**ALBERTA**

**INFORMATION AND PRIVACY COMMISSIONER**

# ORDER 96-009

**September 10, 1996**

**ALBERTA TREASURY BRANCHES**

**REVIEW NUMBER 1066**

## BACKGROUND

On February 2, 1996, the Applicant requested that the Alberta Treasury Branches (herein referred to as "ATB") provide the Applicant with the name of the person or persons who approved loans to a certain individual (herein referred to as "W") or a certain company (herein referred to as "Y Corp."). On March 5, 1996, the Applicant notified this Office that he had no response from ATB and he requested a review of the matter. On March 7, 1996, I authorized an investigation of the failure to respond. Upon being notified of this, ATB stated by letter dated March 12, 1996, that they had not received the original Request for Access. This Office forwarded a copy by consent. On March 22, 1996, ATB declined to give access as requested.

Under section 65 of the *Freedom of Information and Protection of Privacy Act* ("the Act"), mediation was authorized between the Applicant and ATB, but was not successful.

An inquiry was set down for June 25, 1996, and the time for completing the matter was extended to July 17, 1996, pursuant to section 66(6) of the Act. My

office received the Applicant's submission on June 24, 1996, and ATB's submission, dated June 7, on June 13, 1996.

**RECORDS AT ISSUE**

An issue arises with respect to the manner in which the Applicant worded the Request for Access. The Applicant stated that he wanted the records relating to "W and Y Corp. Et Al". Does the addition of the two Latin words mean that the public body to whom the request is made should undertake a research function to determine the breadth of W's or Y Corp.'s holdings, or for that matter to determine the members of W's family who may be among the "et al"?

Et al is an abbreviation for "et alii" which means "and others." Generally, the term "et al" is used in describing the parties to a legal action where the length of the list is such that it is tedious to repetitively list out each party. The list in full is contained in the original pleadings. In the case where an individual makes a request using "et al" or perhaps the more familiar "et cetera" or "etc." or like terminology, I am not prepared to say that the public body or the Commissioner must make the determination as to the identity of the "others".

The notion that the difficult, if not impossible, task of determining who the "others" are should be undertaken by the public body or the Commissioner must be reviewed in light of section 7(2) of the Act which states:

> 7(2) A request must be in writing and must provide enough detail to enable the public body to identify the record.

The Request does not refer to several of the entities referred to in this Order. Requiring the public body to speculate and to do research to complete what it thinks is not reasonable.

At the same time, the public body must, in accordance with section 9(1) of the Act, make reasonable efforts to assist applicants. The two operative words are "reasonable" and "assist". The section does not require the public body to exhaustively research the possible meanings of the request to identify whether a record exists. Every applicant must make some effort to define for the public body what it is they want. The public body must assist them in doing this.

**PRELIMINARY ISSUE**

In its reply of June 7, 1996 to the Applicant, ATB cited section 4(1)(m) of the Act, claiming that any responsive records held by ATB would not be subject to the Act. Section 4(1) states:

> 4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:
>
> > (m) a record in the custody or control of a treasury branch <u>other than a record that relates to a non-arms' length transaction between the Government of Alberta and another party</u>;
> >
> > (my emphasis)

For the purposes of section 4(1)(m), section 4(3) defines a "non-arm's length transaction" as any transaction that has been approved

a) by the Executive Council or any of its committees,

b) by the Treasury Board or any of its committees, or

c) by a member of the Executive Council.

In other words, records related to ATB transactions are not accessible under the Act unless there has been some government involvement (as defined) in the transaction. It is ATB's position that there has not been government involvement of the kind needed to make any responsive records subject to the Act. This was ATB's response to the Request for Access. This inquiry and this Order deal with that issue. If I agree with ATB, that ends the matter (unless there is judicial review). If I disagree, then ATB will have to apply the Act to the responsive records and inform the Applicant of whether or not access will be given and if not, why not. That decision may also be reviewed by this Office upon request. In order to preserve the ability of ATB or any third parties to claim exemptions under the Act, I will avoid naming any parties in this Order.

I have reviewed the ATB files pertaining to transactions with the person (referred to as "W") and company (referred to as "Y Corp.") specified by the Applicant. The Applicant's request does not refer to many of the entities referred to below. I have found the following:

Issue 1: X Ltd.

1. In the mid-1980's a loan guarantee was given to a company I will refer to as X Ltd. by the Government of Alberta by way of an Order in Council.

2. Four years later, X Ltd. and the Western Canada Lottery Corporation ("WCLC") entered into a contract for X Ltd. to provide certain services over a

three-year period. The agreement was signed by WCLC officials. WCLC is authorized by the Province of Alberta to conduct and manage lotteries as agent for the Provincial Government. WCLC is not a public body nor is it a "part" of the Government of Alberta. While there is a Minister responsible for Lotteries, that Minister does not have any legal role in the running of WCLC

3. Three years later, X Ltd. was taken over by Y Corp. (Remember that Y Corp. was one of the entities specified by the Applicant in the request for access). An agreement was entered into between WCLC and Y Corp. to extend the earlier contract with X Ltd. contract for four years. The extension agreement was signed by WCLC officials.

4. Two years later, the agreement was extended for a further four years. Again, the agreement was signed by WCLC officials. The Minister responsible for Lotteries signed the letter conveying the agreement and the cheque to the president of Y Corp. but did not sign the agreement.

So the issue is: Is the agreement between WCLC and X Ltd. or the agreement between WCLC and Y Corp. a "non-arm's length" transaction between the Government of Alberta and another party within the meaning of section 4(3)?

Issue 2: Z Ltd.

1. ATB made a loan to Z Ltd. which the Government of Alberta agreed to guarantee in 1992.

2. Z Ltd. was, at the time, owned by A Ltd. W (the person named in the request for access) was, at that time, a principal of A Ltd.

3. By the time the guarantee was delivered, Z Ltd. was owned by B Ltd., a publicly traded company, in which W was the majority shareholder.

**DISCUSSION**

Sections 4(1)(m) and 4(3) of the Act (cited above) are deceptively simple. They do <u>not</u> say that the Treasury Branch transaction must be approved by Executive Council, Treasury Board or a Minister in order to be "non-arms length" and thus be subject to the Act What they do say is that if you find a transaction, and "transaction" is a very general word, which had the approval of Executive Council, Treasury Board or a Minister, ATB records which "relate" to that transaction become subject to the Act.

A literal and narrow reading of sections 4(1) and 4(3) would mean that only those transactions which are specifically and directly approved by Executive Council, Treasury Board or a Minister would be "non-arms length" and thus

subject to the Act. Such a reading might exclude cases where there was government involvement but not actual government approval.

One of the cases I looked at in coming to my decision in this matter was *Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce et al* (1984) 8 Admin. L.R. 305. While that case was not directly applicable to this one, I found something Justice Jerome wrote in his decision very persuasive. He wrote:

> It should be emphasized however, that since the basic principle of these statutes is to codify the right of public access to government information two things follow: first, that such public access ought not to be frustrated by the Courts except upon the clearest grounds so that doubt ought to be resolved in favour of disclosure; second, ...

The last phrase of that passage reminded me of section 2(1) of the Act which states:

> 2 The purposes of this Act are
>
> (a) to allow any person the right of access to the records in the custody or under the control of a public body subject to the limited and specific exceptions as set out in this Act,

It is therefore my view that even though Executive Council or any of its committees, Treasury Board or any of its committees, or a member of the Executive Council has not directly approved a particular transaction, if they approve a transaction that is directly related, it will be the same for the purposes of the Act as if they approved the main transaction. That means the main transaction will be “non-arm’s length” for the purposes of the Act.

In this case, my staff and I exhaustively reviewed ATB files in both Calgary and Edmonton.

How does this apply to the transactions I described above?

Issue 1: X Ltd.

The initial loan guarantee by the Government of Alberta to X Ltd. would have to be approved by Executive Council. That makes that loan transaction between ATB and X Ltd. subject to the Act since it would be a “non-arm’s length” transaction between the Government and X Ltd. Any records in the custody

and control of ATBs which relate to the transaction between X Ltd. and ATB are subject to the Act.

Issue 2: Z Ltd.

Similarly, the loan from ATB to Z Ltd. will be a "non-arm's length" transaction because the loan was guaranteed by the Government, hence approved by Executive Council.

However, it must be borne in mind that the Applicant did not ask for records relating to either X Ltd. or Z Ltd. The Applicant asked about the person referred to as "W" and the company referred to as "Y Corp.". At certain times, W was involved in both X Ltd. and Z Ltd. At certain times, Y Corp. was also involved in both X Ltd. and Z Ltd.. However, W, X, Y and Z all appear to be separate entities.

I and one of my staff exhaustively searched ATB files for any indication that Cabinet, Treasury Board or a Minister approved any transaction directly involving W or Y Corp. I also approached the issue from the other side and interviewed Treasury Department officials to determine the extent of Government involvement with W and Y Corp. I did not find the approval required by section 4(3) of the Act.

I have decided that records relating to loans to X Ltd. and Z Ltd. are subject to the Act. Can I go behind the fact that X Ltd. and Z Ltd. are legally separate entities in order to say that records relating to W and Y Corp. are subject to the Act because of the involvement of W and Y Corp. with X Ltd. and Z Ltd.?

In order to make this decision, I sought the opinion of outside counsel who has considerable expertise in corporate law. Their advice to me was that I may not go behind X Ltd. and Z Ltd. in these circumstances. To quote at length from their opinion:

> We do not believe that the Office of the Information and Privacy Commissioner has the authority to disclose the records relating to Z Ltd. We do not think that the corporate veil may be pierced in these circumstances. Statutory and case law principles in this area show that the corporate veil may not be pierced except in the clearest of circumstances.
>
> Z Ltd. is not a sham created for a nefarious purpose, nor does it appear possible to characterize it as an agent of A Ltd. or Y Corp.

In his text, *Corporate Law in Canada: The Governing Principles* (Butterworths, Toronto: 1991), Bruce Welling describes three situations in which judges will pierce the corporate veil:

> (1) The first situation is when the judge feels that the rules of fair play and good conscience have been breached. Welling refers to this as the "it's just not fair" situation.
>
> (2) The second situation in which the court will look behind the corporate veil is when the court believes that the corporation was created for a nefarious purpose.
>
> (3) The last situation Welling describes is one in which the judge finds that the corporation is a mere agent of the controlling person.

<u>Have the rules of fair play been breached?</u>

In the context of the Act and the situation you have asked us to review, it does not appear that one can state that the rules of fair play have been breached. The Alberta Government knew that W was involved in the transactions as per W's ownership of various companies, but did not appear to believe that that was a problem. Nothing in the material provided suggests that W was attempting to hide or mask W's involvement. It is useful to note that there are writers, Welling included, who do not believe that the Canadian judges have the authority to look behind the corporate veil on the basis of some principle of fair play, in the face of statutory authority as exemplified by the *Business Corporations Act,* R.S.A.. 1980, Chp. B-15, s.15(1):

> 15(1) A corporation has the capacity, and subject to this Act, the rights, powers and privileges of a natural person.

Such status should not be removed without sufficient reason.

<u>Was Z Ltd. created for an illegal or nefarious purpose?</u>

Similarly, there is no evidence that Z Ltd. was created for an illegal or nefarious purpose. The company appeared to have a useful product and the person (who incorporated Z Ltd. had a legitimate business - my words). There is no evidence that Z Ltd. was set up as a shell to garner Alberta Government guaranteed loans.

Was Z Ltd. an agent of W or Y Corp.?

The final question of whether Z Ltd. was an agent of either W or Y Corp. deserves closer examination.

In Canada *Life Assurance Co. v. Canadian Imperial Bank of Commerce* (1974), 3 O.R. (2d) 70 (C.A.), Gale C.J.O. set out the following criteria to be considered when deciding whether a subsidiary corporation is an agent (at pp. 84-85):

1. the capitalization of the subsidiary;
2. the degree of the observance of corporate formalities;
3. the extent of the legal relationship between the business of parent and subsidiary;
4. the nature and extent of the business dealings between parent and subsidiary;
5. the corporate histories of both parent and subsidiary;
6. the relationship between the boards of directors and upper management personnel of parent and subsidiary; and
7. the extent of the ownership interest of the parent in the subsidiary.

However, superimposed upon each of these seven criteria is the overriding principle that the corporate veil should only be pierced in the most exceptional of circumstances.

… examples of related corporations where the courts chose not to pierce the corporate veil include *Bank of Montreal v. Can. Westgrowth Ltd.* (1990), 72 Alta. L.R. (2d) 319 (Q.B.) and *The Queen v. Waverly Construction Co. Ltd.* (1972), 30 D.L.R. (3d) 224 (N.S.S.C). In *Bank of Montreal* the court chose not to pierce the corporate veil in circumstances where the parent company provided the subsidiary with free management services and interest free loans and where the parent and subsidiary shared the same officers, directors, meetings auditors and year-end. The court found that all parties involved knew of the interrelationship and that the parent and subsidiary were two distinct legal entities. In *Waverly Construction* the court refused to pierce the corporate veil where the parent and the subsidiary had common management personnel and share common office space.

In order to release the records, the Commissioner would have to declare that not only is Z Ltd. an agent of A Ltd. or B Ltd., but that

> A Ltd. or B Ltd. is an agent of W or Y Corp.. There is insufficient information to do so.

On the basis of this advice and my own extensive investigation, I have decided that I am unable to go behind the fact that X Ltd. and Z Ltd., as well as A Ltd. and B Ltd., are legally separate entities in order to say that records relating to W and Y Corp. are subject to the Act due to W's involvement in X Ltd. and Z Ltd. This means that records relating to W and Y Corp. are not subject to the Act pursuant to section 4(1)(m) because they are, in effect, arm's length transactions as far as the Government is involved.

I want to add that the Government's involvement with X Ltd. and Z Ltd. is not a secret. I believe Treasury Department officials were direct and open with me about the extent of that involvement. I also believe that I had access to all relevant ATB records. My reason for using the letters X, Y, Z, etc. in this Order is to protect the privacy of the individual involved. Even if there were "non-arm's length" transactions between the Government and W, the *Freedom of Information and Protection of Privacy Act* would entitle W to notice from ATB that ATB intended to disclose information that affected W. W would then have the opportunity to object before the information was disclosed. It is this right I am protecting.

**ORDER**

For the foregoing reasons, I uphold the finding of the head of the Alberta Treasury Branches that any responsive records held by the Alberta Treasury Branches are not subject to the Act.

Robert C. Clark
Information and Privacy Commissioner