Order F26-57

UNIVERSITY OF BRITISH COLUMBIA

Rene Kimmett
Adjudicator

July 2, 2026

CanLII Cite: 2026 BCIPC 70
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Summary: An applicant made a request, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to the University of British Columbia (University) for access to records related to a building development undertaken by the University. The University withheld the records under common law settlement privilege as well as ss. 14 (solicitor-client privilege) and 17 (harm to financial or economic interests) of FIPPA. The adjudicator found the records are subject to settlement privilege and that the University is not required to give the applicant access to them.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSBC 1996, c. 165.

INTRODUCTION

[1] A journalist (applicant) made a request, under the *Freedom of Information and Protection of Privacy Act* (FIPPA), to the University of British Columbia (University) for access to records related to a building development undertaken by the University.

[2] The University withheld all the responsive records under common law settlement privilege as well as ss. 14 (solicitor-client privilege) and 17 (harm to financial or economic interests) of FIPPA.

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the University's decision to withhold the records responsive to her access request. The OIPC engaged the parties in mediation, but it did not resolve the issues in dispute, and the matter proceeded to this inquiry.

[4] At the inquiry stage, the University notified the OIPC that three third parties may have an interest in the records in dispute and, therefore, may be "appropriate persons" who should be offered an opportunity to participate in the inquiry under ss. 54(b) and 56(3) of FIPPA. The OIPC asked the third parties whether they were interested in participating. Only the City of Kelowna (City) sought to participate in the inquiry as an appropriate person. After considering the parties' submissions on the subject, the OIPC invited the City to participate.

[5] The applicant, the University, and the City have each provided submissions and evidence in this inquiry.

PRELIMINARY ISSUE

[6] The applicant raises s. 25(1) (public interest disclosure) in her submission. The OIPC's notice of inquiry and its *Instructions for Written Inquiries*, both of which were provided to the parties at the outset of the inquiry, clearly explain that parties may not add new issues without the OIPC's prior consent. Past orders and decisions have consistently said the same thing.[1]

[7] The applicant did not apply to the OIPC for permission to add a new issue to this inquiry and did not explain why she is only raising s. 25(1) at this late stage of the OIPC's inquiry process. I am not satisfied that there are any exceptional circumstances that warrant adding s. 25(1) to the inquiry. Therefore, I decline to add s. 25(1) as an issue in this inquiry.

ISSUES AND BURDEN OF PROOF

[8] In this inquiry, the following issues are in dispute:

1. Is the University authorized to refuse access to the information in dispute under settlement privilege?

2. Is the University authorized to refuse access to the information in dispute under s. 14?

3. Is the University authorized to refuse access to the information in dispute under s. 17(1)?

[9] The University has the burden of proving the applicant has no right of access to the information it has withheld under settlement privilege[2] and ss. 14 and 17(1).[3]

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[1] Order F25-88, 2025 BCIPC 102 (CanLII) at para 5.
[2] Order F18-12, 2018 BCIPC 15 (CanLII) at para 6.
[3] FIPPA, s. 57(1).

DISCUSSION

Background

[10] In 2023, the University began constructing a mixed-use commercial and residential development intended to form part of the University's downtown Kelowna campus (the Development).[4]

[11] The Development is located adjacent to an affordable housing building (the Building), which was operated by Pathways Abilities Society (Pathways) on land the City owns and leased to Pathways.

[12] Shortly after construction of the Development began, Pathways and tenants of the Building began noticing damage to and around the Building. Pathways reported this damage to the University in July 2023 and alleged construction of the Development had caused the damage. Sometime between July 2023 and December 2023, Pathways informed the University that it believed the Building had experienced further damage during the Development's excavation process.[5]

[13] On March 31, 2024, the City's Fire Chief issued an order requiring all residents to evacuate the Building.

[14] Several legal disputes flowed from the Development, including:

a) A class action filed against the University on May 16, 2024 on behalf of the tenants affected by the evacuation order;

b) A class action filed against the University on May 3, 2024 on behalf of tenants and occupiers of buildings alleged to have been damaged by the Development. Contractors who worked on the Development were later also added as defendants in this case.

c) A claim Pathways filed on June 26, 2025 against the University and others alleging, among other things, negligence, nuisance, and breach of contract.

d) A claim Pathways filed on June 26, 2025 against its own insurers seeking recovery of damages under its insurance policies.

e) A claim the University filed on July 31, 2025 against geotechnical engineers and contractors engaged to carry out services and work related

[4] Lawyer's affidavit at para 17(d).
[5] *Ibid* at para 17(h).

to the Development alleging, among other things, negligence, breach of contract, and breaches of other duties.

Records at issue

[15] The University has entirely withheld 13 records totalling 178 pages and consisting of six letters, four memoranda, and one draft technical report.

Settlement privilege

[16] The University has withheld all the records in dispute on the basis that they are subject to settlement privilege.

[17] FIPPA does not include settlement privilege as an exception to disclosure. However, the BC Supreme Court has found that since FIPPA contains no clear legislative intent to abrogate it, public bodies are entitled to rely on settlement privilege to refuse to disclose information responsive to an access request made under FIPPA. The BC Supreme Court has explained the reason public bodies may rely on settlement privilege as follows:

> 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 [by requiring disclosure of settlement communications under FIPPA]. It would discourage third parties from engaging in meaningful settlement negotiations with government institutions.[6]

[18] Relevant to this explanation is the fact that disclosure under FIPPA is considered "disclosure to the world" because there are no restrictions in FIPPA prohibiting an applicant from publicly disclosing the information they receive in response to an access request made under FIPPA.[7]

[19] The purpose of settlement privilege is to promote the public's interest in settling lawsuits outside of court.[8] For settlement privilege to apply there must be:

1) a dispute in existence or within contemplation; and

2) a communication made

   a) with the express or implied intention that it will not be disclosed in the event negotiations fail; and

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[6] *Richmond (City) v Campbell,* 2017 BCSC 331 at para 71.
[7] Order F22-31, 2022 BCIPC 34 (CanLII) at para 80, citing Order 03-35, 2003 CanLII 49214 (BC IPC) at para. 31.
[8] Lederman et al., *The Law of Evidence in Canada*, 4th ed. (Markham, ON: LexisNexis Canada Inc., 2014) at 1036, citing *Kelvin Energy Ltd v Lee,* 1992 CanLII 38 (SCC).

b) for the purpose of attempting to effect a settlement.

[20] The University submits that in early 2024, the University entered into settlement discussions with the City, Pathways, and another party whose identity has not been publicly disclosed. I will refer collectively to these four parties as the Participants.

[21] To support its submission, the University provides evidence from a lawyer (Lawyer) who says they "provided legal advice and representation to [the University] in connection with these early settlement discussions".[9]

[22] The Lawyer says that, to facilitate meaningful negotiations, the Participants engaged in an information exchange process on a confidential and without prejudice basis. She says the Participants exchanged technical information prepared by experts, which included assessments about the scope, nature, and alleged causes of the damage to the Building and proposed remediation and repairs.[10]

[23] The Lawyer provides a table of records that includes a description of each record, the date each record was created or sent, and a description of who created and received each record.

[24] The records are dated between March 21, 2024 and July 31, 2024. They consist of six letters, four memoranda, and one draft technical report. The Lawyer says the Participants engaged engineers and other technical experts to prepare these records and each record was shared with the other Participants during settlement discussions.[11]

[25] I find that a dispute existed between the Participants when the records were created. Specifically, I find there was a dispute between the Participants in existence, or at least in contemplation, effective July 2023 when Pathways notified the University about the damage to the Building and its view the damage was caused by the Development.

[26] I accept the evidence from the Lawyer, who provided legal advice and representation to the University during settlement discussions, that the communications between the Participants were made for the purpose of attempting to settle the dispute and with the express intention that they would not be disclosed in the event negotiations failed.

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[9] Lawyer's affidavit at para 6.
[10] *Ibid* at para 21.
[11] *Ibid* at Exhibit F, Table of Records.

[27] For the reasons above, I find settlement privilege applies to all the records in dispute. I will now consider whether the applicant has established an exception to settlement privilege in this case.

[28] There can be exceptions to settlement privilege where a competing public interest outweighs the public interest in encouraging settlement.[12] The party wishing to overcome the privilege has the burden of proof.[13]

[29] The applicant submits the Building's tenants have suffered significant financial harms as a result of being evicted following the evacuation order.[14]

[30] I find the applicant has not clearly identified what public interest is engaged by the financial impacts to these individuals. Further, she has not explained how disclosure of the records in dispute, which are technical in nature, would assist the tenants in receiving financial compensation. In the circumstances, I find the financial impacts, as described by the applicant, do not amount to a competing public interest that outweighs the public's interest in encouraging dispute settlement.

[31] The applicant also submits that public safety outweighs the public interest in protecting settlement privilege. She relies on a case called *Smith v. Jones*, 1999 CanLII 674 (SCC) (*Smith*), which is a case about the public safety exception to solicitor-client privilege.

[32] In that case, the court held that if there is a clear and imminent risk of serious bodily harm or death to an identifiable person or group, then the aspects of the privileged communications about that imminent danger may be disclosed.[15]

[33] I find *Smith* provides useful guidance for weighing competing public interests and will use it below. However, I acknowledge solicitor-client privilege is the highest privilege the courts recognize and, therefore, the harm to public safety needed to overcome settlement privilege may be less than the harm needed to overcome solicitor-client privilege.

[34] The applicant's overall position is that there is a risk of physical harm to the construction workers working on the Development and members of the public because she believes the Building is at risk of collapse and electrical fire due to the damage it has sustained and the fact that it remains connected to

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[12] *Thomas v Rio Tinto Alcan Inc.,* 2019 BCSC 421 (CanLII) at para 79; *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 (CanLII) at para 20.
[13] *Sable Offshore Energy Inc. v. Ameron International Corp*., 2013 SCC 37 at para 19.
[14] Applicant's submission at pages 8, 12, and 13.
[15] *Smith v. Jones*, 1999 CanLII 674 (SCC) at para 77.

electricity.[16] She submits, and there is evidence before me, that the other damaged buildings near the Development have been demolished because they posed an imminent risk to safety. She submits that, given the risk of harm, the public has a right to know about the state of the Building.

[35] In reply, the University submits that the safety issues identified by the applicant are already well known to the public, as evidenced by the news articles the applicant cites in her submission. The University also says that the safety issues have already been mitigated through evacuation orders and other remediation measures. It submits the applicant has not led evidence that the safety issues associated with the Building are "serious" or "imminent". It also submits the applicant has not explained how the disclosure of the information subject to settlement privilege would meaningfully contribute to the public's understanding of the issue or serve to protect public safety.[17]

[36] For the following reasons, I conclude that public safety does not outweigh the public interest in protecting settlement privilege in this case. I find the applicant has not established there is a clear risk of serious bodily harm or death to the workers or members of the public. I am satisfied that the University and the City have taken measures to mitigate the safety concerns arising from the damage to the Building. Further, I find there is no imminent danger or urgency in this case because the evidence before me is that the damaged Building has been standing for three years without incident. Lastly, to the extent that there is a risk of imminent danger, the public and workers have already been made aware of this risk, through media reports and the legal proceedings, such that disclosure of the information in dispute is not needed to alert them to the risk.

[37] Having concluded the records in dispute are subject to settlement privilege and none of the withheld information is excepted from that privilege, I find the University may withhold the records on the basis of settlement privilege. For that reason, I do not need to consider whether the University is also authorized to withhold these records under ss. 14 or 17 and I decline to do so.

[16] Applicant's submission at page 7-13.
[17] University's reply submission at para 9.

CONCLUSION

[38] For the reasons given above, under s. 58 of FIPPA, I confirm the University's decision to refuse access to all of the records in dispute on the basis of settlement privilege.

July 2, 2026

ORIGINAL SIGNED BY

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Rene Kimmett, Adjudicator

OIPC File No.: F25-00027