

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER FOIP2025-23

June 26, 2025

EXECUTIVE COUNCIL

Case File Number 004340

Office URL: www.oipc.ab.ca

Summary: A lawyer with a law firm (the Applicant) made an access request to Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act* (the FOIP Act) for “all records . . . between the Deputy Minister of the Policy Coordination Office and any party which has provided notice of termination of a Power Purchase Agreement”.

The Public Body located 12 pages of responsive records but withheld all of them under section 25(1)(c) (disclosure harmful to economic and other interests of a public body) of the FOIP Act. The Applicant requested a review by this office of the Public Body’s decision to withhold the records under section 25(1)(c). During the review, the Public Body decided to also apply section 27(1)(a) (privileged information) of the FOIP Act to withhold the records. Subsequently, the Applicant requested, and the Commissioner agreed to conduct an inquiry.

The Adjudicator found that the Public Body had established that settlement privilege applied to the records pursuant to section 27(1)(a) of the FOIP Act and the Public Body was required to withhold the records pursuant to section 27(2) of the FOIP Act. Consequently, it was not necessary for the Adjudicator to consider whether section 25(1)(c) also, or in the alternative, applied to records.

Statutes and Regulations Cited: **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 12, 25, 27, 71, and 72; *Interpretation Act*, R.S.A. 2000, c. I-8, ss. 28; *Personal Information Protection Act*, S.A. 2003, c. P-6.5.

Authorities Cited: AB: Orders 96-008, 2001-008, F2004-027, F2009-047, F2013-27, F2014-02, F2014-18, F2014-49, F2015-34, F2016-41, F2017-02, F2017-39, F2017-40, F2020-23, F2020-28, F2020-34 and F2021-23.

Cases Cited: AB: *Alberta Teachers Association v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19, *Bellatrix Exploration Ltd. v Penn West Petroleum Ltd*, 2013 ABCA 10.

Cases Cited: CAN: *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37.

I. BACKGROUND

[para 1] On August 12, 2016, a lawyer with a law firm (the Applicant) made an access request to Executive Council (the Public Body) under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the FOIP Act) for the following information:

All records, including written or electronic correspondence, between the Deputy Minister of the Policy Coordination Office and any party which has provided notice of termination of a Power Purchase Agreement.

[para 2] The timeline specified was June 1, 2016, to August 12, 2016.

[para 3] On October 6, 2016, the Public Body informed the Applicant that it had located 12 pages of responsive records and that it was refusing access to all of the information under section 25 (disclosure harmful to economic and other interests of a public body) of the FOIP Act. Specifically, in the “Exception Sheet” it attached to its response, the Public Body identified section 25(1)(c) as the exception it was applying to withhold the information.

[para 4] On October 20, 2016, the Applicant requested a review of the Public Body’s decision to withhold the responsive records under section 25(1)(c) of the FOIP Act.

[para 5] The Commissioner authorized a Senior Information and Privacy Manager (SIPM) to investigate and try to settle the matter. During the review, the Public Body also asserted that section 27(1)(a) (privileged information) applied and permitted it to withhold the responsive records.

[para 6] Subsequently, on May 29, 2017, the Applicant requested an inquiry.

[para 7] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

II. RECORDS AT ISSUE

[para 8] The records at issue are the 12 pages of responsive records (the Records) withheld by the Public Body. In its initial submission, the Public Body described the Records as follows:

The responsive records package consists of 4 letters correspondence to [third] party representatives.

III. ISSUES

[para 9] The Notice of Inquiry dated February 27, 2019, set out the following issues for this inquiry:

1. **Did the Public Body properly apply section 25(1) of the Act (disclosure harmful to economic and other interests of a public body) to the information in the records?**
2. **Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?**

IV. DISCUSSION OF ISSUES

Preliminary Matter – Inquiry is de novo

[para 10] In their Request for Inquiry and initial submission, the Applicant referred to the conclusions the SIPM reached following the SIPM's investigation into this matter. The Applicant provided a copy of the SIPM's findings with their initial submission. The Applicant argued that I should consider, and give deference to, the SIPM's conclusions.

[para 11] In its initial submission, the Public Body objected to the Applicant providing a copy of the SIPM's findings and referring to the SIPM's conclusions in the Applicant's Request for Inquiry and initial submission on the basis that an inquiry is a *de novo process*.

[para 12] The Public Body cited Order F2014-18 in support of its objection. At paragraph 10 of that Order, the adjudicator stated (my emphasis):

[para 10] The Public Body correctly points out that the inquiry is a *de novo* process, and that the findings of the officer are not brought forward into the inquiry. An inquiry is not an appeal or review of the officer's findings, but rather a new process, which is separate and distinct from an investigation that, by its very nature, is conducted without prejudice to the rights of the parties if the issues remain unresolved. Submissions and evidence made to the officer are not brought forward into the inquiry process. Further, the officer's findings are not considered in an inquiry. I do not know what was said by the officer to the Applicant regarding a further 4000 pages of records, and I have no evidence before me indicating that these records exist.

[para 13] Numerous prior Orders of this office have stated that an inquiry is *de novo*.¹

¹ See, for example, Orders F2004-027 at para. 21, F2013-27 at para. 4, F2015-34 at para. 5, F2017-02 at para. 14, F2017-39 (upheld on judicial review) at para. 10, F2017-40 (upheld on judicial review) at para. 10, and F2020-28 at para. 7. An inquiry is *de novo* before this Office for both complaints about a public body's collection, use and/or disclosure of personal information and for requests for review of a public body's decision to withhold information under the FOIP Act.

[para 14] The *de novo* nature of any inquiry before this office was commented on with approval in *Alberta Teachers' Association v. Alberta (Information and Privacy Commissioner)*, 2011 ABQB 19 (*ATA*). At paragraphs 125 – 127, the Court stated:

[125] The ATA also argues that the Commissioner has fettered his discretion or failed to exercise his discretion properly because he did not review the report of the Investigator (here, Ms. Clayton). The Commissioner notes that the investigation process and mediation processes are in the nature of settlement proceedings and therefore without prejudice, and he considers that it would be inappropriate for him to review the report or materials before the Investigator. The Investigator will potentially have received information from both parties that they gave as part of an attempt to compromise, and the Commissioner's perspective is that he should not be looking at those materials or a report based on those materials.

[para 126] This practice is described in the University of Alberta Order F-2004-27, and would be equally applicable to his practices under *PIPA*.

[para 127] I agree with the Commissioner's position. When an investigator is appointed, the investigator attempts to negotiate or mediate a settlement between the parties. If the process does not resolve the complaint, it would generally be inappropriate for the Commissioner to review the Investigator's process or materials before the Investigator, or the Investigator's report based on such materials. It is not relevant why the investigation or mediation failed to resolve the matter, or how far either party was prepared to go to resolve the matter. The Commissioner is entitled to (if not obliged to) look at the matter afresh if he is going to properly exercise a discretion without considering materials that are settlement oriented.

[para 15] While that *ATA* case involved a complaint before this Office under the *Personal Information Protection Act*, S.A. 2003, c. P-6.5, the Court's findings above apply equally to an inquiry involving a review of a public body's decision to withhold information under the FOIP Act. Accordingly, I will not be reviewing the SIPM's findings or considering their conclusions wherever they appear in the Applicant's materials, in this inquiry.

Preliminary Matter – Late Raising of Exception to Disclosure

[para 16] I understand from the Applicant's Request for Inquiry and submissions that during the investigation and mediation of this matter before this office, the Public Body asserted that it was also, or in the alternative, withholding the Records under section 27(1)(a) of the FOIP Act on the basis of privilege. The Applicant objected to this as the Public Body did not cite this exception when it responded to the Applicant's access request.

[para 17] In its response to an access request, a public body that refuses access to information is required by section 12 of the FOIP Act to identify "the provision of the Act on which the refusal is based". A public body is expected to inform an applicant of all of the exceptions under the FOIP Act upon which it is relying, either jointly or severally, to withhold responsive information from an applicant in its response. A public body *may* be denied from raising new discretionary exceptions in an inquiry into the public body's decision to withhold information (See, for example, Orders F2009-047 at paragraph 50, F2014-49 at paragraphs 28-30, and F2020-23 at paragraphs 13-14).

[para 18] Mandatory exceptions under the FOIP Act should also be indicated by a public body in its response to an applicant; however, previous Orders of this Office have held that even if raised late, mandatory exceptions will be considered in an inquiry since this Office cannot order a public body to disclose information that it is prohibited from disclosing by the FOIP Act (See, for example, Orders 96-008 at paras. 5-6, 2001-008 at paragraph 13, F2014-02 at paragraph 27 and F2020-34 at paragraph 38).

[para 19] In this case, the Public Body has asserted settlement privilege under section 27(1)(a) of the FOIP Act as an additional or separate exception for withholding the information in the Records.

[para 20] Section 27(1)(a) of the FOIP Act states:

27(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

[para 21] In *Bellatrix Exploration Ltd. v Penn West Petroleum Ltd*, 2013 ABCA 10 (*Bellatrix*) at paragraphs 26, the Alberta Court of Appeal held that settlement privilege belongs to both parties and cannot be unilaterally waived by either one of them.

[para 22] Section 27(2) of the FOIP Act states:

27(2) The head of a public body must refuse to disclose information described in subsection (1)(a) that relates to a person other than a public body.

[para 23] Accordingly, a public body *must* refuse to disclose information described in section 27(1)(a) – information that is subject to any type of legal privilege – that relates to a person other than a public body.

[para 24] “Person” is not defined in the FOIP Act; however, section 28(1)(nn) of the *Interpretation Act*, R.S.A. 2000, c. I-8, provides that the term “person” where it is used in enactments of Alberta includes a corporation.²

[para 25] Consequently, if settlement privilege applies in this case, then the privilege in each letter belongs to both the Public Body and the recipient of the letter, and section 27(2) prohibits the Public Body from disclosing the letter to the Applicant.

[para 26] Since I cannot order a public body to disclose information where the FOIP Act prohibits the disclosure, I must permit and consider the Public Body’s argument that settlement privilege applies to the Records. For procedural fairness, the Applicant has had the opportunity

² Prior Orders of this Office have confirmed that the definition of the term “person” in the *Interpretation Act* applies to the term “person” in the FOIP Act. See, for example, Order F2016-41 at paragraph 55.

to provide initial and rebuttal submissions on the application of settlement privilege to the Records.

[para 27] I have decided to address the Public Body's application of settlement privilege to the Records under section 27(1)(a) first since, if settlement privilege applies, section 27(2) prohibits the Public Body from disclosing the information.

1. Did the Public Body properly apply section 27(1) of the Act (privileged information) to the information in the records?

[para 28] Although the Applicant's Request for Inquiry and submissions address the application of both litigation privilege and settlement privilege by the Public Body under section 27(1)(a), the Public Body only argued in its submissions that it had applied settlement privilege under section 27(1)(a) to withhold the Records. Accordingly, I will only consider whether settlement privilege applies to the Records.

[para 29] The purpose of settlement privilege was discussed by the Alberta Court of Appeal *Bellatrix*. At paragraphs 21 and 23, the Court stated:

[21] Settlement privilege is premised on the public policy goal of encouraging the settlement of disputes without the need to resort to litigation. It allows parties to freely discuss and offer terms of settlement in an attempt to reach a compromise. Because an admission of liability is often implicit as part of settlement negotiations, the rule ensures that communications made in the course of settlement negotiations are generally not admitted into evidence. Otherwise, parties would rarely, if ever, enter into settlement negotiations to resolve their legal disputes.

...

[23] Alberta courts have adopted the public policy rationale for the rule: See *Ed Miller Sales & Rentals Ltd v Caterpillar Tractor Co* (1990), 1990 CanLII 5494 (ABKB), 105 AR 4, 72 Alta LR (2d) 330, aff'd 1990 ABCA 189 (CanLII), 74 Alta LR (2d) 271, [1990] 5 WWR 377 (CA). See also *Costello* at para 94; *Hansraj v Ao*, 2002 ABQB 385, 314 AR 262, rev'd on other grounds 2004 ABCA 223, 354 AR 91. This approach is consistent with the underlying objective that the parties should be permitted to freely "put all their cards on the table" without having to worry that they may be prejudiced should negotiations fail to resolve their dispute.

[para 30] At paragraph 15 in *Bellatrix*, the Court confirmed the three requirements that must be established for settlement privilege to apply to a communication:

- (a) the existence, or contemplation, of a litigious dispute;
- (b) an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed; and
- (c) the purpose of the communication must be to attempt to affect a settlement.

[para 31] At paragraphs 24 – 28, the Court provided the following additional direction in assessing whether settlement privilege applies to a communication:

[24] Courts appear to have accepted that the types of communications covered by the settlement privilege require at least a hint of potential compromise or negotiation: see, for example, *Hansraj* at para. 20. However, an unconditional assertion of rights without any connection to the possibility of settlement or negotiation do not fall within the scope of the rule: *Buckinghamshire County Council v. Moran*, [1990] 1 Ch 623, [1989] 3 All ER 225 (CA), cited in *Hansraj* at para 19. Communications of this type do not offer any potential for compromise, which is the interest the privilege is intended to protect.

[25] The notation “without prejudice” is not conclusive in establishing privilege. If the contents of a communication are truly in furtherance of settlement, and therefore privileged, it makes no difference whether the communication is marked “without prejudice” or not. A communication that is not in substance privileged does not become so just because one party places “without prejudice” on it. Likewise, the absence of the words “without prejudice” means nothing if the communication is truly privileged: see *Leonardis v. Leonardis*, 2003 ABQB 577 at para 6, 50 Alta LR (4th) 56; *Philips v Rogers* (1988), 1988 CanLII 3518 (AB KB), 92 AR 253, 62 Alta LR (2d) 140 (QB); *William Allan Real Estate Co v. Robichaud* (1987), 37 BLR 286, 17 CPC (2d) 138 (Ont HC); *Underwood v Cox* (1912), 1912 CanLII 582 (ON SCDC), 21 OWR 757, 26 OLR 303 at 310 (Div Ct); *Imperial Oil v. 416169 Alberta Inc*, 2002 ABQB 386 at para 30, 310 AR 338.

[26] As settlement privilege operates to preclude admission of evidence that might otherwise be relevant, it competes with the court’s truth-seeking function. For that reason, courts must ensure the communications come within the tripartite test before applying the privilege. However, once that test is met, the privilege must be given broad scope and attach not only to communications involving offers of settlement but also to communications that are reasonably connected to the parties’ negotiations. The privilege belongs to both parties and cannot be unilaterally waived or overridden by either of them: see *Hansraj* at para. 13.

[27] It is to be remembered that the rationale for the privilege is not limited to the notion that it would be unfair to subsequently prejudice one of the parties by admitting any admissions made during settlement negotiations. The rule is also intended to allow parties to freely and openly discuss the potential for a settlement, and while doing so, the parties should not have to carefully monitor the content of their discussions. As noted by Lord Walker in *Unilever plc v The Procter & Gamble Co* (1999), [2001] 1 All ER 783 at para 35, [2000] 1 WLR 2436 (CA):

the protection of admissions against interest is the most important practical effect of the rule. But to dissect out identifiable admissions and withhold protection from the rest of without prejudice communications (except for a special reason) would not only create huge practical difficulties but would be contrary to the underlying objective of giving protection to the parties.

[28] In other words, the rule’s protection is not meant to be limited to the prejudice that an admission may have at trial specifically, but on the potential impairment on settlement discussions as an important element of the litigation process generally. Accordingly, for the rule to operate properly, not only must the ambit of the settlement privilege be broad, but the exceptions to the exclusionary rule must be narrowly construed and only be given effect where another policy objective can be shown to outweigh any impact that may arise to the settlement objective.

[para 32] Pursuant to section 71(1) of the FOIP Act, the onus of proving that an applicant has no right of access to the withheld records is on the public body. Section 71(1) states:

71(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.

[para 33] Accordingly, the burden of establishing that the three requirements set out by the Alberta Court of Appeal in *Bellatrix* for settlement privilege to apply to the Records have been met rests on the Public Body.

The existence, or contemplation, of a litigious dispute

[para 34] The first element of the settlement privilege test is that a litigious dispute must exist or be within contemplation between the parties at the time the communication was made.

[para 35] In its Request for Review and its submissions, the Applicant acknowledged that the Public Body had settled the dispute over the termination by the various parties of their Power Purchase Agreements (PPAs).

[para 36] In its Request for Inquiry, the Applicant stated:

. . . As is apparent from public records, including the government's own statements, one of which is attached hereto, settlements have been reached with three of the four parties involved in the government's action related to the PPAs. Settlements were announced with AltaGas, and TransCanada on December 16, 2016 and Capital Power on November 24, 2016.

[para 37] At paragraphs 9 and 10 of its initial submission, the Applicant stated (my emphasis):

9. In any event, litigation privilege ceases with the end of the litigation. As is apparent from public records, the government has reached settlement with the parties involved in the government action related to the PPAs. Accordingly, litigation privilege cannot extend to such records.

- *Blank v. Canada*, 2006 SCC 39 at paras. 36 and 37 [Tab 2]
- Alberta Government Notification, "*Additional PPA agreements reached*" dated December 16, 2016 [Tab 3]
- Alberta Government Notification, "*Alberta and ENMAX reach agreement*" dated March 9, 2018 [Tab 4]

10. Settlement privilege exists to promote settlement and avoid or limit litigation. In order for settlement privilege to apply, there must be a genuine offer of settlement. Settlement privilege cannot possibly apply in this case in respect of the records in issue. . . .

- *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10 at paras. 21 to 34 [Tab 5]

[para 38] As evidence in support of its statement in paragraph 9 of its initial submission that the Public Body had “reached a settlement with the parties involved in the government action related the PPAs”, the Applicant provided two Alberta Government news releases (the News Releases).

[para 39] The first Alberta Government news release was dated December 16, 2016, and titled “Additional PPA agreements reached”. It stated:

The Government of Alberta has reached final agreements to settle power purchase arrangements (PPAs) with AltaGas Ltd. and TransCanada Energy Ltd.

The agreements will terminate the PPA held by ASTC Power Partnership, a partnership between AltaGas and TransCanada, for Sundance B. The agreements will also terminate TransCanada’s PPAs for Sundance A and Sheerness. The PPAs will be returned to the Balancing Pool.

“These agreements will help ensure Albertans receive stable, reliable power at affordable prices as we transition from coal and add more renewable energy. Moving ahead, the province looks forward to working with energy companies to power Alberta’s future.”

Marg McCuaig-Boyd, Minister of Energy

AltaGas will contribute 391,879 self-generated carbon offsets and pay \$6 million to the Balancing Pool. The cash payments will be made over three years starting in 2018.

TransCanada has provided value associated with a package of carbon offset credits that it has amassed as part of its risk management efforts. The value of the credits will be reflected in TransCanada’s annual, year-end financial statements, which will be released in February 2017.

The carbon offset contribution allows the Balancing Pool greater flexibility in meeting its future greenhouse gas emissions compliance obligations for the PPAs it will hold.

This action today completely removes TransCanada Energy and AltaGas Ltd. from the court proceedings and settles the matter between them and the government as well as all arbitrations between the two companies and the Balancing Pool. Capital Power has also been removed from the government’s proceedings as per its settlement with them announced Nov. 24, 2016.

[para 40] The second Alberta Government news release was dated March 9, 2018, and titled “Alberta and ENMAX reach agreement”. It stated:

The Government of Alberta and ENMAX have agreed to withdraw ENMAX from the Power Purchase Arrangement (PPA) legal action initiated in 2016 by the Attorney General.

This step forward is welcomed by, and mutually respectful of, both the Government of Alberta and ENMAX, and it enables both parties to focus on building Alberta’s energy future.

“We’re pleased to have this final agreement in place as we continue taking action to provide Albertans a more stable, affordable and reliable electricity system. This agreement ensures we can focus our efforts and energy on this important work,” said Margaret McCuaig-Boyd, Minister of Energy. “The Government of Alberta took legal action to fight to protect Albertans, and many parties, including ENMAX, were regrettably caught up in our action against the past government.”

The agreement reached provides for the transfer from ENMAX to the Balancing Pool of 166,667 carbon offset credits and for a payment of equivalent value to ENMAX from the Balancing Pool for previously disputed and unpaid dispatch services and PPA transition matters. The offset credits will allow the Balancing Pool greater flexibility in meeting its future greenhouse emissions compliance obligations for its generation assets.

“We are satisfied that this agreement is in the best interests of our Shareholder, the City of Calgary, and all Albertans,” said Gianna Manes, ENMAX President and CEO. “We are glad to put this behind us as we continue to focus on creating value and serving our customers and communities.”

With this agreement, the legal action between the Government of Alberta, ENMAX and the remaining parties will be ended.

[para 41] In addition, at paragraph 7 of its rebuttal submission, the Applicant stated in part:

. . . It is publicly known and publicly available information that: all PPAs in Alberta have been terminated; the Balancing Pool has accepted all terminations; the Balancing Pool has the sole responsibility to act as buyer under the PPAs; and any lawsuits associated with those have been settled . . .

[para 42] In support of this statement, the Applicant provided a copy of a notification posted on the Balancing Pool’s website under the heading “PPA Buyer Terminations” about the litigation and the settlement agreements reached between the Public Body and the parties that had terminated their PPAs. The footnote on the page has a copyright date of 2019.³

[para 43] The Balancing Pool’s PPA Buyer Terminations notification contained the following information, in part:

PPA BUYER TERMINATIONS

In late 2015 and early 2016, the Balancing Pool received formal notice from a number of PPA Buyers of their intention to terminate their respective PPAs. The table below summarizes the PPA terminations received by the Balancing Pool for that period:

³ The link to the information provided by the Applicant no longer appears to be active, however, I have no reason to believe that the copy of the pages provided by the Applicant are not accurate and were not previously accessible on the Balancing Pool’s website.

Date of Termination Notice	Power Purchase Arrangement	PPA Buyer
December 11, 2015	Battle River 5	ENMAX PPA Management
March 8, 2016	Sheerness	TransCanada Energy Ltd.
March 8, 2016	Sundance A	TransCanada Energy Ltd.
March 8, 2016	Sundance B	ASTC Power Partnership
March 24, 2016	Sundance C	Capital Power PPA Management Inc.
May 5, 2016	Keephills	ENMAX Energy Corporation

...

Accordingly, on January 27, 2016, the Balancing Pool verified the Battle River 5 termination and confirmed with ENMAX PPA Management its right to terminate the Battle River 5 PPA pursuant to Article 4.3(j) thereof.

On July 25, 2016, the Attorney General of Alberta filed an application with the Alberta Court of Queen’s Bench seeking declarations relating to the validity of certain provisions of the Battle River 5 PPA, Sundance A PPA, Sundance B PPA, Sundance C PPA, Sheerness and Keephills PPA. The Attorney General also sought judicial review of the Balancing Pool’s decision to accept the termination of the Battle River 5 PPA by ENMAX PPA Management Inc. The Balancing Pool, the Alberta Utilities Commission, ENMAX PPA Management Inc. and other parties with interests in the PPAs were named as respondents.

On November 24, 2016, the Government of Alberta reached settlement agreements with the PPA Buyers of the Sundance A, Sundance B, Sundance C, and Sheerness PPAs. As a result of these settlement agreements, the Balancing Pool has assumed the role and responsibilities of PPA Buyer under the PPAs in accordance with the Electric Utilities Act.

...

On March 8, 2018, the Government of Alberta reached a settlement agreement with ENMAX PPA Management, the Buyer of the Battle River 5 PPA and Keephills PPA, bringing a conclusion to the Attorney General of Alberta’s application with the Alberta Court of Queen’s Bench.

...

[para 44] The Public Body requested that I accept all of its argument about its application of settlement privilege to the Records in its initial submission *in camera*. I granted its request in part, as most of its submission was intertwined with the information in the Records and would disclose the information the Public Body sought to withhold under settlement privilege.

[para 45] I informed the Public Body that I would not accept its submission under the heading “Issue #2 a)” of its initial submission *in camera* as it consisted solely of the Public Body’s statement about the requirements to establish settlement privilege and did not disclose any of the information in the Records. The Public Body decided to disclose this information to the Applicant so that I could consider it in the inquiry.

[para 46] In its *in camera* submission, the Public Body addressed the first part of the test for settlement privilege as it related to the Records.

[para 47] I have reviewed the Applicant's submissions and evidence as well as the Public Body's *in camera* submission and rebuttal submission, as the evidence and submissions relate to the requirement that in order for settlement privilege to apply to the Records, a litigious dispute must be in existence or contemplated.

[para 48] In the case at hand, the Balancing Pool's PPA Buyer Termination notification (the Notification) provided to me by the Applicant indicates that between December 11, 2015, and May 5, 2016, the facility owners of the generating units listed in the Balancing Pool's PPA Buyer Termination notification gave notice terminating their PPAs. Subsequently, in July of 2016, the Public Body commenced litigation against the facility owners regarding the termination of the PPAs.

[para 49] Thereafter, on August 12, 2016, the Applicant requested access to all records, including written or electronic correspondence, from June 1, 2016, to August 16, 2016, between the Deputy Minister of the Policy Coordination Office and any party which has provided notice of termination of a Power Purchase Arrangement.

[para 50] The Public Body informed the Applicant it had located 12 pages of records responsive to the Applicant's access request, which it described in its submission in this inquiry as four letters to third party representatives.

[para 51] The New Releases and the Notification indicate that the Public Body subsequently reached settlement agreements with the various facility owners, and that all the litigation against the facility owners with respect to the terminated PPAs was concluded by March of 2018.

[para 52] In light of the evidence and the parties' exchanged submissions before me, and the *in camera* submission of the Public Body, I am satisfied that at the time the Records were created, a litigious dispute was contemplated or existed between the Public Body and the third parties which had terminated or given notice of their intent to terminate their PPAs.

An express or implied intent that the communication would not be disclosed to the court in the event negotiations failed

[para 53] The second element of the settlement privilege test is that there was an express or implied intent that the communication would not be disclosed to the court in the event negotiations failed.

[para 54] The Applicant has not seen the Records and therefore does not know whether there was an express or implied intent in the Records that the Records would not be disclosed in the event negotiations failed.

[para 55] As mentioned above, the Public Body's *in camera* submission is intertwined with the information in the Records over which it has asserted settlement privilege. Accordingly, I cannot reveal the Public Body's arguments.

[para 56] Having reviewed the Records and the Public Body's *in camera* submission, I am satisfied that there was an express intent that the information contained in the Records would be kept confidential.

The purpose of the communication must be to attempt to affect a settlement

[para 57] The third element of the settlement privilege test is that the purpose of the communication must be to attempt to affect a settlement.

[para 58] The Applicant made the following argument with respect to the third element of the settlement privilege test:⁴

. . . From what we can discern of the Records and the surrounding circumstances, none of the Records contain a genuine offer of settlement, or potentially any settlement offer at all. Settlement privilege cannot possibly apply in this case.

[para 59] In its amended initial submission, disclosed to the Applicant, the Public Body stated:

The Applicant states that there must be a genuine offer of settlement for settlement privilege to apply. Although this is one sufficient criteria for determining settlement privilege, it is by no means necessary. In a Supreme Court of Canada decision reached after the Alberta Court of Appeal's judgment in *Bellatrix Exploration Ltd v Penn West Petroleum Ltd*, the SCC in *Sable Offshore Energy Inc v Ameron International Corp* [Appendix D] stated the following:

- Settlement privilege promotes settlements that contribute to the effective administration of justice [*Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37, para 11 [*Sable SCC*] [Exhibit 2]]. It is a class privilege meaning that there is a prima facie presumption of inadmissibility, with exceptions as required by the justice [*Sable SCC*, para 12].
- Settlement privilege protects disclosure of negotiations, which allows for more open and fruitful discussions between parties [*Sable SCC*, para 13].
- Communications labelled "without prejudice" are not required to invoke settlement privilege. Rather, what is important is that during those negotiations those parties had the intent to settle [*Sable SCC*, para 14].
- Settlement privilege applies to negotiations whether an agreement was reached or not [*Sable SCC*, paras 15-17]. This also includes any admissions, offers, and compromises made in the course of negotiations [*Sable SCC*, para 18].
- Settlement privilege may be partially waived such that information not waived is still privileged [*Sable SCC*, paras 20-31].

[para 60] The Applicant argued that the Public Body could not rely on the Supreme Court of Canada's decision in *Sable Offshore Energy Inc v Ameron International Corp*, 2013 SCC 37,

⁴ Applicant's rebuttal submission at paragraph 13.

(*Sable SCC*), because the factual situation in the present case was different from the factual situation before the Supreme Court in *Sable SCC*.

[para 61] The principles regarding the application of settlement privilege espoused by the Supreme Court of Canada in *Sable SCC* and relied on by the Public Body in this case are fundamental principles and do not require the same factual basis to be present for them to apply.

[para 62] The Alberta Court of Appeal in the *Bellatrix* decision and the Supreme Court of Canada in the *Sable SCC* decision confirmed that settlement privilege protects correspondence aimed at settling or negotiating the settlement of a dispute whether or not the parties reach a final settlement.

[para 63] In its *in camera* submission, the Public Body directed me to the language in the letters that set out the dispute between the Public Body and the third party recipient, specified the confidentiality of the letter, and addressed the purpose of the letter with respect to settlement of the dispute.

[para 64] As per *Bellatrix* and *Sable SCC*, the letter does not have to be the final agreement reached between the parties to settle the dispute in order to be covered by settlement privilege.

[para 65] Having reviewed the Records, I am satisfied that the purpose of each letter was to negotiate a settlement.

[para 66] Prior Orders of this Office have found that where settlement privilege has been established under section 27(1)(a), which is a discretionary provision, as the privilege belongs to both parties, section 27(2) applies and *requires* that the Public Body withhold the information (see, for example, Order F2021-23 at paragraphs 42 – 45).

[para 67] I find that the Public Body has established that settlement privilege applies to the Records under section 27(1)(a) and that section 27(2) requires the Public Body to withhold the Records.

[para 68] I also note that the Public Body's decision to disclose information in the News Releases about the settlement agreements it reached with the applicable third parties, presumably with the agreement of the applicable third parties, does not vitiate its claim of settlement privilege over information contained in the Records which preceded the settlement agreements, and which information was not otherwise disclosed.

[para 69] As I have concluded that the Public Body has established that settlement privilege applies to the Records, it is not necessary for me to consider whether section 25(1)(c) also, or in the alternative, applies to the Records.

V. ORDER

[para 70] I make this Order under section 72 of the FOIP Act.

[para 71] I find that the Public Body has established that settlement privilege applies to the Records pursuant to section 27(1)(a) of the FOIP Act and the Public Body is required to withhold the Records pursuant to section 27(2) of the FOIP Act.

Carmen Mann
Adjudicator
/kh