

# **ALBERTA**

## **INFORMATION AND PRIVACY COMMISSIONER**

### **ORDER 99-006**

July 6, 1999

#### **ALBERTA TREASURY**

Review Number 1398

#### **I. BACKGROUND**

[para 1.] The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Treasury for access to:

Records in the possession of the Ministry of Treasury, between July 1, 1996 and April 30, 1997, related to the reversal of \$15.735 million of interest capitalized from the Alberta Pacific Pulp Mill Project as of September 30, 1996, as set out in schedule 3 of the Heritage Fund 1996/97 Third Quarter Report and the 1996/97 Quarterly Budget Report, page 3.

[para 2.] Financial assistance was provided to support the Al-Pac Pulp Mill Project through the Alberta-Pacific Pulp Project Credit Agreement ("Credit Agreement"). It is the loan agreement provided by the Province of Alberta to Crestbrook Forest Industries Ltd., MC Forest Investment Inc., Kanzaki Paper Canada Inc. and Alberta-Pacific Forest Industries Inc. as Operator (the "Third Parties") in connection with the development and operation of the Al-Pac Pulp Mill Joint Venture.

[para 3.] As of April 1, 1996, interest payable on the Credit Agreement to the Al-Pac Pulp Mill Joint Venture was no longer capitalized, i.e., added to the principal of the loan. The non-capitalized interest continued to accrue, but was only recorded in the financial statements of the Alberta Heritage Savings Trust Fund when it was received.

[para 4.] Interest for the period April 1, 1996 to September 30, 1996, which had been capitalized effective September 30, 1996, was reversed at December 31, 1996. As a result, effective December 31, 1996, \$15.735 million was removed from the loan value recorded in the Alberta Heritage Savings Trust Fund.

[para 5.] Alberta Treasury found 19 records in response to the access request. Of the 19 records, 11 were disclosed in their entirety (Records 01, 05, 07, 10, 14, 17-19). Of the remaining 8 records, 4 were withheld in their entirety (Records 03-04, 15, 16) and the remaining 4 records were disclosed with some severing (Records 02, 11, 12, 13).

[para 6.] Alberta Treasury withheld information in these records under section 23 (1)(a)(b) (“advice” and “consultations”) and section 15(1)(a)(ii),(b),(c)(i), and (c)(iii) (disclosure harmful to business interests of a third party) of the Act. Record 03 was withheld on the basis that it was not responsive to the Applicant’s request.

## **II. PRELIMINARY MATTERS**

[para 7.] In reviewing the records, it became clear that I would need further information before I could make a decision. I asked Alberta Treasury to provide arguments as to: Whether section 15(3)(c) (non-arm’s length transaction) of the Act applies to the information requested by the Applicant.

[para 8.] The question was also put to the Applicant: “Does section 15(3)(c) of the Act apply to the information requested by the Applicant?”

[para 9.] Once I received the arguments, the matter was set down for a written inquiry on January 28, 1999.

## **III. RECORDS AT ISSUE**

[para 10.] The Loans and Guarantees Division of Alberta Treasury was identified as the office of prime responsibility for locating the records. It identified 19 pages pertinent to the request and numbered them 01-19.

[para 11.] For the purposes of this Order, I will refer to these pages collectively as the “Records”. Each page will be referred to as a “record” although a number of them are attached and form multi-page documents.

### **III. ISSUES**

[para 12.] There are five issues in this inquiry:

- A. Which records are responsive to the Applicant's request for access?
- B. Did Alberta Treasury correctly apply section 23(1)(a) and (b) to the Records?
- C. Does section 15(1) of the Act (disclosure harmful to the business interest of a third party) apply to the Records?
- D. Does section 15(3)(c) of the Act (non-arm's length transaction) apply to the Records?
- E. Is Alberta Treasury required to disclose the Records under section 31(1)(b) of the Act (disclosure in the public interest)?

### **IV. DISCUSSION**

#### **Issue A: Which records are responsive to the Applicant's request for access?**

[para 13.] Before the exceptions can be applied to the records, I must decide which records are appropriately responsive to the Applicant's request.

#### **i) Alberta Treasury's Position**

[para 14.] When Alberta Treasury responded to the Applicant, it first considered all 19 pages of records to be responsive (except part of Record 13) and severed on that basis. However, Alberta Treasury reconsidered its position and stated in its submission that the following records were not responsive:

- Record 03,
- Part of Record 02,
- Part of Record 04.

[para 15.] As part of this reconsideration, Alberta Treasury also decided to disclose Records 05 and 07.

#### **ii) Applicant's Position**

[para 16.] In response to Alberta Treasury's submissions, the Applicant says that the Applicant cannot agree or disagree without having an opportunity to view the Records. However, the Applicant points out that under the original disclosure in February 1998, these records were excepted under sections of the Act.

### **iii) My decision**

[para 17.] I have reviewed the following records or portions of records that were determined to be unresponsive by Alberta Treasury.

#### Record 02

[para 18.] Record 02 is a cover letter to the Treasurer regarding the Heritage Fund 1996-97 Third Quarter Report, enclosing Records 03-06. Alberta Treasury claimed the first handwritten comment on Record 02 is unresponsive. No exception was claimed for this first comment.

[para 19.] I note that the Applicant requested “records” rather than “information”. I stated in Order 99-002, that Alberta Treasury should interpret “responsiveness” to mean anything that is reasonably related to an applicant’s request for access. This is another instance in which a Alberta Treasury has taken too narrow a view of an applicant’s request.

[para 20.] I believe this first handwritten comment is related to the Applicant’s request. Since no exception was claimed for this handwritten comment on Record 02, it must be disclosed.

#### Record 03

[para 21.] Record 03 is a Draft Third Quarter Investment Report 1996-97 attached to Record 02. Record 03 was originally entirely withheld under section 23(1)(a)(b), but upon reconsideration, Alberta Treasury determined it was unresponsive and rescinded its original application of section 23(1)(a)(b).

[para 22.] Records 02-06 are stapled together and appear to constitute one document. Since the Applicant requested records, and this record is a page of a 5-page record, Record 03 is related to the Applicant’s request.

[para 23.] I find that Record 03 is responsive to the Applicant’s request. Because Alberta Treasury has not applied an exception to Record 03, it must be disclosed.

#### Record 004

[para 24.] Record 04 is a table titled “Statement of Changes in Financial Position”. Below the table is a handwritten comment to which Alberta Treasury applied section 23(1)(a)(b). The table contained in Record 04 was determined responsive and originally withheld entirely under section 23(1)(a)(b), but upon reconsideration, Alberta Treasury determined the table to be unresponsive with the exception of one line “Investment: Alberta Investment Division \$15.735” million.

[para 25.] As I stated in Order 99-002, it is incorrect for Alberta Treasury to focus only on a few words of the request, and thereby limit itself to looking for that particular information (almost like a key-word search), such as “\$15.735 million”. In my view, this table is responsive.

[para 26.] Since the section 23(1) exception has been withdrawn from the table and Alberta Treasury has not claimed another exception, it must be disclosed. I note that in Alberta Treasury’s submissions (page 4), it states that part of the table on Record 04 has already been disclosed.

### Record 13

[para 27.] Record 13 is the third page of a memo to the Deputy Provincial Treasurer. Alberta Treasury withheld the last sentence (in italics) on the basis that it is unresponsive to the Applicant’s request. Without revealing the content of the memo, the last sentence qualifies the recommendation or makes a comparison with how Alberta Treasury deals with interest income on another loan.

[para 28.] In my view, this last sentence is responsive because it qualifies and supports the recommendation. Alberta Treasury applied section 23(1)(a)(b) to the entire memorandum. Therefore, in Issue B of this Order, I will deal with whether the exception applies to the withheld sentence.

### **Issue B: Did Alberta Treasury correctly apply section 23(1)(a)(b) of the Act to the Records?**

#### **1. Application of section 23(1)**

[para 29.] 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,...*

[para 30.] 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).

[para 31.] In its written submission, Alberta Treasury 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 32.] The Applicant pointed out that the request for information deals with the reversal of \$15.735 million of interest capitalized from the Al-Pac Pulp Mill Project as set out in Schedule 3 of the Heritage Fund 1996-97 Third Quarter Report. The Applicant submitted that section 23(1)(a)(b) should only have been applied by Alberta Treasury if the advice, proposals, recommendations, analyses of policy options, or the consultations or deliberations had a material effect on the value of the Al-Pac loan.

[para 33.] I agree with the Public Body, and I do not accept the Applicant's submission. 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. I do not agree with the Applicant that section 23(1) only applies if the advice or deliberations had a material effect on the subject matter of the advice. Section 23(1) does not provide for such a restrictive interpretation.

[para 34.] 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 that section 23(2) does not apply and that Alberta Treasury properly severed all of the information in the records under either sections 23(1)(a) or (b) for the following reasons.

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

[para 35.] Alberta Treasury applied section 23(1)(a) to sever information from the following Records: 11, 12, 13, 15, 16.

[para 36.] Alberta Treasury submitted that the Records contain advice or analyses regarding an accounting procedure involving the \$15.735 million reversal in the Third Quarter Report

[para 37.] In Order 96-006, I set out the criteria for “advice” (which includes advice, proposals, and 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 38.] In that Order, I held that 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 39.] After carefully reviewing the records, I find the following information severed from the following Records fulfill the above criteria, and that information was properly withheld under section 23(1)(a): 11, 12, 13, 15, 16.

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

[para 40.] Alberta Treasury applied section 23(1)(b) to sever information from the following Records: 02 and 04.

[para 41.] 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 are 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 42.] After carefully reviewing the Records, I find that the information severed from Records 02 and 04 fulfills the above definitions and criteria and therefore was properly withheld under section 23(1)(b).

**2. Exercise of discretion to withhold information under sections 23(1)(a) and (b)**

[para 43.] Section 23(1)(a) and (b) 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 44.] Alberta Treasury stated that, notwithstanding the exception in section 23, it provided as much information as possible to the Applicant. Alberta Treasury stated that it weighed the purposes of the Act and concluded that its officials must be able to compose draft publications and to resolve any technical accounting issues in confidence in order to provide the public with the best and most accurate product possible.

[para 45.] I note that in this inquiry, Alberta Treasury disclosed 11 of possible 19 Records. Of those records in which information was withheld, the Alberta Treasury applied section 23(1) to only a small portion of information on each record, and released the remainder of each Record. Based on Alberta Treasury's evidence and a review of the Records, I find that Alberta Treasury properly exercised its discretion in deciding to withhold the information under sections 23(1)(a) and (b).

**Issue C: Does section 15(1) of the Act (disclosure harmful to the business interest of a third party) apply to the Records?**

[para 46.] I have found that Alberta Treasury correctly applied section 23(1)(a) and (b) and properly exercised its discretion in deciding to withhold the information severed from the Records under those sections. Therefore, it is not necessary to decide whether section 15(1) applies to the same information severed from the Records.

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

[para 47.] Because I found that it is not necessary to consider whether section 15(1) applies to the information severed from the Records, it is also not necessary to decide whether section 15(3) applies.

**ISSUE E: Is Alberta Treasury required to disclose the Records under section 31(1)(b) of the Act (disclosure in the public interest)?**

[para 48.] 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 49.] The Applicant submitted that it is in the public interest to disclose the Records relating to the reversal of \$15.735 million of interest capitalized under the Al-Pac Pulp Mill Project to “ensure taxpayers that adequate financial control systems and monitoring were in place relative to the administration of the Al-Pac loans”.

[para 50.] As I stated in Order 96-011, for section 31(1)(b) to apply, the matter must be of “compelling public interest”. From reviewing the Records and Alberta Treasury’s submissions, I accept that the Records are about an accounting procedure adopted by Alberta Treasury. No evidence was presented to show that this is a matter of “compelling public interest”. Therefore, I find that section 31(1)(b) does not apply to the Records. Alberta Treasury is not required to disclose the Records under section 31(1)(b).

## **V. ORDER**

[para 51.] Under section 68 of the Act, I make the following Order.

[para 52.] Information severed on Records 02, 03, 04 and 13 on the basis of non-responsiveness is responsive to the Applicant’s Request.

[para 53.] Consequently, the following portions of Records 02, 03 and 04 must be disclosed since Alberta Treasury did not claim exceptions to this information:

- The first handwritten note on Record 02;
- Record 03 in its entirety;
- Table contained in top portion of Record 04.

[para 54.] As Alberta Treasury applied section 23(1)(a) to Record 13, I have considered Record 13 under that exception.

[para 55.] I find that Alberta Treasury correctly applied section 23(1)(a) to the information severed from the following Records: 11, 12, 13, 15, 16. Alberta Treasury also properly exercised its discretion in withholding that information. Consequently, I uphold Alberta Treasury’s decision to refuse access to the information severed from those Records.

[para 56.] I find that Alberta Treasury correctly applied section 23(1)(b) to the information severed from Records 02 and 04. Alberta Treasury also

properly exercised its discretion in withholding that information. Consequently, I uphold Alberta Treasury's decision to refuse access to the information severed from those Records.

[para 57.] Having decided that Alberta Treasury correctly applied section 23(1)(a) and (b) and properly exercised its discretion under those sections, it is not necessary to consider whether sections 15(1) or 15(3) apply to the same information severed from the Records.

[para 58.] Section 31(1)(b) does not apply to the Records. Therefore, Alberta Treasury is not required to disclose the Records under section 31(1)(b).

[para 59.] I further order that Alberta Treasury notify me in writing within 30 days of being given a copy of this Order, that Alberta Treasury has complied with this Order.

Robert C. Clark  
Information & Privacy Commissioner