Order 01-06

GREATER VANCOUVER REGIONAL DISTRICT

David Loukidelis, Information and Privacy Commissioner
February 6, 2001

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Summary: The applicant sought access to a two-page draft settlement offer regarding small claims litigation between applicant and the GVRD. The GVRD is not authorized to refuse access under s. 14. Litigation privilege did not apply, since letter had been drafted for the purpose of settlement discussions with the applicant and applicant read the letter at a settlement meeting. The fact that the GVRD retained the draft at the end of the meeting did not alter the fact that, consistent with its author's intent, contents of the draft settlement offer were communicated to the applicant. In any case, disclosure of the draft's contents to the applicant waived any litigation privilege. Although s. 17 (and others) may provide comparable protection, settlement privilege recognized at common law is not independently incorporated under s. 14 and the GVRD could not invoke it under s. 14.

Key Words: solicitor client privilege – waiver – settlement privilege.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 2(1), 14, 17(1).

Authorities Considered: **B.C.:** Order No. 67-1995, [1995] B.C.I.P.C.D. No. 40; Order 00-08, [2000] B.C.I.P.C.D. No. 8. **Ontario:** Order P-609, [1994] O.I.P.C. No. 7; Order M-477, [1995] O.I.P.C. No. 87; Order M-712, [1996] O.I.P.C. No. 62; Order PO-1732-F, [1999] O.I.P.C. No. 162.

Cases Considered: *Middlekamp* v. *Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.); *Hoghton* v. *Hoghton* (1852), 51 E.R. 545; *British Columbia (Minister of Environment Lands & Parks)* v. *British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.); *R.* v. *Gruenke* (1991), 67 C.C.C. (3d) 289; *Lowry et al.* v. *Canadian Mountain Holidays Ltd. et al*. (1984), 50 B.C.L.R. 137.

1.0 INTRODUCTION

As part of his apparently long-standing claims against the Greater Vancouver Regional District ("GVRD"), the applicant sued that local government, in 1999, in the Provincial Court of British Columbia. He alleged breach of contract, on the GVRD's part, in relation to welding services, for which the applicant said he was owed money. At the time this inquiry was held, the claim was proceeding to trial, although it later settled short of trial. That lawsuit appears to be only one of a number of grievances the applicant says he has against the GVRD. These have resulted in a number of communications between the applicant and the GVRD. The parties' dealings have included apparently considerable efforts by the GVRD's Chief Administrative Officer ("CAO") to resolve the overall situation.

The CAO and the applicant met on March 6 of last year, the CAO's intent being to explore a confidential settlement of all disputes, including the Provincial Court action. The CAO hoped the meeting would lay the groundwork for a settlement and that "the fundamental terms of the settlement" could be agreed to then (even if the final settlement was not effected at that time). At the meeting, the CAO showed the applicant a draft letter, which the GVRD says included (among other things) "certain terms of settlement." It was brought to the meeting, the GVRD says, "as an aide [*sic*] in the discussion of a potential settlement" and to provide it to the applicant as the written settlement agreement, but only if "agreement was reached on terms acceptable to the GVRD" at the meeting. During the meeting, the CAO concluded that the disputes would not be settled, at that time, on terms acceptable to the GVRD, so the CAO "maintained control over the letter and did not give … [the applicant] a copy of the draft letter" at the end of the meeting.

Paragraphs 6-8 of the CAO's affidavit read as follows:

> 6. In preparation for the March 6, 2000 meeting with … [the applicant], I prepared the draft two page letter which is the subject of this inquiry.
>
> 7. The only circumstances under which I would have given a copy to … [the applicant] for him to take away from the meeting would have been if a settlement had been reached at the meeting or, in the alternative, if there had been agreement on the fundamental terms of a settlement.
>
> 8. I did intend to disclose the contents of the letter to … [the applicant] to assist us in our confidential discussions to try to settle matters. At the meeting, … [the applicant] reviewed the terms of the letter.

The applicant says that, at an earlier meeting with GVRD officials in February, he was told the GVRD would be making a settlement offer at a later date and that the applicant should then take the offer to a lawyer. The applicant also confirms that he was "presented" with the draft letter at the March 6 meeting and that he "briefly perused it". He says that, although he did not "read it in detail", he was "happy to agree to all of the terms and conditions" in it, except the amount offered by the GVRD. In his initial

submission, the applicant describes from memory what he believes to be the contents of the draft letter.

Soon after the abortive settlement meeting, the applicant made an access to information request to the GVRD, under the *Freedom of Information and Protection of Privacy Act* ("Act"), for a variety of records. One of them is the draft settlement letter. The GVRD responded on April 14, 2000. It disclosed some records, but refused to disclose the settlement letter. It did so on the basis that it "is subject to solicitor-client privilege" under s. 14 of the Act. The applicant requested a review of this decision under s. 52 of the Act and, because the matter did not settle during mediation by this Office, I held a written inquiry under s. 56 of the Act.

2.0 ISSUE

The only issue here is whether the draft settlement letter is protected by solicitor client privilege under s. 14 of the Act. By virtue of s. 57(1), of the Act, the GVRD bears the burden of establishing that s. 14 applies.

In its reply, the GVRD submits that nothing in the applicant's initial submission "would suggest that there is not a privilege pursuant to Section 14 of the Act over the draft letter that is the subject of this Inquiry." To be clear, the applicant bears no burden to prove that a s. 14 privilege does not exist. The GVRD bears the burden of establishing that s. 14 applies.

3.0 DISCUSSION

3.1 Is the Record Privileged? – The GVRD says the draft letter is protected under s. 14 of the Act, which says that a public body may refuse to disclose information that is "subject to solicitor client privilege". Its s. 14 case is based on litigation privilege. It does not rely on solicitor client communication privilege (also called legal professional privilege).

The GVRD cites Order 00-08, and others, for the proposition that s. 14 of the Act incorporates litigation privilege. That privilege protects from disclosure any communication between a client, or his or her lawyer, and a third party where the dominant purpose for which the communication came into existence was to prepare for, advise upon or conduct litigation that was under way or in reasonable prospect at the time the communication was created. See Order 00-08 and Chap. 3 of R. Manes, *Solicitor Client Privilege in Canadian Law* (Butterworths: Toronto 1993).

The GVRD points out that litigation was actually under way at the time the disputed record was created. It also argues that further litigation by the applicant, relating to his other complaints against the GVRD, was in contemplation at the time the draft letter was created. The GVRD then makes the following argument, at para. 26 of its initial submission:

> It is respectfully submitted that there can be little dispute but that the document itself is subject to a litigation privilege. It is clear from the text of the document and, indeed from the date of its production, that it was written at a time when litigation between the GVRD and … [the applicant] existed and when further litigation was seriously contemplated. It is also clear that the purpose of the document was to settle the existing as well as further contemplated litigation and it is accordingly protected.

The last sentence of this paragraph introduces the theme – sounded again later in the GVRD's submissions – that, because the letter was created to further the parties' attempts to settle their disputes, it is 'privileged' and therefore protected under s. 14.

I am of the view that litigation privilege does not protect this record. The disputed record – a letter addressed to the applicant – is not a communication between the GVRD, or its counsel, and a third party. The evidence establishes that the GVRD intended from the outset to disclose the record's contents to the applicant. There is no doubt the applicant was handed a copy at the March 6, 2000 meeting. He "reviewed the terms of the letter" as to settlement and those terms were discussed at the meeting. The contents of the draft letter were therefore communicated to the applicant, as intended all along. Retention of the paper copy at the conclusion of the meeting does not displace the fact that the GVRD accomplished its intention of communicating the letter's contents to the applicant. To my mind, the GVRD's claim of litigation privilege, on the basis that this record was prepared for the dominant purpose of conducting litigation then under way, is not supportable. I find that the draft letter is not excepted from disclosure on this basis under s. 14 of the Act.

3.2 Settlement Privilege Under the Act – As I indicated above, the GVRD's case under s. 14 – although initially framed as a litigation privilege argument – in some places suggests that the GVRD is arguing that common law settlement privilege applies. At para. 19 of its initial submission, the GVRD argues that litigation privilege "includes those documents prepared in contemplation of settlement of litigation, whether that litigation is pending or contemplated." It cites, on "litigation privilege generally", pp. 745-749 of J. Sopinka *et al.*, *The Law of Evidence in Canada*, 2nd ed. (Butterworths: Toronto, 1999). It also relies on the following passage from the judgement of McEachern C.J.B.C. in *Middlekamp* v. *Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.), at pp. 232-233:

> … The public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "blanket", *prima facie*, common law, or "class" privilege because <u>it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.</u> (emphasis added)
>
> In my judgment, this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the

> other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served.

Other case law is also cited, for the proposition that settlement communications "ought to be held very sacred": *Hoghton* v. *Hoghton* (1852), 51 E.R. 545, at p. 561. The GVRD also refers to an amendment made last year to the *Law and Equity Act* – an amendment that is not yet in force – which will allow regulations to be made, the GVRD says, to maintain "confidentiality over settlement documents".

I have not been referred to any cases in which settlement privilege has been treated as a species, or aspect even, of litigation privilege or legal professional privilege. In *Middlekamp* – a case on which the GVRD relies – McEachern C.J.B.C., writing for a plurality of the Court of Appeal, treated settlement privilege as a "class privilege". He cited the Supreme Court of Canada decision in *R.* v. *Gruenke* (1991), 67 C.C.C. (3d) 289, on the various categories of privilege. Nothing in his reasons for judgement, or in *Gruenke*, supports the view that settlement privilege is a kind of solicitor client privilege or a component of it. Locke J.A., in his concurring reasons in *Middlekamp*, clearly did not consider settlement privilege as falling under the same head as solicitor client privilege (see, for example, para. 61). Manes, above, deals with settlement privilege, but says (at p. 115) that "settlement negotiation privilege is not a true solicitor-client privilege".

The settlement privilege – or 'without prejudice' communications – rule was thoroughly examined by David Vaver, in his article "'Without Prejudice' Communications – Their Admissibility and Effect", 9 U.B.C. Law Rev. 85. He argues, at p. 105, that the rule is not truly a privilege, but says that "no harm is caused" by use of the term 'privilege'

> … in reference to the "without prejudice" rule, provided that one always remembers that the origins and policy of the "without prejudice" rule are quite distinct, for example, from the privilege against self-incrimination or the privilege existing between client and legal adviser.

Beginning with *British Columbia (Minister of Environment Lands & Parks)* v. *British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64 (S.C.), the courts have said that s.14 incorporates the two kinds of common law solicitor client privilege, *i.e.*, the legal professional and litigation privileges.

Although the issue did not directly arise, in Order No. 67-1995, [1995] B.C.I.P.C.D. No. 40, my predecessor said (at p. 7) "I do not think that the settlement document privilege has any distinct status under the Act." Assistant Commissioner Mitchinson concluded, in Ontario Order PO-1732-F, [1999] O.I.P.C. No. 162, that a "discrete settlement privilege" does not exist under Ontario's similar access to information legislation. (I note that, in Order M-477, [1995] O.I.P.C. No. 87, and Order M-712, [1996] O.I.P.C. No. 62, two different inquiry officers appear to have treated as privileged, under the Ontario equivalent to s. 14, records that were created to settle a matter. I prefer the reasoning of Assistant Commissioner Mitchinson on this point. To the same effect as Order PO-1732-F, see the decision of then Assistant Commissioner Glasberg in Order P-609, [1994] O.I.P.C. No. 7.)

Section 2(1)(a) of the Act gives the public a right of access to records. Section 2(1)(c) of the Act stipulates that the Act is intended to advance the goals of access and privacy by "specifying limited exceptions to the right of access". My authority to authorize or require a public body to refuse access is statutory. It is not open to me to read an exception to the right of access into a section of the Act or to create an exception. As Assistant Commissioner Mitchinson put it, in Order PO-1732-F, [1999] O.I.P.C. No.162, at para. 61, the Act "contains an exhaustive list of the exemptions which are available to an institution should it wish to deny access to a particular record." It would, in my view, be an error for me to interpret s. 14 as incorporating 'settlement privilege'.

The GVRD argues that, if records protected by settlement privilege at common law are not protected under the Act, the important public policy purpose underlying settlement privilege will be injured. Public bodies will be exposed to disclosure of records – and, presumably, their use in court and otherwise – that might contain possibly damaging admissions of fact or other information harmful to their interests. I acknowledge that the settlement privilege represents an important public policy goal, *i.e.*, the fair and efficient resolution of litigation. The GVRD's concern about the interests of public bodies is, to some degree, addressed outside the Act. Rule 37(11) of the *Rules of Court* of the Supreme Court of British Columbia provides that a "settlement offer" is not admissible in evidence in any proceeding. Rule 10.1(11) of the *Small Claims Court Rules* speaks to disclosure of settlement offers. The *Law and Equity Act* regulation-making power referred to earlier appears to contemplate further protection for settlement communications. The common law also offers protection. The fact that a record may have to be produced under the Act does not necessarily mean the contents of the record are admissible in court as proof of any facts supposedly evident from the record.

I accept that a party could conceivably, in other ways, use knowledge gained from a record disclosed under the Act to the disadvantage of the disclosing public body. That concern is, however, explicitly dealt with in the Act. Under s. 17(1), a public body can refuse to disclose information the disclosure of which could reasonably be expected to harm the public body's financial or economic interests, including:

> …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in *undue financial* loss or *gain to a third party*;
>
> (e) *information about negotiations* carried on by or for a public body or the government of British Columbia. [emphasis added]
>
> … .

Although it did not rely on s. 17(1) in this case, the GVRD's submissions refer, in passing, to the fact that s. 17(1)(e) contemplates the kind of harm that is addressed at common law by the settlement privilege rule. Of course, s. 17(1) is a harms-based test – and the circumstances of each case will govern – but s. 17(1) can, in principle, protect a public body's interests.

3.3 Waiver of Privilege – Even if s. 14 litigation privilege did apply to the disputed record, the question would arise whether that privilege has been waived. The following discussion assumes, for argument's sake, that the disputed record is protected by litigation privilege under s. 14.

The GVRD contends that its disclosure of the letter's contents did not waive privilege. In a passage that emphasizes the letter's nature as a settlement offer, the GVRD says that use of the record to explore settlement does not amount to a waiver of litigation privilege. Here is para. 33 of the GVRD's initial submission:

> The privilege that is in issue in this Inquiry in regard to the draft document is a privilege over the document itself as a document prepared and then used for the purpose of settlement. This privilege continues notwithstanding the disclosure at the meeting with … [the applicant]. Use of the document to advance and explore settlement does not in any way amount to waiver of the litigation privilege. In fact, the privilege arises here because of the purpose of its creation and its use i.e. for the purpose of trying to bring about a settlement. The privilege over the draft letter is not lost by use of the draft letter in negotiations with … [the applicant]. If so, the privilege over settlement documents would be virtually non-existent.

The GVRD submits that waiver is a matter of intention and, relying on the judgment of Finch J. (as he then was) in *Lowry et al*. v. *Canadian Mountain Holidays Ltd. et al*. (1984), 50 B.C.L.R. 137, says I must look at all of the circumstances in deciding whether disclosure of part of a record's contents can be taken to mislead either the court or another litigant, so as to require the conclusion that privilege over the rest of the record has been waived.

In my view, *Lowry* does not assist the GVRD. It dealt with the issue of whether privilege over the rest of a document should be taken to have been waived where part of the record had been disclosed, in order to avoid misleading the court or another litigant. Here, all of the contents of the draft letter were disclosed to the applicant, as intended by the GVRD, and there is no question about misleading a court or another party.

As Manes notes, at pp. 189-191, express waiver of privilege occurs where there is a voluntary disclosure of privileged material; waiver can be implied if an objective consideration of a party's conduct "demonstrates an intention to waive privilege". Fairness is the "touchstone of such an inquiry". I find that, if any litigation privilege existed, it was (viewed objectively) waived by disclosure of the draft letter's contents at the settlement meeting.

In light of my finding on waiver, I need not consider whether any litigation privilege would have ended because the Provincial Court litigation later settled.

4.0 CONCLUSION

For the reasons given above, under s. 58(2)(a) of the Act, I require the GVRD to give the applicant access to the disputed record.

February 6, 2001

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia