what I can say about it. Without revealing the information submitted *in camera*, the City's position is essentially that the agreement was a confidential communication between it and the employee which was made to attempt to effect settlement of a potentially litigious dispute.¹⁷ Therefore, the City submits that the information in the agreement, including the amount of the agreement payments, is subject to settlement privilege.

[18] The City further submits that each year it publicly issues a statement of financial information which includes a schedule of remuneration and expenses for all City employees who earned more than \$75,000 in the previous fiscal year.¹⁸ The City says that the schedule of remuneration for the fiscal year relevant to the access request sets out amounts paid to the employee by the City in that year but does not account for the agreement payments.¹⁹

[19] On this basis, the City says that someone armed with the information in dispute and the employee's entry in the relevant schedule of remuneration could calculate the value of the agreement payments by subtracting the employee's entry from the information in dispute. Therefore, the City says, releasing the information in dispute would allow a reasonably informed person to determine the substance of information which is subject to settlement privilege.²⁰ The employee adopts and repeats the City's position.

[20] The applicant does not address whether the information in dispute is protected by settlement privilege. Instead, they focus on whether the City's decision to refuse access to the information in dispute is inconsistent with its past

¹⁴ *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*] at para. 17.

¹⁵ *Sable*, *ibid* at paras. 17-18.

¹⁶ *Sable*, *ibid* at para. 19.

¹⁷ HR Officer's affidavit at paras. 6 and 13-14.

¹⁸ City's initial submission at para. 10; HR Officer's affidavit at para. 18; See also *Financial Information Act*, [RSBC 1996], c. 140 at ss. 1 (definition of "corporation") and 2. The City's historic schedule of remuneration data are archived and publicly available at <https://opendata.vancouver.ca/explore/dataset/employee-remuneration-and-expenses-earning-over-75000/>.

¹⁹ City's initial submission at paras. 10-11; HR Officer's affidavit at paras. 18-19.

²⁰ City's initial submission at paras. 12 and 27; HR Officer's affidavit at paras. 19-20.

practice regarding similar information and whether there is a competing public interest overriding the application of settlement privilege in this case.²¹

Analysis

[21] I will first address the applicant's claim that the City's past practice has been to disclose the value of settlement agreement payments made to former employees. There is no indication that in the instances of disclosure cited by the applicant the City claimed settlement privilege over the information. On this basis, I do not find the applicant's submissions on this point to be relevant to the issue I must decide, and I will not consider those submissions further.

[22] I accept the City's evidence that a reasonably informed person, armed with the information in dispute and the publicly available schedule of remuneration data for the final year of the employee's employment, could calculate the amount of the agreement payments. The difference between the information in dispute and the employee's remuneration per the schedule is the agreement payments.²² I also accept that the amount of the agreement payments is information contained in the agreement.

[23] Therefore, I consider below whether the agreement meets the test for common law settlement privilege. If it does, I will then consider whether there is a competing public interest which outweighs the application of settlement privilege to the information in dispute.

Was a litigious dispute in existence or within contemplation?

[24] The City and the employee both submit that a litigious dispute was in contemplation at the time they negotiated the agreement.²³ Further, the City and the employee were both represented by legal counsel during those negotiations.²⁴ The City's evidence is also that City employees involved in negotiating the agreement believed the employee would likely commence a legal action if negotiations surrounding the agreement broke down.²⁵ Based on the evidence discussed here and the information the City submitted *in camera*, I am satisfied that a litigious dispute was in contemplation at the time the agreement was negotiated. Therefore, I find that this stage of the test is met in this case.

Was the communication intended to be confidential?

[25] The employee submits that the agreement was intended by the parties to be confidential.²⁶ Further, the City's chief human resources officer, who was involved in negotiating the agreement, says that those negotiations were "highly confidential and could not be relied upon by either party if the negotiations

²¹ Applicant's submission at pp. 2-4 and 8.

²² Remuneration in this context including both salary and reimbursement for expenses.

²³ Employee's initial submission at p. 2, point "1"; City's initial submission at paras. 30-31.

²⁴ Employee's initial submission at p. 2, point "1"; City's initial submission at para. 5.

²⁵ HR Officer's affidavit at para. 14; City's initial submission at para. 31.

²⁶ Employee's initial submission at p. 2, point "2".

failed.”²⁷ I also find that the City’s *in camera* materials contain clear evidence related to the City’s and the employee’s understanding that the agreement and the surrounding negotiations were intended to be confidential. Based on all of this, I am satisfied that the agreement is a record of communications that were intended to be confidential.

Was the communication intended to effect settlement of a dispute?

[26] The City’s evidence is that the purpose of the agreement was to settle any and all potential claims arising out of the conclusion of the employee’s employment.²⁸ The employee’s submissions also support this conclusion. Having reviewed the evidence, including the copy of the agreement provided to me *in camera*, it is clear to me that this is the case. On this basis, I find that the third step of the test is met here and the agreement was intended to effect settlement of a dispute.

[27] In summary, I find that settlement privilege applies to the full content of the agreement, including the amount of the agreement payments. As discussed above, it is a simple matter to calculate the agreement payments if one has the information in dispute as well as the publicly available schedule of remuneration for the relevant year. Therefore, I am satisfied that disclosing the information in dispute would reveal information that is protected by settlement privilege.²⁹

Competing public interest in disclosure?

[28] As noted above, settlement privilege may be set aside where a competing public interest outweighs the public’s interest in encouraging the settlement of disputes.³⁰ Circumstances where this may be the case include where there are credible allegations of misrepresentation, fraud, or undue influence regarding a settlement agreement, where disclosure of the privileged information would prevent a plaintiff being overcompensated, or where disclosure of the privileged information would prove the existence or scope of a disputed settlement.³¹

[29] However, courts have also recognized that settlement privilege serves an important public policy purpose and that the threshold for setting aside settlement privilege should not be too low.³² Therefore, an exception to settlement privilege should only be found where the information in dispute is both relevant and necessary to enforcing a settlement agreement or to achieving the overriding interests of justice.³³

²⁷ HR Officer’s affidavit at para. 13.

²⁸ HR Officer’s affidavit at para. 6.

²⁹ See Order F20-21, 2020 BCIPC 25 at para. 77 where the adjudicator found that information which would allow a settlement amount to be inferred was protected by settlement privilege.

³⁰ *Sable*, *supra* note 14 at para. 19.

³¹ *Sable*, *ibid*. See also *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 35.

³² *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 19.

³³ *Dos Santos*, *ibid* at para. 20.

[30] The applicant clearly submits that release of the information in dispute is in the public interest. Specifically, the applicant says that “the social contract is broken if government officials cannot be held accountable for how they dispense of public funds” and that the City “has to be accountable for dollars that go out the door ... includ[ing] the amounts paid to [the employee]”.³⁴ The City and the employee do not address whether there is a competing public interest outweighing the application of settlement privilege in this case.

[31] I accept that the applicant has a genuine interest in receiving the information in dispute for the purpose of subjecting the City to public scrutiny related to its handling of public funds. I also accept that the public clearly has an interest in overseeing how its elected representatives and tax-spending bodies use public money. However, I am not persuaded that this is a compelling or overriding interest of justice that warrants an exception to settlement privilege in this case.

[32] Nothing before me indicates that there has been any fraud, undue influence, or misrepresentation here, and this is clearly not a case where disclosure of the information in dispute is necessary to define the scope of a disputed settlement or prevent a plaintiff from being overcompensated. Considering this, to find an exception to settlement privilege in this case would undermine the purpose of settlement privilege, which is to encourage parties to attempt to settle their disputes without resorting to the time and expense of litigation. Therefore, I conclude that an exception to settlement privilege is not warranted here.

Conclusion – Settlement Privilege

[33] Based on the above, I find that the information in dispute meets the test for common law settlement privilege and that there is no overriding interest of justice which warrants an exception to settlement privilege in this case. Therefore, the City is authorized to withhold the information in dispute.

CONCLUSION

[34] For the reasons given above, under s. 58 of FIPPA, I confirm the City’s decision to withhold the information in dispute under common law settlement privilege.

March 12, 2024

ORIGINAL SIGNED BY

Alexander Corley, Adjudicator

OIPC File No.: F22-88710

³⁴ Applicant’s submission at p. 8.