ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-013

October 20, 1998

ALBERTA TREASURY

Review Number 1373

I. BACKGROUND

[1] On October 14, 1997, the Applicant applied for access to records held by Alberta Treasury (the "Public Body") between March 28, 1991 and October 15, 1997 regarding the amount of interest accrued on a loan made by the Alberta government to a corporation (the "Third Party"), as well as the effective interest rate on the loan. The Applicant subsequently narrowed the time frame for the records requested to month-end records for March 31, April 30, June 30, August 31 and September 30, 1997.

[2] The Public Body denied the Applicant's access request under section 15(1) ("business interests") and section 24(1)(c) ("economic interests") of the *Freedom of Information and Protection of Privacy Act* (the "Act").

[3] In a letter dated December 23, 1997, the Applicant requested that the Commissioner review the Public Body's decision. Mediation was authorized but was not successful. An inquiry was held on July 16, 1998, in which representations were made in writing by the Applicant, the Public Body and the Third party. Part of the Public Body's submissions were made in confidence. The entirety of the Third Party's submissions were also provided in confidence.

II. RECORD AT ISSUE

[4] The Record which is responsive to this request consists of information contained in 63 pages of information. There are, essentially, three Categories of information contained in the Record:

[5] Category 1. Information pertaining to the amount of interest accrued on the loan contained in pages of budgetary information prepared by the Third Party. This information is contained in pages 1(a) to (e), 2(a) to (h), 3(a) to (h), 4(a) to (h), 5(a) to (h) of the Record.

[6] Category 2. Information outlining, in broad terms, the formula for determining the interest rate on the loan and other matters pertaining to the repayment of the loan (the "loan formula"). This information is contained in a briefing note to the Provincial Treasurer (a portion of page 6 of the Record) and a memorandum to the Provincial Treasurer (a portion of page 7).

[7] Category 3. Information regarding the interest rate chargeable on the loan and the amount of interest received and receivable at given month ends, as well as the total amount of interest accrued on the loan, contained in records generated by the Public Body. This information is found on pages 6, 7 and 8 of the Record as well as on pages DN01 to DN21 of the Record.

III. ISSUES

[8] There are four issues in this inquiry:

1. Did the Public Body correctly apply section 15(1) of the Act to the Record?

2. Is section 15(3)(c) applicable to the Record?

3. Did the Public Body correctly apply section 24(1)(c) of the Act to the Record?

4. Does section 31(1)(b) (information must be disclosed in the public interest) apply to the Record?

IV. Discussion Of The Issues

Issue 1: Did the Public Body Correctly Apply Section 15(1)?

[9] Section 15(1) of the Act reads:

> *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.

[10] I would first note that section 15(1) establishes a mandatory exception to disclosure. This means that if the information in question falls within the scope of the section, access must be denied: there is no choice.

[11] Under section 67(1) of the Act, the Public Body bears the burden of proving that section 15(1) is applicable. In order to do so, the Public Body must satisfy the following three-part test:

Part 1: Does the information contain trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party? (Section 15(1)(a))

Part 2: Is the information supplied, explicitly or implicitly, in confidence? (Section 15(1)(b))

Part 3: Could disclosure be reasonably expected to bring about one of the

outcomes listed in section 15(1)(c)? (Section 15(1)(c)(i))

Part 1: Does the information contain trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party? (Section 15(1)(a))

[12] The Public Body submits that information pertaining to the amount of any accrued interest with respect to the Third Party's loan, as well as the effective interest rate, constitutes financial information of the Third Party. In Order 96-018, the Commissioner decided that financial information of a third party includes information regarding the monetary resources of the third party. In my view, information concerning the interest accrued on the loan contained in the budgetary records submitted by the Third Party and the Public Body's own accounting records, i.e., information in Categories 1 and 3 above, fits this definition, but information relating to the actual loan formula does not. Information concerning the Third Party's loan obligations - its liabilities - reveals information about its financial capabilities, and thus meets the requirements of this part of the section 15 test.

[13] The loan formula is not, however, in the same category. It does not, in and of itself, reveal anything about the Third Party's financial position, and therefore does not qualify as "financial information" within the meaning of section 15(1)(a).

Part 2: Is the information supplied, explicitly or implicitly, in confidence? (Section 15(1)(b))

[14] In Orders 96-012 and 96-013, the Commissioner established a two-part test for determining whether information "is supplied in confidence" within the meaning of section 15(1)(b). He determined that information is supplied in confidence if (i) the third party has provided original or proprietary information that remains relatively unchanged in a contract or other document, and (ii) disclosure of the information would permit an applicant to make an accurate inference of sensitive third-party business information that would not in itself be disclosed under the Act.

[15] I find, based on the evidence, that information in Categories 1 and 3 meets the test. Information concerning the interest accrued on the loan contained in the Third Party's budgetary documents is certainly original or proprietary information that has remained unchanged in the Public Body's hands. Information regarding the interest rate chargeable on the loan and the amount of interest received and receivable at given month ends, as well as the total amount of interest accrued on the loan, also meets the first part of the test as it is derived directly from information supplied by the Third Party. In my view, disclosing

information concerning the applicable interest rate and interest accruing on the loan, together with information concerning the loan formula, would enable the Applicant to make accurate inferences about sensitive third-party business information that would not in itself be disclosed under the Act.

[16] I find that information in Category 2 concerning the loan formula fails both parts of the section 15(1)(b) test, for the following reasons. I agree with the Applicant's submission that information regarding the way in which the loan is structured is not information which was "supplied" to the Public Body by the Third Party. Rather, it is information which was generated jointly by the parties during the process of negotiating the loan. I also fail to see how disclosing this information on its own, without the information concerning the applicable interest rate and and interest accruing on the loan, would enable the Applicant to make accurate inferences about sensitive third-party business information that would not in itself be disclosed under the Act.

[17] Accordingly, I find that information in Categories 1 and 3 meets this part of the section 15(1) test, and information in Category 2 fails the test.

Part 3: Could the disclosure be reasonably expected to bring about one of the outcomes set out in section 15(1)(c)? (Section 15(1)(c))

[18] The Public Body argues that the disclosure of the information the Applicant is seeking could reasonably be expected to significantly harm the competitive position of the Third Party (15(1)(c)(i)) or result in undue financial loss or gain to any person or organization (15(1)(c)(iii)). It argues that disclosing this information would allow the Applicant to form significant conclusions about the financial status of the Third Party, particularly its cashflow position and ability to meet debt commitments. The Public Body and the Third Party made additional submissions, in confidence, on this issue.

[19] In order to satisfy this part of the section 15 test, the Public Body must establish that the disclosure could be reasonably expected to bring about either one of these outcomes. Only one of these outcomes has to be proven to satisfy this part of the section 15 test. The Public Body must prove its case on a balance of probabilities. It must establish that there is more than a mere possibility of significant harm to the competitive position of the Third Party or undue financial loss or gain occurring if the information is released.

[20] In Order 96-003, the Commissioner stated that in order for a Public Body to meet the "harm" test under section 15(1)(c)(i) "...[The] evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because

of the sensitivity of the matters at issue." (*Canada (Information Commissioner)* v. *Canada (Prime Minister)*, [1992] F.C.J. No. 1054 (Fed. T. D.) In that Order the Commissioner also stated that the Public Body must provide evidence of the following to prove significant harm to the Third Party's competitive position under section 15(1)(c)(i):

> (i) the connection between disclosure of the specific information and the harm which is alleged;
>
> (ii) how the harm constitutes "damage" or "detriment" to the matter; and
>
> (iii) whether there is a reasonable expectation that the harm will occur.

[21] Having considered the evidence presented, I find that the Public Body has met these three tests and proven its case under section 15(1)(c)(i) with regard to information in Categories 1 and 3. Because the Public Body need only prove one outcome under section 15(1)(c), I need not consider whether it has met the burden of proof with regard to section 15(1)(c)(iii) with regard to this information.

[22] I find that the Public Body has not proven its case with respect to the disclosure of information concerning the loan formula (information in Category 2). It has not established how the release of information concerning the broad terms and conditions of the loan could significantly harm the competitive position of the Third Party or result in undue financial loss or gain to any person or organization. In my view, this is not the kind of information section 15(1) was designed to protect. The purpose of section 15(1) is to give a third party some degree of protection with respect to information it provides to a Public Body. It was not designed to shield information of this kind from public view. In my view, one of the primary purposes of the Act is to ensure that the public has the right to scrutinize how its tax dollars are being managed. It consequently should have the right to know how loan agreements of this kind are structured.

[23] Accordingly, I find that the Public Body correctly applied section 15(1) with regard to information in Categories 1 and 3. I find that it incorrectly applied section 15(1) with respect to information in Category 2.

Issue 2: Is section 15(3)(c) applicable in this context?

[24] I note that sections 15(1) and (2) do not apply if any of the conditions outlined in section 15(3) are present. The issue this case raises is whether section 15(3)(c) is applicable. Section 15(3)(c) states:

> *15(3) Subsection (1) and (2) do not apply if*

> ...
> *(c) the information relates to a non-arm's length transaction between the Government of Alberta and another party,...*

[25] The question I have to decide is whether the transaction in question is a "non-arm's length transaction between the Government of Alberta and another party" within the meaning of this section. The Act does not include a general definition for the term "non-arm's length" in section 1(1), nor does it specifically indicate how the term should be defined in the context of section 15(3)(c). The term is defined in section 4(3) for the purpose of determining which records in the custody or control of a treasury branch or the Credit Union Deposit Guarantee Corporation, under sections 4(1)(m) and (n), are subject to the Act. These sections state:

> *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 other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party;*
> >
> > *(n) a record of a credit union in the custody or control of the Credit Union Deposit Guarantee Corporation other than a record that relates to a non-arm's length transaction between the Government of Alberta and another party.*
>
> *...*
> *(3) For the purposes of subsection (1)(m) and (n), a non-arm's length transaction is 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*
> >
> > *(b) by a member of the Executive Council.*

[26] The Applicant argues that the definition outlined in section 4(3) should also be applied to section 15(3)(c), and submits, that under this definition, the loan transaction is a non-arm's length transaction because it was approved by the Executive Council. The Public Body and the Third Party argue, on the other hand, that the section 4(3) definition of a non-arm's length transaction does not apply to section 15(3)(c). They point to the fact that the section 4(3) definition is provided specifically for the purpose of defining which records are subject to the

Act under sections 4(1)(m) and (n). They note that the Act does not specify how the term is to be defined for the purpose of section 15(3)(c), and that it must therefore be given "another more usual meaning."

[27] I agree with this submission. I do not believe that the definition of non-arm's length in section 4(3) applies in the context of section 15(3)(c). Had the Legislature wanted this definition to apply it would have said so in section 1(1), for example, or it would not have specifically limited the application of this definition to sections 4(1)(m) and (n).

[28] I must therefore turn to the common law for guidance in defining the term. According to the *Black's Law Dictionary* 6th ed. (St. Paul: West, 1990) at 109, a transaction is deemed to be at arm's length when the parties involved are unrelated, independent and acting in their own self-interest:

> *Said of a transaction negotiated by unrelated parties, each acting in his or her own interest; the basis for a fair market value determination. A transaction in good faith in the ordinary course of business by paries with independent interests. Commonly applied in areas of taxation when there are dealings between related corporations...The standard under which unrelated parties, each acting in his or her own interest, would carry out a particular transaction...*

[29] Conversely, a transaction is deemed to be non-arm's length when the interests of the parties can not, for a number of possible reasons, be considered separate. I also rely upon the following passage from the headnote of *Re: Tremblay* (1980) 36 B.C.R. 111 (Que. S.C.):

> *In the absence of a better definition, a transaction at arm's length could be considered to be a transaction between persons whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction is not at arm's length.*

[30] Applying this definition to the facts in this case, I conclude that the loan transaction between the Public Body and the Third Party is an arm's length

transaction, and that section 15(3)(c) is therefore not applicable. There is no evidence to suggest that either party exerted "control, influence or moral pressure" over the other in the process of negotiating this loan transaction.

Issue 3: Did the Public Body correctly apply section 24(1)(c) of the Act to the record?

[31] As I have already found that section 15(1) applies to the information contained in Categories 1 and 3, I do not find it necessary to consider whether section 24(1)(c) also applies to that same information. I need to consider section 24(1)(c) only as it relates to the information in Category 2.

[32] Section 24(1)(c) of the Act states:

> *24(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 interests 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 the contractual or other negotiations of,*
>
> *the government of Alberta or a public body;*

[33] The Public Body argues that the disclosure could reasonably be expected to harm the economic interests of the Government of Alberta under section 24(1)(c)(i). It suggests that the disclosure, if harmful to the Third Party's business interests, could negatively affect the Third Party's ability to meet its debt obligations and repay the loan. This occurrence could, in turn, put the government's investment at risk and result in financial loss. The Public Body also suggests that the disclosure could expose the government to lawsuits and financial loss for any damages suffered by the Third Party as a consequence of the disclosure. The Public Body made additional confidential submissions to me regarding the application of section 24(1)(c).

[34] I do not find the Public Body's arguments persuasive. In order to establish that this section is applicable, a Public Body must, at minimum, present evidence to show that the information falls within the general rule under section 24(1). It

must establish that the information "could reasonably be expected to harm the economic interests of a public body or the Government of Alberta or the ability of the Government to manage the economy".

[35] In Order 96-016, I said that there must be a clear and direct linkage between the disclosure of the specific information and the particular harm alleged. Section 24(1) is not concerned with "indirect harm" or harm resulting from a "ripple effect". It must be reasonable to expect that the disclosure of the specific information will result in the alleged harm. The Public Body has failed to establish a clear and direct linkage between the disclosure of the information in Category 2 (loan formula) and the potential harms alleged. It is not reasonable to expect that the disclosure of the loan formula will result in the alleged harms.
[36] For the reasons noted above, I find that the Public Body did not correctly apply section 24(1)(c) to the information in Category 2. That information is to be disclosed.

Issue 3: Does section 31(1)(b) (information must be disclosed in the public interest) apply to the Record?

[37] The Applicant argues that the Record should be disclosed because section 31(1)(b) of the Act is applicable. I need only consider this question with respect to the information in Categories 1 and 3, as the information in Category 2 is to be disclosed. The relevant parts of section 31 read:

> *31(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*
>
> *...*
>
> *(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[38] Section 31 imposes a statutory obligation on the head of a public body to release information of certain risks in "emergency-like" situations (i.e., "without delay"). Because section 31 is an "override provision", the scope of what is caught by the provision must be defined narrowly.

[39] The Applicant bears the difficult task of proving that the disclosure is clearly in the public interest under section 31(1)(b). In Order 96-014, Mr. Justice Cairns considered what type of information would qualify as "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is "a matter of public interest". In Order 96-011, the Commissioner further clarified the matter by stating that a

matter must be of compelling public interest to qualify as "clearly a matter of public interest".

[40] The Applicant argues that "it is in the public interest to know the interest rate the government has charged on loans to the private sector, the amount of interest that has accumulated and the amount of principal that has been repaid" given the fact that the loan was advanced by Alberta taxpayers. Though I agree that the circumstances surrounding the repayment of the loan is a matter of interest to the public, I can not agree that it is a matter of public interest.

[41] I therefore find that the information in question is not information which is clearly in the public interest within the meaning of section 31(1)(b), and that this section is not applicable to the Record.

V. ORDER

[42] Under section 68 of the Act, I make the following order:

1. The Public Body correctly applied section 15(1) of the Act to the information in Categories 1 and 3 of the Record, namely, the amount of interest accrued on the loan contained in 45 pages of budgetary information prepared by the Third Party, and information regarding the interest rate chargeable on the loan and the amount of interest received and receivable contained in records generated by the Public Body, respectively.

2. The Public Body did not correctly apply section 15(1) of the Act to the information contained in Category 2 of the Record, namely, the information pertaining to the loan formula contained in portions of pages 6 and 7 of the Record.

3. Section 15(3)(c) is not applicable to the Record.

4. The Public Body did not correctly apply section 24(1)(c) to the Record.

5. Section 31(1)(b) does not apply to the Record.

6. I order that the Public Body refuse access to the information contained in Categories 1 and 3 of the Record. I also order that the Public Body give the Applicant access to information contained in Category 2, namely, information pertaining to the loan formula contained in portions of pages 6 and 7 of the Record. For the sake of clarity, I have provided the Public Body with photocopied pages of the portion of the Record which contains

the information in Category 2, and have highlighted the information which the Public Body is required to disclose.

7. I further order that the Public Body notify me in writing, not later than 30 days after being given a copy of this Order, that the Public Body has complied with this Order.

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Frank J. Work
Acting Information and Privacy Commissioner