Order F20-21

CITY OF WHITE ROCK

Ian C. Davis
Adjudicator

May 25, 2020

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Summary: The applicant made a request to the City of White Rock for access to records relating to negotiations between the City and EPCOR Utilities Inc. The City withheld the disputed records and information under common law settlement privilege and s. 14 (solicitor-client privilege), s. 21 (harm to third-party business interests), and s. 22 (unreasonable invasion of third-party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that ss. 14 and 22 applied to some, but not all, of the information withheld under those sections. The adjudicator confirmed in part the City's decision regarding settlement privilege. Finally, the adjudicator determined that the City was not required to refuse to disclose the information withheld under s. 21.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 14, 21, 22(1), 22(4)(e), and 22(3)(d).

INTRODUCTION

[1] The applicant made a request to the City of White Rock (City) for access to records relating to negotiations between the City and EPCOR Utilities Inc. (EPCOR). Initially, the City withheld all of the records responsive to the applicant's request under s. 17 (harm to the financial or economic interests of a public body) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review the City's decision. During mediation, the City advised that it was also withholding records pursuant to common law settlement privilege and s. 14 (solicitor-client privilege), s. 21 (harm to third-party business interests), and s. 22 (unreasonable invasion of third-party personal privacy) of

FIPPA.[1] Mediation failed to resolve the matter and the applicant requested an inquiry.

PRELIMINARY MATTERS

[3] Several preliminary matters arise in this inquiry. First, the applicant says that the City failed to identify all of the records responsive to his request, contrary to s. 6 (duty to assist applicants) of FIPPA. I acknowledge the applicant devoted a significant part of his submissions to this. However, the OIPC has already denied the applicant's request to reopen this inquiry to add the s. 6 complaint issue.[2] Accordingly, I decline to address that issue here.

[4] Second, the City says it was reasonable for it to have initially withheld the responsive records under s. 17. However, the City acknowledges that s. 17 may no longer serve as a basis to withhold the records. The City says it does not intend to make further argument regarding s. 17. The City's table of records shows that no information is being withheld under s. 17.[3] Given the City's submissions, I am satisfied that s. 17 is no longer an issue in this inquiry.

[5] Third, the City and EPCOR argue that s. 22 is no longer in issue because the applicant stated in his submissions that he accepts EPCOR's right to protect third-party personal privacy.[4] However, the applicant subsequently advised the OIPC that he still disputes the application of s. 22. Given that clarification, I confirm that s. 22 is still in issue.

[6] Finally, the City submits that three records responsive to the applicant's request are publicly available on the City's website.[5] Since the applicant does not dispute this, I am satisfied these three records are no longer in dispute.

ISSUES

[7] The issues to be decided in this inquiry are:

1. Is the City authorized to refuse to disclose the information in dispute under s. 14 or common law settlement privilege?

2. Is the City required to refuse to disclose the information in dispute under ss. 21 and 22?

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[1] Investigator's Fact Report at para. 4.
[2] Email from the OIPC to the parties dated June 13, 2019.
[3] Affidavit #1 of KO, Exhibit "A"; updated table of records attached to email from the City to the OIPC and parties dated June 12, 2019 [Updated Table].
[4] City's reply submissions dated January 10, 2019 at para. 15; EPCOR's reply submissions dated January 10, 2019 at para. 1.
[5] Records 120-122; Updated Table, *supra* note 3.

[8] According to s. 57(1) of FIPPA, the City has the burden of proof under ss. 14 and 21. The City also has the burden to establish settlement privilege.[6] However, based on s. 57(2) of FIPPA, the burden of proof under s. 22 is on the applicant to show that disclosure of any personal information would not be an unreasonable invasion of a third party's personal privacy.

BACKGROUND FACTS

[9] The following facts are not in dispute. For some time prior to late 2015, EPCOR owned and operated the local White Rock water utility. In 2013, the City and EPCOR began negotiations with a view to the City acquiring the water utility from EPCOR.[7] The City retained a law firm (Firm A) to act on its behalf throughout its dealings with EPCOR.[8]

[10] In late 2013, the City and EPCOR entered into a "Two-Way Confidentiality Agreement" (Confidentiality Agreement).[9] In that agreement, the City and EPCOR mutually agreed to keep "in strictest confidence" information shared between them as part of their negotiations.[10]

[11] On October 30, 2015, the City purchased the water utility from EPCOR pursuant to an asset purchase agreement dated August 28, 2015 (Purchase Agreement).[11] The Purchase Agreement provided, in part, that:

- the purchase price was the "fair market value" of the water utility as at the closing date of October 30, 2015 (Closing Date);
- if the parties did not agree on the fair market value of the water utility by the Closing Date, the City would pay EPCOR $14,000,000, and the parties would continue to negotiate in good faith;
- failing agreement on the fair market value following good faith negotiations after the Closing Date (i.e., "post-closing"), the parties would proceed to arbitration; and

[6] Order F18-06, 2018 BCIPC 08 (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: 2009 BCCA 452.
[7] Affidavit #1 of KO at para. 3.
[8] Affidavit #1 of KO at para. 4.
[9] Affidavit #1 of KO at para. 3.
[10] Confidentiality Agreement at paras. 1 and 3, provided by email from the City to the OIPC dated April 28, 2020; Appendix F to applicant's submissions dated December 13, 2018.
[11] Affidavit #1 of KO at para. 5.

- the parties would abide by the terms of the Confidentiality Agreement until October 30, 2018.[12]

[12] The City and EPCOR did not agree on the fair market value of the water utility by the Closing Date, so the City paid EPCOR $14,000,000.[13] After further negotiations, the parties still had not agreed on the fair market value, so they started preparing for arbitration.[14] They agreed on an arbitrator and discussed dates for arbitration.[15]

[13] The applicant made his access request on February 2, 2017, while negotiations between the City and EPCOR were ongoing.[16] Specifically, the applicant requested:

> Copies of all records of the Mayor, Council, City Staff and Agents and/or Service Providers to the City of White Rock related to the City's water utility purchase negotiations with EPCOR and/or EPCOR's Agents and Service Providers, and/or other third parties, subsequent to the Asset Purchase Agreement dated August 28, 2015.[17]

[14] On September 29, 2017, the City and EPCOR entered into a "settlement agreement and mutual release" that resolved the issue of the fair market value of the water utility (Settlement Agreement).[18] The Settlement Agreement included a confidentiality clause, which stated that, except for the final purchase price, the parties would "hold the facts and terms to" the Settlement Agreement and "the settlement underlying in confidence".[19]

RECORDS AND INFORMATION IN DISPUTE

[15] Nearly all of the records in dispute are emails or email chains and various documents attached to those emails.[20]

[16] The City provided a table of records. The table provides brief descriptions of the records and the City's basis for withholding each record.[21] During the

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[12] Purchase Agreement at Article 2, s. 5.09(a) and s. 8.01, provided by the City to the OIPC by email dated April 28, 2020 [Purchase Agreement]; Affidavit #1 of KO at paras. 5-6; Applicant's submissions dated December 13, 2018 at para. 221.
[13] Affidavit #1 of KO at para. 7.
[14] Affidavit #1 of KO at para. 8.
[15] Affidavit #1 of KO at para. 8.
[16] Affidavit #1 of KO at para. 9.
[17] Email from the applicant to the City dated February 2, 2017. In the email, the applicant also details the types of records sought and possible locations of responsive records.
[18] Affidavit #1 of KO at para. 13; email from the City to the OIPC dated April 28, 2020 [Settlement Agreement].
[19] Settlement Agreement, *ibid* at para. 1.
[20] Record 53 is a memo from Firm A to the City.
[21] Affidavit #1 of KO, Exhibit "A".

inquiry, the City provided an updated table of records, in the same form as the initial one, to reflect further disclosures made to the applicant after the City's initial submissions.[22]

SECTION 14 – SOLICITOR-CLIENT PRIVILEGE

[17] Section 14 of FIPPA provides that the head of a public body "may refuse to disclose to an applicant information that is subject to solicitor client privilege." This section encompasses both legal advice privilege and litigation privilege.[23] The City submits that legal advice privilege applies to the records it is refusing to disclose under s. 14.

[18] The test for solicitor-client privilege has been expressed in various ways, but the essential elements are that there must be:

1. a communication between solicitor and client (or their agent[24]);

2. that entails the seeking or giving of legal advice; and

3. that is intended by the solicitor and client to be confidential.[25]

[19] A communication does not satisfy this test merely because it was sent to or from a lawyer; the lawyer must be acting in a legal capacity.[26] That said, solicitor-client privilege is so important to the legal system that it should apply broadly and be as close to absolute as possible.[27] The confidentiality ensured by solicitor-client privilege allows clients to speak to their lawyers openly and honestly, which in turn allows lawyers to better assist their clients.[28]

Positions of the Parties

[20] The City submits that solicitor-client privilege applies to the information in dispute under s. 14.[29] For many of the records, the City simply relies on the

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[22] Updated Table, *supra* note 3.
[23] *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 26.
[24] *Descoteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at pp. 872-873 and 878-879.
[25] *Solosky v. The Queen*, [1980] 1 S.C.R. 821 at p. 837; *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 15; *Festing v. Canada (Attorney General)*, 2001 BCCA 612 at para. 92; and *R. v. B.*, 1995 CanLII 2007 (BC SC).
[26] *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2006 BCSC 1180 at paras. 61 and 81 [*Keefer Laundry*]; *R. v. McClure*, 2001 SCC 14 at para. 36; *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 10.
[27] *McClure*, *ibid* at para. 35; *Camp Development Corporation v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88 at paras. 10 and 13 [*Camp*].
[28] *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 34.
[29] City's initial submissions dated October 19, 2018 at paras. 22-38.

contents of the records to establish privilege. With respect to email attachments, the City submits that these would reveal privileged communications. The City also submits that the common-interest exception to waiver applies to communications between the City and EPCOR or KPMG LLP, a firm retained by the City to valuate the water utility.

[21] The applicant submits that the City has applied solicitor-client privilege too broadly.[30] He notes that not everything lawyers do is privileged. The applicant also submits that, if solicitor-client privilege does apply, the City has waived privilege through public statements that it would disclose all records related to the negotiations between the City and EPCOR.[31]

Analysis

[22] Based on my review, I find the records in dispute under s. 14 are emails and email chains, including attachments, between:

- the City and Firm A (City/Firm A Emails);[32]
- lawyers at Firm A (Firm A Emails);[33]
- the City and EPCOR (EPCOR Emails);[34] and
- the City and KPMG LLP (KPMG Emails).[35]

[23] There is also one memorandum that says it is from Firm A to the City (Memo).[36]

[24] The City provided affidavit evidence from KO, its manager of Property, Risk Management, and Freedom of Information. KO deposes that the City retained Firm A "to carry out negotiations with EPCOR regarding the acquisition of the water utility and to complete the purchase transaction, including the negotiation of the final purchase price with EPCOR's legal counsel and external counsel."[37] Based on this evidence and the records themselves, I find the City and Firm A were in a solicitor-client relationship when all of the records in dispute under s. 14 were made.

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[30] Applicant's submissions dated December 13, 2018 at para. 359.
[31] Applicant's submissions, *ibid* at paras. 350-357.
[32] Records 17, 20-31, 33-52, 54-57, 87-98, 102-105, and 115-116.
[33] Records 18-19, 75-86, and 100-101.
[34] Records 15, 107-108, 112-114, 117, and 125-126.
[35] Record 99.
[36] Record 53.
[37] Affidavit #1 of KO at para. 4.

City/Firm A Emails

[25] The City/Firm A Emails are written communications between the City and its lawyers at Firm A. Therefore, the first part of the test for privilege is met.

[26] I also find the City/Firm A Emails were intended to be confidential. I accept KO's evidence that, to his knowledge, the disputed communications "have at all times been treated confidentially by the City."[38] Further, almost all of the email chains are exclusively between the City and Firm A. This satisfies me that the City and Firm A intended these communications to be confidential.[39] Some of the email chains involve third parties, but the chains end with emails between the City and Firm A. The earlier emails would allow accurate inferences as to the nature of the legal advice sought and provided, so it would not be appropriate to sever these emails.[40] Finally, there is one email between the City and Firm A, copied to City staff and the City's expert at KPMG. I am satisfied that the City intended the email to be confidential and that KPMG was included on the understanding that the email was confidential.[41]

[27] The final question is whether the City/Firm A Emails entail the seeking or giving of legal advice. I agree with the applicant that not everything lawyers do is privileged. That said, much of what lawyers do for their clients is privileged, particularly in the context of a complex and prolonged transaction. In *Balabel v. Air India*, Taylor L.J. stated:

> Once solicitors are embarked on a conveyancing transaction they are employed to ensure that the client steers clear of legal difficulties, and communications passing in the handling of that transaction are privileged (if their aim is the obtaining of appropriate legal advice) since the whole handling is experience and legal skill in action and a document uttered during the transaction does not have to incorporate a specific piece of legal advice to obtain that privilege.[42]

[28] Based on my review of the records, I am satisfied that the City/Firm A Emails fall within this scope of protection. I find the email communications were all sent with the ultimate aim of Firm A providing legal advice to the City on, for example, how to comply with agreements and municipal law, how contracts and other legally-related documents should be drafted, and how to negotiate with EPCOR. These were all clearly legal matters, given the contracts and municipal law involved. Accordingly, I accept KO's evidence that the City/Firm A Emails

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[38] Affidavit #1 of KO at para. 21.
[39] See Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 4th ed. (Markham: LexisNexis, 2014) at para. 14.49.
[40] *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 40.
[41] See e.g. R.D. Manes & M.P. Silver, *Solicitor-Client Privilege in Canadian Law* (Toronto: Butterworths, 1993) at pp. 61-62.
[42] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 (Eng. C.A.) at p. 1048 *per* Taylor L.J.

were either "created for the purpose of seeking and providing legal advice in relation to the asset purchase transaction", or "would reveal privileged communications".[43] I conclude the City/Firm A Emails are privileged.

[29] The City/Firm A Emails also include attachments to emails that I found above are privileged. However, if a document is attached to a privileged communication, the attachment is not necessarily privileged. The attachment will only be privileged if it satisfies the test for privilege. For instance, an attachment may be privileged on its own, independent of being attached to another privileged record. Alternatively, an attachment may be privileged if it is an integral part of the privileged communication to which it is attached and it would reveal that communication either directly or by inference.[44]

[30] I am satisfied that the attachments are privileged. Most of them are various documents that the lawyers at Firm A either drafted for the City or were asked by the City to provide advice on. These documents were exchanged in the process of working through the various legal issues that arose during the asset purchase transaction. I find these attachments are strongly connected to the emails in terms of subject matter and would reveal, directly or through inference, the legal advice sought or given in the accompanying email. The other attachments are drafts of a valuation report prepared by KPMG and sent to the City by Firm A. I am satisfied that the emails and attached reports are privileged because they were sent to the City with the aim of keeping both the City and its lawyers informed so that advice on the City's negotiating position could be sought and given as required.[45]

Memo

[31] The Memo is addressed to the City from a lawyer at Firm A. I am satisfied it was intended to be confidential. The Memo shows it was destined for only one person at the City, and there is nothing to suggest it was shared with anyone other than Firm A lawyers and City employees. Further, the Memo clearly contains legal advice because it is generally about drafting a legal instrument. To disclose the Memo would reveal the legal advice sought by the City and Firm A's formulation of legal advice in response. I conclude the Memo is privileged.

Firm A Emails

[32] The Firm A Emails are between lawyers at Firm A. I am satisfied they are privileged. First, I find they were all intended to be confidential. No outsiders to the solicitor-client relationship were included in the emails. Further, the emails involve lawyers at Firm A working together to formulate legal advice for the City.

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[43] Affidavit #1 of KO at para. 20(b), (c), (h), (i), (k), (m), (n), and (r).
[44] Order F18-19, 2018 BCIPC 22 (CanLII) at paras. 36-40 (and the cases cited therein).
[45] *Balabel*, *supra* note 42 at p. 1046.

Privilege applies because the emails would reveal the legal advice sought by the City and formulated by Firm A.[46]

[33] I also find the attachments to the Firm A Emails privileged for the same reasoning as set out above in relation to the attachments to the City/Firm A Emails. The attachments are connected to the emails in terms of subject matter and either constitute the legal advice sought or would reveal that advice through inference.

EPCOR Emails

[34] Most of the EPCOR Emails are between Firm A and EPCOR and involve their lawyers working to complete the asset purchase transaction. Some of the EPCOR Emails involve Firm A, EPCOR's lawyers and City and EPCOR staff. I address those records separately below.

[35] The City submits that the EPCOR Emails "would reveal" privileged legal advice that Firm A provided to the City.[47] The City argues "privilege has not been waived by virtue of common-interest privilege since the parties had a common interest in completing the asset purchase transaction."[48] The City relies on *Maximum Ventures Inc. v. De Graaf* [*Maximum Ventures*], a 2007 decision of the BC Court of Appeal, and Order F15-61.[49]

[36] *Maximum Ventures* follows a line of cases in which courts have consistently applied common-interest privilege to situations in which one party to a commercial transaction obtains a legal opinion about a transaction (e.g. about how best to structure it in relation to tax), and then shares that opinion with another party to the transaction.[50] The rationale for extending the privilege is so that "each party has an appreciation of the legal position of the others and negotiations can proceed in an informed and open way."[51] The legal opinion is said to be "in aid of the completion of the transaction and, in that sense, [is] for the benefit of all parties to it."[52]

[37] In Order F15-61, also cited by the City, common-interest privilege was applied to legal advice provided to the RCMP. The advice was shared at a meeting of police agencies, and recorded in the minutes of that meeting. The

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[46] For a similar finding, see Order F16-09, 2016 BCIPC 11 (CanLII) at paras. 18-19.
[47] City's initial submissions dated October 19, 2018 at para. 37.
[48] City's initial submissions, *ibid* at para. 37; Affidavit #1 of KO at para. 20(k), (m)-(n).
[49] *Maximum Ventures Inc. v. De Graaf*, 2007 BCCA 510 [*Maximum Ventures*]; Order F15-61, 2015 BCIPC 67 (CanLII).
[50] See e.g. *Pitney Bowes of Canada Ltd. v. Canada*, 2003 FC 214 [*Pitney Bowes*]; *Fraser Milner Casgrain LLP v. Canada (Minister of National Revenue)*, 2002 BCSC 1344; *Archean Energy Ltd. v. Canada (Minister of National Revenue)*, 1997 CanLII 14953 (AB QB).
[51] *Pitney Bowes*, *ibid* at para. 20.
[52] *Pitney Bowes*, *ibid*.

advice related to the incorporation of the BC Association of Chiefs of Police under the BC *Societies Act*. The adjudicator found that the RCMP and the police agencies at the meeting had a common interest in incorporation of the Association under the *Act*, and that there were "parallels to the cases where the successful completion of a commercial transaction was the common interest."[53]

[38] These authorities make clear that common-interest privilege is not a standalone privilege, like solicitor-client privilege or settlement privilege.[54] Rather, it is an exception to the general rule that disclosure to outsiders of privileged information constitutes waiver of privilege.[55] It applies where disclosure of privileged information to a third party is intended by the privilege-holder to be confidential and the third party has a common interest with the privilege-holder sufficient to support extending the privilege to the third party.[56] Therefore, the first question here is whether the EPCOR Emails are protected by solicitor-client privilege. If they are not, then there is no need to consider waiver or the common-interest exception to waiver.

[39] The City argues that the emails and attachments between EPCOR and the City "would reveal" privileged information. I disagree with respect to Records 107-108, 112-114, and 117. These records are draft closing agendas and draft contracts, with edits tracked in the documents, and emails between the City and EPCOR discussing the details of closing the asset purchase transaction. In my view, these communications were made when the City, EPCOR, and their lawyers had moved past the stage of seeking and providing advice on whether to complete the asset purchase transaction, and how to do so.[57] There is no indication that the drafts were sent to the clients. I find the records reflect the lawyers executing their client's instructions. Having reviewed the records, I am not satisfied that they would reveal privileged information between the lawyers and their clients.

[40] Records 125-126 are slightly different. They are an email chain and attachments that a City employee sent to the City's lawyer at Firm A before the purchase transaction closed. The City's lawyer then forwarded the email and attached documents to EPCOR's lawyer and advised EPCOR of the City's position on a related issue.

[41] In my view, the first email is privileged but the second email, including the attachments, is not. The first email is privileged because it is information passed between solicitor and client "aimed at keeping both informed so that advice may

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[53] Order F15-61, *supra* note 49 at para. 66.
[54] *Maximum Ventures*, *supra* note 49 at para. 14; see also *Ross v. Bragg*, 2020 BCSC 337 at para. 22; *Barclays Bank PLC v. Metcalfe and Mansfield*, 2010 ONSC 5519 at para. 11.
[55] *Maximum Ventures*, *supra* note 49 at para. 14; *Malimon v. Kwok*, 2019 BCSC 1972 at para. 20.
[56] *Maximum Ventures*, *supra* note 49 at para. 14.
[57] See e.g. *Canada (Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104 at para. 33.

be sought and given as required".[58] However, I find the second email does not reveal legal advice provided by Firm A to the City. The City clearly instructed Firm A to communicate its position to EPCOR, so there was no expectation of solicitor-client confidentiality in that information.[59] Similarly, I find the City sent the attachments to Firm A with the expectation that they would be sent to EPCOR. Therefore, the attachments were not intended to be kept confidential between solicitor and client and are not privileged.

[42] Finally, the City claims solicitor-client privilege (and settlement privilege) over information in Record 15.[60] Record 15 is a final statement of adjustments, signed by the City and EPCOR, and sent by the City to EPCOR as an email attachment. The City does not explain what information in Record 15 is protected by solicitor-client privilege and why. Generally, statements of adjustments are not privileged because they are evidence of a transaction, not a solicitor-client communication.[61] I am not satisfied that solicitor-client privilege applies.[62]

[43] In the result, I conclude that, except for the first email in Record 125, solicitor-client privilege does not apply to the EPCOR Emails. Therefore, there is no need to consider waiver and common-interest privilege. As for the first email in Record 125, there is no evidence that it was disclosed to a third party, so waiver does not apply.

KPMG Emails

[44] The City had Firm A retain KPMG to provide a report valuating the water utility, and EPCOR had its own valuation report prepared. The City and EPCOR then shared their reports during their negotiations after the Closing Date. I found above that draft versions of the KPMG valuation report sent from Firm A to the City are privileged because they kept the City and its lawyers informed so that advice on the City's negotiating position could be sought and given as required.

[45] However, there is one email chain where KPMG raised an issue about the content of the KPMG report with a Firm A lawyer.[63] I find this is not a solicitor-client communication and it would not reveal privileged legal advice. Therefore, I conclude solicitor-client privilege does not apply. Since this email chain is not

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[58] *Balabel*, *supra* note 42 at p. 1046.
[59] See e.g. *Conlon v. Conlons*, [1952] 2 All ER 462 (C.A.) at p. 465.
[60] City's initial submissions dated October 19, 2018 at para. 21(b).
[61] See e.g. *Canada (National Revenue) v. Clark*, 2012 FC 950 at para. 16.
[62] I would, however, have found an earlier version of the statement of adjustments attached to the last email in the chain in Record 17 sent from Firm A to the City privileged as part of the continuum of communications between solicitor and client. However, the City did not include that document in the records, apparently being of the view that it was the same document as Record 15. However, the documents appear to me to be different. They are named differently and sent at different times, and therefore raise different considerations regarding solicitor-client privilege.
[63] Record 99.

privileged, waiver of privilege and the common-interest exception to waiver do not apply.[64] The City also claims settlement privilege over this record (and the others relating to the KPMG report),[65] so I will consider it again below.

Waiver of Solicitor-Client Privilege

[46] I found above that solicitor-client privilege applies to most of the information being withheld under s. 14. The applicant argues that the City waived privilege. Solicitor-client privilege belongs to, and can only be waived by, the client.[66] To establish waiver, the party asserting it must show:

a) the privilege-holder knew of the existence of the privilege and voluntarily evinced an intention to waive it; or

b) in the absence of an intention to waive, fairness and consistency require disclosure.[67]

[47] The applicant argues that the City waived privilege over the information in dispute under s. 14 through public statements it made committing to disclose all City records related to the asset purchase transaction once the final purchase price had been determined.[68] For example, the applicant notes that in a revised response to the applicant's access request KO stated "that the City has committed to releasing all relevant information once negotiations have concluded."[69]

[48] In response, the City submits:

> … the statements relied upon by the Applicant are not sufficient to constitute waiver of privilege. None of the statements made by any City representatives specifically refer to privileged records or to waiving solicitor-client privilege over those records. Further, solicitor-client privilege may only be properly waived by a resolution or bylaw passed by a majority of Council for the City: *Guelph (City) v. Super Blue Box Recycling Corp.*, 2004 CanLII 34954 (Ont S.C.) at para. 84; Order F13-10, *District of North Saanich*, 2013 BCIPC No. 11.[70]

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[64] I note that the City did not rely on the principles set out in *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA) to establish privilege over the EPCOR Emails or the KPMG Emails. See also *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 532 at para. 27. However, I have considered those principles and find that they do not apply in the circumstances of this case.
[65] City's initial submissions dated October 19, 2018 at para. 21(b); Updated Table, *supra* note 3.
[66] *Canada (National Revenue) v. Thompson*, 2016 SCC 21 at para. 39.
[67] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218 (S.C.) at para. 6.
[68] Applicant's submissions dated December 13, 2018 at paras. 49-93, 350-357.
[69] Letter from the City to the applicant dated August 17, 2017.
[70] City's reply submissions dated January 10, 2019 at para. 3.

[49] KO deposes that, to the best of his knowledge, the City's Council has not passed a resolution to waive solicitor-client privilege.[71]

[50] In my view, the evidence does not establish waiver of solicitor-client privilege. First, I agree with the City that the statements referred to by the applicant are too vague. The City made a general commitment to disclosure. Given the significance of solicitor-client privilege, I find more specificity is required to establish express waiver or that fairness and consistency require disclosure. Second, I find the authorities cited above by the City establish that a resolution from Council was required to waive privilege in the circumstances. There is no evidence that Council passed a resolution to waive solicitor-client privilege. Accordingly, I conclude the City did not waive solicitor-client privilege.

Discretion to Waive Solicitor-Client Privilege

[51] Finally, the applicant argues that if solicitor-client privilege applies the City should have exercised its discretion to waive it. The applicant suggests public bodies must exercise their discretion to waive solicitor-client privilege unless they can show that harm would result.[72] However, that is not the law. What is required of public bodies is that they exercise their discretion, and do so lawfully, which means not in bad faith, for no improper purpose, and by considering all relevant factors and only those factors.[73]

[52] The applicant submits that the City has exercised its discretion in bad faith. As I understand the applicant, he argues that it amounts to bad faith for the City to withhold responsive records under s. 14 after having committed, publicly and repeatedly, to disclose them.[74] The applicant also alleges that the City has been "manipulating and doctoring" public records.[75]

[53] In response, the City submits it cannot have acted in bad faith by refusing to waive solicitor-client privilege.[76] The City notes that, generally, the OIPC has ordered public bodies to reconsider their exercise of discretion under s. 13 of FIPPA, but not under s. 14.

[54] I am satisfied the City exercised its discretion under s. 14 and did so lawfully. The City had counsel, so I find it was well aware of its right to waive solicitor-client privilege and considered whether to do so. As to whether the City properly exercised its discretion, I understand the applicant to be arguing that the City demonstrated a general bad faith approach that influenced the City's

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[71] Affidavit #2 of KO at para. 8.
[72] Applicant's submissions dated December 13, 2018 at paras. 212, 237 and 243.
[73] Order F17-35, 2017 BCIPC 37 (CanLII) at paras. 86-91; *John Doe v. Ontario (Finance)*, 2014 SCC 36 at para. 52.
[74] Applicant's submissions dated December 13, 2018 at para. 161.
[75] Applicant's submissions, *ibid* at para. 162.
[76] City's reply submissions dated January 10, 2019 at paras. 5-7.

decision not to waive solicitor-client privilege. In my view, the evidence is too speculative to establish bad faith. At any rate, the applicant seems to concede that the basis for the City's decision not to waive solicitor-client privilege was "just a lawyer's cautious, general and speculative apprehensions."[77] Given the importance of solicitor-client privilege, I do not consider it to be an improper exercise of discretion to err on the side of caution in deciding whether to disclose privileged information.

SETTLEMENT PRIVILEGE

[55] The City and EPCOR submit that common law settlement privilege applies to many of the records in dispute.[78] The applicant says that settlement privilege does not apply to any of the records.[79]

[56] Settlement privilege is not an exception to an applicant's right of access under Part 2 of FIPPA. However, the BC Supreme Court has said that since FIPPA does not contain express language abrogating it, public bodies may rely on settlement privilege to refuse to disclose information.[80]

[57] The purpose of settlement privilege is to promote settlement by allowing parties to negotiate without fear that the concessions they offer, and the information they provide, will be used against them in subsequent proceedings.[81] The rule is that communications and documents[82] "exchanged by parties as they try to settle a dispute" cannot be used in subsequent proceedings, whether or not a settlement is reached.[83] The privilege applies "not only to communications involving offers of settlement but also to communications that are reasonably connected to the parties' negotiations".[84]

[58] The test for settlement privilege has the following three parts:

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

b) 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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[77] Applicant's submissions dated December 13, 2018 at para. 233.
[78] City's initial submissions dated October 19, 2018 at paras. 52-58; EPCOR's initial submissions dated October 19, 2018 at paras. 15-21.
[79] Applicant's submissions dated December 13, 2018 at paras. 323-339.
[80] *Richmond (City) v. Campbell,* 2017 BCSC 331 at paras. 71-73.
[81] *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at paras. 3 and 31 [*Union Carbide*]; *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 12 [*Sable*].
[82] *Middelkamp v. Fraser Valley Real Estate Board*, 1992 CanLII 4039 (BC CA) at para. 20.
[83] *Union Carbide*, *supra* note 81 at para. 31; *Sable*, *supra* note 81 at paras. 2 and 17.
[84] *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 at para. 26 [*Bellatrix*].

c) The purpose of the communication must be to attempt to effect a settlement.[85]

[59] If settlement privilege is established, it "belongs to both parties and cannot be unilaterally waived".[86] There are exceptions to settlement privilege,[87] but none were argued here.

Analysis

[60] Based on my review of the evidence and submissions, I find the records and information in dispute under settlement privilege fall into the following categories:

- emails and attachments sent after the Closing Date. They are between the City and EPCOR, and between the City and KPMG, and include various financial documents sent by EPCOR to the City about the valuation of the water utility (Valuation Records);[88]

- an email chain with one attachment between the City and EPCOR sent in 2017 (Records 133-134);[89] and

- parts of three email chains between the City and EPCOR sent the day before the Closing Date and on the Closing Date (Closing Emails).[90]

[61] Before turning to an analysis of the records, I note that the OIPC registrar of inquiries invited EPCOR to make written submissions only on ss. 21 and 22 of FIPPA. Although EPCOR was not invited to make submissions on settlement privilege, it did so, and I have considered them. Settlement privilege is jointly held between parties to settlement negotiations. Therefore, if settlement privilege applies at all in this case, it belongs to the City and EPCOR jointly. The issue of settlement privilege directly affects EPCOR's legal rights. For this reason, I conclude procedural fairness requires that I consider EPCOR's submissions on settlement privilege, and I have.

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[85] *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2008 BCSC 442 at para. 70 citing J. Sopinka, S.N. Lederman & A.W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), at para. 14.207. See also Order F19-20, 2019 BCIPC 22 (CanLII) at para. 9.
[86] *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022 at para. 56 [*Reum*], citing *Sinclair v. Roy*, 1985 CanLII 559 (BC SC) at 222.
[87] *Dos Santos Estate v. Sun Life Assurance Co. of Canada,* 2005 BCCA 4 at para. 20; *Sable*, *supra* note 81 at para. 19.
[88] Records 1, 3, 5, 9, 11-13, 16, 32, 39, 97-105, 127-132, and 135-141.
[89] Records 133-134.
[90] Records 14-15 and 73-74 (Affidavit #2 of KO, Exhibit "A").

Valuation Records

[62] The City and EPCOR submit that they were in a "litigious dispute" when the Valuation Records were created. In support, the City and EPCOR note that they had failed to agree on the purchase price for the water utility, entered into negotiations and commenced arbitration proceedings.

[63] In response, the applicant argues that the "water utility purchase price negotiations were always just that – a negotiation, not a litigious dispute".[91] The applicant says that the City and EPCOR were not in a "litigious" dispute because they "agreed to an alternative dispute resolution process rather than relying on the courts".[92]

[64] I disagree with the applicant that the "litigious dispute" requirement for settlement privilege is limited to disputes to be litigated in court. The rationale for settlement privilege applies equally to matters to be resolved by arbitration. Parties to a dispute are not likely to make the compromises required to reach settlement if they know that those compromises may later be used against them in arbitration. For this reason, courts have recognized that settlement privilege applies to matters to be resolved before "any adjudicative body or third-party decision maker."[93]

[65] In *Langley (Township) v. Witschel*, the Court held that the "litigious dispute" requirement for settlement privilege is satisfied where parties are in a "dispute or negotiation", even if they have not commenced legal proceedings.[94] However, the law is clear that settlement privilege does not apply where parties are simply negotiating the terms of a commercial contract.[95] This is because, without having entered into a contract, there are no legal obligations between the parties that could form the basis for a litigious dispute.

[66] To be clear, the Valuation Records were not created in the course of ordinary commercial negotiations about what the terms of a contract should be. Rather, they were created after the City and EPCOR had entered into the Purchase Agreement and closed the asset purchase transaction. The Purchase Agreement imposed legal obligations on the City and EPCOR that do not exist when parties are simply negotiating the terms of a commercial contract.

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[91] Applicant's submissions dated December 13, 2018 at para. 334.
[92] Applicant's submissions, *ibid* at para. 328.
[93] *Nova Scotia Teachers Union v. Nova Scotia (Attorney General)*, 2019 NSSC 175 at paras. 40 and 46 [*NSTU*], aff'd 2020 NSCA 17.
[94] *Langley (Township) v. Witschel*, 2015 BCSC 123 at paras. 34-40 [*Witschel*], applying *Belanger v. Gilbert*, 1984 CanLII 355 (BC CA).
[95] *Maillet v. Thomas Corner Mini Mart & Deli Inc.*, 2017 BCSC 214 at paras. 1-17; *Jeffrie v. Hendriksen*, 2012 NSSC 335 at paras. 25-40.

[67] The question is whether, on the very specific facts of this case, the City and EPCOR were in a litigious dispute after the Closing Date and in a negotiation aimed at resolving that dispute. I am satisfied that they were. The Purchase Agreement required EPCOR to sell, and the City to buy, the water utility for fair market value. This was an enforceable contractual obligation.[96] Since the parties did not agree on fair market value prior to closing, the City was required to and did pay EPCOR $14,000,000. The parties then disagreed about whether $14,000,000 was fair market value. I find this disagreement amounted to the City alleging that EPCOR had breached its contractual obligation to sell the water utility for fair market value and EPCOR alleging that the City had breached its contractual obligation to pay fair market value. In my view, that is a dispute about contractual performance, not a mere commercial negotiation aimed at establishing a contract.

[68] Turning to the second part of the test for settlement privilege, the City and EPCOR submit that they intended that their communications would not be disclosed to the arbitrator in the event negotiations failed. The City and EPCOR point to the Confidentiality Agreement and the "without prejudice"[97] language in the disputed communications as evidence of their intention that the communications would not be disclosed. In response, the applicant submits that all of the disputed communications "would have been disclosed in court – or before the arbitrator as the case might be".[98]

[69] I accept that the disputed communications were made with the intention that they would not be disclosed to the arbitrator. The context and the substance of the communications, not a label that they are "without prejudice", are the deciding factors.[99] The context was that the City and EPCOR knew they would be required to go to arbitration if their negotiations failed. I am satisfied by this context and the content of the records themselves that the City and EPCOR intended their post-closing communications and information-sharing to be without prejudice. In particular, I am satisfied by the substance of the records[100] that the parties intended, at least for the purposes of post-closing negotiations, that their expert valuation reports were to be shared on a without prejudice basis.

[70] The final issue is whether the purpose of the Valuation Records was to settle the dispute over the fair market value of the water utility. The City submits it was. The applicant argues it was not because the Settlement Agreement deals

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[96] *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995] 2 S.C.R. 187 at para. 31.
[97] "The use of this expression is commonly understood to mean that if there is no settlement, the party making the offer is free to assert all its rights, unaffected by anything stated or done in the negotiations": *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 17.
[98] Applicant's submissions dated December 13, 2018 at para. 332.
[99] See e.g. *Re: Bella Senior Care Residences*, 2019 ONSC 3259 at para. 16.
[100] Records 32 and 131.

only with liability, not "valuation", and therefore the "true dispute" between the parties was liability.[101]

[71] I disagree with the applicant's interpretation of the Settlement Agreement. The main effect of the Settlement Agreement was that the City and EPCOR would release each other of any claims related to the arbitration, the purchase price, or the Purchase Agreement in consideration for EPCOR paying the City the difference between $14,000,000 and the fair market value of the water utility. EPCOR's obligation to pay that amount reflects the parties' settlement with respect to valuation. The fact that the Settlement Agreement also addresses liability by providing for a mutual release of claims does not negate the fact that the Settlement Agreement resolved a dispute about valuation.

[72] Having reviewed the Valuation Records, I am satisfied their purpose was to settle the dispute over the fair market value for the water utility. The major post-closing issue between the City and EPCOR was the fair market value price. I find the disputed communications reflect the course of the parties' post-closing efforts to resolve that issue. I find the financial documents, the KPMG report and the communications about that report were all reasonably connected to the parties' negotiations. The financial documents and valuation reports were clearly crucial in assisting the parties to reach a settlement. They assisted the parties in forming their respective positions in settlement negotiations and in identifying the source of their disagreement. Courts have found that such reports are protected by settlement privilege,[102] and I make a similar finding here.

Records 133-134

[73] The City is also withholding an email chain and attachment between the City and EPCOR sent while the negotiations were ongoing. I find these records are tangential to the dispute over the valuation of the water utility, and not part of it. I am not satisfied that there was a litigious dispute about the subject matter of these two records. The records do not show any disagreement or negotiation between the City and EPCOR. Further, there is no indication that the communications were intended to be without prejudice or that their purpose was to resolve a dispute. In my view, settlement privilege does not apply.

Closing Emails

[74] The Closing Emails are Records 14-15 and 73-74. Record 15, discussed above, is a statement of adjustments attached to an email in Record 14. The emails in the other records are between the City and EPCOR. They were sent

[101] Applicant's submissions dated December 13, 2018 at para. 338.
[102] See e.g. *D. Crupi & Sons Limited v. Travelers Guarantee Company of Canada et. al.*, 2011 ONSC 5874; *City of Toronto Economic Development Corporation v. Olco Petroleum Group Inc.*, 2008 CanLII 29606 (ON SC).

either on the Closing Date or on the day before the Closing Date, after the City and EPCOR had entered into the Purchase Agreement. The City is withholding parts of these emails.

[75] I find the emails in Records 14 and 73-74 form part of one continuous negotiation that deals with two issues. EPCOR claimed that the City was required by the Purchase Agreement to pay a certain amount, and the City disputed that amount. The City and EPCOR then resolved this issue through compromise on a second issue.

[76] Given this context, I am satisfied that settlement privilege applies to the severed parts of Records 14 and 73-74. First, I find that the City and EPCOR were in a dispute. They clearly disagreed about what the Purchase Agreement required the City to pay. Second, I accept that the emails were intended to be without prejudice given that they contain compromises. Finally, I have no hesitation in finding the emails were aimed at settling the dispute about the City's contractual obligations. The content of the emails is ample evidence of that.

[77] Record 15 is a final statement of adjustments attached to an email in Record 14 that the City disclosed to the applicant. The City argues that settlement privilege applies because the statement of adjustments records the settlement amount for the dispute over the first issue in Records 14 and 73-74.[103] I agree. Settlement privilege applies to settlement amounts.[104] Further, I find the totals on the second page of the statement must also be withheld, so that the settlement amount cannot be inferred. As for the other information in the statement of adjustments, I find settlement privilege does not apply because there was no litigious dispute about those amounts and they do not relate to without prejudice settlement negotiations.

Waiver of Settlement Privilege

[78] During this inquiry, the applicant sent the OIPC a copy of a February 11, 2019 White Rock City Council resolution. The applicant said the resolution establishes that the City waived settlement privilege.[105] The resolution reads, in relevant part:

> The City of White Rock Council at their February 11, 2019 Closed Council meeting adopted the following resolution:
>
> …

[103] City's initial submissions dated October 19, 2018 at para. 21(b).
[104] See e.g. *Richmond (City) v. Campbell*, *supra* note 80. Given my conclusion that settlement privilege applies to the severance amount in Record 15, there is no need to consider EPCOR's argument that s. 22 also applies to this information.
[105] Email from the applicant to the OIPC dated March 5, 2019.

> THAT Council direct legal counsel to request legal consent of EPCOR to release the valuations prepared for the purchase price. Failing the consent of EPCOR, to the release of the valuations used to determine the purchase price, the City shall cooperate in any proceedings before the office of the Information and Privacy Commissioner (OIPC) to determine if the valuation should be released; and
>
> THAT the City waives settlement privilege to the negotiations of the purchase price.
>
> **CARRIED**

[79] The City and EPCOR were provided opportunities to respond to the applicant's submission. EPCOR reiterated its assertion of settlement privilege over the records identified in its initial submissions.[106] The City noted that it sought EPCOR's consent to release the valuations, as required by the resolution, but EPCOR did not grant its consent.[107] Further, the City agreed that it waived settlement privilege through the resolution, but that it could not release the records in dispute under settlement privilege without EPCOR's consent. The City stated that "EPCOR has not waived privilege over the documents for which this privilege is claimed."[108]

[80] The applicant says that, since this is a FIPPA matter involving records in the custody and control of a public body, EPCOR as a third party has no right to override the City's decision to waive settlement privilege.[109] The law is clear, however, that settlement privilege is jointly held by the parties to settlement negotiations, and cannot be unilaterally waived.[110] In this case, the negotiating parties were the City and EPCOR. The evidence before me is that EPCOR has not granted its consent to waive settlement privilege.[111] Therefore, I conclude settlement privilege has not been waived.[112]

SECTION 21 – THIRD-PARTY BUSINESS INTERESTS

[81] The City disclosed two records to the applicant with parts severed under s. 21.[113] Section 21 provides, in relevant part:

> (1) The head of a public body must refuse to disclose to an applicant information

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[106] Email from EPCOR to the OIPC and the parties dated June 13, 2019.
[107] Email from the City to the OIPC and the parties dated June 12, 2019.
[108] Email from the City to the OIPC and the parties dated June 12, 2019.
[109] Applicant's submissions dated December 13, 2018 at para. 340.
[110] *Reum, supra* note 86.
[111] Affidavit #2 of KO at para. 9.
[112] To the extent the applicant argues that the City failed to properly exercise its discretion in relation to settlement privilege, I find it was not required to demonstrate this: see Order F17-35, 2017 BCIPC 37 (CanLII) at paras. 66-69.
[113] Records 59 and 61.

> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
>
> …
>
> (3) Subsections (1) and (2) do not apply if
>
> (a) the third party consents to the disclosure[.]

[82] The principles for determining whether s. 21 applies are well-established.[114] All three parts of s. 21(1) must be met. The City must demonstrate that:

1. the information in dispute would reveal: trade secrets of a third party; or commercial, financial, labour relations, scientific or technical information of or about a third party;

2. the information was supplied, implicitly or explicitly, in confidence; and

3. disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c).

Analysis

[83] During the time that EPCOR owned and operated the water utility, it undertook a project to upgrade the White Rock water system. Through a request for quotations process, EPCOR sought a contractor to work on the project. Graham Infrastructure LP (Graham) provided a response to the request for

[114] See e.g. Order 03-02, 2003 CanLII 49166 (BCIPC).

quotations, which included a draft goods and services contract (G&S Contract) and a package of forms (Response Forms).

[84] In late 2018, the City wrote to Graham seeking its consent to disclose the G&S Contract and the Response Forms to the applicant.[115] Graham advised that it only consented to the disclosure of some of that information.[116] The City disagreed and informed Graham of its decision.[117] The City ultimately decided to withhold only parts of the G&S Contract and the Response Forms under s. 21.[118]

[85] During the inquiry, I invited Graham to make submissions regarding the application of s. 21 to the severed parts of the G&S Contract and Response Forms. Graham declined to do so.

[86] The City says that EPCOR initially took the position that s. 21 applied to the information withheld from the G&S Contract and the Response Forms, but later abandoned that position.[119] In its reply submissions, EPCOR confirms that it no longer relies on s. 21 due to the expiry of the Confidentiality Agreement.[120]

[87] The City says that, given EPCOR's position, it will not make its own submissions about s. 21 and is prepared to disclose the withheld information pursuant to an order of the OIPC.[121] However, the City also says that it has continued to withhold the information under s. 21 because it was provided by EPCOR in confidence and "may contain confidential commercial and/or financial information of a third party."[122]

[88] The onus is on the City to prove that it is required to refuse to disclose the disputed information under s. 21. However, the City says nothing about whether disclosing the information could reasonably be expected to cause one or more of the harms under s. 21(1)(c). Its lack of evidence and argument, in particular about the issue of harm, is fatal to its case. I conclude that the City has not established that s. 21 applies.

SECTION 22 – THIRD-PARTY PERSONAL PRIVACY

[89] The City and EPCOR submit that s. 22 of FIPPA applies to some of the information in dispute.[123] Section 22(1) provides that a public body must refuse to

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[115] Affidavit #2 of KO at para. 4.
[116] Affidavit #2 of KO at para. 5.
[117] Affidavit #2 of KO at para. 6.
[118] Graham did not request that the OIPC review the City's decision.
[119] City's initial submissions dated October 19, 2018 at paras. 43, 45-46.
[120] EPCOR's reply submissions dated January 10, 2019 at para. 2.
[121] City's initial submissions dated October 19, 2018 at paras. 46.
[122] City's reply submissions dated January 10, 2019 at para. 8.
[123] Records 65-72 (Affidavit #2 of KO, Exhibit "A"); City's initial submissions dated October 19, 2018 at paras. 47-51; EPCOR's initial submissions dated October 19, 2018 at para. 22.

disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy. The applicant disputes the application of s. 22.

[90] The proper approach to the analysis under s. 22 is well-established. It has four steps.[124] I will apply that approach here.

Analysis

[91] The information in dispute is the severed parts of emails and attachments relating to the City offering work to the utility employees that EPCOR requested that the City hire.[125] The attachments are job offer letters (one sample and the others signed). The particular information withheld from these records is: the names of the employees, signatures, information about positions, details about employment status, pay rates, service dates, sick and vacation leave bank balances, names and/or titles of City supervisors, and home and email addresses.

Personal Information

[92] The first question under s. 22 is whether the withheld information is "personal information", which means "recorded information about an identifiable individual other than contact information".[126] Information is "about an identifiable individual" when it is "reasonably capable of identifying an individual, either alone or when combined with other available sources of information."[127] Contact information is "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual".[128]

[93] I find that all of the disputed information is personal information. It is information about named individual employees. Although the withheld information includes names and position titles, the context in which the information appears is not "to enable an individual at a place of business to be contacted". Further, the addresses are personal, not business.

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[124] See e.g. Order F15-03, 2015 BCIPC 3 (CanLII) at para. 58.
[125] In Record 65, the City disclosed that this was a term of the Purchase Agreement.
[126] Schedule 1 of FIPPA.
[127] Order F19-13, 2019 BCIPC 15 (CanLII) at para. 16 citing Order F18-11, 2018 BCIPC 14 (CanLII) at para. 32.
[128] Schedule 1 of FIPPA.

Section 22(4) – No Unreasonable Invasion of Privacy

[94] The next step is to analyze s. 22(4), which sets out various circumstances in which disclosure of personal information is not an unreasonable invasion of a third party's personal privacy. The only relevant subsection is s. 22(4)(e), which provides that a disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if "the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body".

[95] The City says that some of the personal information of the employees "could be considered to fall within s. 22(4)(e) once those individuals became employees of the City".[129] However, the City argues that the information should not be disclosed because it would "simultaneously" disclose information related to the employees' employment history with a "non-public body employer" (i.e., EPCOR), which the City says is presumed to be an unreasonable invasion of privacy under s. 22(3)(d).[130] Section 22(3)(d) states that a disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information relates to employment, occupational or educational history.

[96] I find that s. 22(4)(e) does not apply to the employees' names, signatures, employment status, sick and vacation leave bank balances, and service dates. This information is not exclusively about the employees' positions, functions or remuneration with the City. The information about employment status relates to one employee. I find this employee's employment status existed prior to being hired by the City, so this information is about employment with EPCOR as well as the City. Further, the disclosed parts of the records reveal that the City honoured the employees' service dates with EPCOR, which were used to calculate sick and vacation leave. Given the unusual facts of this case, I conclude that s. 22(4)(e) does not apply to the employees' names, signatures, employment status, sick and vacation leave bank balances, and service dates.

[97] However, I find that s. 22(4)(e) applies to the pay rates and information about positions. In my view, the information in the offer letters is not sufficient to allow one to accurately infer what the employees were paid at EPCOR and what specific positions they held. Since this information is about the employees' positions and remuneration with the City, s. 22(4)(e) applies.

[98] Similarly, I find that s. 22(4)(e) applies to the names and/or titles of the City supervisors. This is information about the supervisors' positions and functions as employees of a public body. In my view, one cannot accurately infer the employees' positions at EPCOR based on the names and titles of their new

[129] City's initial submissions dated October 19, 2018 at para. 51.
[130] City's initial submissions, *ibid*.

City supervisors. This is because supervisors generally supervise employees in several different positions.

Section 22(3) – Presumed Unreasonable Invasion of Privacy

[99] The third step in the s. 22 analysis is to determine if any of the presumptions in s. 22(3) apply. The City submits that s. 22(3)(d) applies. As noted above, s. 22(3)(d) states that disclosure of personal information relating to a third party's employment history is presumed to be an unreasonable invasion of privacy.

[100] In Order 01-46, former Commissioner Loukidelis found that s. 22(3)(d) applied to "details" about employment such as income and the name of a third party's past employer.[131] In Order F19-15, the adjudicator found that s. 22(3)(d) applied to third parties' previous work positions and roles.[132] Further, Order F15-17 establishes that s. 22(3)(d) applies to information about employment-related time banks.[133]

[101] Following these orders, and given the context as stated above, I find in this case that s. 22(3)(d) applies to the employees' names, signatures, information about positions, employment status, sick and vacation leave bank balances and service dates. This information reveals details about the employees' employment history with EPCOR.

[102] I find that no other s. 22(3) presumptions apply.

Section 22(2) – All Relevant Circumstances

[103] The last step in the analysis is to consider, given all the relevant circumstances, whether disclosure of the disputed personal information would be an unreasonable invasion of third-party personal privacy.

[104] Section 22(2)(a) is relevant to consider, but I find it does not apply. That section states that a relevant circumstance is whether disclosure is desirable for the purposes of subjecting the activities of a public body to public scrutiny. The applicant has not provided any argument as to why s. 22(2)(a) applies and I am not persuaded that it does.

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[131] Order 01-46, 2001 CanLII 21600 (BC IPC) at para. 39.
[132] Order F19-15, 2019 BCIPC 17 (CanLII) at para. 65.
[133] Order F15-17, 2015 BCIPC 18 (CanLII) at paras. 35-36.

[105] I find that there are no circumstances that rebut the s. 22(3)(d) presumption that applies to the employees' names,[134] signatures, employment status, sick and vacation leave bank balances and service dates.

[106] Finally, the City is withholding certain employees' home and email addresses. The presumption under s. 22(3)(d) does not apply to this information. However, I find this information relates to the employees' private, personal lives. The applicant has provided no argument as to why this information should be disclosed. I conclude it would be an unreasonable invasion of the employees' personal privacy to disclose this information.

Summary

[107] To summarize, I conclude it would be not be an unreasonable invasion of the third-party employees' personal privacy to disclose the pay rates, the information about positions and the names and/or titles of the City supervisors. However, I conclude it would be an unreasonable invasion of third-party personal privacy to disclose the employee names and signatures, home and email addresses, the information about employment status, sick and vacation leave bank balances, and service dates.

CONCLUSION

[108] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. I confirm in part the City's decisions to refuse to disclose the information withheld under ss. 14 of FIPPA and common law settlement privilege.

2. The City is not authorized or required to refuse to disclose the information withheld under s. 21 of FIPPA.

3. I confirm in part the City's decision to refuse to disclose the information withheld under s. 22 of FIPPA.

4. The City is not authorized or required under settlement privilege or ss. 14, 21 or 22 of FIPPA to refuse to disclose:

    a) Records 107-108, 112-114, 117, 126, and 133-134;

    b) the last email in the chain (timestamped October 22, 2015 at 8:58 AM) in Record 125;

[134] I recognize that the City inadvertently disclosed the first initial and surname of five employees in the second pages of their offer letters. However, as stated above, I find this slip is not sufficient to rebut the presumption under s. 22(3)(d).

c) the information highlighted in the copy of Record 15 that will be provided to the City with this order;

d) the severed information in Records 59 and 61; and

e) the information highlighted in the copies of Records 65-72 that will be provided to the City with this order.

5. The City is required to give the applicant access to the information identified in subparagraph 4 above, and must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59 of FIPPA, the City is required to comply with this order not later than July 7, 2020 which is 30 days after being given a copy of this order. Taking notice of the present state of emergency in the province, I retain conduct of this matter in case the City wishes to seek an extension of the 30-day period.

May 25, 2020

ORIGINAL SIGNED BY

Ian C. Davis, Adjudicator

OIPC File No.: F17-69983