

# **ALBERTA**

## **INFORMATION AND PRIVACY COMMISSIONER**

### **ORDER 99-007**

May 26, 1999

#### **Alberta Treasury**

Review Number 1408

#### **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:

*Copies of all annual and interim financial statement analyses prepared by the Ministry of Treasury, as set out under section 5.2 and section 5.3 under the Loans and Guarantees Procedures Manual, for the period January 1, 1997 through December 31, 1997, in the possession of the Ministry of Treasury, as it pertains to financial assistance provided by the Government of Alberta to support the Al-Pac Pulp Mill Project.*

[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.] Under sections 5.2 and 5.3 of the Loans and Guarantees Procedures Manual, Alberta Treasury was required to prepare annual and interim analyses with respect to the financial assistance Alberta Treasury provided to the Al-Pac Pulp Mill Project.

[para 4.] Alberta Treasury found 16 records in response to the access request.

[para 5.] Alberta Treasury withheld information in these records under section 15(1)(a)(ii),(b),(c)(i), and (c)(iii) of the Act (disclosure harmful to business interests of a third party).

## **II. PRELIMINARY MATTERS**

[para 6.] 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 the following additional information:

1. Whether section 15(3)(c) (non-arm's length transaction) of the Act applies to the information requested by the Applicant.
2. Advise as to the meaning of an acronym referred to in some of the records.

[para 7.] The following question was also put to the Applicant: "Does section 15(3)(c) of the Act apply to the information requested by the Applicant?"

[para 8.] Once I received the additional information, the matter was set down for a written inquiry on February 2, 1999.

## **III. RECORDS AT ISSUE**

[para 9.] The Loans and Guarantees Division of Alberta Treasury identified 16 records. The records consist of four memoranda to file. The analyses contained in the memoranda are identical in structure: Brief Overview, Change in Cash Holdings, Financial Comments, General Comments, and Summary. The four memoranda are described as follows:

Record No.	Date	Description	Portions Withheld
Records 13-16	Memo A -dated June 2, 1997	Analyses of audited financial statements provided by Al-Pac for year ending Dec 31, 1996	Record 13 - two paragraphs regarding Brief Overview and Change in Cash Holdings for fiscal year ending Dec. 1996

			<p>Record 14 - in entirety regarding Financial Comments</p> <p>Record 15 - One paragraph in General Comment and one paragraph in Summary</p> <p>Record 16 - One paragraph in Summary</p>
Records 9-12	Memo B-dated June 10, 1997	Analyses of unaudited (first quarter) 1997 financial statement	<p>Record 9 - two paragraphs regarding Brief Overview and Change in Cash Holdings for the first quarter</p> <p>Record 10 - in entirety regarding Financial Comments</p> <p>Record 11 - Three paragraphs regarding Financial Comments</p> <p>Record 12 - two paragraphs in Summary</p>
Records 5-8	Memo C-dated September 30, 1997	Analyses of unaudited (second quarter) financial	Record 5 - two paragraphs regarding Brief Overview and

		statement and the first six months of 1997	<p>Change in Cash Holding for the second quarter</p> <p>Record 6 in entirety regarding Financial Comments</p> <p>Record 7 – Three paragraphs regarding Financial Comments</p> <p>Record 8 - two paragraphs in Summary</p>
Records1-4	Memo D-dated Feb 10, 1998	Analyses of unaudited (third quarter) financial statement for 1997	<p>Record 1 – two paragraphs regarding Brief Overview and Change in Cash Holding for the third quarter</p> <p>Record 2 in entirety regarding Financial Comments</p> <p>Record 3 – three paragraphs regarding Financial Comments</p> <p>Record 4 - two paragraphs in Summary</p>

[para 10.] For the purposes of this Order, I will refer to these records collectively as the “Records”.

[para 11.] The remaining portions of the Records were disclosed.

#### **IV. ISSUES**

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

- A. Does section 15(1) of the Act (disclosure harmful to the business interest of a third party) apply to the Records?
- B. Does section 15(3)(c) of the Act (non-arm's length transaction) apply to the Records?
- C. Is Alberta Treasury required to disclose the Records under section 31(1)(b) of the Act (disclosure in the public interest)?

#### **V. DISCUSSION**

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

##### **1. Application of section 15(1)**

[para 13.] 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 14.] 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, Alberta Treasury must establish that:

- a. the information would reveal trade secrets, commercial, financial, labour relations, scientific or technical information of the Third Parties;
- 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 Parties?**

[para 15.] The Applicant argued that section 15(1) does not apply to the Records because similar financial and commercial information was publicly disclosed in Crestbrook Forest Industries Inc.'s March 1, 1998 Information Circular.

[para 16.] The Applicant stated, however, if section 15(1) does apply, it only applies to the information actually provided by the Third Parties and not to any analyses prepared by Alberta Treasury under sections 5.2 and 5.3 of the Loan and Guarantees Procedures Manual.

[para 17.] I have reviewed the financial information contained in the Crestbrook Forest Industries Inc.'s Information Circular dated March 1, 1998, and I find that it does not provide the same financial information as do the Records.

[para 18.] In accordance with the Credit Agreement, the Third Parties were required to provide to Alberta Treasury certain financial and commercial information. The Records at issue contain analyses of that information. Sections 5.2 and 5.3 of the Loans and Guarantees Procedures Manual specify what kind of information is found in the Records. Sections 5.2 and 5.3 are found in the Monitoring and Financial Statement Analysis Chapter of the Loans and Guarantees Procedures Manual.

[para 19.] Section 5.2 (Interim Financial Statement Analysis) provides:

1. Issues to be addressed in the interim review include the following:
  - 1) Identify key terms of financial assistance
  - 2) Review and highlight profitability, cash flow, financial position and need to establish a provision for loss
  - 3) Comment on compliance with financial agreement
  - 4) Key ratios, where applicable, are to be updated on the Contingent Liability System as set out below:
    - a) Current Ratio
    - b) Accounts Receivable Days Outstanding
    - c) Inventory Turnover
    - d) Interest Coverage
    - e) Net Profit Margin
    - f) Debt to Equity

The Contingent Liability System allows five user defined ratios/statistics which can be entered to fit the particular industry being analyzed.
2. Issues should be brought forward to the Manager and discussed as soon as possible including any issue which suggests a change to the provision for loss required on the account.
3. Key ratios need not be calculated for companies in liquidation.

Section 5.3 of the Loans and Guarantees Procedures Manual reads:

1. Issues to be covered in the annual review include those covered in the procedures for interim financial statement plus those items in 5.3.2 and special attention should be paid to Notes to the Financial Statements.

The annual review analysis of the annual financial statements should be in sufficient detail to provide the report reader with a good understanding of the financial position of the company and its compliance with the financing agreement with the Crown. The recommended structure for annual review reports is as follows:

a) Financial

An abbreviated financial table of the Statement of Earnings, Working Capital and Balance Sheet. This table should also include the prior year's results and the comparable period budget projections. If available.

b) Comments

Significant variances to both the budget and prior year's operations should be highlighted along with the cause and effect of the variances.

Issues of importance concerning ongoing viability and/or future plans which may not be considered consistent or compatible with the company's normal course of business.

c) Other

Non financial issues which are significant for an analysis to be completed on an informative basis, if applicable.

[para 20.] The foregoing kinds of information required by the Loans and Guarantees Procedures Manual is detailed financial and commercial information.

[para 21.] I have reviewed the Records, and I find that the information withheld in the Records is commercial and financial information of the Third Parties.

**b) Was the information supplied, explicitly or implicitly, in confidence;**

[para 22.] Although, the financial and commercial information contained in the financial statements provided to Alberta Treasury, as a condition of the loan agreement, was provided with the reasonable expectation of confidentiality, the information withheld in the Records is an analysis authored by an employee of Alberta Treasury. This analysis was not supplied by the Third Parties. However, evidence showed that the information in the analysis is inextricably linked with the information actually supplied by the Third Parties. In other words, this information (analysis) would not exist if the Third Parties had not supplied the original commercial and financial information to Alberta Treasury.

[para 23.] Furthermore, I am satisfied that disclosure of this information would permit the Applicant to make accurate inferences about sensitive business information of the Third Parties that would not, in itself, be disclosed under the Act.

[para 24.] Therefore, I find that section 15(1)(b) applies to the analyses of this information.

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

[para 25.] Alberta Treasury submitted that section 15(1)(c)(i) (harm significantly the competitive position or interfere significantly with the negotiating position of the Third Parties and section 15(1)(c)(iii) (result in undue financial loss or gain to any person or organization) apply.

[para 26.] The information in the Records refers directly to business items such as sales volumes, production levels, working capital available, cash flow, profits or losses. References are also made to budgetary items of the Third Parties, the Third Parties' debt situation and loan repayment details. Access to this business information would clearly affect the



competitive position of Al-Pac with respect to other competitor companies in timber-related industries.

[para 27.] Based on the evidence, I find that disclosure of the records could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Parties in accordance with section 15(1)(c)(i).

## **2. Third Party Notification**

[para 28.] The Applicant also argued that Alberta Treasury failed to obtain the Third Parties' opinion on the disclosure of the Records.

[para 29.] It is not mandatory under section 29 of the Act that a public body give written notice to a third party if the public body does not intend to give access to the records. Under section 29(1) of the Act, a public body must only give written notice to a third party when the public body is considering giving access to a record that may contain information that affects the interests of a third party under section 15.

[para 30.] Alberta Treasury did not intend to give access to the Records. Therefore, it was not mandatory for Alberta Treasury to give notification to the Third Parties in this inquiry.

## **3. Conclusion under section 15(1)**

[para 31.] I find that section 15(1) applies to the Records.

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

[para 32.] Section 15(3) reads:

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

*...*

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

[para 33.] The Applicant argued that a non-arm's length transaction did exist. The Applicant stated in its November 30, 1998 submission:

Evidence of the application of section 15(3)(c) to the request for records is through the establishment of a direct financial relationship between the Government of Alberta and the Alberta-Pacific Pulp Mill Project from the

execution of a June 29, 1990 memorandum of understanding which specifies certain rights and obligations of the parties.

The Applicant is of the view that there is evidence of control or influence being exerted by Alberta-Pacific Forest Industries Inc. over the Government of Alberta by virtue of the substance of clause 6 of the MOU...under clause 6 the Government of Alberta is required to provide an additional \$100 million to finance the construction of the Al-Pac Pulp Mill on the basis of the portion of the increased costs due to inflation and Project delays. Given that the Project Credit Agreement between the parties was concluded on September 4, 1991, it would be reasonable to assume that the additional \$100 million in financing was made available on the basis of the terms and conditions of the MOU. The Applicant submits that this is sufficient evidence of control and influence to meet the test established by the Freedom of Information and Privacy Commissioner in Order 98-013.

[para 34.] 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 35.] There is a connection between Alberta Treasury’s analyses contained in the Records, and the Credit Agreement, for the purposes of establishing that the information relates to a “transaction” under section 15(3)(c).

[para 36.] I find that the Credit Agreement between the Government of Alberta and the Third Parties was an arm’s length transaction. There is no evidence that the parties were “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 Records.

[para 37.] Therefore, Alberta Treasury is not required to disclose the Records under section 15(3)(c).

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

[para 38.] 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 39.] The Applicant submitted that it is in the public interest to disclose the Records to “ensure taxpayers that adequate financial control systems and monitoring were in place relative to the administration of the Al-Pac loans”.

[para 40.] As I stated in Order 96-011, for section 31(1)(b) to apply, the matter must be of “compelling public interest”. In the Applicant’s 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 Records. Alberta Treasury is not required to disclose the Records under section 31(1)(b).

## **VI. ORDER**

[para 41.] Under section 68 of the Act, I make the following Order.

[para 42.] Alberta Treasury correctly applied section 15(1) of the Act to the Records. As section 15(3)(c) does not apply the Records, Alberta Treasury is not required to disclose the Records under section 15(3)(c).

[para 43.] 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 44.] Consequently, I uphold Alberta Treasury’s decision to refuse access to the Records.

Robert C. Clark  
Information and Privacy Commissioner