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**BULLETIN**

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### **SEVERANCE AGREEMENTS WITHHELD ON BASIS OF SETTLEMENT PRIVILEGE**

The Office of the Information and Privacy Commissioner for British Columbia (“OIPC”) recently released a decision confirming that settlement privilege can apply to employment termination severance agreements ([Order F21-11](#)). The applicant had requested copies of several severance agreements between the local government and certain former employees. The local government withheld the severance agreements in their entirety, in part, on the basis of common law settlement privilege and this decision was upheld by the OIPC.

The *Freedom of Information and Protection of Privacy Act* (“FIPPA”) does not contain an explicit exception to an applicant’s right of access based on settlement privilege. Rather, settlement privilege is a fundamental common law principle that protects communications exchanged by parties in settlement discussions. The underlying purpose of settlement privilege is to encourage resolving disputes without the need to resort to litigation by allowing parties to have honest, frank discussions in an attempt to reach a compromise. The BC Supreme Court has held that settlement privilege cannot be abrogated in legislation without clear and explicit statutory language, and FIPPA does not contain such language. Public bodies can, therefore, withhold information protected by settlement privilege from applicants, as demonstrated in Order F21-11.

In Order F21-11, the OIPC held that the severance agreements met the three-part test for settlement privilege, which requires:

- (1) a litigious dispute to be in existence or within contemplation;
- (2) a communication to have been 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 that communication must have been to attempt to effect a settlement.

The applicant argued that even if settlement privilege applied, it had been waived as the local government had already disclosed the severance amounts paid to the former employees. However, the adjudicator concluded that the evidence did not suggest that both parties intended to have waived the settlement privilege.

The applicant also argued that the City’s decision to withhold the severance agreements under settlement privilege represented an improper exercise of its discretion to withhold records. However, settlement privilege is a common law privilege that belongs to all of the parties involved and cannot be waived unilaterally by any of them. As the former employees had not

waived privilege, the OIPC held that the City could not have exercised its discretion in favour of release.

Therefore, the OIPC concluded that the City was authorized to withhold the disputed records under common law settlement privilege.

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