ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2005-030

December 18, 2007

ALBERTA ENVIRONMENT

Case File Number 3355

Office URL: www.oipc.ab.ca

Summary: The Applicant sought access under the *Freedom of Information and Protection of Privacy Act* (the "Act) to a remediation agreement (the "Agreement") reached between the Public Body and a corporation (the "Affected Party"). The Agreement concerned environmental remediation of lands contaminated by hydrocarbon vapours and lead. The Affected Party had been named as the "responsible person" in environmental protection orders (EPOs) that had been issued by the Public Body prior to the mediation. The mediation was instigated after the Affected Party brought appeals of the EPOs to the Environmental Appeals Board (EAB), but before the matters were heard by the Board. An EAB mediator assisted in the mediation. The Agreement contained provisions for achieving clean-up of the lands. It resulted in cancellation of the EPOs by the Director and withdrawal by the Affected Party of the related appeal. The Public Body had released certain information about the Agreement to the public through the news media, and more detailed information directly to the Applicant on a confidential basis, but refused to disclose the document that is the Agreement in response to the access request. The corporate Affected Party objected to release of the information.

The Commissioner found:

With regard to section 16 of the Act (disclosure harmful to business interests of a third party): Most of the information in the Agreement which the Affected Party said was its commercial, financial, scientific and technical information had not been supplied in confidence to the Public Body. Even if it had been, the *Environmental Protection and Enhancement Act* ("EPEA") authorized disclosure of the information, and section 16(1) was therefore inapplicable by reference to section 16(3). A single exception, that the Commissioner found could properly be withheld, was contained in an exhibit (#7) to the Agreement.

With regard to section 17 of the Act, the Commissioner held that it would be proper to withhold the personal information of third parties.

With regard to section 27 of the Act (settlement negotiation privilege): This privilege applies to communications made during the course of negotiating an agreement, but not to the agreement itself.

With regard to section 24(1) of the Act (advice from officials, information for contractual negotiations): The section protects information exchanged during the currency of negotiations, but does not extend to the results of those negotiations. The Agreement was the result of negotiations and thus was not captured by the section. The ongoing regulatory relationship between the parties did not change this conclusion. With respect specifically to sections 24(1)(a) (advice developed by a public body) and 24(1)(c) (positions, plans, etc., developed by a public body), no part of the Agreement or the exhibits attached to it was shown to have been developed by or on behalf of the Public Body.

With regard to section 25(1)(c)(iii) of the Act (disclosure harmful to economic or other interests of the public body): Disclosure of the agreement would not harm the Public Body's interests by making it impossible for it to perform its statutory mandate to require responsible persons to meet their duties. Neither could the Public Body rely on harm that might be caused by requiring it to breach a contract to keep the Agreement confidential. It had not clearly entered into such a contract. Even had it done so, it is not permitted to contract out of obligations under FOIP and then rely on the contract to establish harm.

With regard to section 32, it is not necessary to deal with this provision, except in relation to the two minor categories of information that may properly be withheld, as decided above. Section 32 does not apply to these items of information

The Commissioner ordered the Public Body to disclose to the Applicant the entire Agreement, except certain items of personal information, which he agreed must be severed, and Exhibit 7.

Statutes Cited: AB: *Conservation and Reclamation Regulation*, A.R. 115/93, s. 3; *Disclosure of Information Regulation*, A.R. 273/2004; *Environmental Protection and Enhancement Act*, RSA 2000 c. E-12, ss. 2, 35, 35(1), 35(1)(b), 35(3), 35(9), 100, 100(1) Part 5, ss. 123-127; Part 6, Part 10, s. 243(1)(b); *Environmental Appeals Board Regulation*, A.R. 114/93, ss. 11, 12, 12(1); *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 11, 16, 16(1), 16(1)(a), 16(1)(b), 16(1)(c), 16(3), 16(3)(b), 17, 24, 24(1), 24(1)(a), 24(1)(c), 25, 25(1)(c), 25(1)(c)(iii), 27, 27(1), 27(2), 59(3)(a), 72; *Interpretation Act*, R.S.A. 2000, c. I-8, s.1(1)(c)(i), 28(1)(m); Ministerial *Order* 23/2004, ss. 1(i), 1(k), 1(m), 1(n), concluding paragraph condition (i); *Provincial Court Act*, R.S.A. 2000, c. P-31, ss. 22, 67.

Orders Cited: AB: Orders 96-006; 96-012; 96-013; 96-016; 96-020; 98-015; 99-017; 99-020; 2000-003; 2000-005; 2000-029; 2001-010; 2001-025; F2004-024; **BC:** Orders 01-06; 03-15; **ONT:** Order PO-2112.

Cases Cited: *Sparling v. Southam Inc*., (1988), 66 O.R. (2d) 225 (Ont. H.C.); *R. v. Gruenke* [1991] S.C.J. No. 80; *Middelkamp v. Fraser Valley Real Estate Board***,** [1992] B.C.J. No. 1947 (B.C.C.A.); *Loewen, Ondaatje, McCutcheon & Co. v. Sparling* [1992] 3 S.C.R. 235 (S.C.C.); *Geleta v. Alberta (Minister of Transportation & Utilities)*, (1996) 193 A.R. 67 (Alta. C.A.); *Costello v. Calgary (City)*, [1997] A.J. No. 888 (Alta. C.A); *Western Canadian Place Ltd. v. Con-Force Products Ltd.*, [1998] A.J. No. 1295 (Alta. Q.B.); *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [2003] B.C.J. No. 591 (B.C.C.A.); *Dos Santos v. Sun Life Assurance Co. of Canada* [2005] B.C.J. No. 5 (B.C.C.A.).

Authorities Cited: J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada,* 2nd Edition, Toronto: Butterworths, 1999; Sullivan, R., *Sullivan and Driedger on the Construction of Statutes*, 4th Edition, Markham: Butterworths, 2002.

I. BACKGROUND

[para 1] Alberta Environment ("the Public Body") is responsible for environmental regulation under the *Environmental Protection and Enhancement Act* ["EPEA"]. It took regulatory action starting in 2001 regarding contamination by hydrocarbons and lead of an area of land located within the boundaries of the City of Calgary (the "Applicant"). A previous owner of the land, Imperial Oil Ltd., had released contaminants on the land many years earlier, before statutory environmental restrictions on doing so had been imposed. It later sold the land to a subsidiary. Imperial Oil Ltd. and the subsidiary corporation are referred to herein as "the Affected Party." The latter developed the land as a residential area. Concerns later arose as to the environmental condition of the site for that use.

[para 2] The need to remediate the site, to what standard, and the responsibilities of the parties, had been the subject of protracted regulatory and court proceedings. The Public Body had issued a number of environmental protection orders (EPOs), and the Affected Party (which had been named as the "responsible person" therein) had contested them. At one point in the proceedings, at which the Affected Party had appealed two EPOs to the Environmental Appeals Board (the "EAB" or "Intervenor") but the appeal had not yet been heard, the Public Body and Affected Party engaged in a mediation, assisted by a mediator provided by the EAB. The Applicant had been invited to the mediation, but had declined to participate.

[para 3] The mediation was successful, and an Agreement was signed by the Public Body and the Affected Party. In early 2005 the Public Body and Affected Party released certain information about the mediated Agreement to the public through press releases. They also provided more detailed information (consisting of significant parts of the Agreement) to the Applicant, with the condition that the Applicant not disclose it further.

The Applicant was not satisfied and applied under the *Freedom of Information and Protection of Privacy Act* ("the Act") for access to the Agreement. The Public Body refused to release the document. The Affected Party also objected to its release.

[para 4] The Applicant asked the Commissioner's office to review the Public Body's decision to withhold the Agreement. A full OIPC mediation was rejected as unlikely to resolve the matter, and it proceeded to an inquiry. The Public Body, the Affected Party and the Applicant all made initial and rebuttal submissions. My Office accepted the request of the Environmental Appeals Board to participate as an Intervenor. The Intervenor made a submission addressing a number of issues set out for it by my Office.

This matter was initially set to be heard by an Adjudicator in this Office as a written hearing. The Adjudicator made some preliminary procedural decisions in this inquiry, but retired from his position before concluding the inquiry. I have accordingly taken over the inquiry and reheard the matter, based on the parties' submissions.

II. RECORDS AT ISSUE

[para 5] The record in issue is the agreement reached between the Public Body and the Affected Party ("the Agreement"). The record submitted to me consists of 235 pages.

ISSUES

[para 6] The issues stated in the Notice of Inquiry are as follow:

Issue A: Does section 16 of the Act (business interests) apply to the records/information?

The Adjudicator requests that, under section 16 of the Act, the parties also address whether section 16(3)(b) applies to the records/information. Section 16(3)(b) says that section 16(1) does not apply if an enactment of Alberta or Canada authorizes or requires the information to be disclosed. The Adjudicator wants to know whether, for example, the Alberta Environmental Protection and Enhancement Act or its regulations authorizes or requires the information to be disclosed.

Issue B: Does section 17 of the Act (personal information) apply to the records/information?

Issue C: Does section 27(2) of the Act (privileged information of person other than public body) apply to the records/information?

Issue D: Did the Public Body properly apply section 24 of the Act ("advice") to the records/information?

Issue E: Did the Public Body properly apply section 25 of the Act (economic interest of a public body) to the records/information?

Issue F: Did the Public Body properly apply section 27(1) of the Act (privileged information) to the records/information?

Issue G: Did the Public Body comply with section 11 of the Act (time limit for responding)?

Issue H: Does section 32 of the Act require the Public Body to disclose information in the public interest?

[para 7] Before discussing the issues stated above, I will make a finding of fact that is significant to my determination of some of these issues. This relates to what the Agreement itself says on the point of whether it is confidential, or disclosable, by the parties to it. I will state this preliminary issue as follows:

Preliminary Issue: What did the parties agree with regard to the confidentiality of the Agreement?

III. DISCUSSION OF ISSUES

Preliminary Issue: **What did the parties agree with regard to the confidentiality of the Agreement?**

[para 8] Throughout their submissions, the Public Body and Affected Party repeatedly make the point that the Agreement is, by its own terms, to be kept confidential and not disclosed to anyone. The Public Body argues that that disclosure by any party (which would include the Public Body on an access request) would itself constitute a breach of the Agreement.

[para 9] To support this contention, the Public Body points to various clauses in the Agreement. In particular, at para 56 of its initial submission, it names the pages and Articles at which these particular clauses are found, and argues that these demonstrate that "the contents of the Remediation Agreement were confidential and not to be disclosed by any party".

[para 10] The Affected Party makes similar assertions and references in its *in camera* submissions at Tab B, page 2, fourth paragraph, and page 3, fifth paragraph, bullets two to four (referring in particular to clauses 13 and 15 of the Agreement).

[para 11] The clauses cited cannot be reproduced here because the Agreement is the document in issue. Section 59(3)(a) prohibits me from disclosing this record or its contents. As this is an important factual question, I will include a discussion of the parts of the Agreement that are relevant to this question in an Addendum to this decision. I will provide the Addendum to the Public Body and Affected Party, but not to the Applicant. In the event the Public Body or Affected Party take this aspect of this decision to judicial review, I will provide in my return to the court both the Order containing the open part of

my reasons for decision, and the Addendum, and will request that the Addendum be sealed. The court may then make any orders it sees as necessary with respect to further dissemination of these reasons for the purpose of the review.

[para 12] In view of the parts of the Agreement just referred to (and discussed in the Addendum), I do not accept the contention of the Public Body and the Affected Party that they contracted to keep the Agreement itself confidential. I find, rather, that only the communications made, during the mediation, in order to achieve the Agreement were clearly intended to be confidential, in the various ways the Agreement specifies. With respect to whether the Agreement itself was intended to be kept confidential and not disclosable, I find the Agreement is inconclusive as to the parties' intentions. Accordingly, I cannot find that they contracted to make it confidential.

[para 13] Because the language of the Agreement itself is equivocal, I am perplexed that the Public Body and the Affected Party contend in their submissions, in no uncertain terms, that the terms of the Agreement prevent its disclosure.

[para 14] I am the more perplexed about these claims when I consider that there is a regulatory process in the legislation, that was not followed in this case, which reflects a public policy of openness relating to the remediation of contaminated land. The *Environmental Protection and Enhancement Act* and associated regulations permit a mediated resolution of the appeal of an EPO. However, resolutions are to become the subject of a Board Report, and ultimately, a decision by the Minister. EPOs, Board Reports under section 12(1) of the *Environmental Appeal Board Regulation*, and Minister's orders under section 100(1) of the EPEA, are all available to the public.[1] In this case, there was a resolution, but no Board Report or subsequent Minister's order. Rather, the parties entered into a binding agreement, based on the mediated resolution, that resulted in cancellation of the EPOs and withdrawal of the appeals.

[para 15] It seems a surprising proposition that by not following the usual processes, and instead entering into an agreement the EPEA does not contemplate in the context of an appeal, the parties can keep confidential the document that takes the place of publicly-available instruments. The environmental legislation mentioned above clearly reflects a policy that the public should know about the mediated resolutions of regulatory problems. The same public policy for openness applies, in my view, to the terms of the cancellation of an EPO (which in this case are contained in the Agreement). As noted in the Addendum, the equivocation in the Agreement may reflect the signing parties' own recognition of this public policy.

[para 16] I am further strengthened in my conclusion on this point by the submissions of the Intervenor, the EAB. In these submissions, the EAB sets out its policy with respect to confidentiality or otherwise of decisions made in the regulatory appeal process. With reference to the Board's "template agreement to mediate", the submission says the following:

[1] These provisions are quoted or further described at para 61 below.

> In the Board's view it is good practice and permissible to allow the parties to modify the standard template [which provides for publication of regulatory decisions] within certain bounds, and at times it is necessary to do so to get the parties to agree to mediate at all. The limits of this as regards confidentiality are that any change to the regulatory decision [in this case, the EPOs that were under appeal] must obviously remain public and is not only producible under the Privacy legislation it is public. However, to the extent the parties choose to mediate other, albeit collateral, issues, they are free to do so and indeed encouraged to do so if, as a result, the regulatory action under appeal may be resolved.

The latter reference is to clauses that are "solely between the Participants and do not become part of the regulatory document", and that cannot be enforced by the EAB or Alberta Environment (though they may be enforced through court action or private mediation). A hypothetical example of such a clause was provided by the EAB. This was where "a community might withdraw its objection to certain adverse effects of a plant if the project promoter agrees to provide enhanced facilities within that community".

[para 17] In this case, the Agreement is a document neither contemplated by the legislation nor enforceable through it. In this strict sense, therefore, it might not be a "regulatory document". However, the substance of the Agreement is the same as – though more detailed than - the substance of the regulatory action it replaces. The matter treated by the Agreement is a regulatory rather than collateral matter.[2] In my view, even though the procedure used by the parties for achieving the regulatory resolution was not that set out in the legislation, the principle of openness for regulatory decisions, described by the Intervenor, applies equally to this document. By simply adopting an alternate procedure to that set out in the environmental legislation, the parties could not – nor, as my review of the relevant clauses demonstrates, did they clearly intend to – avoid the sound principle that the resolution of environmental remediation issues should be visible to the public.

[para 18] I turn now to the issues stated in the Notice of Inquiry.

Issue A: Does section 16 of the Act (business interests) apply to the records/information?

Application of section 16(1)
[para 19] In order for section 16 to apply, the information at issue must fall under section 16(1). This provides:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
> *(a) that would reveal*
> *(i) trade secrets of a third party, or*

[2] There are some clauses that might be seen as treating collateral issues – for example, Exhibit 7 – but this is relatively a very minor part of the overall agreement.

> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, 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.*

[para 20] The Applicant argued that section 16(3)(b) which makes section 16(1) inapplicable in certain circumstances, has been met in this case. Section 16(3)(b) provides in part that:

> *16(3) Subsections (1) and (2) do not apply if…*
> *(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,… .*

[para 21] The first question is whether the information falls under either 16(1)(a)(i) or (ii). The Affected Party has provided submissions on this point. In its open submission it says that the Agreement contains its commercial, financial, scientific and technical information, but does not specify which parts of the Agreement contain such information. In its closed submission it narrows its claim to one that the Agreement contains its commercial and financial information. It describes which parts of the Agreement consist of its commercial and financial information. With respect to commercial information, it says this consists of the parts of the Agreement that define its responsibility for remediating the site. With respect to financial information, it says this consists of the costs it will incur in the remediation process and the timing of these costs. It also says that the specifics of its remediation obligations will affect the future use and value of its property in the site.

[para 22] I accept that some, though not all, parts of the Agreement contain the Affected Party's financial information.

[para 23] In its rebuttal submission, the Affected Party includes another assertion that the Agreement contains its scientific and technical information. This assertion relies on the Applicant's statement that it seeks to discover "what environmental clean-up standards are being applied to the lands" and "the scientific basis used to set those

standards". While I see that this can be described as scientific and technical information, I have no basis on which to conclude that this is scientific and technical information *of the Affected Party*. Though some of the Exhibits (#s 8 to 10) contain correspondence directed to the Affected Party that contain scientific or technical information (for example, the first page of Exhibit 8), and state that the information is for the use of the Affected Party, some of these same documents also indicate that they were developed at the request of the Public Body or in consultation with it, and one pertains to work that, as disclosed in the press releases, was to be the responsibility of the Public Body. Neither the Public Body nor the Affected Party asserted that these particular documents constituted scientific or technical information of the Affected Party. Thus, without more, I cannot find that this is the case.

[para 24] The foregoing discussion also informs the question of whether the information was "supplied to" the Public Body by the Affected Party. For information to be so "supplied", the third party must be the source of the information. Order 2000-005 held that, generally, information in an agreement that has been negotiated between a third party and a public body is not information that has been *supplied to* a public body. There are exceptions, where information supplied to the public body prior to or during negotiations is contained in the agreement in a relatively unchanged state, or is immutable, or where disclosure of information in an agreement would permit an applicant to make an accurate inference about information supplied to the public body during the negotiations (See Order 2000-005 at para 85; see also an extensive discussion of this topic in British Columbia Order 03-15.)

[para 25] In this case, the information the Public Body seeks to withhold is part of a contract negotiated between itself and the Affected Party. With respect to most of the Agreement, there is no evidence before me that any of the information that the Affected Party has described as its commercial or financial information was supplied to the Public Body by the Affected Party for the purpose of or prior to the negotiations of the contracts, or that any inferences can be drawn from the requested information about information that was so supplied. Accordingly I cannot conclude that most of this part of the requested information was information *supplied to* a Public Body as contemplated by section 16(1)(b).

[para 26] A possible exception is the Draft that constitutes Schedule B of Exhibit 1. This document states on its face that it was supplied to the Public Body by the Affected Party. However, this would not be true to the extent this draft was in fact the product of negotiations between these two parties. The preface for this document indicates that the Public Body had provided its comments and directives for revisions to an earlier draft, and that these had been considered in later drafts. The involvement of the Public Body in the development of the document means that it does not meet the criterion of information of the third party that is supplied to the public body

[para 27] With respect to scientific or technical information, as already noted, some of the Exhibits contain correspondence contain scientific or technical information directed to the Affected Party by other persons and said to be for its use. However, many of these

same documents also indicate that they were developed by these other persons in consultation with or, in one case, at the request of, the Public Body. Thus, again, I cannot conclude that these documents were scientific or technical information *supplied to* the Public Body. Rather, they were documents that reflected the Public Body's requirements and were *negotiated with it*, with the assistance of a third party.

[para 28] I turn finally to the "in confidence" criterion. As I have already said, I do not question that communications made during or relative to the Mediation, whether made before, during or after it, were intended by both the Public Body and the Affected Party to be kept in confidence. There is a great deal of evidence to this effect, including in the Agreement itself. However, as I have explained in the Addendum, the same is not true for the resolution achieved through the mediation – the Agreement itself. The Agreement is, as described in detail in the Addendum, internally contradictory and equivocal as to whether it may be disclosed by a party unilaterally. Thus for the most part, not only was the Agreement, including its attachments, not *supplied to* the Public Body, but it cannot be said conclusively that the parties intended any information that was incorporated into the Agreement to be kept confidential.

[para 29] As I have concluded that neither section 16(1)(a) nor 16(1)(b) are met, and as in order for section 16(1) to apply all of its conditions must be met,[3] it is not necessary for me to consider the Affected Party's submissions that disclosure of the Agreement would cause the harms described in section 16(1)(c).

[para 30] As I have concluded that section 16(1) is not met, it is not strictly necessary for me to consider the Applicant's claim that section 16(3)(b) applies to create an exception to the application of section 16(1). I will nevertheless consider this question, in case I am wrong in my conclusions relative to section 16(1). I will therefore consider whether there is any legislation that authorizes or requires the Public Body to disclose the information in the Agreement that the Affected Party so described.

[para 31] The parties drew to my attention to the following:

- EPEA sections 2, 35, Part 5 (sections 107 – 122), sections 123 – 127;
- Disclosure of Information Regulation A.R. 273/2004, made under the EPEA;
- Ministerial Order 23/2004 made under the authority of EPEA section 35(3), and;
- Conservation and Reclamation Regulation A.R. 115/93 section 3, made under the EPEA.

Conservation and Reclamation Regulation

[para 32] I agree with the Public Body that section 3 of the *Conservation and Reclamation Regulation* does not govern in the situation before me. It applies to actions taken by the Director of the Public Body under Part 6 of the EPEA. In this case, the action taken by the Public Body was, according to its own submission, under the authority of Part 5 of the EPEA, which governs substance releases.

[3] See Order 98-015, at para 9.

EPEA section 35(1)[4]

[para 33] I agree with the Public Body and the Affected Party that the Agreement is not specifically any one of the listed items that the Public Body must disclose to the public pursuant to EPEA section 35(1). The Applicant argues that the terms of the Agreement (as far as it can tell having seen only limited parts of it) stand in substitution for documents in that list, such as EPOs and remediation certificates. It says that the idea that the intent to release that *type* of information to the public is clear, and the Agreement, as an equivalent document, could be taken to be covered by the section. As I find below that other parts of the legislation clearly cover any information in the Agreement that might be the Affected Party's commercial, financial, scientific or technical information, I do not need to decide if I accept this reasoning.

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[4] This provides:

35(1) Subject to this section,

(a) the following documents and information in the possession of the Department that are provided to the Department in the administration of this Act must be disclosed to the public in the form and manner provided for in the regulations:

- *(i) information in respect of a proposed activity that is provided to the Department for the purposes of Part 2, Division 1 by a proponent within the meaning of that Part;*
- *(ii) documents and information in the register referred to in section 56;*
- *(iii) information that is provided to the Department as part of the application by*
  - *(A) an applicant for an approval, a registration or a certificate of variance;*
  - *(B) the holder of an approval or registration, in respect of an application to change an activity;*
  - *(C) the holder of an approval, in respect of an application to amend a term or condition of, add a term or condition to or delete a term or condition from the approval;*
- *(iv) environmental and emission monitoring data, and the processing information that is necessary to interpret that data, that is provided by an approval holder or a registration holder or provided pursuant to a code of practice;*
- *(v) any reports or studies that are provided to the Department in accordance with a term or condition of an approval or a code of practice;*
- *(vi) any reports or studies that are provided to the Department and are required by the regulations to be disclosed to the public under this section;*
- *(vii) statements of concern;*
- *(viii) notices of appeal;*

(b) the following documents that are created by the Department in the administration of this Act shall be disclosed to the public in the form and manner provided for in the regulations:

- *(i) approvals and registrations;*
- *(ii) certificates of qualification;*
- *(iii) certificates of variance;*
- *(iv) environmental and emission monitoring data and the processing information that is necessary to interpret that data;*
- *(v) reclamation certificates;*
- *(vi) remediation certificates;*
- *(vii) enforcement orders;*
- *(viii) environmental protection orders.*

EPEA section 35(3) and Ministerial Order 23/2004

[para 34] EPEA section 35(3) authorizes the Minister to disclose to the public, in the form and manner provided in the regulations, any information in the possession of the Department that the Minister considers should be public information. Ministerial Order 23/2004 was made under the authority of EPEA section 35(3) as part of a "Routine Disclosure" initiative by the Public Body. The Appendix to the Ministerial Order provides:

> *1. Pursuant to s. 35(3) of the Environmental Protection and Enhancement Act and s. 88(1) of the Freedom of Information and Protection of Privacy Act, the following records and information in the possession of the Department shall, as of April 1, 2005, be available to the public without the need for a formal request under the Freedom of Information and Protection of Privacy Act regardless of the format of the information or records and the date of receipt or date of production of the information or records:*
>
> …
>
> *g) Notice of Decision of a Director;*
>
> *h) decisions of a Director provided to an applicant, approval holder, registration holder, licensee, preliminary certificate holder or Statement of Concerns filers;*
>
> *i) any information or records submitted to the Department pursuant to Part 5 of the Environmental Protection and Enhancement Act,*
>
> …
>
> *k) scientific and/or technical information, studies, reports, records submitted to the Department pursuant to Part 5 of the Environmental Protection and Enhancement Act relating to the environmental condition of a site, including tests and assessments, relating to the delineation or remediation of such sites, or any correspondence between the submitter and the Department pertaining to such information or records;*
>
> …
>
> *m) information or records submitted to the Department that relate to an application under the Environmental Protection and Enhancement Act, or its regulations, excluding an application for a reclamation certificate;*
>
> *n) any correspondence from the Department to the applicant relating to the submitted information or records, excluding correspondence relating to an application for a reclamation certificate;*
>
> *Notwithstanding the foregoing, this Order does not apply to any information or records*
> *(i) that relate to a matter that is the subject of an open or ongoing investigation or proceeding or*
> *(ii) (ii) that is subject to a Director's determination in favour of confidentiality under s. 35(5) of the Environmental Protection and Enhancement Act.* [5]

[5] The Ministerial Order was signed November 9 2004, and at that date included direction that it would come into effect April 1 2005. It applies to documents dated before and after its making. In accordance with sections 28(1)(m) and 1(1)(c)(i) of the *Interpretation Act*, this Ministerial Order is an enactment of Alberta. The *Disclosure of Information Regulation* AR 273/2004 addresses the manner of disclosure of information considered by the Minister to be public information under the authority of EPEA section 35(3), and includes preconditions in certain circumstances.

[para 35] The Public Body says that the Ministerial Order does not apply. I do not agree. The Public Body itself, in its rebuttal submission[6], asserts that

> The Remediation Agreement, …, and the previous EPOs, are based on the authority of Part 5 of the EPA, governing substance releases.

The Director as party to the Agreement was necessarily acting under the authority of the Act, and Part 5 is the part of the Act that gave him authority relative to the matters in issue in the Agreement. I note as well that the two Environmental Protection Orders (EPOs), issued under Part 5, remained in place until the Agreement was signed, and the Agreement contained terms that replaced these EPOs.

[para 36] Thus, if I am wrong that any scientific, technical, commercial and financial information of the Affected Party in the Agreement was not *supplied to* the Public Body, and such information was in fact so supplied, then, in my view, the information falls squarely within the scope of section 1(i) of the Ministerial Order – "any information or records submitted to the Department pursuant to Part 5 of the Environmental Protection and Enhancement Act". As well, any scientific or technical information that was supplied falls within section 1(k) of the Ministerial Order. Alternatively, if the parties were not acting under Part 5 but instead were acting further to the Director's power to cancel EPOs under 243(1)(b) of the EPEA[7], the information falls under sections 1(m) and 1(n). Thus the terms of section 16(3)(b) are met for this information, and section 16(1) does not apply.

[para 37] I am not moved from this conclusion by the Public Body's and Affected Party's assertions that the information relates to a matter that is the subject of an open or ongoing investigation or proceeding under the Act. (In this regard, the Affected Party refers to EPEA section 35(9)[8], and the Public Body to Ministerial Order concluding paragraph, condition (i) (quoted at para 34 above). The two provisions contain similar language. They provide that information may not be released under subsections 35(1) and (3), or under the Ministerial Order, where it relates to a matter that is subject of an open or ongoing investigation or proceeding under the Act.) The Public Body and the Affected Party assert the matter is, under the auspices of the EPEA, "ongoing" or "open" between them. They say that parts of the Agreement set terms of future monitoring, expectations and requirements, and that the Affected Party has ongoing obligations under the EPEA.

[para 38] I have reviewed the EPEA as to what constitutes an "investigation" or "proceeding" under that Act. Part 10 refers to "investigations", and provides a framework for understanding that term in the context of the EPEA. While previous action in this matter included issuance of a "Notice of Investigation", that investigation was overtaken

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[6] At page 4, para 7.
[7] This analysis of the actions of the parties is discussed further below at para 66.
[8] This section of the EPEA provides: "Information relating to a matter that is the subject of an investigation or proceeding under this Act may not be released under subsections (1) or (3)."

by the issuance of EPOs and, finally, by the signing of the Agreement. As to "proceeding," the EPEA does not define the term. It authorizes many actions that the Public Body may undertake that would in my view properly be called a "proceeding." Examples include the processes leading to granting certificates, approvals, and registrations, and adjudications by the EAB. Read as a whole, the EPEA and the Ministerial Order suggest to me that what is meant by "proceedings" in the two provisions are discrete actions taken under specific legislative authority that have recognizable endpoints. That accords with the dictionary (Canadian Oxford) definition of the term "proceeding", used in the sense of an action at law.

[para 39] Thus, in this case, I would characterize the appeal of the EPOs as a "proceeding", of which the mediation was a part, but in my view, that "proceeding" concluded with the withdrawal of the appeal that took place on signing of the Agreement. Alternatively, the mediation was a "proceeding" in itself, but again, that proceeding concluded in the same manner. The fact that actions remained to be taken under the Agreement did not mean that the subject matter of the Agreement was the subject of an open or ongoing investigation or proceeding under the EPEA. Non-compliance with the Agreement or other issues requiring resolution might arise, but to my mind any legal actions taken to deal with them would, whether or not they were set out in the Agreement, constitute new proceedings.

[para 40] I am supported in this view by the fact that, in the same way the Agreement does, EPOs contemplate future action by the regulated party, and set out terms for what is to be done. EPEA section 35(1)(b) requires disclosure of EPOs. The EPOs that were under appeal were publicly available when they were issued. I discount any suggestion that section 35(9) requires that any possible future action to be taken under an EPO be completed before it is to be made publicly accessible. In the same way, I reject the idea that section 35(9) should be read as precluding disclosure of the information in the Agreement because the Agreement sets out the details of future activity on the part of the parties, or could result in further regulatory activity by the Public Body, or litigation before the courts. A reading of section 35(9) that would require non-disclosure on the basis that there might be future regulatory activity or litigation relative to a matter would render many of the disclosure provisions in section 35 of little value.

[para 41] I note also that section 16 would in any event support withholding only of information in the Agreement that is described in section 16(1), and that the Agreement contains other kinds of information in addition information of the Affected Party, if any, that is its commercial, financial, scientific or technical information.

[para 42] A single item of information may be withheld under this heading as "financial information supplied in confidence". Exhibit 7 contains a draft of a document that deals with a matter which is in my view a collateral issue of the kind discussed at para 16 above. Because it is collateral, I believe it is not covered by any of the clauses of the Ministerial Order quoted above. As the Public Body is not involved directly in this matter, and as the information could reasonably be expected to interfere with the

negotiating position of the Affected Party with other persons, this information may be severed and withheld.

Issue B: Does section 17 of the Act (personal information) apply to the records/information?

[para 43] The Applicant and Public Body are not in dispute on this issue. There is a small amount of personal information of third parties contained in the Agreement and its attachments. The Applicant makes clear that it does not seek disclosure of that information. I have reviewed the severing of personal information done by the Public Body in the Agreement. With one exception of omission, the severing is correct. The omission is found at page 27 of the record, (page number 24 of the text of the Agreement) paragraph 13.2, line 3 (the name of an individual). Section 17 applies to all this information, and the Public Body must sever it before disclosing the remainder of the Agreement (excepting Exhibit 7).

[para 44] The Affected Party argues that revealing the information in the Agreement would be an unreasonable invasion of its personal privacy. The Act in section 1(n) defines "personal information" as "recorded information about an identifiable individual." Previous decisions of the Commissioner have interpreted that definition to mean that human beings, not corporations, have personal information. The Affected Party is a corporation. The Agreement does not contain any information of the corporate Affected Party disclosure of which would be an unreasonable invasion of privacy under section 17 of the Act. (See Order 96 –020.) In accordance with earlier decisions of this office, disclosure of the names of employees or representatives of the Affected Party or of other private organizations as they appear in the Agreement, acting in their representative capacities, is not an unreasonable invasion of their personal privacy.

Issues C and F:

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

Does section 27(2) of the Act (privileged information of person other than public body) apply to the records/information?

[para 45] Section 27 provides in part as follows:

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, … .

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 46] The Public Body's reliance on section 27 is based in part on the idea that that the Agreement falls within the phrase "subject to any type of legal privilege", in particular, "settlement negotiation privilege". As the Affected Party participated in the negotiation of the Agreement, any privilege relating to settlement negotiations that attaches to the Agreement would be in part the privilege of the Affected Party. Therefore I will discuss these two issues together.

[para 47] The Public Body relies on the test for settlement privilege set out in J. Sopinka, S.N. Lederman and A.W. Bryant, *The Law of Evidence in Canada*. As well, it argues that the Agreement is subject to case-by-case public interest privilege, to which a four-part test stated by Wigmore applies. Alternatively, it says that the Agreement is subject to case-by-case Crown privilege or immunity, and the associated criteria stated by the former Commissioner in Order 96-020.

[para 48] I will begin by making some observations about the law relating to privilege for settlement negotiations.

Privilege for settlement agreements in Alberta

[para 49] It is well settled that the discussions leading up to a resolution of a dispute in the face of litigation are privileged. In *The Law of Evidence in Canada,* cited above, the conditions that must be present for settlement privilege to be recognized are stated in the following terms:

> (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
>
> (c) the purpose of the communication must be to attempt to effect a settlement.[9]

[para 50] The purpose for this privilege that is most commonly recognized is that it promotes the settlement of lawsuits.[10]

[para 51] However, the Public Body's argument in this case is based on the idea that settlement *agreements* - in contrast to the discussions that lead up to the negotiated

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[9] This test for settlement negotiation privilege has been stated by the Alberta Court of Appeal in *Costello v. Calgary*, [1997] A.J. No. 888.

[10] The Supreme Court of Canada noted the strong public policy reason which encourages settlement in *Loewen, Ondaatje, McCutcheon & Co. v. Sparling*, [1992] 3 S.C.R. 235 (S.C.C.), at 259, citing *Sparling v. Southam Inc*. (1988), 66 O.R. (2d) 225 at 230 (Ont. H.C.):

> [T]he Courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduced the strain upon an already overburdened provincial Court system. [Emphasis deleted.]

In *Geleta v. Alberta (Minister of Transportation & Utilities)* (1996), 193 A.R. 67, at 69, the Alberta Court of Appeal recognized that "public policy is to encourage compromise, whether it is partial or full".

resolution of a dispute in the face of litigation - are covered by settlement negotiation privilege.

[para 52] As authority for this idea, the Public Body cites a case decided by the British Columbia Court of Appeal in 2003. In *British Columbia Children's Hospital v. Air Products Canada Ltd.*, [2003] B.C.J. No. 591, the court held that the privilege can apply not only to the communications during the course of settlement negotiation, but also to a concluded settlement agreement.[11] It is not clear from that case how the afore-noted criteria can be said to be met by the concluded settlement, as the language of the second and third clauses, (b) and (c), does not apply.[12] It makes no sense to conceive of the agreement as a communication in the context of condition (b). Since the existence of the settlement means negotiations have succeeded, the requisite intention relative to the communication of which the condition speaks – that it will not be disclosed if the negotiation fails - cannot exist for the settlement document. As for (c), the Agreement is not a communication attempting to affect a settlement, it is the settlement. Arguably, the goal of encouraging negotiated settlements would in some cases be promoted as much by attaching privilege to the negotiated outcome as to the preceding discussions. However, the only recognized rule is that communications in furtherance of settlement are to be withheld. The fact that withholding settlement agreements might achieve the same purpose is not a proper basis for asserting an unrecognized rule.

[para 53] In any event, there has not been an Alberta decision adopting the conclusion of the British Columbia Court of Appeal. In *Western Canadian Place Ltd. v. Con-Force Products Ltd.* [1998] A.J. No. 1295 (Q.B.), McMahon J. had reached a contrary conclusion, (at paras 13 to 19):

> In the critical task of balancing the two different public interests, namely the public interest in promoting settlements and the public interest in full discovery between parties to litigation, I have no doubt that the documents and contents of negotiations leading up to a settlement remain privileged notwithstanding that a settlement is reached.
>
> That, however, does not answer the issue in this application where the applicants seek to obtain production of the settlement agreement itself.
>
> WCPL argues that the public policy interest in fostering settlement must take priority even in circumstances where the negotiations are successful and an agreement results. It is said that the agreement may be a compromise and should not be available to be used against either party to it by persons who are not parties to the agreement.
>
> I am told that counsel have been able to find only one authority that dealt with a privilege claim to the production of a settlement agreement itself. That is the case of Hudson Bay Mining & Smelting Co. v. Fluor Daniel Wright [1997] 10 W.W.R. 622 (Man. Q.B.). In

[11] Leave to appeal this decision to the Supreme Court of Canada was granted, but the case was not pursued at that level.

[12] Conceivably, it could be said to apply where the final agreement in some way reveals particular, attributable, communications made during negotiation. However, the court did not suggest this was the case.

that case the plaintiff sued two defendants and settled with one. The second defendant sought production of the settlement agreement, documents reflecting the terms of the settlement and any releases.

After noting that the applicants there did not seek disclosure of the communications and negotiations leading up to the settlement, the Court held at p. 635:

> The settlement agreement is relevant for the purposes of disclosure. Relevance for the purpose of trial is for the trial judge. The settlement agreement is not privileged. It is a concluded contract. It is to be distinguished from settlement negotiations and communications.

Counsel have been unable to cite any cases where the settlement agreement was held to be privileged from production.

To weigh the competing interests I conclude that a concluded agreement, assuming relevance, cannot remain privileged. Either party to it may sue upon it. It may affect the rights and interests of others - for example on the issue of damages and values. The weight to be given to it is another matter entirely and is for the trial judge. The policy objective of encouraging settlement has been achieved. Now the primary interest is in full disclosure of relevant documents.

[para 54] The *British Columbia Children's Hospital* case (2003) came after the *Western Canadian Place* decision. However, in 2005, Binder, J. of the Alberta Court of Queen's Bench noted the case and commented that in the circumstances before him he did not need to decide whether there is, in Alberta, a class privilege that protects settlement agreements in the case of multi-party defendants. By implication, the Alberta court considers the question of whether the British Columbia ruling should be adopted to be undecided in this province. The only existing authority on the question in this jurisdiction, *Western Canada Place*, decides that the privilege (whether class or case-by-case) does not apply to settlement *agreements* as distinct from the negotiations leading up to them.

[para 55] In a more recent decision of the British Columbia Court of Appeal – *Dos Santos v. Sun Life Assurance Co. of Canada* [2005] B.C.J. No. 5 – the British Columbia Court of Appeal referred to its earlier conclusion in the *British Columbia Children's Hospital* case, but acknowledged that this is not the position in Alberta, at para 15, as follows:

> In B.C. Children's Hospital v. Air Products Canada (2003), 11 B.C.L.R. (4th) 28, 2003 BCCA 177, leave to appeal to S.C.C. granted, [2003] S.C.C.A. No. 240, this Court held that a final settlement agreement was covered under the Middelkamp blanket protection for settlement communications (para. 32). In contrast, the Manitoba and Alberta Courts of Appeal have both endorsed a distinction between final settlement agreements and communications leading up to settlement. The latter are privileged, the former are not: Hudson Bay Mining and Smelting Co. v. Fluor Daniel Wright (1997), 120 Man.R. (2d) 214 (Q.B.), aff'd (1998), 131 Man.R. (2d) 133 (C.A.), and cited with approval in Amoco Canada Petroleum Co. v. Propak Systems Ltd (2001), 281 A.R. 185, 2001 ABCA 110 at para. 40.

The criteria for determining case-by-case public interest privilege

[para 54] The Public Body's second argument relies on "case-by-case", privilege, as distinct from "class" or "blanket" privilege. The distinction between these two kinds of privilege was discussed by the Supreme Court of Canada in 1991[13] as follows:

> The parties have tended to distinguish between two categories: a "blanket", prima facie, common law, or "class" privilege on the one hand, and a "case-by-case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a prima facie presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). Such communications are excluded not because the evidence is not relevant, but rather because, there are overriding policy reasons to exclude this relevant evidence. Solicitor-client communications appear to fall within this first category (see: Geffen v. Goodman Estate, [1991] 2 S.C.R. 353 and Solosky v. The Queen, [1980] 1 S.C.R. 821). The term "case-by-case" privilege is used to refer to communications for which there is a prima facie assumption that they are not privileged (i.e., are admissible). The case-by-case analysis has generally involved an application of the "Wigmore test" (…[14]), which is a set of criteria for determining whether communications should be privileged (and therefore not admitted) in particular cases. In other words, the case-by-case analysis requires that the policy reasons for excluding otherwise relevant evidence be weighed in each particular case.

[para 56] The court noted that some writers tend to use the term "privileged communications" or "privilege" only in relation to communications which are class-based or prima facie inadmissible, but stated it would use the term "privilege" in relation to both types of communications.

[para 57] The afore-noted discussion by the Supreme Court of Canada was in the context of deciding whether there was a privilege for communications between pastor and church member (relative to a trial in a murder). For this reason, the reference to the

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[13] *R. v. Gruenke* [1991] S.C.J. No. 80, at para 26.

[14] The Wigmore test outlines four fundamental conditions as necessary to the establishment of a privilege against the disclosure of communications, as follows:

(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

Wigmore test, which focuses primarily on the *nature and importance of the relationship* between the parties to a communication, was appropriate for deciding whether there was a case-by-case privilege in that case. However, the same set of criteria has been imported in some cases, as well as in the submissions in the matter before me, into the discussion of case-by-case privilege relative to settlement negotiations between opposing parties.

[para 58] The idea that the Wigmore criteria apply to decide the latter question is, in my view, a misconception. It is possible that the Wigmore criteria were inappropriately imported into the discussion of privilege for settlement negotiations because Wigmore also contains a list of four policy rationales behind settlement privilege. In *Middelkamp v. Fraser Valley Real Estate Board***,** [1992] B.C.J. No. 1947, (B.C.C.A.)**,** a key and oft-cited B.C. decision on settlement negotiation privilege, both the Wigmore tests for relationship privilege, and the Wigmore theories for settlement negotiation privilege are mentioned. In *Costello v. Calgary (City)*, [1997] A.J. No. 888 , the Alberta Court of Appeal mentions the Wigmore criteria for relationship privilege in its discussion of privilege for settlement negotiations, but doesn't rely on them to decide if the privilege applies.[15] I note that there is no Supreme Court of Canada case that combines the two concepts. Neither are the Wigmore criteria for relationship privilege mentioned in the discussion of settlement privilege in Sopinka and Lederman's highly authoritative text, *The Law of Evidence in Canada.* (However, Wigmore's four theories for justification of the privilege are set out and discussed in this text). In my view, if there is a case-by-case public interest privilege applicable to settlement negotiation communications that is to be determined by balancing public policy goals, the Wigmore relationship test is the wrong one to apply to the relationship between two parties opposed in interest who are trying to achieve a negotiated resolution. Thus I reject the idea that the relationship between the Department of the Environment and the Affected Party in this case (Imperial Oil) meets the Wigmore criteria in the present circumstances, or that it makes any sense to ask whether it does. Rather, the case-by-case weighing that is to be done is between the public policies that favour disclosure on the one hand, and withholding on the other. Where, as is typically the case when a privilege is asserted for settlement negotiations, a particular legal action exists or is in contemplation, the competing policies are that of making evidence fully available for the proper administration of justice, versus that of promoting settlements.

Privilege for settlement negotiations in the public arena

[para 59] I note finally that privilege for settlement negotiation communications as discussed in the cases arises in the context of civil suits that arose from private disputes. Even if a privilege is attachable not only to statements made during negotiations but also to agreements that result from negotiation, can it be said to so attach in the context of regulatory proceedings that have a public interest component, in contrast to merely private disputes? A concept that is appropriate for the private arena may not be transferable to a more public one, particularly one in which the legislated norm is

[15] The court below (*Costello v. Calgary (City*) [1994] A.J. No. 1065) also mentions the Wigmore criteria, but the reference cited is to a case (*Strass v. Goldsack et al.* [1975] 6 W.W.R. 155 (Alta. S.C.A.D.)), that deals with a communication between a plaintiff and an insurance adjuster, and not with settlement negotiation privilege.

openness of the process. The agreement at issue in this case may have some private elements, but clearly it also falls into the public arena.

[para 60] As discussed earlier at para 16, the submission of the Intervenor, the Environmental Appeals Board, is highly instructive with respect to the public policy considerations that underlie the question of confidentiality of the mediation of appeals of regulatory actions. This submission makes it clear that from the EAB's standpoint, the negotiated resolutions of regulatory matters (in contrast to collateral contractual ones) are to be public. It supports the idea that based on considerations of public policy, the parts of the Agreement that stand in the place of regulatory action should not be treated as privileged within the terms of the FOIP Act.

The facts of this case
[para 64] I turn now to the facts before me.

[para 61] The subject matter of the negotiations was the clean-up of the contaminated area. It was undertaken after EPOs had been issued and an appeal from the EPOs had been taken to the EAB. Section 11 of the *Environmental Appeals Board Regulation* permits a mediation to be undertaken. Under section 12, where the parties agree to the resolution of a notice of appeal, the mediated result is to form the basis for a report, and, ultimately, a decision by the Minister under section 100 of the EPEA, both of which are to be made available to the public. The relevant parts of these provisions include the following:

> *Mediation*
> *11* *Where the Board has determined the parties to the appeal, the Board may, prior to conducting the hearing of the appeal, on its own initiative or at the request of any of the parties, convene a meeting of the parties and any other interested persons the Board considers should attend, for the purpose of*
> *(a)* *mediating a resolution of the subject matter of the notice of appeal, … .*
>
> *Resolution of notice of appeal*
> *12(1)* *Where the parties agree to a resolution of a notice of appeal filed pursuant to section 91(1)(a) to (j) of the Act … [which includes an appeal of an environmental protection order], the Board shall within 15 days*
> *(a)* *prepare a report and recommendations that are signed by the parties and reflect the agreed upon resolution,*
> *(b)* *submit the report and recommendations to the Minister to be dealt with under section 100 of the Act, and*
> *(c)* *send a copy of the report and recommendations to each party.*

[para 62] The EAB in its submissions included the following summary of what takes place once a resolution of the substantive issues in an appeal of an EPO has been reached:

> Whenever the Board makes a Report and Recommendations to the Minister, the Minister is the final decision-maker and will make a decision by issuing a Ministerial Order advising of the decision to confirm, reverse, or vary the decision appealed. The Ministerial Order is a wholly public document, and so is any Report and Recommendations once the Ministerial order is made.[16]

The EAB's submission also states that:

> … any change to the regulatory decision [in this case, the EPOs that were under appeal] must obviously remain public and it is not only producible under the Privacy legislation, it is published. However, to the extent the parties choose to mediate about other, albeit collateral, issues they are free to do so and indeed encouraged to do so if, as a result, the regulatory action under appeal may be resolved.[17]

[para 63] With respect to the Remediation Agreement at issue in this case, the EAB says the following:

> In this case, the final agreement that was reached did not form the basis of a Report and Recommendation to the Minister *because the agreement reached did not modify the Environmental Protection Orders that were the basis of the appeal. Alberta Environment did not modify the appealed Environmental Protection Orders but cancelled them* and Imperial Oil then withdrew its appeal to the EAB. That is something Imperial has a unilateral right to do. It required no exercise of the Board's discretion. Once the appeal was withdrawn the matter was no longer within the jurisdiction of the EAB. [emphasis added]

[para 64] The Public Body said in its submission that the mediation in this case took place under section 11 of the *Environmental Appeals Board Regulation*.[18] Neither the EAB nor the Public Body has suggested that the content of the Remediation Agreement is other than a resolution of the substantive matters under appeal. A comparison of the original EPOs and the terms of some parts of the Remediation Agreement suggests that this is precisely the case (though the latter is more detailed), and that the Remediation Agreement deals for the most part with a matter that is subject to the regulatory powers of the Board and not (with one minor exception[19]) with collateral contractual matters.

[para 65] It is not clear, therefore, why the steps under section 12 of the Regulation, which are mandatory in the event of an agreed-on resolution of a notice of appeal, were not followed, and why, in consequence, the Board did not prepare a Report and Recommendations, the Minister did not make a decision, and the entire outcome did not,

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[16] See sections 103 and 104 of the EPEA.
[17] The example provided by the EAB, already quoted above, was where "a community might withdraw its objection to certain adverse effects of a plant if the project promoter agrees to provide enhanced facilities within that community".
[18] See Rebuttal Submission page 3, paragraph 1.
[19] This was discussed at para 42.

in due course, become public in the way the legislation requires.[20] I have noted the EAB's point that the EPOs were not modified but rather were cancelled. In this regard, in my view, a cancellation is the most extreme form of modification, and in any case, the regulation does not in terms contain as a precondition to the mandatory steps that there be an *amendment* to the regulatory action. (Though the Board's procedural templates and rules speak in these terms to some extent[21], the regulation speaks only of an agreed-on resolution of the matter under appeal.)

[para 66] Because the parties did not follow the procedures just described, I considered a different analysis of the present facts. Section 243(1)(b) of the EPEA, which is located in the "Miscellaneous Provisions" section, permits the Director to cancel an EPO. Conceivably, the parties might (despite the assertion in the Public Body's submission) be seen as having negotiated not pursuant to section 11 of the *Appeals Board Regulation*, but rather, as in aid of an application by the Affected Party to the Director to cancel the EPO under section 243(1)(b) of the EPA Act. In other words, the settlement negotiation was for the purpose of achieving a Director-approved settlement that was a precondition to the exercise of the Director's power under section 243(1)(b). I am not sure section 243 can be interpreted as sufficiently broad in scope to allow the Director to entertain such an application in circumstances such as the present. In any event, even if this, or something like it, were the correct understanding of the steps taken by the parties under the legislation, the negotiations could not be treated as settlement negotiations such as could give rise to settlement negotiation privilege. This is because the Director under the EPEA was involved in the negotiations. Thus there can be no question of the content of the negotiations being privileged from disclosure to that official. For this reason, the criteria for the privilege, set out at para 49, cannot be met.

Conclusions regarding the claim of privilege for the settlement negotiation communications

[para 67] In light of the foregoing discussion, I have reached the following conclusions:

1. Settlement negotiation privilege in Alberta is for communications that take place during the settlement process. There is no privilege for the resulting settlement *agreements* in this jurisdiction. Thus neither sections 27(1) nor 27(2) can be said to apply to the Agreement on the basis of settlement negotiation privilege (regardless whether this is a class or a case-by-case privilege).
2. If that is the wrong conclusion, and a privilege for settlement negotiation communications applies to settlement agreements in Alberta (as one type of case-by-case public interest privilege), the Wigmore criteria for the application of a privilege (to protect a relationship) do not apply. Rather, the balancing is to be done by weighing the competing public policies that favour withholding on the one hand and disclosure on the other (with a presumption in favour of the latter). Typically, this balancing is done in the context of a

[20] I considered whether the parties to the Agreement might have been proceeding under section 128(1) of the EPEA, which deals with remedial action plans and agreements.. However, this provision seems to apply only to situations that are prior to the issuance of an EPO.

[21] See Rules of Practice # 17, and Template for Participants' Agreement to Mediate page 5.

known legal proceeding, and the competing goals are providing relevant evidence on the one hand, and encouraging negotiated settlements on the other. I am unaware of any such proceeding in this case.

3. If there is a case-by-case privilege for settlement agreements, it arises, and the weighing described in the previous paragraph is to be done, relative only to the settlement of private disputes rather than those that have a public interest element and an associated policy of openness.
4. Even if the weighing is to be done in the present circumstances, in the absence of the context referred to in para 2 (an ascertainable legal proceeding), I would give precedence in this circumstance to the public policy that there should be openness in the regulatory process. I would take for guidance the fact that the EPEA creates a procedure that makes it quite clear that the public should know about the outcomes resulting from a mediated solution to a regulatory problem. The legislature has dictated that the terms of an EPO itself are to be public.[22] The EAB's reports relative to mediated settlements are also to be public, as are the Minister's decisions based on such reports. In my view the same public policy considerations for openness apply to the terms of the cancellation of an EPO which in this case are contained in the settlement Agreement. Accordingly, I would find that in this case, the public policy of openness relative to remediation of contaminated sites would defeat the public interest in the negotiation of settlements.
5. With regard to the Public Body's argument that a case-by-case Crown privilege applies to the Agreement, in my view, only the first two of the five criteria set out by the Public Body[23] are meaningful in this case at this time. These are "the nature of the policy concerned" and "the particular contents of the documents". In my view, the consideration that is most significant relative to these criteria is, again, the public policy of openness relative to the remediation of contaminated sites. Thus Crown privilege does not constitute a basis for withholding the Agreement.

[para 68] I accordance with the foregoing discussion, I hold that there is no privilege relative to the Agreement, within the terms of section 27 of the Act, for the purpose of this access request. This conclusion would of course not preclude a court from finding that there was a privilege making the Agreement inadmissible in the context of a court proceeding.

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[22] See EPEA Section 35((1)(b)(viii).

[23] These criteria, which were adopted by the Alberta Court of Queen's Bench in *Leeds v. Alberta (Minister of the Environment)in denying a claim for immunity*, were outlined by the former Commissioner in Order 96-020. They are:

(a) the nature of the policy concerned
(b) the particular contents of the documents
(c) the level of the decision-making process
(d) the time when a document or information is to be revealed(e) the importance of producing the documents in the administration of justice
(e) any allegation of improper conduct by the executive branch towards a citizen.

[para 69] In its rebuttal the Public Body refers to section 67 of the *Provincial Court Act*, R.S.A. 2000, c. P-31. It says this provision codifies settlement negotiation privilege, and notes that the FOIP Act is said not to apply to "the result of a pre-trial conference or mediation". I do not accept that this provision applies to the present circumstances. Section 22 of the *Provincial Court Act* (the definition section) makes it clear that the "mediation" and "pre-trial conference" referred to in section 67 relate to such proceedings in actions taken under Part 4 of that act (which deals with civil claims).

Issue D: Did the Public Body properly apply section 24 of the Act ("advice") to the records/information?

The relevant parts of section 24 provide:

> *24(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,*
>
> *(b) consultations or deliberations involving*
> *(i) officers or employees of a public body,*
> *(ii) a member of the Executive Council, or*
> *(iii) the staff of a member of the Executive Council,*
>
> *(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations, … .*

[para 70] Previous orders of the Commissioner considering the application of section 24 have distinguished between information provided to public bodies during the decision-making process, including deliberations, and the end result of the decision or deliberations. The Public Body has discretion to withhold from disclosure information that is developed during the process of coming to the decision. The result of the process, the final decision, is not covered by the section. This conclusion is grounded in the purpose of the provision, which was stated in Order 96-006, by the then-Commissioner (at para 48), as follows:

> When I look at section 23 [now section 24] as a whole, I am convinced that the purpose of the section is to allow persons having the responsibility to make decisions to freely discuss the issues before them in order to arrive at well-reasoned decisions. The intent is, I believe to allow such persons to address an issue without fear of being wrong, "looking bad" or appearing foolish if their frank deliberations were to be made public. Again, this is consistent with Ontario and British Columbia. I therefore believe that a "consultation" occurs when the views of one or more officers or employees is sought as to the appropriateness of

> particular proposals or suggested actions. A "deliberation" is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. Here again, I think that the views must either be sought or be part of responsibility of the person from whom they are sought and the views must be sought for the purpose of doing something, such as taking an action, making a decision or a choice.

[para 71] The Public Body relies specifically on section 24(1)(c). In Order 96-012, the then-Commissioner elaborated his view of section 24 (then section 23), specifically in relation to section 24(1)(c) (then 23(1)(c)), at para 37-38, as follows:

> This is the first time that I have considered section 23(1)(c) in an Order. I interpret the intent of section 23(1)(c) to be similar to (a) and (b), that is, to protect information generated during the process of making a decision, but not to protect the decision itself. Furthermore, the information must relate to negotiations.
>
> Applying this reasoning, I do not see how section 23(1)(c) applies to the information severed on pages 25-1 and 37-10. The information severed on page 25-1 does not indicate any position, plan, procedure, criteria or instruction developed for the purpose of negotiations, as required by the section.

[para 72] The Commissioner confirmed his position as to the intent of section 24(1)(c) in Orders 99-020 and 2001-010. He said it is similar to sections 24(1)(a) and (b), in that it is to protect information generated during the decision-making process, but not to protect the decision itself.

[para 73] The Public Body argues first that pages 40–223 of the Agreement, consisting of 11 of the 12 Exhibits that the Agreement explicitly incorporates, reveal the basis of the negotiations between it and the Affected Party, and that this is a reason to permit it to withhold the Agreement under section 24(1)(c).

[para 74] Every negotiated agreement reflects to some degree the proposals that were made by one party or the other, and the matters that were discussed in achieving it. In the normal course some proposals are rejected and others are accepted and become part of the content of the agreement. Some such material is very likely to find its way into the agreement in a modified or even an unaltered format. Nevertheless, the Agreement is the decision itself. According to the earlier decisions of this Office cited above, it is not covered by section 24(1)(c).

[para 75] Further, material that can be withheld under this provision is “plans, procedures, criteria or instructions” that can be shown to have been developed *by or on behalf of the Public Body* for the purposes of negotiations. In this case, it is not clear to me that that any of the Exhibits attached to the Agreement meet the second element in this description. I noted earlier (in my discussion of whether any of this material would properly be characterized as information “of the Affected Party”) that some of the

attachments have headings suggesting that they were submitted by the Affected Party to the Public Body. As well, some are correspondence directed to the Affected Party by other persons containing scientific or technical considerations. The reason I could not conclude these documents were the information of the Affected Party is that while they have these headings or named recipients, they also contain statements suggesting they were developed with the input of, or at the request of, the Public Body. For the same reason - that both parties appear to have been involved in the development of these documents - I cannot conclude that any of them meet the criterion of section 24(1)(a) that they were prepared "by or on behalf of" the Public Body, and thus that they constituted the basis for its strategy for negotiating with the Affected Party.

[para 76] The Public Body's second argument under section 24(1)(c) is that the Agreement itself falls within section 24(1)(c) because the regulatory matter between it and the Affected Party is ongoing. It says the Agreement requires action and information from both parties to determine and negotiate further steps to be taken. This, the Public Body argues, makes the Agreement not a final decision, and makes it information that was developed for the purpose of negotiations. Thus, the Public Body says, the entire Agreement may be withheld under this heading.

[para 77] By far the greatest part of the Agreement consists of very precise steps that are to be carried out. Some small parts of the Agreement consist of mechanisms for resolving matters or disputes that might arise in future, or prescribe steps to be taken contingent on other decisions that are still to be made or eventualities that may happen. However, I do not accept that the fact the Agreement has such components means it can be described in its entirety as information developed for the purpose of future negotiations. At most, this argument would apply only to very minor parts of the Agreement that set out the mechanisms for resolving disputes, and any considerations that are to be applied for making such decisions.

[para 78] Further, I note, again, that section 24(1)(c) applies to information relevant to the negotiating strategy of the Government or Alberta or a public body, that was *developed by it or on its behalf* for that purpose. The Agreement is the product of mutual discussions and decisions of both the Public Body and the Affected Party. Thus not even the particular parts of the Agreement in which the parties agree to future decision-making relative to the matters at hand can be said to have been developed *by or on behalf of the Public Body* for its negotiations with the Affected Party. While the parties may have been cooperating to some degree, the context was a negotiation in which the Affected Party was seeking to avoid further directives made against it by the Public Body. It would be far too great a stretch to suggest that in helping to create the terms of the Agreement, the party that was opposed to the Public Body in interest was acting "on its behalf".

[para 79] A final point relative to the applicability of section 24 is that it is to be read as a whole with the remainder of the Act, as well as with the remaining legislation in the province, including the EPEA. As described above[24], the EPEA creates a process under which resolutions reached through mediation under that act are eventually made public.

[24] See para 61 to 62.

As well, as I have decided earlier[25], an enactment of Alberta (Ministerial Order 23/2004) requires disclosure of any of the information in the Agreement that is the financial, commercial or technical information of the Affected Party that was provided to the Public Body. The presumption of coherence means that legislation is to be read, so far as possible, so as not to conflict with other legislation.[26] I believe this presumption is offended if section 24 is read as though it permitted the Public Body to withhold information, despite the requirement that the Public Body disclose it under another piece of legislation – in this case, its own legislation. I recognize the FOIP Act prevails over other pieces of legislation with which it is in conflict. However, it is possible to understand these provisions as capable of being read together. The Public Body's ability to withhold information under section 24 is discretionary rather than mandatory. It does not have to withhold the information in order to achieve compliance with the Act. Thus there is no conflict (in the sense that compliance with one item of legislation involves breach of the other) with the provisions of the EPEA and related legislation that require disclosure of such information. This point reinforces the conclusion that section 24 does not apply to the information in this case.

Exercise of discretion under section 24

[para 80] Because I have decided that section 24 does not apply to the information in this case, I do not need to decide if the Public Body exercised its discretion properly under this section. Were it necessary to do so, I would consider the fact there is a clause in the Agreement (Article 13.7) that can be interpreted as fettering the discretion of the Public Body in the case of an access request. I would also consider that in this case, the discretion under section 24 appears to have been exercised in accordance with this clause.[27] This would be, in my view, an improper consideration.

[para 81] As well, the point I made above – that the EPEA and associated regulations contain provisions for disclosing this or closely parallel information - is a relevant consideration that favours exercising discretion to disclose rather than withhold information. The Public Body appears to have failed to take this relevant consideration into account.

Issue E: Did the Public Body properly apply section 25 of the Act (economic interest of a public body) to the records/information?

[para 82] Section 25 provides in part:

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[25] See paras 34 to 42.

[26] *Sullivan and Driedger on the Construction of Statutes* states (at pp. 262, 263): "The presumption of coherence is also expressed as a presumption against internal conflict. It is presumed that the body of legislation enacted by a legislature does not contain contradictions or inconsistencies, that each provision is capable of operating without coming into conflict with any other."

[27] I note the Public Body said in its submission that it had identified specific information to be severed under sections 24 (as well as under section 25). However, it does not appear to have done so in fact.

25(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy, including the following information:

…

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

(ii) prejudice the competitive position of, or

(iii) interfere with contractual or other negotiations of, the Government of Alberta or a public body; … .

[para 83] The Public Body contends that disclosure of the Agreement would cause it economic harm. In its final submission (para 4) it says that its commitment to protect the environment "links directly to the economic interests and commitment of the Alberta Government in ensuring sustainable economic development within Alberta".

[para 84] The Public Body has not satisfied me that the terms of section 25 are met in this case.

[para 85] With respect to its claim that disclosure of the Agreement could compromise its ability to achieve its mandate, I note that the Public Body has the ability to choose how to exercise its regulatory authority to meet its objectives of environmental protection and restoration. Persons responsible for contaminating the environment must meet their legal obligations for remediation, regardless whether they are determined by way of negotiated agreement or through unilateral directives on the Public Body's or the EAB's part. I accept that confidential negotiated agreements might in some cases be more desirable from the standpoint of responsible persons. However, even if disclosing them has a chilling effect on the ability to reach agreements, it does not follow that responsible persons will be able to avoid their obligations to remediate. The Public Body in its initial submission adverts to circumstances in which "there is no other way to achieve the goals except by agreement", but it is not clear to me why this should be the case. In the decision which it cites to support this point (Order 2001-025), the contracts the Public Body was negotiating were program and services contracts, which were entirely voluntary on the part of the service providers. I do not see the parallel with the present situation, in which the subject of the negotiations and the Agreement is how the legal obligations of the persons responsible for the contamination will be met.

[para 86] Furthermore, it is not clear to me that the fact that an Agreement may be disclosed would necessarily mean that the persons responsible for remediation would prefer a unilateral directive by the Director or a decision by the EAB. I note that the Affected Party in this case has said it would not have engaged in consensual mediation absent satisfactory confidentiality protections. However, the "confidentiality protections" in the Agreement, which were regarded as satisfactory at the time the agreement was signed, did not clearly extend to precluding disclosure *of the Agreement* to the public.

Further, this idea seems to overlook that in an EAB hearing, the Affected Party could have exercised persuasive powers only, in a public forum, with a public outcome.

[para 87] For all the foregoing reasons, I do not accept that withholding the Agreement is necessary to enable the Public Body, as a branch of government, from fulfilling its mandate of ensuring the remediation obligations of responsible persons are met.

[para 88] The Public Body also suggests that disclosure of the Agreement would compromise the EAB's ability to conduct confidential mediations. Citing the EAB's 10th Anniversary Report pages 51, 54 and 55, the Public Body says that "approximately 80% of the appeals mediated through the EAB's *confidential* mediation process have been successfully resolved by mediation, without the need for a hearing." It says on this account disclosure of the Agreement would harm the economic interests of the EAB. If this reference is intended to suggest that *mediated resolutions* of appeals (in contrast to information provided by participants during the mediation process) are routinely kept confidential by the EAB, I refer again to the EAB's submission in this inquiry. Therein it stated that mediated resolutions of regulatory actions should be and are made public, and only aspects of the resolutions that, in the EAB's words, are "collateral or external interests which … would not form any part of the ruling on the appeal" and are "contractual and not regulatory" are kept in confidence. Thus I do not accept that it is necessary to withhold this Agreement in its entirety to preserve the EAB's processes. Furthermore, it is open to question whether section 25 was meant to apply to a situation in which the ostensible negative impact on a public body is the need to resort to administrative processes that it was constituted to apply in the normal course.

[para 89] The Public Body also made the more specific claim that disclosure would interfere with its contractual and other negotiations.

[para 90] I note first in this regard that it is not enough to fall within the section that disclosure would interfere with contractual negotiations. It is necessary, in addition, that this interference would cause economic harm to a public body or the government.[28]

[para 91] To substantiate its claim of harm, the Public Body points to one of the articles in the Agreement which it says supports the view that disclosure of any part of the Agreement would constitute a breach of its confidentiality requirements. It argues that because disclosure would be a breach of the Agreement and an event of default, disclosure would destroy the results of its negotiating efforts, and harm its credibility.

[para 92] In Order 96-016, the former Commissioner rejected the argument that where the Public Body has contracted with another entity to keep the information at issue

[28] In Orders 96-012 and 96-013,The former Commissioner stated that the public body may present evidence to show that the information falls within section 25(1)(c) (then 24(1)(c)), but the public body must still present evidence to show that the information falls within the general rule under section 25(1). In other words, the public body must show that the information "could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy".

confidential, disclosure of the information can cause it harm by interfering with its contractual relations.[29] The Public Body acknowledges this decision, but says that the present circumstances are different because specific harmful consequences would, by the terms of the Agreement, be triggered by its disclosure.

[para 93] This assertion overlooks that the referenced Article is capable of being read as providing quite the opposite, making it impossible to conclude that confidentiality of the Agreement is a term of the contract. Further, even had the Public Body entered into such a contract, if the Act requires the Public Body to disclose the Agreement or parts of it, the Public Body is not permitted to contract out of these obligations. (See Order 2000-029 at para 54.[30]) A Public Body cannot enter into a contract that it will not meet any obligations it has under the FOIP legislation, and then argue, *on the basis of this contract*, that section 25 is met because violating the contract will cause it economic harm.
[para 94] Further, the Public Body has not, as it is required to do according to Order 96-016,[31] "examined the information to determine whether that particular information could reasonably be expected to cause the alleged harm".

[para 95] I will deal with one other possible basis for relying on section 25 – that disclosures of particular positions taken by the Public Body in the contract would harm its ability to negotiate with other persons or organizations relative to similar matters. I am

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[29] The former Commissioner's comments (at para 12 *et seq*.) included the following excerpts:

> The essence of the public body's argument is this: The information in the record was produced under a contract between a division of a public body and an organization independent of government. There was a confidentiality clause in that contract, which restricts publication of the information. Releasing this information under the Act, contrary to the confidentiality clause, will affect AEC's and, consequently, ARC's contracts with this and other organizations, thereby causing harm to both AEC and ARC. Harm will result from cancelled contracts, and from other organizations bypassing AEC and ARC, knowing they are subject to the Act. That harm is quantifiable.
>
> However reasonable the public body's argument sounds, I do not think that section 24(1) [now 25(1)] can or should be interpreted as the public body claims. Section 24(1) focuses on the harm resulting from the disclosure of that specific information.
>
> … the public body appears to have focused on protecting the contractual relationship which produced that information. To the public body's way of thinking, if (i) there's a contractual relationship in place, (ii) the relationship produces information that could be disclosed under the Act, and (iii) the information is subject to a confidentiality clause, then "harm at large" or "indirect harm" to this or any other contractual relationship is sufficient for the purposes proving harm under section 24(1).
>
> … The consideration in applying section 24(1) must be whether it's reasonable to expect the alleged harm from the disclosure of the specific information. Since the public body did not examine the information, it is precluded from claiming that there is a reasonable expectation of harm from disclosure.
>
> Furthermore, the main object and purpose of the Act is access, subject to limited and specific exceptions. The public body's focus on protecting contractual relationships is not one of the objects or purposes of the Act. … .

30 The former Commissioner said (at para 54): "I have stated that the Act supersedes an agreement regarding the withholding of information, except where the Act itself permits that withholding: See Order 2000-003. Public policy mandates that parties cannot contract out of the Freedom of Information and Protection of Privacy Act."

[31] See the fourth paragraph quoted in footnote 29 (para 18 of Order 96-016).

not sure section 25 applies to such situations. It does not necessarily follow from the fact a position is taken in one case that it would be obliged to take it in another, or that there would be pressure on the Public Body to take it that it could not resist. Even if the provision is applicable, in my view, any elements of the Agreement that could potentially have such an effect have already been disclosed in the press releases with a sufficient particularity that disclosure of the Agreement itself could not exacerbate such consequences to any significant degree. As well, I note the Public Body did not make an argument specifically with reference to future negotiations with other persons relative to specific subjects covered by the Agreement. Thus presumably it did not exercise its discretion to withhold on this basis.

Exercise of discretion under section 25

[para 96] Because I have decided that section 25 does not apply to the information in this case, I do not need to decide if the Public Body exercised its discretion properly under this section. Were it necessary to do so, I would consider the fact that the Public Body says that it exercised its discretion to withhold the Agreement under section 25 because disclosure would involve breach of a term of the Agreement, and would thereby cause it harm. This claim involves what is in my view, as explained earlier, an erroneous interpretation of the Agreement. Thus by taking this interpretation into account, the Public Body took into account what I regard as an improper consideration. As well, I would have regard to the fact that the discretion under this heading seems to have been done in accordance with a clause in the Agreement (13.7) that can be interpreted as fettering the discretion of the Public Body in an access request. This would also be an improper consideration.

[para 97] Finally, the point I made at para 79 relative to section 24 applies equally for section 25. It may be inappropriate for the Public Body to rely on section 25, and to exercise its discretion to withhold information under this provision, in the face of specific, non-conflicting legislation in another statute (its own) that requires it to disclose such information routinely for the sake of openness.

Issue G: Did the Public Body comply with section 11 of the Act (time limit for responding)?

[para 98] The Applicant raised this as an issue at an early stage of this proceeding. In its initial submission it withdrew its complaint on this point. The Public Body in its initial submission gave a satisfactory explanation of its process and timelines for responding to the Applicant in this matter. I do not need to deal with this issue further.

Issue H: Does section 32 of the Act require the Public Body to disclose information in the public interest?

[para 99] The Applicant argues that the Public Body is obliged to disclose the Agreement based on section 32.

[para 100] Section 32 provides:

> *32(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant*
> *(a) information about a risk of significant harm to the environment or to the health or safety of the public, of the affected group of people, of the person or of the applicant, or*
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*
>
> *(2) Subsection (1) applies despite any other provision of this Act.*

[para 101] I have found that most of the Agreement cannot be withheld under other provisions of the Act. Therefore, relative to the greatest part of the Agreement, it is not necessary to deal with section 32 at this time. With respect to the two minor categories of information that may properly be withheld (as decided above at paras 42 and 43), the criteria of section 32(1) do not apply to these items of information.

V. ORDER

[para 102] I make this Order under section 72 of the Act.

[para 103] I order the Public Body to disclose the Agreement to the Applicant, with two exceptions: personal information, as indicated in para 42, and Exhibit 7.

[para 104] I find the Public Body must withhold the personal information referred to in para 43 under section 17 of the Act.

[para 105] I find the Public Body must withhold Exhibit 7 under section 16 of the Act.

[para 106] I further order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order, that it has complied therewith.

Frank Work, Q.C.
Information and Privacy Commissioner