ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-007

May 12, 1997

ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1087

Background:

[1.] On November 21, 1995, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Environmental Protection (the "Public Body"), for all documents relating directly or indirectly to a gas plant including all reports, studies, reviews, memos and correspondence. On January 23, 1996, the Public Body provided some of the documents with respect to the "flora and fauna", but denied access to four "briefing notes" claiming that Section 23(1)(a) (advice) applied to these documents. Subsequently, the Applicant requested that the scope of the search include all documents, not only those dealing with "flora and fauna". On March 21, 1996 the Applicant made a request for review regarding the refusal of the public body to disclose the "briefing notes".

[2.] Mediation was authorized between the Applicant and the Public Body, but was unsuccessful. An inquiry was scheduled for March 19, 1997. Prior to the commencement of the inquiry, the Public Body raised a jurisdictional issue. It said that section 4(1)(l) removed the briefing notes from the Act's jurisdiction.

[3.] The inquiry was conducted via teleconference with the Applicant and its counsel. Public Works, Supply and Services and Alberta Justice also

participated as intervenors respecting the broader government interest in the disclosure of ministerial briefing notes, but did not present any evidence.

[4.] The inquiry was conducted in public except for an "in camera" session with the Public Body and the Intervenors when a line by line review of the Record was conducted to determine the applicability of section 23 to the "ministerial briefing notes".

[5.] During the inquiry, I asked the parties to submit supplementary submissions. The Public Body was also asked: firstly, to provide a listing of categories of records that the Public Body would consider discloseable to the public in whole or in part, having regard to the Public Body's and the Intervenors' suggested interpretation of section 4(1)(l); and secondly, to provide a copy of any written departmental policy directive relating to the creation and purpose of ministerial briefing notes.

[6.] The Public Body provided supplementary submissions and documents with respect to the two other requests. The Intervenors and the Applicant did not provide further argument.

Record at Issue:

[7.] The record consists of six pages authored by two professionals within the department. Evidence was given by the Public Body to show that these briefs were written on a special template and were destined for the Minister. These will be referred to as "briefing notes".

Issues:

[8.] There are four issues in this inquiry.

Issue A: Does section 4 exclude the briefing notes from the application of the Act?

Issue B: Did the Public Body correctly apply section 23(1)(a) ("advice, proposals, recommendations, analyses or policy options") to the briefing notes?

Issue C: Did the public body correctly apply section 23(1)(b) (" consultations or deliberations involving officers or employees of a public body, member of the Executive Council, or staff of a member of the Executive Council") to the briefing notes?

Issue D: Are briefing notes which fall within section 23(1)(a) or (b) subject to severing?

Issue A: Does section 4 exclude the briefing notes from the application of the Act?

[9.] Section 4(1)(l) of the Act reads:

> *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:*
>
> > *(l) a record created by or for*
> > *(i) a member of the Executive Council,*
> > *(ii) a Member of the Legislative Assembly, or*
> > *(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly*
> >
> > *that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;*

[10.] Section 4 marks out the jurisdiction of the Act and the standard in applying that jurisdiction should be a standard of correctness. In other words, a record either is or is not subject to the Act: there is no discretion involved.

[11.] The Public Body and the Intervenors argue that as long as a record is prepared for the Minister and is sent to, or intended to be sent to, the Minister for his or her consideration, section 4(1)(l) will apply to the record in question. Anything to which section 4 applies is outside the Act.

[12.] The interpretation of paragraph 4(1)(l) turns on the word "for". I understand the Public Body's and the Intervenors' interpretation of "for" to mean a record *intended to go to* or *destined to go to* any of the persons listed in section 4(1)(l)(i) to (iii). In this case it is the Minister, a member of the Executive Council.

[13.] In *Black's Law Dictionary* 5th edition, (St. Paul: West Publishing Co., 1983) "for" is defined:

> *In behalf of, in place of, in lieu of, instead of, representing, as being which, or equivalent to which, and sometimes imports agency. During; throughout; for the period of, as where a notice is required to be published "for" a certain number of weeks or months.*

> *In consideration for; as an equivalent for; in exchange for; in place of; as where property is agreed to be given "for" other property or "for" services.*

[14.] In *Black's Law Dictionary* , *supra*, "by" is defined:

> *Before a certain time; beside; close to; in close proximity; in consequence of; not later than a certain time; or before a certain time; in conformity with; with the witness or sanction of; into the vicinity of and beyond. Through the means, act, agency or instrumentality of.*

[15.] Following these definitions, I think "for" to mean "on behalf of". I believe that the Legislature intended "for" as being analogous to the word "by", meaning that the documents must emanate from the office of the Minister. In other words, the persons listed in subparagraphs 4(1)(l)(i), (ii), and (iii) must be the source of the documents and generate the documents for them to fall under section 4(1)(l). This interpretation is preferable for three reasons.

[16.] Firstly, the statutory interpretation principle, "Purposive Analysis" says that the purpose of legislation must be taken into account in determining the ordinary meaning of a word. An interpretation that "runs counter to" the Legislature's purpose should be avoided even though it may be argued that such an interpretation is based on the ordinary meaning of the words: see R. Sullivan, *Driedger on the Construction of Statutes*, 3d ed., (Toronto: Butterworths, 1994) at page 64. Sullivan quotes Duff C.J. in *McBratney v. McBratney* (1919), 59 S.C.R. 550, where he asserted two principles that govern judicial reliance on purpose in interpretation.

> *(1)Where the ordinary meaning of legislation is ambiguous or otherwise unclear, the interpretation that best accords with the purpose of the legislation should be adopted.*
> *(2)Where the ordinary meaning is clear, but an alternative interpretation is plausible and more in keeping with the purpose, the interpretation that best accords with the purpose of the legislation should be adopted.*

[17.] One of the purposes of the Act is to allow any person a right of access to the records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the Act. While section 4 is not an exception to disclosure under the Act but an exclusion from the Act, I think that the Legislature would have intended it to be consistent with the overall purpose of the Act.

[18.] According to the Public Body's and the Intervenors' interpretation, the creator of the record need not be limited to those persons listed in subparagraphs 4(1)(l)(i), (ii), and (iii). In this case, the creators of the records

are two staff from within the Public Body. The word "or" between the words "by" and "for" would be interpreted as introducing a second type of creator as an alternative to the creators listed in the subparagraphs. This interpretation implies that anyone in the world can be a creator of a record which would be excluded from the Act.

[19.] I believe section 4(1)(l) encompasses only communications between those persons listed in section 4(1)(l)(i) to (iii), or communications among any combination of those persons. Should I adopt the interpretation argued by the Public Body and the Intervenors, any document created for the Minister and is sent to, or intended to be sent to the Minister will fall out of the Act's application. Such an interpretation would potentially exclude a vast number of records.

[20.] The Public Body said that it does not mean documents sent to a Minister, other than ministerial briefing notes, should be excluded by section 4(1)(l). Although the Public Body's and the Intervenors' submissions are specifically in regard to ministerial briefing notes and not other documents which may be sent to a Minister, I am unable to avoid the logical conclusion that if briefing notes are excluded because they were "intended for" the Minister, anything else intended for the Minister would also be excluded. Again, it seems to me that this would run counter to the purpose of the Act. Since a Minister is the head of a Public Body, it could be argued that much of what the Public Body does is done to enable the Minister to do his or her job. That being the case, much of what a department does would be excluded from the Act. I do not believe that the Legislature intended this.

[21.] On the other hand, if of all the things that are done for a Minister, the Legislature had wanted to exclude only "briefing notes", it would have said so. The language of section 4(1)(l) does not expressly address ministerial briefing notes as a class of documents. Section 4(1)(l) does not mention ministerial briefing notes at all.

[22.] I believe a broad interpretation to exclude the records would defeat the purpose of this legislation.

[23.] Secondly, there is the statutory interpretation principle of "Avoiding Absurd Consequences" which is summarized in Dreidger, *supra*, page 85. This says that to avoid absurd or unacceptable consequences, the ordinary meaning may be rejected even if it is "plain".

[24.] Accepting the Public Body's and the Intervenors' argument that "for" means "*destined to*" implies that there are two sets of creators of documents: persons listed in 4(1)(l)(i), (ii), and (iii) of the Act and, by implication, anyone in the world at large. Should the Public Body's argument be taken to its logical

conclusion, a letter written by a school child to the Minister would be excluded from the application of the Act since it is a document created "for" a minister and sent to a minister. Again, the Public Body argues that it is not purporting to have such information excluded from the Act and that it only wishes to have briefing notes excluded from the Act. I believe that such an interpretation has an absurd consequence.

[25.] I believe interpreting "for" as meaning "on behalf of" is a more plausible, reasonable interpretation which is consistent with the purpose of the Act and avoids impractical and absurd consequences such as those discussed above.

[26.] Thirdly, the scheme of the Act is that certain kinds of records are excluded from the Act entirely by section 4. If a record is not excluded, it is subject to the Act. That is not the end of it, however. A record that is subject to the Act may still be withheld from disclosure if it falls within one the "exceptions" to disclosure set out in the Act. Section 23(1) provides an exception to disclosure for a number of things including advice to Ministers, consultations with Ministers, draft Cabinet documents and policy and budgetary information. Section 23(2) contains some specific rules as to what must not be withheld under this exception to disclosure. To interpret "for" in section 4 to mean "*destined to*" would render section 23 redundant because much of what section 23 is carefully designed to deal with would never make it into the Act. The same may be said of section 21 which provides an exception to disclosure for Cabinet and Treasury Board confidences.

[27.] In accordance with the principle of "Presumed Coherence" which is explained in Driedger, *supra,* at page 176, the provisions of legislation should not contain internal conflict or inconsistencies. To interpret "for" to mean "*destined to*" instead of "*on behalf of*" produces confusion or inconsistency with the operations of sections 21, 23 and 4(1)(j) of the Act because section 4(1)(l) would render them superfluous.

[28.] I think that section 4(1)(l) must have been intended to allow Ministers to communicate with other Ministers and members of the Legislative Assembly completely outside of the Act. The Legislature would have done this in order to uphold the fundamental principle of cabinet solidarity. In *Canadian Constitutional Conventions*, by Andrew Heard (Toronto: Oxford University Press, 1991) it states at page 49:

> *The principles of individual and collective ministerial responsibility take form mostly in informal rules that have arisen to modify the positive legal framework of the constitution. The importance of these rules of responsible government cannot be overstated ...*

and at page 62

The collective responsibility of the Cabinet as a whole provides some of the basic characteristics of our system of government, where a body of ministers directs the affairs of state with a single public voice ...

Cabinet Ministers have a responsibility to each other that takes two forms: they must maintain a public posture of unanimity in support of the policies decided upon by the Cabinet, and they must respect the confidentiality of the materials reviewed and of discussions held in reaching those decisions.

[29.] If this is the principle which section 4(1)(l) was intended to embody, then section 4(1)(l) only excludes records created "by or on behalf of" Ministers: it does not logically exclude records "destined for" a minister (unless of course the record originated from one of the other people defined in section 4(1)(l)).

[30.] So section 4(1)(l) excludes from the Act what goes on between Ministers. Section 23 allows a limited exception to disclosure for what goes into Cabinet. But section 23 operates on records which are subject to the Act and it allows the head of the public body to exercise discretion in deciding what to withhold from disclosure.

[31.] Conclusion: In this case, the briefing notes do not fall within section 4(1)(l) and are therefore subject to the Act.

Issue B: Did the Public Body correctly apply section 23(1)(a)("advice, proposals, recommendations, analyses or policy options") to the briefing notes?

[32.] Section 23(1)(a) of the Act reads:

23(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,

[33.] I first note that section 23(1) provides a discretionary exemption. In addition, section 67 of the Act provides that the Public Body must prove that the Applicant has no right of access to the records or part of the records.

[34.] It should also be noted that section 23(2) sets out a number of kinds of information which specifically must not be withheld, even though that information might otherwise fall within section 23(1).

[35.] In Order 96-006 I set out the criteria for "advice" (which includes advice, proposals, analyses and policy options) under section 23(1)(a). The "advice" should be:

> *1) sought or expected, or part of the responsibility of a person by virtue of that person's position,*
> *2) directed toward taking an action, and*
> *3) made to someone who can take or implement the action.*

[36.] The Intervenors and the Public Body suggested that I take a functional approach when determining what constitutes advice or consultations. They argued that applying a functional approach in the context of ministerial briefings can result in a determination that information which is merely background or factual in nature, can be in the nature of advice or consultation. I agree it is not sufficient for a document to simply be called "Ministerial Briefings" to bring it under section 23(1)(a). Careful consideration must be given to the content of the document to decide whether or not the information actually falls within section 23(1)(a).

[37.] With respect to the first of the above criteria, the Public Body gave evidence that the authors of the record were two professionals within the Public Body. Evidence was also provided to show that the record was prepared in accordance with the Public Body's "ministerial briefing" template. According to the Public Body, this template was specifically and solely used for the purpose of writing ministerial briefs. The Public Body's evidence was that whenever the ministerial briefing note template is invoked, the primary purpose of this "dedicated briefing process" relates to the creation of the document to brief the Minister on matters deemed important by the Minister (where the Minister initiates the request) or deemed important by the Public Body staff (where the request is initiated by the Public Body staff). In this particular case, it was not known whether the Minister requested the record or whether it was written at the professional's own initiative.

[38.] I am satisfied that the first criteria is met: the briefing notes were part of the author's responsibilities.

[39.] The second criteria requires a nexus between the advice and the taking of some action. Advice must contain more than mere factual information, and must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. A factual summary of events, without more, is not sufficient.

[40.] I note that the *Treasury Board of Canada Policy Manual - Access to Information Volume, Part 2- Guidelines, Chapter 2-8* dealing with the advice exception (section 21) under the federal *Access to Information Act* states:

> *Its focus is on "advice" and "recommendations". For the purpose of the Act, the verb "to recommend" is defined as the act of bringing someone or something forward as worthy of notice or favour. "Advice" is defined as an opinion, view or judgment based on the knowledge, training and experience of an individual or individuals expressed to assist the recipient to decide whether to act and, if so, how.*
>
> *Two things should be noted about the definition of advice. Firstly, the definition requires an opinion be given either explicitly or implicitly. Secondly, it requires that the opinion be given or offered as to action. What is meant by the term "opinion" is what one thinks about a particular thing, subject, or point; a judgment formed; a belief, view, notion.*
>
> *The second requirement - i.e. that the opinion be given or offered as to action - is particularly important. Unless an opinion is tied to some action, it cannot generally be considered advice.*

[41.] The Public Body argued that the briefing notes contained information related to the Minister's general responsibilities. Consequently, a direct or specific action need not be referenced or suggested. Its position is that when this type of briefing note template goes to the Minister, it is implicit that the Minister may take some steps or make a decision based on the information contained therein. If the Minister so chooses he may make a decision or take an action because he ultimately has the discretion and authority to do so.

[42.] I do not dispute that it is within the Minister's discretion to make a decision based on facts or on any other form of information, but the criteria requires that the "advice, proposals, recommendations, analyses or policy options" be directed toward an action. If a Minister takes an initiative on bare facts, the disclosure of these fact will not necessarily disclose the basis for the initiative. On the other hand, if the Minister acts on advice or recommendation, disclosure would divulge the basis for the action. It is the latter situation which section 23 excepts from disclosure.

[43.] Upon reviewing the briefing notes, I note that there is no reference to a possible course of action for the Minister. In short, the briefing notes appear to be a narration or a status report. The authors of the briefing notes were not advising the Minister as to what he should do or not do, nor were they providing an analyses of the events using their expertise. "Analyses" is defined in the *Concise Oxford Dictionary*, 9th edition, (New York: Oxford, 1995) as:

> *a detailed examination of the elements or structure of a substance etc.; a statement of the result of this.*

[44.] While there is some discretion exercised in choosing which facts are gathered, without more, a compilation of facts is not an analyses. Gathering pertinent factual information is only the first step that forms the basis of an analyses. It is also the common thread of "advice, proposals, recommendations, or policy options" because they all require, as a base, a compilation of pertinent facts.

[45.] In Order 96-012, I stated that I took section 23(1)(a) to contemplate the protection of information generated during the decision-making process. There is nothing in the information to indicate a decision or a pending decision. The second criteria has not been met.

[46.] Based on the evidence that the records were prepared for the Minister and sent to the Minister, I am satisfied that the third criteria has been met.

[47.] Conclusion: I accept that a ministerial briefing note may meet the criteria of section 23(1)(a). However, in this case I find that the Public Body did not correctly apply section 23(1)(a) to withhold the record.

Issue C: Did the public body correctly apply section 23(1)(b) ("consultations or deliberations involving officers or employees of a public body, member of the Executive Council, or staff of a member of the Executive Council) to the briefing notes?

[48.] Section 23(1)(b) of the Act reads:

> *23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal*
>
> *(b)consultations or deliberations involving*
>
> *(i)officers or employees of a public body,*
>
> *(ii)a member of the Executive Council, or*
>
> *(iii) the staff or a member of the Executive Council,*

[49.] The purpose of section 23(1)(b) is to protect consultations or deliberations occurring during the decision-making process.

[50.] In Order 96-006, I stated the following regarding the interpretation of section 23(1)(b)(i):

> *...When I look at section 23 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 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 the 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.*

[51.] As stated above, I find that the information contained in the records is a narration of facts which has no suggested courses of action or recommendations.

[52.] Conclusion: Based on the evidence presented at the inquiry, I find that the Public Body did not correctly apply section 23(1)(b) to withhold the briefing notes.

Issue D: Are records which fall within section 23(1)(a)and (b) subject to severing?

[53.] Had I found that section 23 applied to the record, I would find that the principle of severance applied as follows.

[54.] The Public Body submitted that once the ministerial briefing note is demonstrated to contain some component that could be construed as engaging the section 23 exception that the exception should be fully engaged to permit the statutory decision maker to withhold the entire record.

[55.] Such an interpretation would be inconsistent with the general principles enounced in the Act regarding severing. Section 2(a) provides that one of the purposes of the Act is to allow any person a right of access to the records in the custody or under the control of a public body, subject to limited and specific exceptions as set out in the Act. Accordingly, there is a presumption in favour of disclosure, placing upon the head of a public body an obligation to disclose as much as possible and accordingly sever only the exempt material. Moreover, section 6(2) reads:

(2) The right of access to a record does not extend to information excepted from disclosure under Division 2 of this part, but if that information can reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

[56.] Mr. Justice Cairns held in Order 96-014 that rather than withholding an entire document, the preferred position is severance. If severance is reasonable, the applicant is entitled to the remainder of the record which is consistent with section 6(2) of the Act.

[57.] Therefore, when considering whether exceptions apply to a record, a Public Body must also consider whether parts of the record could be disclosed without revealing the nature of the information severed and withheld.

[58.] It is recognized that if solicitor-client privilege indivisibly applies to a communication, no part of the communication may be disclosed. Severance of part of the communication may result in waiver of the privilege: see Order 96-017 and *British Columbia (Minister of Environment, Lands & Parks) v. British Columbia (Information & Privacy Commissioner)* (1995), 16 B.C.L.R. (3d) 64.

[59.] I am not persuaded that section 23 has the inherent quality of nonseverability integral to solicitor-client privilege contained in section 26(1)(a). The Public Body urged that the principle of Ministerial responsibility means that records destined for a Minister should be treated the same as records subject to solicitor-client privilege. That is, if any part of the record is advice within the meaning of the section, then the whole record is subject to the exception and no severing can be done. I do not agree. Ministerial responsibility, where it needs to be absolute, is protected by section 4(1)(l). Advice from officials to Ministers may be, but is not necessarily, part of Ministerial responsibility, Cabinet solidarity and so on. To the extent that a record does contain advice or consultations, the head of the Public Body may decide to withhold the record or to sever those parts which would violate the principle.

[60.] By the same reasoning, I do not view what I have said as a significant threat to either Ministerial responsibility or Cabinet solidarity. I believe that those things which need to be withheld because their disclosure would betray Cabinet confidences can be withheld. It seems to me to be consistent with the principle of open and accountable government however, that not everything that is addressed to a Minister should automatically be withheld. For example, simply telling or reminding the Minister of what has gone on, in the absence of accompanying analyses, advice, suggestions or recommendations, does not undermine Cabinet solidarity or Ministerial responsibility.

[61.] Furthermore, it is also a general statutory rule of interpretation that exceptions are to be interpreted narrowly rather than broadly. Consequently, in light of the above reasons, I find that the principle of severance does apply to section 23 and documents to which section 23 applies should be reviewed for possible severing by the public body.

Order:

[62.] I find that the records are not excluded by section 4(1)(l), and that the Public Body incorrectly applied section 23(1)(a) and (b) to the information contained in the records. Therefore, the Public Body is not authorized to refuse access. Consequently, pursuant to section 68(2)(a) of the Act, I require that the head of the Public Body give the Applicant access to the records.

[63.] I ask that the public body 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