ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-019

January 14, 1999

ALBERTA TREASURY

Review Number 1424

I. BACKGROUND

[para. 1] On December 22, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Treasury (the "Public Body") for access to:

> *"Copies of all studies and reports prepared by or for the Ministry of Treasury and the Alberta Treasury Branches between January 1, 1993 and December 22, 1997 assessing the feasibility of privatizing or selling the assets and liabilities of the Alberta Treasury Branches."*

[para. 2] The Public Body disclosed 55 of a possible 102 pages of records responsive to the access request. The remaining 47 pages were either partially or entirely withheld. The Public Body claimed sections 23(1)(a), 24(1)(c)(i) and 24(1)(c)(ii) as its authority to sever the information.

[para. 3] On April 23, 1998, the Applicant requested that this Office review the Public Body's decision. Mediation was not successful and the matter was set down for a written inquiry.

[para. 4] Written representations were made by the Public Body, the Applicant, and the Alberta Treasury Branches as an Affected Party (the "ATB").

II. RECORDS AT ISSUE

[para. 5] The records consist of documents relating to the restructuring alternatives of the ATB. They include letters, memoranda, and reports that were either prepared by the Public Body, the ATB, or consultants of the ATB. It should be noted that while all the records are in the physical possession of the Public Body, it is reasonable to assume that the ATB may have physical possession of file copies or duplicates of many of the records.

III. BURDEN OF PROOF

[para. 6] Section 67(1) of the Act states that if an inquiry relates to a decision to refuse an Applicant access to all or part of a record, the head of the Public Body must prove the Applicant has no right of access. In this inquiry the Public Body refused to give the Applicant access to the records. The Public Body therefore has the burden of proof.

IV. ISSUES

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

A. Does section 4(1)(m) exclude the records from the application of the Act?

B. Did the Public Body correctly apply sections 24(1)(c)(i) and 24(1)(c)(ii) (economic harm) to the records?

C. Did the Public Body properly exercise its discretion to withhold the information under sections 24(1)(c)(i) or 24(1)(c)(ii)?

D. Did the Public Body correctly apply section 23(1)(a) (advice) to the records?

E. Did the Public Body properly exercise its discretion to withhold the information under section 23(1)(a)?

F. Does section 31(1)(b) (information must be disclosed if in the public interest) apply to the records?

V. DISCUSSION

Issue A: Does Section 4(1)(m) exclude the records from the application of the Act?

[para. 8] Section 4 specifies the jurisdiction of the Act and my jurisdiction as Commissioner under the Act. Consequently, the standard in determining that jurisdiction must be a standard of correctness. In other words, a record is either subject to the Act or not subject to the Act; there is no discretion involved.

[para. 9] The Public Body and the Applicant both state that, in their opinion, section 4(1)(m) does not exclude the records from the Act. However, the ATB differs from the other two parties and indicates in its written submission that this section functions to exclude some of the records. The ATB states this exemption is necessary to maintain customer confidentiality in the financial services business.

[para. 10] Section 4(1)(m) 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:…*
>
> > *(m) a record under 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;"*

[para. 11] After reviewing section 4(1)(m), it is clear that in order for a document to be exempt under this section, three requirements must be fulfilled:

> i) the document must be a record;
> ii) the record must not relate to a non-arm's length transaction between the Government of Alberta and another party; and
> iii) the record must be in the "custody or control" of a treasury branch.

> (i) Do the documents constitute a "record"?

[para. 12] The term "record" is defined under section 1(1)(q) of the Act. This section states:

"1(1) In this Act,

> *(q) "record" means a record of information in any form and includes books, documents, maps, drawings, photographs, letters, vouchers and papers and any other information that is written, photographed, recorded or stored in any manner, but does not include software or any mechanism that produces records;"*

I have carefully reviewed the documents, and find that each constitutes a "record" under the Act.

(ii) Do the records relate to a non-arm's length transaction?

[para. 13] Section 4(3) states that in order for a record to relate to a non-arm's length transaction under 4(1)(m), the transaction must have been approved by one of the listed entities. It states:

> *"(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*
>
> *(c) by a member of the Executive Council."*
>
> (emphasis added)

[para. 14] This section does not state that it is sufficient for a transaction to be approved at a future time. Rather, it requires that approval must already have been granted. In this inquiry, there is no evidence before me that, at this time, a non-arm's length transaction has been approved by one of the entities listed in section 4(3). Therefore, I find that none of the records relate to a non-arm's length transaction.

(iii) Are the records in the "custody or control" of a treasury branch?

[para. 15] The records are not in the physical possession of the ATB and therefore cannot be considered to be in the "custody" of the ATB. While the ATB may have physical possession of duplicates or file copies, this is not sufficient. In order to have "custody" of the records, the ATB must have physical possession of the actual records at issue.

[para. 16] Furthermore, the ATB does not have "control" of the records as there is no evidence before me that the ATB has the authority to manage those records. While the ATB may have physical possession of duplicates or file copies of many of the records, this does not give the ATB the authority to manage or, in other words, "control" the records that are in the physical possession of the Public Body.

[para. 17] Unlike the protection afforded to copies of the Ombudsman's records that are in the custody or control of another public body (as discussed in Order 97-008), copies of the ATB's records in the custody or control of another public body are not similarly protected, for the following reasons.

[para. 18] The role or business purpose of the ATB in providing financial services is outlined in section 11 of the *Alberta Treasury Branches Act*. It states:

> *"11(1) Subject to this Act and the regulations, Alberta Treasury Branches shall not engage in or carry on any business other than business generally appertaining to the business of providing financial services.*
>
> *(2) Notwithstanding subsection (1), Alberta Treasury Branches may*
>
> > *(a) carry on business as a custodian of property,*
> >
> > *(b) act as a trustee for a trust in respect of a prescribed class of transaction, and*
> >
> > *(c) hold, manage and otherwise deal with real property."*

[para. 19] The *Alberta Treasury Branches Act* and corresponding regulations do not, however, go further and give the ATB control over records that are not in its physical possession. Records outside of the ATB's physical possession cannot be considered under the control of the ATB if there is no evidence of the ATB's authority to control those records.

[para. 20] To summarize, I find the records are not excluded from the provisions of the Act under section 4(1)(m) as only the first and second requirements of that section are fulfilled. The third requirement, that the records be in the custody or control of a treasury branch, is not fulfilled.

Issue B: Did the Public Body correctly apply sections 24(1)(c)(i) and 24(1)(c)(ii) (economic harm) to the records?

[para. 21] Section 24(1)(c) 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 interest 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 contractual or other negotiations of,*
> >
> > *the Government of Alberta or a public body;"*

[para. 22] Section 24(1) is composed of two parts: (1) a general rule, and (2) several subsections that provide specific examples of situations that may fulfill the general rule.

[para. 23] In order for a Public Body to withhold information under section 24(1) it must fulfill the general rule under this section. It must prove that the disclosure of information "*could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the ability of the Government to manage the economy*." While subsections (a) to (d) in section 24(1) provide specific examples that fall within the general rule, these examples are not exhaustive. There may be situations where information fulfills the general rule, but does not fall within the list of examples.

[para. 24] In Order 96-003, I held that the test to determine reasonable expectation of harm is three-fold: (1) there must be a clear cause and effect relationship between the disclosure and the harm; (2) the disclosure must cause harm and not simply interference or inconvenience; and (3) the likelihood of harm must be genuine and conceivable.

[para. 25] In Order 96-016, I further elaborated on the test of reasonable expectation of harm, and referred to the Federal Court Trial Division decision of *Canada (Information Commissioner)* v. *Canada (Prime Minister)* [1992] F.C.J. No. 1054. In that decision, the court emphasized that to prove on a balance of probabilities that there is a reasonable expectation of economic harm from the disclosure of the records in question, the Public Body must show direct harm. This means: (1) the Public Body must show a clear and direct linkage between the disclosure of the specific information and the harm alleged, and (2) the court must be given an explanation of how or why the harm alleged would result from the disclosure of the specific information.

[para. 26] Furthermore, in that same Order, I emphasized that the nature of the information is an important consideration. I held that it is not reasonable to expect harm will result from disclosure of information if the information is already in the public domain.

[para. 27] After carefully reviewing the records, I find the disclosure of the information could reasonably be expected to harm the economic interest of the Government of Alberta or the ATB, and in particular, could reasonably be expected to result in financial loss under section 24(1)(c)(i) or prejudice their competitive position under section 24(1)(c)(ii).

[para. 28] I agree with the Public Body that the records or the severed portions of records reveal information that would have a major impact on any future sale of the ATB. In my view, the disclosure of this information would give a potential buyer valuable information regarding the Government of Alberta's and the ATB's concerns, objectives, timing of future decisions, process, and prospective purchasers. The disclosure could affect the sale price, terms or conditions that may be negotiated in the future sale, and thereby could reasonably be expected to result in a financial loss to the Government of Alberta or the ATB.

[para. 29] Furthermore, I agree that the disclosure of information will reveal sufficient internal information about the ATB's operations and strategic plans, and its internal issues and concerns which, in the hands of the banking community, could reasonably be expected to prejudice the ATB's ability to compete with other banking institutions.

[para. 30] The Applicant argued that the disclosure of the records could not reasonably be expected to harm the economic interest of a public body or the Government of Alberta as some of the options with respect to the disposition of the ATB have already been made public. Furthermore, the Applicant argued that the CIBC Wood Gundy report commissioned by the Alberta Government regarding the changing dynamics of the financial marketplace will likely be released in the near future. The Applicant

states that this report will likely disclose much of the information currently withheld in the records.

[para. 31] While I agree with the Applicant that some of the options with respect to the disposition of the ATB, such as the privatization, have been made public, knowledge of potential options is not the same as knowing what the Government, the ATB or the ATB's consultants think about those options, the priority that is assigned to each option, what options have been or are being discounted, and the attention that each option is receiving or has received. Furthermore, while evidence indicates that the CIBC Wood Gundy report may be released in the near future, it has not yet been made public, and it is unclear whether it will be made public in the future. Even if portions of the report are made public, I do not know whether that information will be similar to that contained in the records. I cannot order the release of the records based on mere speculation regarding the contents of the CIBC Wood Gundy report.

Issue C: Did the Public Body properly exercise its discretion to withhold information under sections 24(1)(c)(i) and 24(1)(c)(ii)?

[para. 32] Section 24(1)(c) is a discretionary ("may") exception. While on the surface it appears to allow the Public Body a choice as to whether to disclose information, there are limits on how the Public Body may make its choice; or in other words, exercise its discretion.

[para. 33] The Public Body and the Applicant both recommended tests which they suggest should be used to determine whether discretion was properly exercised under the Act and, in particular, whether the discretion was properly exercised under section 23(1)(a). While the parties did not apply the recommended tests to the exercise of discretion under section 24(1)(c), it is reasonable to assume that the parties intended for the tests to apply to all discretionary exceptions in the Act. I will therefore discuss the tests as they relate to the exercise of discretion under section 24(1)(c).

[para. 34] The Public Body stated four factors must be considered in determining whether a Public Body properly exercised its discretion: (1) currency, i.e. the information pertains to a current matter; (2) significance, i.e. the information pertains to a matter of substance that is not trivial in nature and/or not short-lived in importance; (3) relevancy, i.e. the information is directly pertinent to the matter at hand; and (4) specific, i.e. the information pertains to an identifiable, discrete matter that has an objective conclusion or finish; that is, it is not a routine matter or part of the ongoing operations of a Public Body.

[para. 35] Conversely, the Applicant stated there are two factors that must be considered. First, the Applicant stated that the Public Body must take into account whether there is a public interest in disclosure. Second, the discretion to withhold information should only be exercised if there is a direct relationship established between the disclosure of the information and a potential of undue financial loss or gain.

[para. 36] With respect, I do not think the test proposed by either the Public Body or the Applicant is correct.

[para. 37] In Order 96-017, I said that a public body exercises its discretion properly when: (1) it considers the objects and purposes of the legislation in question, and (2) it does not exercise its discretion for an improper or irrelevant purpose.

[para. 38] While I disagree with the test recommended by the Public Body as to the proper exercise of discretion, I nevertheless agree that the Public Body properly exercised its discretion. In my opinion, the Public Body exercised its discretion according to the objects and purpose of the Act and did not exercise its discretion for an improper or irrelevant purpose. After reviewing the records, it is clear that the Public Body disclosed what information it could to the Applicant without revealing information that would reasonably be expected to harm the economic interest of the Government of Alberta or a Public Body.

Issue D: Did the Public Body correctly apply section 23(1)(a) (advice) to the records?

[para. 39] I have found that the Public Body correctly applied sections 24(1)(c)(i)and (ii) to the records and properly exercised its discretion in deciding to withhold the records under those sections. Therefore, it is not necessary to decide whether the Public Body correctly applied section 23(1)(a) to the records.

Issue E: Did the Public Body properly exercise its discretion to withhold information under section 23(1)(a)?

[para. 40] I have found that the Public Body correctly applied sections 24(1)(c)(i) and (ii) to the records and that it properly exercised its discretion in deciding to withhold the records under those sections. Therefore, it is not necessary to decide whether the Public Body properly exercised its discretion under section 23(1)(a).

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

[para. 41] Section 31(1)(b) states:

> *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. 42] This section imposes a statutory obligation on the head of the Public Body to release information of certain risks in "emergency-like" situations. Because section 31 is an "override provision", the scope of what is caught by the provision must be narrowly defined.

[para. 43] In Order 96-011, I held that a matter must be of compelling public interest to qualify as "clearly a matter of public interest". Furthermore, 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".

[para. 44] In Order 98-011, I further clarified the application of this section by stating that the criteria outlined as relevant to the issue of public interest under section 87(4)(b) are not relevant to a determination under section 31(1)(b). While both sections refer to the term "public interest", the test applied under each of these sections is distinct.

[para. 45] The Applicant argues that there is a "fiduciary duty" on the part of ATB management to keep shareholders appraised of future directions taken by the ATB, and thus the disclosure of the information must be in the public interest. According to the Applicant, it is only through public disclosure of information that Albertans will be able to make a reasonable assessment of the merits of privatization.

[para. 46] I do not agree with the Applicant's arguments for two reasons. First, the ATB is a provincial Crown corporation. While Albertans are stakeholders, they are not "shareholders" of the organization in the strict legal sense. Second, in my view, the information regarding the privatizing/restructuring of the ATB is not of a sufficient compelling public interest to warrant the disclosure under section 31(1)(b). The information does not relate to an "emergency-like" circumstance. There is no evidence before me that Albertans' financial interests in the Crown

ownership of the ATB are in jeopardy or that the deposits of individual Albertans are at risk at this time. While the information may well be of interest to the public, it should not be considered a matter of "public interest" under section 31(1)(b).

VI. ORDER

[para. 47] For the reasons stated in this Order, I find that section 4(1)(m) does not exclude the records from the application of the Act.

[para. 48] I also find the Public Body correctly applied sections 24(1)(c)(i) and (ii) to the records and appropriately exercised its discretion under those sections. I therefore uphold the Public Body's decision to withhold the information in these records.

[para. 49] Having decided that the Public Body correctly applied sections 24(1)(c)(i) and (ii) to the records and properly exercised its discretion under those sections, it is not necessary to consider whether the Public Body also correctly applied section 23(1)(a) to the records or whether it properly exercised its discretion under that section.

[para. 50] In addition, I find the records do not fulfill the requirements for public interest disclosure under section 31(1)(b).

Robert C. Clark
Information and Privacy Commissioner