

# ALBERTA

## INFORMATION AND PRIVACY COMMISSIONER

### ORDER 99-001

January 28, 1999

## ALBERTA ENVIRONMENTAL PROTECTION

Review Number 1353

### I. BACKGROUND

[para. 1] In December 1995, the Public Body began a review of its Kananaskis Country recreational development policy.

[para. 2] On March 10, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Environmental Protection (the "Public Body") for access to records relating to the review process. Following the original access request, the Applicant narrowed the request two times. The final version of the request was for the following records:

*" – 1994 Draft Discussion Paper – Future Recreation and Tourism Development in Kananaskis*

*- 1995 records concerning the public consultation and review process;*

*- 1995 Draft Terms of Reference and Draft Table of Contents;*

*- May 7, 1997 Draft Kananaskis Country Recreation Development Policy Review – Draft Recommendations Document; and associated internal memos;*

*- Briefing Notes from July 1, 1996 to the end of 1996.”*

[para. 3] On August 12, 1997, the Public Body disclosed 90 of a possible 312 pages of records responsive to the access request. The remaining 222 pages were either partially or entirely withheld.

[para. 4] On October 11, 1997, the Applicant requested that this Office review the Public Body’s decision. Mediation ensued and resulted in the further release of records on June 5, 1998 and September 9, 1998. The matter was then set down for a written inquiry.

[para. 5] At the date of the inquiry, 121 of 312 pages of records remain either partially or entirely withheld from the Applicant. In its written argument the Public Body claimed section 23(1)(a), (b) or (g) as the authority to withhold the information. The Applicant did not submit a written argument to this Office.

## **II. RECORDS AT ISSUE**

[para. 6] The records consist of documents relating to the Public Body’s review of its Kananaskis Country recreational development policy. The records include memoranda, briefing notes and discussion papers.

## **III. BURDEN OF PROOF**

[para. 7] 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 a public body must prove the applicant has no right of access. In this inquiry, the Public Body refused to give the Applicant access to a portion of the responsive records. The Public Body therefore has the burden of proof.

## **IV. ISSUES**

[para. 8] There are two issues in this inquiry:

A. Did the Public Body correctly apply sections 23(1)(a), (b) and (g) to the records?

B. Did the Public Body properly exercise its discretion in deciding to withhold the severed information under sections 23(1)(a), (b) or (g)?

## V. DISCUSSION

### **Issue A: Did the Public Body correctly apply sections 23(1)(a), (b) and (g) to the records?**

[para. 9] The relevant parts of section 23(1) read:

*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,*

*(b) consultations or deliberations involving*

*(i) officers or employees of a public body,  
(ii) a member of the Executive Council, or  
(iii) the staff of a member of the Executive Council,...*

*(g) information, including the proposed plans, policies or projects of a public body, the disclosure of which could reasonably be expected to result in disclosure of a pending policy or budgetary decision.*

[para. 10] It should be noted that section 23(2) sets out the specific kinds of information that must not be withheld, even though that information might otherwise fall within section 23(1). Section 23(2) states:

*(2) This section does not apply to information that*

*(a) has been in existence for 15 years or more,*

*(b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function,*

*(c) is the result of product or environmental testing carried out by or for a public body, unless the testing was done*

*(i) for a fee as a service to a person other than a public body, or*

*(ii) for the purpose of developing methods of testing or testing products for possible purchase,*

*(d) is a statistical survey,*

*(e) is the result of background research of a scientific or technical nature undertaken in connection with the formulation of a policy proposal,*

*(f) is an instruction or guideline issued to the officers or employees of a public body, or*

*(g) is a substantive rule or statement of policy that has been adopted by a public body for the purpose of interpreting an Act or regulation or administering a program or activity of the public body.*

[para. 11] In its written submission, the Public Body argued that a public body may use section 23 of the Act to withhold records that relate to a policy development process within the public body. It argued that in order to effectively develop policy, a public body must be able to create these types of records in confidence.

[para. 12] I agree with the Public Body. In my opinion, one of the purposes behind section 23 of the Act is to give a public body the ability to develop policy in confidence, or as the B.C. Commissioner stated in his Orders 159-1997, 215-1998, and 267-1998, to provide a public body with a “zone of confidentiality” around the policy-making process which permits full and frank discussion of advice and recommendations.

[para. 13] Keeping this in mind, I have carefully reviewed the records at issue, as well as section 23(1) and 23(2) of the Act. I find the Public Body properly severed all of the information in the records under either sections 23(1)(a), (b), or (g) for the following reasons.

(i) Section 23(1)(a) (advice, proposals, recommendations, analyses or policy options)

[para. 14] The Public Body applied section 23(1)(a) to sever information on the following pages of records:

107, 111-114, 118-123, 129, 131-138, 140, 142, 147, 156, 158, 159, 161, 164, 167-171, 173-178, 181, 182, 184-186, 188-192, 200-203, 205-208, 211-216, 221, 225-227, 230, 232, 241-244, 247, 254-257, 259-262, 265-270, 274, 276, 277, 278, 281, 282, 285-291, 302, 307-310, 312.

[para. 15] In addition, the Public Body informed me that record 305 was also severed under section 23(1)(a). It stated that it made an error in its initial written submission to this Office. In its submission, it incorrectly stated that record 305 was withheld under section 23(1)(b) when, in fact, this record was withheld under sections 23(1)(a) and (g).

[para. 16] In Order 96-006, I set out the criteria for “advice” (which includes advice, proposals, recommendations, analyses or policy options) under section 23(1)(a). The advice should:

- (a) be sought or expected, or be part of the responsibility of a person by virtue of that person’s position;
- (b) be directed toward taking an action; and
- (c) be made to someone who can take or implement the action.

[para. 17] In that Order I held the record must contain more than a bare recitation of facts or summaries of information. The information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process.

[para. 18] However, I want to emphasize that this does not mean all assertions of fact found in public body records must be disclosed. Rather, it is my view that a public body may withhold assertions of fact under section 23(1)(a) if the factual information is sufficiently interwoven with other advice, proposals, recommendations, analyses, or policy options so that it cannot reasonably be considered separate or distinct.

[para. 19] After carefully reviewing the records, I find the following pages of records fulfill the above criteria and were properly withheld under section 23(1)(a):

107 (2<sup>nd</sup> and 3<sup>rd</sup> severed sentence), 111-114, 118-123, 129, 131-138, 140, 142 (2<sup>nd</sup> and 3<sup>rd</sup> severed sentence), 147, 156, 158, 159, 161, 164, 167-171, 173-178, 181, 182, 184-186, 188-192, 200-202, 203 (information under the 1<sup>st</sup> and 2<sup>nd</sup> headings), 205, 206 (information preceding the heading), 208, 211-213, 214, 216, 221, 225, 226, 230, 232, 241, 242, 243, 244 (information preceding the 1<sup>st</sup> heading), 247, 254-

256, 257 (information under the 1<sup>st</sup> and 2<sup>nd</sup> headings), 259, 260, 262, 265-268, 269 (information preceding the 1<sup>st</sup> heading) 270, 274, 276, 277, 281, 282 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs), 285-290, 291 (information preceding the 1<sup>st</sup> heading), 302 (handwritten notation), 305, 307-310, 312.

(ii) Section 23(1)(b) (consultations or deliberations)

[para. 20] The Public Body applied section 23(1)(b) to sever information on the following pages of records:

8, 98, 107, 142, 146-149, 151, 152, 156, 159, 181, 182, 184-186, 188-192, 200-203, 205-208, 211-216, 221, 225-227, 230, 232, 241-244, 247, 254-257, 259-262, 265-270, 274, 276-278, 281, 282, 285, 286, 288-291, 296, 297, 299, 300-302.

[para. 21] The purpose of section 23(1)(b) is to shield consultations or deliberations occurring during the decision-making process. In Order 96-006, I defined the terms “consultation” and “deliberation”. I held that 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. I defined a “deliberation” as a discussion or consideration by the persons described in the section, of the reasons for or against an action. I also stated that the criteria for advice under section 23(1)(a) should be applied to this section.

[para. 22] After carefully reviewing the records I find that the information on the following pages of records fulfill the above definitions and criteria and therefore were properly withheld under section 23(1)(b):

8, 98, 107 (1<sup>st</sup> severed sentence), 142 (1<sup>st</sup> severed sentence), 146, 148, 149, 151, 152, 203 (information under 3<sup>rd</sup> and 4<sup>th</sup> headings), 206 (information under the heading), 207, 215, 227, 244 (information under 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> headings), 257 (information under 3<sup>rd</sup> and 4<sup>th</sup> headings), 261, 269 (information under 1<sup>st</sup> and 2<sup>nd</sup> headings), 278, 282 (3<sup>rd</sup> paragraph), 291 (information under the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> headings), 296, 297, 299, 300, 301, 302 (typewritten portion).

(iii) Section 23(1)(g) (pending policy or budgetary decision)

[para. 23] The Public Body applied section 23(1)(g) to sever information on the following pages of records:

111-114, 118-123, 129, 131-138, 140, 164, 167-171, 173-178, 294, 307- 310, 312.

[para. 24] In addition, the Public Body informed me that record 305 was also severed under section 23(1)(g). It stated that it made an error in its initial written submission to this Office. In its submission it incorrectly stated that record 305 was withheld under section 23(1)(b) when, in fact, this record was withheld under sections 23(1)(a) and (g). I have already found that the Public Body correctly applied section 23(1)(a) to record 305.

[para. 25] Of the records set out in paragraph 23, the only record that remains at issue under section 23(1)(g) is record 294. I will not deal with the other pages of records withheld by the Public Body under section 23(1)(g) as I have already decided that the Public Body correctly severed the information in those records under either section 23(1)(a) or 23(1)(b).

[para. 26] Record 294 is an internal memorandum between two Public Body employees that discusses the options for proceeding with the policy review. After reviewing this record, it is clear that record 294 was properly severed under section 23(1)(g) as the nature of the severed information is such that a disclosure of the information could reasonably be expected to disclose a pending policy decision.

(iv) Summary

[para. 27] In conclusion I find that the Public Body correctly withheld all of the severed information under the following sections of the Act:

(a) Section 23(1)(a) (advice, proposals, recommendations, analyses or policy options)

107 (2<sup>nd</sup> and 3<sup>rd</sup> severed sentences), 111-114, 118-123, 129, 131-138, 140, 142 (2<sup>nd</sup> and 3<sup>rd</sup> severed sentences), 147, 156, 158, 159, 161, 164, 167-171, 173-178, 181, 182, 184-186, 188-192, 200-202, 203 (information under the 1<sup>st</sup> and 2<sup>nd</sup> headings), 205, 206 (information preceding the heading), 208, 211-213, 214, 216, 221, 225, 226, 230, 232, 241, 242, 243, 244 (information preceding the 1<sup>st</sup> heading), 247, 254-

256, 257 (information under 1<sup>st</sup> and 2<sup>nd</sup> headings), 259, 260, 262, 265-268, 269 (information preceding the 1<sup>st</sup> heading), 270, 274, 276, 277, 281, 282 (1<sup>st</sup> and 2<sup>nd</sup> paragraphs), 285-290, 291 (information preceding the 1<sup>st</sup> heading), 302 (handwritten notation), 305, 307-310, 312

(b) Section 23(1)(b) (consultations or deliberations)

8, 98, 107 (1<sup>st</sup> severed sentence), 142 (1<sup>st</sup> severed sentence), 146, 148, 149, 151, 152, 203 (information under the 3<sup>rd</sup> and 4<sup>th</sup> heading), 206 (information under the heading), 207, 215, 227, 244 (information under the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> headings), 257 (information under the 3<sup>rd</sup> and 4<sup>th</sup> headings), 261, 269 (information under the 1<sup>st</sup> and 2<sup>nd</sup> headings), 278, 282 (3<sup>rd</sup> paragraph), 291 (information under the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> headings), 296, 297, 299, 300, 301, 302 (typewritten portion)

(c) Section 23(1)(g) (pending policy or budgetary decision)

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**Issue B: Did the Public Body properly exercise its discretion to withhold information under sections 23(1)(a), (b) or (g)?**

[para. 28] Section 23(1)(a), (b), and (g) are discretionary (“may”) exceptions. Consequently, even if these sections apply to the information in the records, a public body may nevertheless decide to disclose the information. To properly exercise its discretion in this regard, a public body must consider the purposes of the Act, one of which is to allow access to the information.

[para. 29] The Public Body states that, notwithstanding the exception in section 23, it provided as much information as possible to the Applicant. In this inquiry, the Public Body disclosed 191 of a possible 312 records. Of those records that were withheld, the Public Body applied section 23(1) to only a small portion of information on each record, and released the remainder of each document. Based on the Public Body’s evidence and a review of the records, I find that the Public Body properly exercised its discretion in deciding to withhold the records under sections 23(1)(a), (b), and (g).



## **VI. ORDER**

[para. 30] For the reasons stated in this Order, I find the Public Body correctly applied sections 23(1)(a), (b), and (g) to the records and properly exercised its discretion under those sections. I therefore uphold the Public Body's decision to withhold the severed information in these records.

Robert C. Clark  
Information and Privacy Commissioner