

## Practice note: confidentiality motions

This practice note is intended to assist Alberta Utilities Commission (AUC) hearing participants to understand when and how the AUC will treat certain types of information as confidential. It also addresses what may happen if confidential information is improperly disclosed.

### The open-court principle

The AUC makes public interest decisions on utility rates and infrastructure. The AUC holds public hearings to make these decisions and adheres to the open-court principle established by the Supreme Court of Canada. The open-court principle is reflected in Section 18 of Rule 001: *Rules of Practice*. Section 18 directs that, subject to the limited exceptions outlined in sections 4 and 30 of Rule 001, all documents filed in a proceeding must be placed on the public record.

Using the Supreme Court of Canada's test, the AUC will grant a request for confidential treatment if:

1. court openness poses a serious risk to an important public interest;
2. confidentiality is necessary to prevent this serious risk because reasonable alternative measures will not prevent the risk; and
3. as a matter of proportionality, the benefits of the order outweigh its negative effects.

All parts of the test must be met before confidential treatment can be granted.

A party seeking to file information confidentially must provide evidence establishing that confidentiality is necessary to prevent a serious risk to an important public interest. This is a significant legal and evidentiary burden, and the evidence provided must be convincing, subject to close scrutiny and meet rigorous standards.<sup>1</sup>

### What is a serious risk to an important public interest?

The Supreme Court has not provided a complete list of what is considered an important public interest. However, courts have emphasized that the public interest in question “transcends the interests of the parties to the dispute” and that determining an important public interest “can be done in the abstract at the level of general principles”.<sup>2</sup>

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<sup>1</sup> [Campbell v Alberta \(Public Interest Commissioner\)](#), 2024 ABKB 269.

<sup>2</sup> [Sherman Estate v Donovan](#), 2021 SCC 25, 2021 SCC 25 at paragraphs 42 and 43.

The seriousness of the risk must also be substantiated. It is not enough to speculate about the potential harms that will result from disclosing the confidential information; the risk must be well grounded in the evidence.

### **What are reasonable alternative measures?**

When considering a request for confidential treatment of information, the Commission will assess whether there are reasonable alternatives to granting confidentiality. The Commission will ask the following questions:

- Is the information material and relevant? If not, does the information need to be on the proceeding record at all?
- Can the filing party provide a high-level summary of the confidential information that omits the sensitive or confidential details?
- Can the information be aggregated or anonymized so that it can be filed publicly?

Even if confidential treatment is granted, the party filing the information will be required to provide two versions of each confidential document it files:

- A full, unredacted version on the confidential record.
- A partially redacted version on the public record.

If it is not possible to file a partially redacted version of a document because the entire document is confidential, then the filing party must provide a brief explanation of the document on the public record. This ensures that members of the public who cannot view the confidential information are still able to understand what has been filed.

### **Examples of information generally treated as confidential**

Below are types of information that are generally granted confidential treatment:

- Medical reports (only permitted to be filed on a proceeding record where necessary).
- Specific locations of
  - protected archaeological or cultural sites
  - wildlife related sites for nesting, denning or mating (depending on the conservation status of the wildlife)
- Competitive bids.

### **Examples of information where confidentiality is generally denied**

Below are situations that generally do not warrant confidential treatment:

- Where the information is already available in the public sphere.
- Where the harm associated with disclosure is speculative or unsubstantiated.

*This practice note is for information purposes only. The Commission retains discretion to issue any directions it considers necessary for the fair, expeditious and efficient determination of an issue in a proceeding.*

## **How to ask for confidential treatment**

A request for confidential treatment must be made by filing a motion. The requirements for a confidentiality motion are set out in Section 30 of the Rule 001. If a motion is filed by an organization, the organization must appoint at least one eFiling System user within the organization as a “confidentiality administrator.”

If the request for confidential treatment is made by an individual and relates solely to that person’s personal information, then a formal motion is not required, and the individual can make a request for confidential treatment by emailing [foip@auc.ab.ca](mailto:foip@auc.ab.ca). The Commission will consider such requests on a case-by-case basis. However, the Commission does not allow individuals to participate anonymously in AUC proceedings and will therefore not grant a request to keep an applicant or intervener’s identity confidential.

Section 17 of the [eFiling System External User Guide](#) includes detailed instructions on how to access and use the confidentiality functions on the eFiling System.

Please refer to the [Quick tip: Confidential proceedings for disclosing parties](#) for more information.

## **Who can access confidential information?**

Even if the Commission grants confidential treatment to certain information, the other parties in the proceeding are usually allowed to access the information, as long as they agree to maintain it in confidence.

Registered parties who wish to access confidential information on a proceeding record must execute a confidentiality undertaking ([Form RP5](#)) and upload it to eFiling. Among other requirements, they must agree that they will only use the information for the purpose of the proceeding and must undertake to expunge and destroy all copies of the confidential information once the proceeding has concluded. Upon destruction of the confidential information, registered parties execute and deliver the statutory declaration included in Form RP5. Commission members, AUC staff who are assigned to a proceeding, and court reporters who transcribe confidential information during a hearing will also have access to the confidential information and are not required to execute a confidentiality undertaking.

## **Who cannot access confidential information?**

Members of the public, and parties who do not execute a confidentiality undertaking (Form RP5) cannot access confidential information.

In exceptional circumstances, the party filing confidential information may wish to keep it confidential from other proceeding participants, even if they provide a Form RP5. The Commission will consider such requests on a case-by-case basis but cautions that these requests will be granted rarely, as procedural fairness generally requires that all parties have access to the same information and can respond fully to evidence or argument made by the other side.

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## **What happens if a confidentiality order is breached?**

The Commission takes breaches of confidentiality extremely seriously. Parties who are given access to confidential information are expected to uphold their confidentiality undertakings and take great care to preserve confidentiality. If a party discovers that a confidentiality order has been breached, they are expected to notify the AUC immediately. The party that breached the order may be subject to a specified penalty or an administrative penalty.

In cases where confidential information has been improperly disclosed on a public proceeding record, the Commission may take the following steps:

- The AUC will void any public documents on eFiling that contain the confidential information.
- In exceptional circumstances and depending on the nature of the risk associated with the breach, the AUC may determine the scope of the breach by identifying who accessed the materials through eFiling.
- The AUC may provide direction or an order on treatment of the confidential information to all who accessed the documents.
- The AUC notifies the Market Surveillance Administrator if the breach has the potential to impact markets.
- The AUC may notify the AUC Enforcement branch of the breach.