



Order F22-60

**PROVINCIAL HEALTH SERVICES AUTHORITY  
(BC Emergency Health Services)**

David S. Adams  
Adjudicator

November 21, 2022

CanLII Cite: 2022 BCIPC 68  
Quicklaw Cite: [2022] B.C.I.P.C.D. No. 68

**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 three of the pages under common law settlement privilege. The adjudicator found that BCEHS was authorized to withhold the information.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c 165, s. 58(2)(b).

**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 them to the applicant. However, BCEHS withheld much of the information in these records under various exceptions to disclosure set out in Part 2 of FIPPA. BCEHS also withheld three pages of emails 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.

[3] In Order F22-52,<sup>1</sup> I decided all issues except settlement privilege. I concluded that I needed to see the three pages of emails to decide if settlement privilege applied, and I ordered BCEHS to produce them under s. 44(1)(b) of

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<sup>1</sup> 2022 BCIPC 59 (CanLII).

FIPPA for my review. BCEHS complied with that order, so I can now dispose of the settlement privilege issue.

## **ISSUE**

[4] The only issue remaining in this inquiry is whether BCEHS can rely on settlement privilege to withhold three pages of emails, which are pages 5757 to 5759 of the consolidated package of records.

[5] FIPPA does not expressly set out who has the burden of proving that settlement privilege applies; however, previous OIPC orders have consistently held that the party asserting the privilege bears the burden of proving it.<sup>2</sup>

## **DISCUSSION**

### **Background**

[6] I have set out the background in more detail in Order F22-52. Briefly, 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 embarked on a process of finding an alternative job for him. This process has often been contentious. The record BCEHS is withholding under settlement privilege relates to a labour grievance begun by the applicant's union in 2018 (the 2018 Grievance), which remains outstanding.<sup>3</sup>

### **Record at issue**

[7] The only record still at issue is a three-page email string consisting of emails among several BCEHS and PHSA employees from November 30 to December 6, 2018. The emails relate to an offer BCEHS was preparing to make to the applicant to settle the 2018 Grievance.

### ***Settlement privilege***

[8] Settlement privilege is a common law privilege that promotes settlement by protecting communications made for the purpose of settling a dispute. The privilege “wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these

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<sup>2</sup> See, e.g., Order F21-11, 2021 BCIPC 15 (CanLII) at para 5; F18-06, 2018 BCIPC 8 (CanLII) 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 at 2009 BCCA 452.

<sup>3</sup> Affidavit of PHSA Lawyer at paras 6-12.

negotiations are inadmissible”.<sup>4</sup> The privilege applies whether or not a settlement is actually reached.<sup>5</sup>

[9] Settlement privilege is not an exception to disclosure in Part 2 of FIPPA, but the BC Supreme Court has held in *Richmond (City) v. Campbell*, 2017 BCSC 331 [*Richmond*] that absent clear and explicit language, settlement privilege should not be taken to have been abrogated by statute.<sup>6</sup> FIPPA does not have such language. Public bodies may therefore rely on settlement privilege to withhold information.<sup>7</sup>

[10] In order to establish settlement privilege over a record, a public body must show three elements:

1. A litigious dispute must be in existence or within contemplation (although it is not necessary for proceedings to have actually been commenced);
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,
3. The purpose of the communication must be to attempt to [effect] a settlement of the dispute between the parties.<sup>8</sup>

[11] Settlement privilege has been held to protect not only communications passing between the parties, but also “undisclosed internal discussions undertaken by one party about the settlement negotiations they are engaged in”.<sup>9</sup>

### *Analysis*

[12] Neither party made a submission specifically about the application of settlement privilege to the disputed record. BCEHS made a brief submission on settlement privilege, relying on *Richmond*, but only in relation to a different

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<sup>4</sup> *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para 2 [*Sable*].

<sup>5</sup> *Ibid* at para 17.

<sup>6</sup> At paras 71-72.

<sup>7</sup> Nevertheless, the reasoning in *Richmond* has been criticized. In Order F22-39, 2022 BCIPC 44 (CanLII), the adjudicator opined that the conclusions reached in *Richmond* were incompatible with the principles of statutory interpretation because, in his view, Division 2 of Part 2 of FIPPA was intended by the Legislature to be a “complete code” of exceptions to disclosure, not permitting interpolations from the common law. Ultimately, however, the adjudicator considered himself bound to follow *Richmond* (at paras 24-64 and footnote 54). I agree with this criticism, but consider myself similarly bound.

<sup>8</sup> *Nguyen v. Dang*, 2017 BCSC 1409 at para 22.

<sup>9</sup> *Cowichan Tribes v. Canada (Attorney General)*, 2020 BCSC 1507 at para 78, citing *Thomas v. Rio Tinto Alcan Inc.*, 2019 BCSC 421 at para 80, and *Concord Pacific Acquisitions Inc. v. Oei*, 2016 BCSC 2028 at para 52.

document.<sup>10</sup> Nevertheless, I think I can decide the issue on the basis of the framework set out above and my examination of the record.

[13] In my view, the first branch of the test is easily met. The parties are (and were at the time of the emails) engaged in several litigious disputes, with one of them being the 2018 Grievance.

[14] It is also clear, on my examination of the emails, that there is an implied intention to keep the contents confidential. While there is no express statement of confidentiality, the “context and the substance of the communications, not a label that they are ‘without prejudice’, are the deciding factors”.<sup>11</sup> Here, the context of the emails was that the applicant’s union and BCEHS knew they would have to proceed to arbitration if negotiations failed. The substance of the emails – a discussion of BCEHS’s negotiating position – is, to my mind, precisely the kind of material that a party would seek to keep confidential.

[15] As for the third branch of the test, it is plain on the face of the emails that their purpose was to facilitate settlement. The emails deal solely with the details and timing of a proposed settlement offer.

[16] I therefore conclude that the evidence satisfies all three branches of the test for settlement privilege.

#### *Exceptions to settlement privilege*

[17] Courts have held that settlement privilege can be set aside where, on balance, “a competing public interest outweighs the public interest in encouraging settlement”. Circumstances where settlement privilege has been set aside include allegations of fraud, misrepresentation, or undue influence.<sup>12</sup> Here, no such circumstances have been alleged, and I cannot see a competing public interest that would outweigh the encouragement of settlement in this case.

#### *Conclusion on settlement privilege*

[18] In light of the above, I conclude that settlement privilege applies to the disputed emails.

## **CONCLUSION**

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<sup>10</sup> BCEHS’s initial submission at para 47.

<sup>11</sup> F20-21, 2020 BCIPC 25 (CanLII) at para 69, citing *Re: Bella Senior Care Residences*, 2019 ONSC 3259 at para 16.

<sup>12</sup> *Sable*, *supra* note 4 at para 19, citing *Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para 20.

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[19] For the reasons given above, pursuant to s. 58(2)(b) of FIPPA, I confirm BCEHS's decision to withhold pages 5757 to 5759 of the consolidated package of records under common law settlement privilege.

November 21, 2022

**ORIGINAL SIGNED BY**

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David S. Adams, Adjudicator

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