

ALBERTA
INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-015

November 25, 1998

ALBERTA TREASURY

Review Number 1372

I. BACKGROUND

[para 1.] On November 7, 1997, the Applicant applied for access to records in the custody of Alberta Treasury (the "Public Body"). The Applicant requested the following:

Copies of all independent valuations and/or fairness assessments, prepared between January 1, 1996 - November 7, 1997 for the Government of Alberta, the Alberta-Pacific Forest Industries (Al-Pac) joint venture and the Al-Pac joint venture partners, in the possession of the Ministry of Treasury, regarding the value of the province's financial interest in the Al-Pac Pulp Mill Project.

[para 2.] The Public Body found 309 records that were responsive to the Applicant's request and released 31 records in their entirety; 187 records were disclosed with severing, and 91 records were not disclosed.

[para 3.] In a letter dated December 23, 1997, the Applicant asked my Office to review the Public Body's decision not to disclose all of the information in its custody. Mediation was authorized and resulted in the Public Body's disclosing additional records on two separate occasions. As a result of the additional disclosures, 238 of the 309 records have been disclosed in their entirety to the Applicant. Of the 71 records that remain,

10 records have been partially disclosed and 61 records have been withheld in their entirety. The Public Body withheld all this information under section 15(1) of the Act (“disclosure harmful to business interests of a third party”).

II. RECORDS AT ISSUE

[para 4.] The records consist of 71 pages from a report prepared by a contractor hired by the Public Body. The report relates to the loan given by the Government of Alberta to the Alberta-Pacific Pulp Mill Joint Venture (the “Third Party”) and was prepared to assist the Public Body in assessing the appropriateness of negotiating a settlement to certain loan obligations which the Third Party had with the Government of Alberta.

[para 5.] The information in the records can be broken down into three Categories:

Category One: Information actually supplied by the Third Party to the Public Body (the “First Category of records”);

Category Two: Forecasts and estimates based on the information actually supplied by the Third Party (the “Second Category of records”); and

Category Three: Information about the published price of pulp in United States dollars, the published price of pulp in Canadian dollars, and the \$Cdn/\$US exchange rate (the “Third Category of records”).

[para 6.] In this Order, I will refer to the records individually by page number, by Category, or collectively as the “Records”.

III. ISSUES

[para 7.] There are three issues in this inquiry:

- A. Did the Public Body correctly apply section 15(1) of the Act (disclosure harmful to business interests of a third party)?
- B. Does section 15(3)(c) of the Act (non-arm’s length transaction) apply to the Records?

C. Does section 31(1)(b) of the Act (information to be disclosed in the public interest) apply to the Records?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body correctly apply section 15(1) of the Act (disclosure harmful to business interests of a third party)?

1. Application of section 15(1)

[para 8.] Section 15(1) 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.

[para 9.] Section 67(1) places the burden of proof on a public body when, as here, the public body has refused access to a record that does not contain the personal information of a third party. In order to prove that section 15(1) applies, the Public Body must establish that:

- a. the information would reveal trade secrets, commercial, financial, labour relations, scientific or technical information of the Third Party;
- b. the information was supplied, explicitly or implicitly, in confidence; and,
- c. disclosure of the information could reasonably be expected to bring about one of the outcomes listed in Section 15(1)(c).

a. Would the information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party?

[para 10.] The Public Body submits that the Records either contain or would reveal financial and commercial information of the Third Party.

[para 11.] In Order 96-018, I said that “financial information” includes information regarding the monetary resources of a third party. In Order 96-013, I said that “commercial information” related to the “buying or selling, or exchange of merchandise or services”, among other things.

[para 12.] After reviewing the Records, I find that the information contained in the First Category of records not only is the financial or commercial information of the Third Party, but would also reveal the financial or commercial information of the Third Party. I also find that the information contained in the Second Category of records would reveal the financial or commercial information of the Third Party.

[para 13.] The information contained in the Third Category of records is not the financial or commercial information of the Third Party, nor would it reveal the financial or commercial information of the Third Party.

[para 14.] I note that, on pages 0044, 0056, 0068, 0244, 0267 and 0300 of the Records, the Public Body has already disclosed information contained

in the Third Category of records, namely, the published price of pulp in United States dollars for the years 1997 to 2012.

b. Was the information supplied, explicitly or implicitly, in confidence?

[para 15.] With respect to the First Category of records, the Third Party stated that it submitted that information to the Public Body in “strictest confidence.” Based on the information contained in the Records, I accept that the information actually supplied by the Third Party to the Public Body was supplied in confidence.

[para 16.] The information in the Second Category of records was not supplied by the Third Party, but is inextricably linked with the information actually supplied by the Third Party. In other words, this information would not exist if the Third Party had not supplied the original information to the Public Body. Furthermore, I am satisfied that disclosure of this information would permit the Applicant to make accurate inferences about sensitive business information of the Third Party that would not, in itself, be disclosed under the Act. Therefore, I find that the information contained in the Second Category of records was supplied in confidence.

[para 17.] The Second Category of records contains the operating rates for the years 1996 to 2012, which are set out on pages 0052, 0064, 0076, 0235 and 0258 of the Records. On pages 0044, 0056, 0068, 0244, 0267 and 0300 of the Records, the Public Body has already disclosed the operating rates for the years 1997 to 2012.

[para 18.] In Order 96-013, I said that I would not take into consideration a public body’s disclosure of information when it comes to determining whether the information is supplied in confidence. To do so would allow a public body to unilaterally disclose information and deprive the third party of the protection afforded by section 15(1). Therefore, I find that, although the Public Body has disclosed the operating rates for the years 1997 to 2012, that information is nevertheless supplied in confidence for the purposes of section 15(1)(b).

[para 19.] The operating rate for the year 1996 is the Third Party’s financial or commercial information within the First Category of records, and meets the requirements of section 15(1)(b).

[para 20.] Having found that the information contained in the Third Category of records is not the financial or commercial information of the Third Party, I do not find it necessary to consider the third category of records under section 15(1)(b).

c. Could disclosure of the information reasonably be expected to bring about one of the outcomes listed in Section 15(1)(c)?

[para 21.] The Public Body did not say specifically what outcome it was relying on under section 15(1)(c). However, given the nature of the information contained in the Records, I have identified that outcome as section 15(1)(c)(i): harm significantly the competitive position or interfere significantly with the negotiating position of the third party. None of the other three outcomes, namely, section 15(1)(c)(ii) to (iv), were raised by the Public Body and, based on the Records, I find that they do not apply.

[para 22.] As I stated in Order 96-013, for a public body to establish that disclosure of information would harm significantly the competitive position or interfere significantly with the negotiating position of a third party, the public body must provide evidence of the following:

- (i) the connection between disclosure of the specific information and the harm that 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.

[para 23.] Although the evidence put forward by the Public Body and the Third Party is not as complete as it could have been, the nature of the information contained in the Records is sufficient to establish that disclosure of the information contained in the First and Second Categories of records could reasonably be expected to harm significantly the competitive position of the Third Party. Disclosure of the information in those categories would allow the Applicant, or a competitor of the Third Party, to make accurate inferences about the Third Party’s pricing strategy, revenues, contracts for goods and services, and expenses (operating, capital and other expenses).

[para 24.] Having found that the information contained in the Third Category of records is not the financial or commercial information of the Third Party, I do not find it necessary to consider that information under section 15(1)(c)(i).

2. Conclusion under section 15(1)

[para 25.] I find that the Public Body correctly applied section 15(1) to the information contained in the First and Second Categories of records. However, the Public Body did not correctly apply section 15(1) to the information contained in the Third Category of records. The information contained in the Third Category of records is to be disclosed to the Applicant.

[para 26.] In its submissions to me, the Public Body asserted that any harm that issues to the Third Party through disclosure of the information could result in lawsuits against the Government of Alberta. In this regard, I refer the Public Body to section 85 of the Act.

[para 27.] One further matter needs to be dealt with. On the following eleven pages of the Records, there are fax transmission markings: 0189, 0190, 0191, 0192, 0193, 0194, 0202, 0279, 0280, 0281, and 0282. Those markings consist of the date and time of transmission, the name of the sender, the receiving fax number and the page number of the fax. Except for the fax page number of each separate page transmitted, the markings are the same.

[para 28.] Those markings have been disclosed on two of the pages on which other information has already been disclosed to the Applicant, but not on the remaining pages on which no information has been disclosed to the Applicant.

[para 29.] I find that the fax transmission markings are not information to which section 15(1) of the Act applies. As a result, the Public Body would normally be required to disclose those markings. However, in this case, I do not intend to order that the Public Body disclose the markings, for the following reasons: (i) the markings have already been disclosed on two of the pages, (ii) the only difference between the markings already disclosed and those not disclosed is the fax number of each separate page transmitted, and (iii) to disclose only the markings on those pages for which there is no other information that can be disclosed would provide the Applicant with meaningless information.

ISSUE B: Does section 15(3)(c) of the Act (non-arm’s length transaction) apply to the Records?

[para 30.] Section 15(3)(c) reads:

15(3) Subsections (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

[para 31.] Section 15(3)(c) applies only to information to which section 15(1) applies. Therefore, I find it necessary to consider section 15(3)(c) only for that information to which I have said that the Public Body correctly applied section 15(1).

[para 32.] The interpretation of section 15(3)(c) was fully considered in Order 98-013, and I do not intend to repeat that analysis here. For the purposes of this Order, I simply note that the definition of the phrase “non-arm’s length transaction” in section 15(3)(c) is the common law definition, and not the definition contained in section 4(3) of the Act.

[para 33.] After reviewing all the evidence, I conclude that the transaction between the Government of Alberta and the Third Party was an arm’s length transaction. There is no evidence that the parties are “related” or that either party was not acting in its own interest. In other words, there is no evidence to suggest that either party exerted “control, influence or moral pressure” over the other in the process of negotiating the loan transaction. As a result, section 15(3)(c) does not apply to the information to which the Public Body correctly applied section 15(1).

ISSUE C: Does section 31(1)(b) of the Act (information to be disclosed in the public interest) apply to the Records?

[para 34.] 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.

[para 35.] Section 31(1)(b) applies only to information that would otherwise be withheld under the Act. Therefore, I find it necessary to consider section 31(1)(b) only for that information to which I have said that the Public Body correctly applied section 15(1).

[para 36.] Because section 31 significantly overrides rights under the Act, the types of information that are caught by this section will be defined narrowly. The Applicant bears the burden of proving that disclosure of the information is clearly in the public interest.

[para 37.] The Applicant submits that it is in the public interest to know how the range of market values for the loan to the Third Party were determined, to ensure that all leverages available were maximized by the Government of Alberta. As I stated in Order 96-011, for section 31(1)(b) to apply, the matter must be of “compelling public interest.” In its submissions, the Applicant has not established that this is a matter of “compelling public interest”. Therefore, I find that section 31(1)(b) does not apply to the information to which the Public Body correctly applied section 15(1).

V. ORDER

[para 38.] Under section 68 of the Act, I make the following Order.

[para 39.] The Public Body correctly applied section 15(1) to the information contained in the First and Second Categories of records, namely, the information actually supplied by the Third Party to the Public Body, and the forecasts and estimates based on the information actually supplied by the Third Party.

[para 40.] The Public Body did not correctly apply section 15(1) to the information contained in the Third Category of records, namely, the information about the published price of pulp in United States dollars, the published price of pulp in Canadian dollars, and the \$Cdn/\$US exchange rate.

[para 41.] Section 15(3)(c) does not apply to the information to which the Public Body correctly applied section 15(1).

[para 42.] Section 31(1)(b) does not apply to the information to which the Public Body correctly applied section 15(1).

[para 43.] I order that the Public Body refuse access to the information contained in the first and second categories of records.

[para 44.] I order that the Public Body give the Applicant access to the information contained in the third category of records. Along with this Order, I will provide the Public Body with a copy of the highlighted information that is to be disclosed to the Applicant.

[para 45.] 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.

Robert C. Clark
Information and Privacy Commissioner