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CLIENT BULLETIN

SETTLEMENT RECORDS PROTECTED FROM DISCLOSURE IN BRITISH COLUMBIA

In its decision released February 28, 2017, the BC Supreme Court has found that settlement records, including negotiated settlement amounts, are protected by settlement privilege and not required to be disclosed pursuant to BC's *Freedom of Information and Protection of Privacy Act*.

While both Ontario and Alberta courts had come to a similar conclusion under the terms of their freedom of information legislation, this is the first time that settlement privilege has been recognized as a ground upon which local governments, and other public bodies, can refuse to disclose mediated or negotiated settlement terms and amounts. In British Columbia, the OIPC has required disclosure of confidential settlement terms and amounts under FOIPPA.

In 2015, the OIPC BC ordered the City of Richmond to disclose the aggregate confidential settlement figures in relation to two employment grievances, together with the aggregate amount of legal fees spent in defending the claims. The applicant sought the information to assist in pursuing his own grievance and claim against the City.

The City sought judicial review of the order, arguing that the confidential negotiated settlement amounts were subject to settlement privilege at common law, and that *FOIPPA* did not abrogate that protection. Specifically, the City argued that s. 14, which protects documents subject to "solicitor client privilege" should extend to settlement privilege documents similar to the protection of documents that are subject to litigation privilege. Alternatively, the City argued that s. 17, which authorizes refusal of records that could reasonably harm the financial interests of a public body, also protects these records, and that the OIPC should be subject to a standard of review of correctness on these issues.

The City also argued that even aggregated legal fee amounts must be presumed to disclose information that is subject to solicitor client privilege.

Judge Gray of the BC Supreme Court agreed with the City's position, and quashed the order of the OIPC in relation to both the confidential settlement records and the aggregated legal fees. In doing so, the Court found that, while the protection of solicitor client records under s. 14 of *FOIPPA* does not extend to settlement records or amounts, the *Act* cannot abrogate the common law in this respect. Therefore, settlement records and amounts are immune from disclosure under the *Act*.

The Court also affirmed the application of the law of solicitor client privilege to legal fees, including aggregated legal fees that cover more than one file. Those fees are presumed to be privileged, and their aggregation alone is not likely to be sufficient to rebut that privilege, particularly in the context of employment grievances.

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