ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 96-018

December 3, 1996

TREASURY DEPARTMENT

Review Number 1073

BACKGROUND

On October 12, 1995, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Treasury Department (the "public body") for access to the following information:

> Records containing the details and background about a loan guarantee, including the criteria used to evaluate the riskiness of the venture and the justification for subjecting tax dollars to that risk.

One of the responsive records contained third party information. Accordingly, on November 1, 1995, the public body notified the third party of the request, asking for written representations regarding its views on disclosure of the record.

The third party replied to the public body, on November 14, 1995, indicating its objections to disclosure.

Upon review of the relevant factors, including the third party's representations, the public body decided to release the record to the Applicant. The third party was notified of the proposed disclosure on February 26, 1996.

On March 13, 1996, the third party requested, under section 62(2) of the Act, that my Office review the public body's decision to release the record. Efforts

to mediate the matter were unsuccessful. As a result, the matter was set down for a written inquiry on September 10, 1996.

I received written submissions from both the public body and third party.

RECORD AT ISSUE

The record at issue is a 1988 letter between the third party and the company that received the loan guarantee. The letter relates to a conditional commitment for private venture financing.

ISSUE A: Which party has the burden of proof?

The relevant portion of section 67 provides:

> *67(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
>
> *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

Since personal information is not involved, the burden of proof rests with the third party by virtue of disagreeing with the public body's decision to release the record. Accordingly, the onus is on the third party to prove that the Applicant has no right of access to the record.

ISSUE B: Does section 15(1) apply to the record?

The third party submits that the record is exempt pursuant to section 15(1) (disclosure harmful to business interests) and, thus, the head of the public body incorrectly decided to release the record. Section 15(1) provides:

> *15(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*

> *(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.*

For a record to qualify for exemption under section 15(1), the third party must meet one of the tests in section 15(1)(a), the test in section 15(1)(b), and one of the tests in section 15(1)(c).

Section 15(1)(a): ***Does the information contain trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party?***

The third party submits that the information in the record is of a "financial" nature.

In keeping with my decision in Order 96-013, I attribute ordinary meaning to the word "financial". I also reiterate that careful consideration must be given to the content of the document in determining whether or not the information falls within this section. Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved.

As such, the information in the record is not of a "financial" nature because it reveals nothing of the third party's financial capabilities beyond its

commitment to raise the dollar amount specified. Similarly, I find that the record reveals nothing of the third party's assets or liabilities, either past or present.

The third party submits that the information is of a financial nature because it discloses its ability and willingness to finance a specific corporation and a specific industry, thus revealing its interest in this area. I agree this may reveal an interest in the area in 1988 with respect to this specific business opportunity. However, no evidence is provided to show how this transaction could reveal either the third party's commercial status or business interests.

Based on the foregoing, I conclude that the third party has not met the burden of proving that the information in the record is of a financial nature.

Section 15(1)(b): ***Is the information supplied, explicitly or implicitly, in confidence?***

As I indicated in Order 96-013, to determine if information "is supplied…in confidence" I must consider the status of the information when it was originally supplied, in addition to its current status.

Both the third party and public body submit that the information was "supplied in confidence".

In order to fall within section 15(1)(b), (i) the information has to be originally supplied in confidence during the proposal or negotiation stage and then used relatively unaltered in the contract, and (ii) the information contained in the contract must allow an Applicant to make accurate inferences about sensitive third party business information that would not, in itself, be disclosed under the Act. As I indicated in Order 96-012, this two-part test not only protects the information originally supplied, but also protects that information now, so long as it has remained relatively unchanged. Consequently, it does not matter whether the information is now in a contract or in some other document, as here. I must now consider whether the third party has provided evidence to meet both parts of this test.

Based on my review of the record, I conclude that the information remained the same from the time it was proposed to the time it was incorporated into the record. Thus, the first part of the test is satisfied.

However, I do not agree that this record would allow the Applicant to make accurate inferences about sensitive business information that would not, itself, be disclosed under the Act. On review of the evidence, I do not believe it is possible to extrapolate third party business information from the information contained in the record. The second part of the test is therefore not satisfied.

Since both parts of the test are not met, the third party has not met the burden of proving this information was supplied in confidence, either explicitly or implicitly.

Section 15(1)(c): ***Could disclosure reasonably be expected to bring about one of the outcomes set out in this section?***

I will now deal with the third party's submission that disclosure may harm future negotiations because the record provides information regarding its financial strength. First, no evidence was provided to show how current or imminent negotiations could adversely be affected by disclosure of a an 8-year-old transaction which, in fact, never transpired. All the information really indicates is the willingness of the third party to enter into the area of endeavor at that time. Second, I am of the opinion that a dollar figure, without more, is not indicative of the third party's financial strength. The fact that the third party was willing to come up with the dollar figure indicated proves only that the third party was able to do so at that time.

It is unclear from its submissions whether the third party is alleging that disclosure could reasonably be expected to significantly harm its competitive position, significantly interfere with its negotiating position, or both. In any event, upon review of the submissions, I find the evidence provided to support these allegations unconvincing.

Accordingly, the third party has not met the burden of proving that disclosure of the record could reasonably be expected to harm significantly either its competitive or negotiating position. The third party could nonetheless meet the test under section 15(1)(c) by proving one of the other outcomes ((ii) - (iv)) in this subsection.

Specifically, the third party submits that disclosure of the information could reasonably be expected to result in similar information not being supplied to the public body when it is in the public interest that such information continue to be supplied.

The third party indicates that if disclosure of the record is permitted, it will have a direct and negative impact on how it conducts its business since it will, in the future, refuse to provide this type of record to its business associates. Consequently, similar information relating to the availability of private venture financing will no longer be supplied to public bodies. The third party alleges that it is in the public interest that government agencies providing venture funding continue to receive indications of private funding.

I find this argument unconvincing for two reasons. First, even if this type of information is no longer available from this particular third party, that does not mean that similar information would cease to be produced by other lenders in this area generally and, thus, not be accessible to public bodies. Section 15(1)(c)(ii) does not limit information to only that provided by the third party.

Second, it seems to me that the provision of this type of information to the public body is less a matter of public interest and more a matter of benefit to the person borrowing money from the public body.

On this basis, the third party has not met the burden of proving that disclosure of the record could reasonably be expected to result in similar information no longer being supplied to the public body. Neither am I satisfied that this type of information is a matter of public interest.

Generally, given the purposes of the Act, where public funds are to be committed to a project, it seems to me that the rationale for the decision of the public body to commit funds should be subject to scrutiny.

ISSUE C: Does the record contain personal information so that section 16 applies to the record?

The relevant portion of section 1 provides, in part:

> *1(1)(n) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, home or business address or home or business telephone number,*

The record does contain personal information of both the third party and another identifiable individual, including names, business addresses and identifying designations. As such, even though neither party raised the issue, I am obliged, as I stated in Order 96-008, to consider whether disclosure of the personal information would constitute an unreasonable invasion of personal privacy under section 16. If it does, and I decide the record should be released, I must sever the personal information as section 16 is a mandatory exception.

The relevant portions of section 16 provide:

> *16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.*

> *(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(g) the personal information consists of the third party's name when*
> >
> > > *(i) it appears with other personal information about the third party, or*
> > >
> > > *(ii) the disclosure of the name itself would reveal personal information about the third party*

After reviewing the record, I am applying section 16(2)(g) to sever the following: the name of the individual to whom the record is addressed on line 4; the name on line 9; and the signature, name and designation of the individual who sent the record on lines 18, 19 and 20. I do this because release of that information would be an unreasonable invasion of the third parties' personal privacy as provided by section 16(2)(g).

ORDER

For the reasons stated in this Order, I uphold the public body's decision to release the record to the Applicant, subject to severing as required under section 16.

Once severed, I order the record to be disclosed to the Applicant.

I ask the public body to notify me in writing, not later than 30 days after being given a copy of this Order, that this Order has been complied with.

Robert C. Clark
Information and Privacy Commissioner