

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT
(the FOIP Act / the Act)

COMMISSIONER'S INQUIRY CASE #007391

Shaun Fluker

The Applicant

-and-

Justice

The Public Body

**REBUTTAL SUBMISSION OF
Justice
March 13, 2025
(to be Exchanged Amongst the Parties)**

1. Please find the public body's rebuttal to the Applicant's February 20, 2025 submission.

Issues 1, 3, and 5: Is the OIPC Functus Officio?

2. The public body relies on its initial submissions in paragraphs 15 to 26 of its initial submission. The OIPC is not *functus officio* in this matter.

Issue 6: Is the information withheld subject to settlement privilege?

3. In order to meet the test for settlement privilege, a record must satisfy three criteria:
 - The existence or contemplation of a litigious dispute;
 - The express or implied intention that the communication would not be disclosed to the court if the negotiation failed; and
 - The purpose of the communication must be to attempt to effect a settlement.
4. The Applicant contends at paragraphs 27 to 33 that the records at issue are not subject to settlement privilege at all.
5. Note that all parties have previously agreed that the second and third criteria of this test have been met.¹ The Applicant's new arguments around the privilege not extending to creative environmental sentences at all are inconsistent with his initial submission. They have only arisen in response to the public body's assertions that settlement privilege does not end with the end of the litigious dispute.
6. Moreover, the Applicant's interpretation is an overly restrictive view of negotiation and settlement between parties. This approach is inconsistent with the law on settlement privilege which makes clear that the ambit of settlement privilege must be broad and the exclusionary rules narrow.² The Applicant's view that communication between the subject of a creative sentence and ACPS does not involve a "hint of compromise or negotiation" is not correct.
7. The Supreme Court of Canada has noted that joint submissions to the Court in the context of a plea arrangement are a subset of resolution discussions.³ This principle includes discussions about joint submissions on sentencing. Sentencing always occurs after a finding of guilt. This is not unique to creative sentences under the Environmental Protection and Enhancement Act (EPEA) and does not change the nature of the communications between counsel. The fact that the judge is the ultimate decision maker on whether to accept a joint submission on sentencing is not unique to creative sentences under section 234 of the EPEA. Likewise, it does not change the nature of the communications at issue.
8. It is important to note that joint submissions on a creative sentence do not always follow a conviction under the EPEA. Without a joint submission before the court, the sentencing process would be contested. Where a sentence is contested, the quantum of the

¹ Public Body's Submission dated June 24, 2024 submission at paragraph 54, Applicant's Submission dated December 8, 2022 at paragraph 8, Affected Party's Initial Submission dated July 22, 2024 at paragraph 29.

² *Bellatrix Exploration Ltd. v Penn West Petroleum Ltd.*, 2013 ABCA 10 at paragraph 28.

³ *R. v Anthony-Cook*, 2016 SCC 43 at paragraph 2.

sentence and the terms of any additional sentencing will need to be litigated with the Court as the ultimate decision maker. Accordingly, a contested sentence clearly remains part of the litigious dispute between parties. Avoiding litigation on a contested sentence will often be in the best interests of both the Crown and defense. Accordingly, efforts by counsel to agree to develop a joint submission on a creative sentence to avoid further litigation clearly represents an attempt to settle a litigious dispute through negotiation.

9. In this case, the records at issue are discussions between counsel in the development of a joint submission on a creative sentence under the EPEA. The process of reaching a joint recommendation involves negotiation on recipient selection, considerations of quantum, and the terms of the creative sentence itself.
10. Creative sentences where fines are diverted to specific projects (as occurred in the matter discussed in the responsive records) are complicated. Only where the terms of the project are negotiated into a form acceptable to both parties can the proposed creative sentence become a joint submission to the Court. A substantial amount of work and some level of compromise is necessary to reach this point. Where a sentence is contested, neither party will have the incentive to develop this type of creative sentence. If privileged settlement discussions could not occur, these creative sentences will not be possible in the future.

The Effect of Settlement Privilege

11. At paragraph 37, the Applicant also suggests the following:

Alberta Justice's submissions fail to distinguish evidentiary privilege from confidentiality, they therefore misunderstand the purpose and function of settlement privilege and misread and misunderstand caselaw. Alberta Justice is incorrect that settlement privilege provides or promises confidentiality against settlement communications becoming public. The public policy bargain of settlement privilege is to provide parties who engage in settlement negotiations an evidentiary privilege against those settlement communications being placed as evidence before the Court, not a confidentiality against the public. That is not the bargain.

12. The Applicant appears to be suggesting that settlement privilege only extends to prevent settlement negotiations from being put before a Court, but not to prevent public access to records. *Imperial Oil v Alberta (Information and Privacy Commissioner)*⁴ makes clear at paragraph 50 that all privileged documents are confidential, but not all confidential documents are privileged. The Court of Appeal makes the following clear at paragraph 58 (emphasis added):

While "confidentiality" (at least in this context) depends almost entirely on the intentions of the parties (see *infra*, para. 75), the same is not true of "privilege". Privilege relates to the legal status of a document, and it depends on the circumstances under which the document was created. The parties cannot, by

⁴ 2014 ABCA 231.

agreement, make a document privileged if the law does not regard it as being privileged.

13. The public body and affected party take the position that the records at issue meet the three-part test for settlement privilege. Where this is found to be the case, the records are privileged. Pursuant to section 27 of the FOIP Act, the head of the public body may choose not to disclose them. Where they are subject to section 27(2), they cannot be disclosed.
14. Paragraph 45 of the Affected Party's submission (relying on paragraph 31 of 1400467 Alberta Ltd v Adderley⁵) notes that it is difficult to imagine a situation in which a true stranger to litigation would have a public policy basis for claiming access to a settlement involving others.
15. The Applicant's position would appear to suggest that settlement privilege does not operate to prevent documents from being from being accessed and made public by non-parties to the negotiation.
16. This approach would not only be inconsistent with the law of settlement privilege in Canada, but would also be inconsistent with the FOIP Act, which clearly acknowledges that, where records are subject to legal privilege, they may be withheld (or must be withheld where the privilege relates to a person other than the public body).

The Open Court Principle

17. The Applicant notes at paragraph 27 of their submission (citing the Department of Justice Canada) that there is a presumption in favour of "open courts that allow the public and press to attend hearings, to consult court files, and to inquire into and comment on the workings of the courts (Sherman Estate v Donovan, 2021 SCC 25)."
18. The Applicant suggests (at paragraph 29-30) that the "[a]pplication of settlement privilege related to a creative sentencing order made pursuant to s. 234 of the EPEA would have the effect of hiding the reasons and rationale of any such sentencing decisions from the public."
19. Withholding records subject to settlement privilege has nothing to do with the open court principle. The Applicant is seeking to suggest that applying settlement privilege in this context will effectively "hide" the creative sentencing order from the public.
20. This is not correct. In the absence of a publication ban, the terms of a final order and any documents filed by the parties in the context of litigation, can be requested by any person. The terms of a creative sentence are typically set out as a schedule to the sentencing order.
21. In this instance, the Applicant is not requesting court records (and, in any event, access to records in a Court file are outside the scope of the FOIP Act). The Applicant is

⁵ 2015 ABQB 528.

suggesting that the open court principle requires that information exchanged between parties in the context of settling a litigious dispute must be provided in the context of an access request under the FOIP Act. This is incompatible with settlement privilege and reflects a misreading of the open court principle. The open court principle does not entitle third parties to the privileged content of counsel's file or privileged correspondence between counsel.

22. The Applicant suggests at paragraph 32 and 33 that the EPEA does not limit court openness and that the information sought attracts strong public interest considerations.
23. In *Imperial Oil* the Alberta Court of Appeal specifically considered an access request for a settlement agreement to which the Adjudicator had (incorrectly) failed to accept as privileged. The Alberta Court of Appeal made the following clear at paragraphs 63-64 (emphasis added):

[63] Further, the Commissioner expressed the view that the law of settlement privilege as it applies to private disputes might not be appropriate when applied to disputes that have a public interest component. However, the reasons behind the recognition of the settlement privilege are the same regardless of the nature of the dispute: *Union Carbide* at para. 40. The settlement privilege allows parties to discuss frankly and openly their respective strengths and weaknesses, and to disclose the basis upon which they would be prepared to resolve the dispute, without fear that anything said would be used against them in the future. Those consequences of the settlement privilege are held to be fundamental to the recognized advantages of settlement, and they apply equally to public and private disputes: *Ontario (Liquor Control Board) v Magnotta Winery Corp.*, 2010 ONCA 681 at para. 36, 102 OR (3d) 545.

[64] Section 27(2) of the FOIPP Act is in mandatory terms, and does not give the Commissioner any authority to override the settlement privilege by consideration of broader aspects of public policy, such as any perceived "public policy of openness". There is in addition no common law jurisdiction in the Commissioner to ignore or override legal privileges: *Canada (Privacy Commissioner) v Blood Tribe Department of Health* at paras. 11, 30; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at paras. 39-40, 53, [2010] 1 SCR 815; *Ontario (Liquor Control Board) v Magnotta Winery Corp.* at para. 38. Since the Remediation Agreement is privileged in law, that ends the debate.

24. The records at issue are settlement discussions between two counsel. They were made when a litigious dispute existed and are all focused on negotiating the litigious dispute. Accordingly, the records are covered by settlement privilege and, as in *Imperial Oil*, this ends the debate.

Settlement Privilege Does Not End with the Litigation

25. In the alternative, the Applicant submits that settlement privilege expires with the end of the litigious dispute at paragraph 34 of their February 20, 2025 submission.

26. While the public body and affected party have already provided argument on the point that settlement privilege survives the conclusion of the litigious dispute, there are a number of points the Applicant makes that are not correct.

27. First, at paragraph 43, the Applicant indicates that “Nothing in *Union Carbide or Sable Offshore Energy Inc. v Ameron International Corp.* supports the view that litigation privilege survives the end of the litigious disputes.”

28. To be clear, the public body is not suggesting that these records are subject to litigation privilege. Settlement privilege is a different category of privilege with its own specific criteria. It does not end with the conclusion of litigation (as litigation privilege does).

29. Second, the Applicant notes the following at paragraph 49:

We are aware that the success of negotiations does not end settlement privilege, the issue is whether settlement privilege ends once the entire ‘litigious dispute’ has concluded.

30. The Applicant appears to be suggesting that settlement privilege only applies where a successful negotiation is concluded but a litigious dispute still exists. There is no basis for limiting settlement privilege in this manner.

31. Third, the Applicant’s notion at paragraph 52 of their February 20, 2025 submission is that only a “misreading” of the law in *McDiarmid Estate v Alberta (Infrastructure)* supports the position that settlement privilege survives the litigious dispute is incorrect.

32. Even more recent decisions of the Alberta Court of King’s Bench plainly also support the position that settlement privilege does not expire once the litigious dispute has concluded. See, for example, paragraphs 36 to 41 of *Baker Law Firm v Colors Unlimited Inc.*⁶ and, in particular paragraph 38 (emphasis added):

[38] Once this test is met, the privilege has broad scope and attaches to communications involving offers of settlement but also communications reasonably connected to the parties’ negotiations. It applies to all communications that lead up to settlement. The privilege belongs to both parties and can only waived if both parties consent, subject as I have already noted to some exceptions: see *Bellatrix* at paras 29 – 34. Unlike litigation privilege, settlement privilege continues even after a settlement is reached (and even after the death of a settling party) and includes the content of successful negotiations: see *Union Carbide Canada Inc v Bombardier Inc*, 2014 SCC 35 at para 34; see also *Flock Estate v Flock*, 2019 ABCA 194 at para 37.

33. The position of the Alberta Courts on this issue are binding and clear. Settlement privilege clearly survives the end of a litigious dispute. It even survives the death of a settling party. It is not absolute, of course, and can be set aside in specific recognized

⁶ 2024 ABKB 53.

exceptions (such as the need to prove the terms of the settlement or a court is determining a cost award). No recognized exception exists in respect of these records.

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