Order F21-11

CITY OF WHITE ROCK

Laylí Antinuk
Adjudicator

March 19, 2021

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Summary: The applicant requested severance agreements between the City of White Rock (City) and certain former City employees. The City identified five agreements as responsive, but withheld them in their entirety on the basis of common law settlement privilege and s. 22 (unreasonable invasion of third party privacy) of FIPPA. The adjudicator found that the City was authorized to withhold the records on the basis of settlement privilege. Given this, the adjudicator did not consider whether s. 22 applied.

INTRODUCTION

[1] The applicant requested copies of severance agreements between the City of White Rock (City) and seven named former City employees. In his request, the applicant included the specific dollar figure severance amounts the City had paid to five of these seven former City employees, as the City had previously disclosed those amounts.[1] The City responded by saying two of the seven former employees did not receive severance pay. The City withheld the responsive records about the remaining five former employees (the former employees) in their entirety under common law settlement privilege and s. 22 (unreasonable invasion of third party privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review the City's decision. Mediation did not resolve the issues between the parties and they proceeded to inquiry.

[1] Both the applicant and the City say that the City had previously disclosed the severance amount it paid to each former employee. Applicant's response submission at para. 9; City's reply submission at para. 6.

[3] The OIPC invited all five former employees to participate in the inquiry.[2] Two former employees (party A and party B) chose to participate.

ISSUES

[4] This inquiry raises the following issues:

1) Is the City authorized to withhold the information in dispute on the basis of settlement privilege?
2) If not, does s. 22 require the City to withhold the information in dispute?

[5] The City bears the burden of proving that settlement privilege applies.[3] It also bears the burden of proving that all the information withheld under s. 22 is personal information.[4]

[6] The applicant bears the burden of proving that the disclosure of any personal information in the records would not constitute an unreasonable invasion of third party privacy.[5]

DISCUSSION

Information in dispute

[7] The information in dispute comprises five records totalling 16 pages. Two records are letters that contain signed releases indicating that the respective recipients agreed to the terms in the letters. One record is a letter that says it confirms the terms of settlement between the City and the former employee. It refers to an attached release that the former employee must sign and return to the City upon agreement with the terms in the letter, but the signed release is not before me. The other two records are formal signed agreements.

[8] I will call the records the "agreements" throughout the remainder of this order.

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[2] Under s. 54, the OIPC can invite any person it considers appropriate to participate in an investigation or inquiry arising from an applicant's request for review. The OIPC invited all five former employees, but one former employee did not respond to written correspondence, and correspondence sent to the other was returned to sender.
[3] Order F18-06, 2018 BCIPC 8 at para. 9, citing *Shooting Star Amusements Ltd. v. Prince George Agricultural and Historical Association*, 2009 BCSC 1498 at para. 9, leave to appeal dismissed: 2009 BCCA 452.
[4] Order 03-41, 2003 CanLII 49220 (BC IPC) at paras. 10-11. See also Order F19-38, 2019 BCIPC 43 at para. 143.
[5] Section 57(2).

SETTLEMENT PRIVILEGE

[9] FIPPA does not contain an exception to an applicant's right of access based on settlement privilege. However, settlement privilege is a fundamental common law privilege, and there is an overriding public interest in favour of settlement.[6] In *Richmond (City) vs. Campbell*, (*Richmond (City)*) Madam Justice Gray said that settlement privilege cannot be abrogated in legislation without clear and explicit statutory language and FIPPA does not contain such language.[7] Given this, public bodies may withhold information protected by settlement privilege from access applicants.

[10] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute.[8] It encourages resolving disputes without the need to resort to litigation by allowing disputing parties to have honest, frank discussions in an attempt to reach a compromise.[9] It applies as a "blanket" or "class" privilege, protecting all communications exchanged in pursuit of settlement – regardless of whether or not negotiations succeed – as well as any final settlement achieved.[10] This includes settlement agreements and settlement amounts because settlement agreements and amounts reflect the admissions, offers and compromises made in the course of negotiations.[11]

[11] The test for settlement privilege has three parts:

1) A litigious dispute must be in existence or within contemplation;

2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

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[6] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 11 [*Sable*] quoting with approval from *Sparling v. Southam Inc.* (1988), 1988 CanLII 4694 (ON SC), 66 O.R. (2d) 225 (H.C.J.) at p. 230, which was also quoted with approval in *Kelvin Energy Ltd. v. Lee*, 1992 CanLII 38 (SCC), [1992] 3 S.C.R. 235, at p. 259.
[7] *Richmond (City) v. Campbell*, 2017 BCSC 331 at para. 71 [*Richmond (City)*].
[8] *Union Carbide Canada Inc. v. Bombardier Inc.,* 2014 SCC 35 at para. 31.
[9] *Ibid*; *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 at para. 21 [*Bellatrix*].
[10] *Sable*, *supra* note 6 at paras. 16-17.
[11] *Sable*, *supra* note 6 at paras. 17-18, quoting with approval and added emphasis from *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84 at para. 41: "Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself... *The distinction ... is arbitrary*. The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it*."

3) The purpose of the communication must be to attempt to effect a settlement.[12]

Parties' positions

[12] The City submits that settlement privilege applies to all the agreements because they were the result of negotiations between the City and each former employee.[13] The City says the purpose of each agreement was to effect a settlement of matters related to the cessation of each former employee's employment with the City, and each agreement was created with the express intention that it would be kept confidential.

[13] The applicant argues that settlement privilege does not apply to the agreements.[14] He submits that the City's claim of settlement privilege is not genuinely motivated by an interest in promoting settlement, but rather a desire to avoid public scrutiny and accountability. The applicant quotes from a 1997 order written by former Commissioner Flaherty that states: "The public has a fundamental right to know how its money is being spent, especially with respect to severance agreements."[15]

[14] The applicant contends that the City's evidence does not establish that it was in a litigious dispute with every former employee, so it fails the first part of the test. He says the City also failed to establish the second part of the test because three of the agreements say the parties will keep the terms of their settlement confidential "except as required by law". The applicant also argues that the City has disclosed the severance amounts, so any claim of confidentiality over the agreements is hollow and meaningless. In addition, the applicant submits that the second and third parts of the test have not been met because he requested final agreements, not "communications". The applicant further contends that if any true dispute ever existed between the City and the former employees, it would have only been about the severance amounts. The City already disclosed these, so the applicant argues settlement privilege cannot apply to the agreements in their entirety.

Analysis and findings on settlement privilege

[15] For the reasons that follow, I find that the agreements meet the three-part test for settlement privilege.

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[12] *Nguyen v. Dang*, 2017 BCSC 1409 at para. 22; Order F17-35, 2017 BCIPC 37 at para. 25; Order F18-06, 2018 BCIPC 8.
[13] The information in this paragraph comes from the City's initial submission at para. 17.
[14] The information in this paragraph and the one that follows comes from the applicant's response submission at paras. 46, 156-157, 171 and 173-193.
[15] Order No. 173-1997, 1997 CanLII 1023 (BC IPC) at p. 5. Quoted at para. 46 of the applicant's response submission.

Legal dispute or negotiation

[16] To satisfy the first part of the test, the courts have said it is sufficient that the parties are in a dispute or negotiation.[16] I find that the evidence establishes that the agreements arose as a result of negotiations between the City and each former employee about legal disputes respecting the end of each one's employment with the City.

[17] The City's Director of Human Resources (director) provides sworn affidavit evidence. She deposes that if negotiations with the former employees had not successfully resulted in the agreements, the former employees may have commenced wrongful dismissal suits against the City and/or pursued other employment-related claims against the City.[17] From my review of the records, I can tell that at least one former employee had already commenced such a claim. I can also tell that some former employees had already incurred legal expenses related to the matters between them and the City. Given the circumstances, I accept the City's submission that it is reasonable to expect that if negotiations had failed, the City may have ended up in a litigious dispute with one or more of the former employees, such as a wrongful dismissal claim or a claim before an employment-related board or tribunal, such as WorkSafeBC or the Employment Standards Tribunal.[18]

[18] With this evidence in mind and based on the contents of each agreement considered in context, I find it clear that each former employee was in a legal dispute with the City about the cessation of his or her employment. To settle these disputes without resort to litigation, I find that the respective parties engaged in negotiation that ultimately resulted in the agreements. As a term of every agreement, each former employee explicitly released the City of all claims against the City arising out of his or her employment or termination of employment. Taking all this into account, I find that the City has provided sufficient evidence to meet the first part of the settlement privilege test.

Parties intended no disclosure to the court

[19] Additionally, based on my review, I find that the negotiations that led to the agreements (and the agreements themselves) were made with the intention that they would not be disclosed to the court. This is clear from the terms in each agreement that expressly state that the information in the agreements would remain confidential.[19] Furthermore, the evidence from parties A and B, the director's affidavit evidence, and the records themselves show that each

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[16] *Langley (Township) v. Witschel*, 2015 BCSC 123, paras. 35 and 37-38.
[17] Director's affidavit at para. 8.
[18] City's initial submission at para. 17(a).
[19] Record 1 at term 9; Record 2 at pp. 2 and 3; Record 3 at term 10; Record 4 at terms 6-7; Record 5 title heading.

agreement was negotiated in the context of the termination of employment relations between the City and the former employees. Given this, I find it reasonable to conclude the City and the former employees knew they could be required to go before a court or other decision-making body if their negotiations about the employment terminations failed. The City submits that it "is trite to say an aggrieved employee might commence legal proceedings if negotiations failed."[20] I agree. As a result, I find the explicit confidentiality requirements in each agreement indicate that the parties intended that their negotiations – and the agreements that resulted therefrom – would not be disclosed to the court.

[20] The applicant submits that the second part of the test has not been met because some agreements acknowledge that disclosure may be "required by law". I find that three agreements contain this language, but do not accept that this means the second part of the settlement privilege test has not been met. As I see it, the inclusion of this language in some agreements merely means that the parties to each agreement will not have breached their respective confidentiality requirements if the law obliges them to disclose information in the agreement. In other words, I find that this exception to the confidentiality requirements in some agreements does not negate the fact that the parties expressly intended that the agreements (and the negotiations that led to them) would not be disclosed. I reject the applicant's argument that disclosure of the severance amounts means any claim of confidentiality over the agreements is hollow and meaningless for the same reason.

[21] With all this in mind, I find that the agreements meet the second part of the settlement privilege test.

Purpose was to effect a settlement

[22] Lastly, given their contents and context, I find that the purpose of each agreement was to settle a dispute about the end of each employment relationship. As noted, all the agreements required the former employees to sign a release of all claims against the City.[21] Additionally, one agreement stipulates that a former employee will withdraw a complaint made to a named Board or Tribunal in BC relating to that former employee's employment with the City. Further, party B's evidence indicates that the purpose of his agreement with the City was to settle the dispute between them respecting the end of his employment with the City.[22]

[23] Moreover, based on the contents of the agreements, I am satisfied that each one was meant to settle all outstanding matters related to each employment

[20] City's reply submission at para. 5.
[21] Record 1 at term 6; Record 2 at pp. 1 and 5; Record 3 at term 9; Record 4 at terms 6 and 12; Record 5 at term 12.1; Director's affidavit at paras. 4-5.
[22] Party B's initial submission at paras. 2-3.

relationship and the termination of those relationships. These outstanding matters include issues related to benefits, expense claims, reimbursement of legal fees, press communications, and reference letters. They also include references to agreed upon statements about the reasons for the termination of the employment relationship, and references to matters that will *not* be referred to as the reason for the termination of the employment relationship.[23]

[24] In short, I find that the evidence establishes that the City entered into the agreements with the former employees in order to settle the legal disputes that arose in relation to the termination of each employment relationship. Given this, I find that the agreements meet the third part of the settlement privilege test, so settlement privilege applies.

Applicant's additional arguments

[25] I pause here to note that the applicant made extensive arguments respecting the reasonableness of the severance amounts and the law surrounding wrongful dismissal.[24] He says the City has given an excessive amount of compensation to the former employees and argues this is "woefully unexplainable".[25] The question before me is not whether the severance amounts are reasonable or whether the former employees were wrongfully dismissed, but rather whether the specific agreements in dispute satisfy the test for settlement privilege. For the reasons set out above, I find that they do.

[26] Additionally, and with respect, I acknowledge that former Commissioner Flaherty said that the public has a fundamental right to know how its money is being spent, especially with respect to severance agreements. However, the former Commissioner made this statement ten years before the BC Supreme Court's decision in *Richmond (City)*, so he did not have the benefit of Madam Justice Gray's reasons which clarified that access applicants are not entitled to information protected by settlement privilege.[26] I am bound to follow *Richmond (City)*, meaning that if I find settlement privilege applies to the agreements – and I do – then the City is authorized to withhold them. At any rate, the City already disclosed the severance amounts it paid to each former employee, so the public knows how its money has been spent with respect to these severance agreements.

[27] The applicant also contends that FIPPA contains the type of clear and unequivocal language that Madam Justice Gray said was necessary to abrogate

[23] City's initial submission at para. 24(e).
[24] Applicant's response submission at paras. 15-29, 41-44, 64-69, 81-84, 90-91, 97, 108-113, 121-125.
[25] *Ibid* at para. 5.
[26] *Supra* note 7.

settlement privilege.[27] According to the applicant, the wording of s. 22(4)(e) requires the disclosure of severance agreements. I disagree.

[28] Section 22(4)(e) does not contain clear and unequivocal language abrogating settlement privilege. Instead, s. 22(4)(e) merely provides that disclosing personal information about a public body employee's "position, functions or remuneration" is not an unreasonable invasion of that employee's personal privacy under s. 22(1). Contrary to the applicant's position, s. 22(4)(e) does not require the disclosure of this type of information in all circumstances. For example, if another exception to disclosure applies to information about a public body employee's remuneration, then the public body would be authorized to refuse access regardless of whether s. 22(4)(e) applies. In this case, I have found that settlement privilege applies to the records, so the fact that some of the information in them may fit within the meaning of s. 22(4)(e) is irrelevant.

Waiver

[29] The applicant says that if settlement privilege ever applied, it has been waived because the City already disclosed the severance amounts paid to the former employees. Because the applicant argues that waiver occurred, he bears the burden of proving it.[28]

[30] Settlement privilege belongs to all the parties involved and cannot be unilaterally waived or overridden by any of them.[29] For an express waiver to occur, the evidence must establish that the possessors of the privilege: *(a)* know of the existence of the privilege; and *(b)* voluntarily evince an intention to waive that privilege.[30]

[31] Additionally, in certain cases, intention may be implied where fairness and consistency so require.[31] In the context of solicitor client privilege, the courts have said that fairness and consistency require waiver where, for example, a party relies on legal advice as an element of their claim, or where a party asserts that a mistake arose by reason of the negligence or inadvertence of their counsel.[32] Similarly, if a party discloses part of a privileged communication to

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[27] Applicant's response submission at paras. 208-209.
[28] Order F17-35, 2017 BCIPC 37 at para. 57; Order F16-28, 2016 BCIPC 30 at para. 41, citing *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para. 22; *Maximum Ventures Inc. v. de Graaf*, 2007 BCSC 1215 at para. 40.
[29] *Bellatrix*, *supra* note 9 at para. 26.
[30] *R. v. Campbell*, 1999 CanLII 676 (SCC) at paras. 67-68; and *S. & K. Processors Ltd*. v*. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC) at paras. 6 and 10 [*S. & K.*]. This test for waiver was used in the context of settlement privilege (rather than solicitor client privilege) in Order F17-35, 2017 BCIPC 37 at para. 55. See also *Pacific Concessions, Inc. v. Weir*, 2004 BCSC 1682 at para. 14 [*Pacific Concessions*].
[31] *S. & K., ibid* at para. 6; *Pacific Concessions*, *ibid* at para. 16; *Biehl v. Strang*, 2011 BCSC 213 at para. 55.
[32] *Weir-Jones v. Taylor*, 2013 BCSC 1633 at para. 53.

prove an issue in their case, fairness requires that the opposing party be at liberty to examine the entire communication.[33] Conversely, if a party discloses an expert report as required by statute, fairness will not require waiver over documents related to the expert's report.[34] In cases where fairness requires implied waiver, "there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent."[35]

Parties' positions on waiver

[32] The parties agree that the City previously disclosed the severance amount each former employee received.[36] The applicant argues that this means the parties have waived privilege.[37] The applicant also says one former employee consented to the release of her severance amount to an access applicant in the past. In addition, the applicant says party B openly spoke about his severance amount in an all-candidates meeting prior to the election of City mayor. From this, I understand the applicant to argue those two specific former employees expressly waived privilege over their respective agreements.

[33] The City disputes the applicant's claim that its disclosure of the severance amounts constitutes waiver.[38] The City submits that to waive privilege over the agreements, a majority of City Council would have had to pass a resolution to that effect, which has not happened. The City acknowledges that it has disclosed the severance amounts, but says this was required by statute. For example, the City says the *Financial Information Act* requires it to report: *(a)* the number of severance agreements it enters into each year with non-unionized employees; and *(b)* the number of months of salary each agreement required it to pay.

Analysis and findings on waiver

[34] The evidence provided by the applicant does not satisfy me that both parties to each agreement expressly intended to waive privilege.

[35] In my view, nothing in the evidence demonstrates that any former employee who knew about the existence of the privilege intended to waive it. Quite the opposite: party A and party B's evidence clearly indicates that neither

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[33] *Kamengo Systems Inc. v. Seabulk Systems Inc.*, 1998 CanLII 4548 (BC SC) at para. 16.
[34] *S. & K., supra* note 30 at para. 12.
[35] *Ibid* at para. 10.
[36] Applicant's response submission at para. 9; City's reply submission at paras. 6 and 17.
[37] The information summarized in this paragraph comes from the applicant's response submission at paras. 215 and 218.
[38] The information summarized in this paragraph comes from the City's reply submission at paras. 17 and 24-26; and its initial submission at para. 18.

intends to waive privilege.[39] Additionally, the director deposes that, to the best of her knowledge, none of the former employees has waived settlement privilege.[40]

[36] I acknowledge that one former employee consented to the release of her severance amount to an access applicant in 2017, but I am not satisfied that this constitutes waiver. First, nothing in the evidence indicates that this former employee knew of the existence of the privilege. Second, the agreement that pertains to this particular former employee does not explicitly include the exact dollar figure severance amount. Therefore, I am not satisfied that this former employee intended to waive privilege by consenting to the release of a dollar figure amount that does not even appear in her specific agreement.

[37] Similarly, I am not persuaded that party B waived privilege over the applicable agreement by discussing his severance amount publicly. The evidence shows that party B – a mayoral candidate at the time – defended his severance amount after being asked a direct question about it in an all-candidates meeting.[41] Nothing in the evidence indicates that party B voluntarily offered up any information about his agreement with the City. Instead, party B answered a direct question about his severance amount when asked about it in the context of a mayoral competition in front of hundreds of constituents. I am not satisfied that this evinces a voluntary intention to waive privilege over his agreement with the City. In addition, the exact dollar figure that he was asked about in the meeting does not appear anywhere in his particular agreement. Therefore, as with the former employee who consented to the release of her severance amount to an access applicant, I am not satisfied that party B intended to waive privilege over his agreement by answering a direct question about a dollar figure amount that does not actually appear in it.

[38] In short, I find that the applicant has failed to establish express waiver on the part of the former employees. As noted, settlement privilege belongs to all the parties involved and cannot be unilaterally waived or overridden by any of them. Therefore, given my conclusion respecting the intention of the former employees, I do not need to decide whether the City voluntarily evinced an intention to waive privilege. In my view, given the joint nature of settlement privilege, when it comes to express waiver, it is enough that one holder of the privilege (i.e. each respective former employee) has not shown a voluntary intention to waive it.

[39] However, as discussed above, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Therefore, I will consider whether fairness or consistency require waiver in this case.

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[39] Party A's reply submission at para. 4; Party B's initial submission at paras. 1, 4 and 17.
[40] Director's affidavit at para. 9.
[41] Applicant's response submission at appendix F.

[40] As I see it, the question here centres around the fact that the City disclosed the severance amounts. Does this prior disclosure mean that fairness and consistency require waiver in this case? I think not.

[41] Nothing in the evidence suggests that any parties have been prejudiced by the disclosure of the dollar figure severance amounts which, in some cases, do not even appear in the agreements at issue. There is no indication that the applicant or anyone else is (or was) involved in litigation or any other proceeding with the City in which the City disclosed the severance amounts, but nothing else about the agreements in order to buttress its case unfairly. This is not a situation in which the City somehow benefited from the disclosure of the severance amounts and is now seeking an additional unfair advantage by claiming settlement privilege over the agreements. Therefore, I do not think it unfair or inconsistent for the former employees and the City to retain settlement privilege over the agreements.

[42] Taking all this into account, I conclude that settlement privilege has not been waived in respect of any of the agreements.

Exceptions to settlement privilege

[43] The applicant also submits that some exceptions to settlement privilege apply in this case, so the agreements should be disclosed to him for that reason.

[44] Under the common law, there are exceptions to settlement privilege, such as circumstances involving misrepresentation, fraud or undue influence.[42] Exceptions must be narrowly defined and rarely applied.[43]

[45] The person who asserts that an exception applies has the burden of establishing that a competing public interest in disclosure outweighs the public interest in encouraging settlement.[44] This involves providing evidence that the records sought are both relevant and necessary in the circumstances of the case to achieve a compelling or overriding interest of justice.[45] The BC Court of Appeal has said that the test for discharging the burden to establish an exception should not be set too low because the public policy behind settlement privilege is a compelling one.[46]

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[42] *Sable*, *supra* note 6 at para. 19.
[43] *Heritage Duty Free Shop Inc. v. Attorney General for Canada,* 2005 BCCA 188 at para. 25. See also *Bellatrix*, *supra* note 9 at para. 28.
[44] *Sable*, *supra* note 6 at para. 19.
[45] *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 20 [*Dos Santos*]. Order F17-35, 2017 BCIPC 37 at para. 46.
[46] *Dos Santos*, *ibid* at para. 19

Parties' positions on exceptions

[46] The applicant argues that the City's decision to claim settlement privilege was made in bad faith.[47] He asserts that there may have been a breach of fiduciary duty in the City's handling of the five severance payouts. The applicant says withholding the agreements would wrongfully cloak one or more potential improprieties. The applicant also contends that the public has an undeniable right to know how and why the former employees received severance. To support these arguments, the applicant provides news articles from the local community newspaper, City press releases, a print-off from a Facebook group page, and past FIPPA access requests with the City's responses. Put briefly, the applicant contends this evidence shows that:

- some or all of the former employees were not entitled to severance; and/or
- the severance amounts were not reasonable; and/or
- the City has not been honest about the circumstances of the former employees' departures and their entitlement to severance.

[47] The City says the applicant's allegations should be disregarded entirely because there is no factual basis to support them.[48]

Analysis and findings on exceptions

[48] I find that the applicant has not provided persuasive arguments or sufficient evidence to show that a competing public interest outweighs settlement privilege. In my assessment, the applicant's evidence does not suffice to establish his allegations of bad faith, breach of fiduciary duty, or impropriety on the part of the City. A party that makes such allegations must adduce strong and compelling evidence to support them.[49] I find no such evidence here.

[49] The applicant also contends that the public has an undeniable right to know how and why the former employees received severance.[50] I am not persuaded by this argument in the circumstances.

[50] The City has already disclosed all the severance amounts, so the public already knows how much taxpayer money the former employees received. In my view, this has allowed the public to scrutinize the City's actions and call for

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[47] The information summarized in this paragraph comes from the applicant's response submission at paras. 44, 69, 113, 119, 128, 134, 149, 153, 198-199 and appendices F, N, U, X, and Z.
[48] City's reply submission at paras. 10 and 20.
[49] For examples, see *Thorburne v. Sun Life Assurance Company of Canada*, 2020 NSSC 240 at para. 52; and *M5 Marketing Communications Inc v. Ross*, 2011 NSSC 32 at para. 31.
[50] *Supra* note 47.

accountability. Indeed, the applicant's own evidence demonstrates that members of the public have repeatedly done this.[51]

[51] Furthermore, while I agree that transparency and accountability are important public interests, I have reviewed the agreements carefully and do not see how disclosure is necessary to achieve these interests. I say this because the specific information in the agreements does not answer the applicant's overarching questions about how and why the former employees received severance nor do the agreements clearly explain the circumstances of any former employee's departure.

[52] In short, I find that no exceptions to settlement privilege apply here. Therefore, for all the reasons expressed above, I find that settlement privilege applies to the disputed records.

Exercise of discretion

[53] The applicant contends that the City's decision to withhold the agreements under settlement privilege represents an improper exercise of its discretion to withhold records.[52] The applicant cites previous OIPC orders that set out the principles for a public body's proper exercise of discretion under FIPPA. However, all those orders relate to the FIPPA exceptions to access that grant public bodies the discretion to withhold information.

[54] To clarify, FIPPA contains both mandatory and discretionary exceptions to access. For example, public bodies *may* withhold information that solicitor client privilege applies to (s. 14), but public bodies *must* withhold information if its disclosure would constitute an unreasonable invasion of third party personal privacy (s. 22). Previous OIPC orders have considered a public body's exercise of discretion when it comes to the *discretionary* exemptions to access – i.e. the exemptions that use the permissive "may" rather than the obligatory "must" language.[53]

[55] As discussed above, FIPPA does not contain an exception to access based on settlement privilege. This means that the Legislature has not specified whether information protected by settlement privilege "may" or "must" be withheld by public bodies. In any event, as mentioned previously, settlement privilege is a common law privilege that belongs to all parties involved and cannot be unilaterally waived by any of them. Therefore, even if the City had discretion

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[51] Applicant's response submission at appendices C2, L, N, Q, T, X and Z.
[52] Applicant's response submission at paras. 129-153.
[53] Former Commissioner Loukidelis made this clear in Order No. 325-1999, 1999 CanLII 4017 (BC IPC) at p. 4 when he said: "Section 13(1) is discretionary, *i.e.*, the head of a public body may decide to disclose information to which the section technically applies. Of course, many other exceptions in the Act are also discretionary in this sense."

under FIPPA, it could not have exercised that discretion in favour of release in this case because the former employees have not waived privilege.[54]

[56] For all these reasons, I find that the City is authorized to withhold the disputed records under common law settlement privilege. Given this, I do not need to decide whether s. 22 also applies to the agreements.

CONCLUSION

[57] For the reasons given above, under s. 58 of FIPPA, I confirm the City's decision to refuse access to the information in dispute under common law settlement privilege.

March 19, 2021

ORIGINAL SIGNED BY

Laylí Antinuk, Adjudicator

OIPC File No.: F18-75477

[54] For similar reasoning, see Order F17-35, 2017 BCIPC 37 at paras. 66-69.