

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-020

November 25, 1999

ALBERTA TREASURY

Review Numbers 1517, 1520, 1521

I. BACKGROUND

[para 1.] Between September 1, 1998 and October 13, 1998, the Applicant made three access requests under the *Freedom of Information and Protection of Privacy Act* (the "Act"). The final written version of each request reads as follows:

Request #1

"Copies of all memoranda, studies, correspondence and legal opinions prepared for the Provincial Treasurer and the Ministry of Treasury, between January 1, 1993 and December 31, 1996 evaluating all proposals of Gentra Canada Investments Inc. and Alberta Treasury Branches to refinance the West Edmonton Mall."

Request #2

"Copies of all correspondence, memoranda, studies, reports and background documents prepared by or for the Ministry of Treasury, or received by the Ministry of Treasury, for the period January 1, 1993 to December 31, 1995, pertaining to the involvement of First Boston Corporation in the refinancing of the West Edmonton Mall."

Request #3

“Copies of all correspondence, memoranda, studies and reports prepared and received by the Ministry of Treasury, between January 1, 1994 and September 1, 1998, in the possession of the Ministry of Treasury, pertaining to financial transactions involving West Edmonton Mall Property Inc., Triple Five Corporation Limited, Toronto Dominion Bank, Nomura Canada, TD Trust Company, 606881 Alberta Ltd., 333856 Alberta Ltd., 218703 Alberta Ltd., 298936 Alberta Ltd., 342322 Alberta Ltd., the West Edmonton Mall, and the Alberta Treasury Branches.”

[para 2.] I also note that the Applicant and Public Body verbally agreed to revise request #3 to exclude records in the possession of the Investment Management division of the Public Body.

[para 3.] In response to these access requests, the Public Body partially or entirely withheld 147 of 172 pages of records. The Applicant disagreed with the Public Body’s decision and requested this Office review the decision in regard to each of the access requests. The Public Body then subsequently obtained consent from a Third Party to disclose record C111. This record was disclosed to the Applicant on February 9, 1999. Further mediation was unsuccessful and each of these requests for review were set down as one written inquiry.

[para 4.] The Public Body cites sections 4(1)(c), 4(1)(l), 15, 21(1), 23(1)(a), 23(1)(b), 23(1)(c), 24(1), and 26(1) as the authority to withhold the records.

[para 5.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORDS AT ISSUE

[para 6.] The records at issue in regard to Request #1 consist of documents that were prepared between January 1, 1993 and December 31, 1996 that evaluated all proposals of Gentra Canada Investments Inc. and the Alberta Treasury Branches (“ATB”) to refinance West Edmonton Mall. For the purpose of this inquiry, these records will be identified as A01 – A19.

[para 7.] The records at issue in regard to Request #2 consist of documents that were prepared or received by the Ministry of Treasury

between January 1, 1993 and December 31, 1995 that pertain to the involvement of First Boston Corporation in the refinancing of West Edmonton Mall. For the purpose of this inquiry, these records will be identified as B01 – B40.

[para 8.] The records at issue in regard to Request #3 consist of documents that were prepared and received by the Ministry of Treasury between January 1, 1994 and September 1, 1998 that pertain to financial transactions involving West Edmonton Mall Property Inc., Triple Five Corporation Limited, Toronto Dominion Bank, Nomura Canada, TD Trust Company, 606881 Alberta Ltd., 333856 Alberta Ltd., 218703 Alberta Ltd., 298936 Alberta Ltd., 342322 Alberta Ltd., the West Edmonton Mall, and the Alberta Treasury Branches. For the purpose of this inquiry, these records will be identified as C01- C113.

III. BURDEN OF PROOF

[para 9.] 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 that 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 10.] There are eight issues in this inquiry:

- A. Did the Public Body properly remove non-responsive information from the records?
- B. Do sections 4(1)(c) and 4(1)(l) exclude certain records from the application of the Act?
- C. Did the Public Body correctly apply section 15 to the records?
- D. Did the Public Body correctly apply section 21(1) to the records?
- E. Did the Public Body correctly apply section 23(1)(a), (b), and (c) to the records and properly exercise its discretion under those sections?
- F. Did the Public Body correctly apply section 24(1) to the records and properly exercise its discretion under that section?

G. Did the Public Body correctly apply section 26(1) to the records and properly exercise its discretion under that section?

H. Does section 31(1)(b) require the Public Body to disclose the records?

V. DISCUSSION

Issue A: Did the Public Body properly remove non-responsive information from the records?

[para 11.] In responding to the Applicant's access request, the Public Body withheld the following records as non-responsive:

B05 (1st line, para. 1 & 3), B06 (non-asterisked portion), B08 (2nd bullet), B10-B20, B21 (para. 1 & 3, stamped and handwritten notations), B30 (para. 1-4), B31 (para. 1-5), B32 (para. 1, 3, 4, 5), B33 (para. 1-3), B35 (para. 2-5), B36, B37, C01, C02 (para. 1-4), C03-C05, C07 (handwritten portion), C64 (handwritten portion), C69 (non-asterisked portion), C82-C85

[para 12.] In Order 97-020, I said that information or records that do not reasonably relate, or in other words, are not relevant to an applicant's request for access will be considered "non-responsive" to the request.

[para 13.] Furthermore, in Order 99-002, I said that, in determining what records are responsive, a public body must first look at whether the access request is for "information" or a "record". Generally speaking, if the access request is for a "record" a public body must treat the whole record as responsive if a portion of the record is responsive. If an applicant's request is for "information" a public body may treat a portion of the record as responsive and other portions as non-responsive.

[para 14.] However, notwithstanding the general rule, it is my opinion that even if an applicant requests access to a "record", the public body may withhold portions as non-responsive, if those portions are clearly separate and distinct and entirely unrelated to the access request. By allowing a public body to withhold a portion of the records as non-responsive, it prevents resources from being expended to comply with section 29 notice requirements for irrelevant information, and recognizes that public bodies create records to serve multiple purposes.

[para 15.] In this inquiry, the Applicant requested “copies”, or in other words, “records” of correspondence, memoranda, studies, background documents and reports.

[para 16.] After carefully reviewing the records, it is my opinion that the Public Body properly removed the following records as non-responsive as each of these records are separate and distinct and entirely unrelated to the access request:

B05 (para. 1 & 3), B06 (non-asterisked portion), B08 (2nd bullet), B10-B20, C01 (except title), C03-C05, C69 (non-asterisked portion)

[para 17.] However, it is my opinion that the Public Body did not properly remove the following records as non-responsive:

B05 (1st line), B21 (para. 1 & 3, stamped and handwritten notations), B30 (para. 1 - 4), B31 (para. 1 - 5), B32 (para. 1, 3, 4, 5), B33 (para. 1 - 3), B35 (para. 2 - 5), B36, B37, C01 (title), C02 (para.1- 4), C07 (handwritten portion), C64 (handwritten portion), C82-C85

[para 18.] Furthermore, as there are no mandatory exceptions that apply, and the Public Body did not claim any discretionary exceptions in regard to the following records, these records must be disclosed to the Applicant:

B21 (para. 1 & 3, stamped and handwritten notations), B30 (para. 1 - 4), B31 (para. 1 - 5), B32 (para. 1, 3, 4, 5), B33 (para. 1 - 3), C01 (title), C02 (para.1- 4), C64 (handwritten portion)

[para 19.] However, the Public Body applied section 23(1)(a) to record B05 (1st line), section 23(1)(b) to records C82-C85, and section 21(1) to records B35 (para. 2 - 5), B36 and B37, and I have considered these records under those sections. In addition, I have addressed the handwritten portion of record C07 under section 4(1)(l).

Issue B: Do sections 4(1)(c) and 4(1)(l) exclude certain records from the application of the Act?

[para 20.] If a record falls under section 4 of the Act, the Act does not apply to the record and there is no obligation on the Public Body to give the Applicant access to the record.

(i) Application of section 4(1)(c)

[para 21.] The Public Body applied section 4(1)(c) to records C56-C63 and to the typewritten portion of C86-C103. However, I will also address the handwritten portions of C86, C96, and C102 under this section, as these records also pertain to the Auditor General.

[para 22.] Section 4(1)(c) 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: ...

(c) a record that is created by or is in the custody or under the control of an officer of the Legislature and relates to the exercise of that officer's functions under an Act of Alberta;

[para 23.] In Order 97-008, I discussed the interpretation of section 4(1)(c). In that Order, I said that for a record to be excluded under section 4(1)(c), the following three criteria must be met:

- (i) The documents must constitute a record;
- (ii) The records must be created by, or in the custody of, or under the control of an officer of the Legislature; and
- (iii) The records must relate to that officer's functions under an Act of Alberta.

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

[para 24.] 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;

[para 25.] After reviewing the documents, it is my opinion that each document constitutes a "record" under the Act.

(ii) Are the records created by, or in the custody of, or under the control of an officer of the Legislature?

[para 26.] Section 1(1)(m) of the Act defines “officer of the Legislature” to mean the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner.

[para 27.] In this case, the officer of the Legislature is the Auditor General.

[para 28.] Record C56, and the typewritten portions of C86–C103 fulfill this part of the three-part test as all of these records were created by the Auditor General.

[para 29.] Furthermore, although records C57-C63 were created by someone other than the Auditor General, these records also fulfill this part of the test as all of these records are under the control of the Auditor General.

[para 30.] Under the *Alberta Auditor General Act*, c. A-49, the Auditor General has a number of duties. The Auditor General’s responsibilities include: acting as the auditor for every ministry, department, regulated fund, revolving fund and Provincial agency under section 12, performing special duties under section 17, reporting on the financial statements of the Crown under section 18, issuing an annual report under section 19, and issuing special reports under section 20.

[para 31.] In order for the Auditor General to successfully carry out his duties, he and his staff must have the ability to maintain control and confidentiality over the information they obtain in the course of their audits, reviews or special duties. In coming to this conclusion, I took note of the fact that the courts have historically held that “working papers” or, in other words, an auditor’s records regarding his or her examination, are owned by the auditors and subject to a professional confidence between the accountant and the client (*Hay v. Institute of Chartered Accountants of Alberta* (1988), 54 D.L.R. (4th) 26 (Alta. C.A.), *Terisigni v. Circosta* (1997) O.J. No. 1860 (Ont. Gen. Div.)).

[para 32.] However, the handwritten portions of records C86, C96, and C102 do not fulfill section 4(1)(c). In my view, these notations must be considered separate and distinct from the typewritten portion of these records as the notations change the character and provide value-added information to those records. After reviewing these notations as independent records, it is my view that these notations were neither

created by, nor are they in the custody or control of the Auditor General, and therefore do not fall under section 4(1)(c).

(iii) Do the records relate to that officer's functions under an Act of Alberta?

[para 33.] As previously mentioned, the Auditor General has a number of duties under the *Auditor General Act* including: performing audits, performing special duties as specified by the Assembly, reporting on the financial statements of the Crown, issuing an annual report and preparing other special reports.

[para 34.] After carefully reviewing the records at issue under section 4(1)(c), it is my opinion that all of these records, except for the handwritten portions of records C86, C96, and C102, relate to the Auditor General's functions under the Act.

(iv) Conclusion

[para 35.] To summarize, records C56-C63 and the typewritten portion of records C86-C103 are excluded under section 4(1)(c). Consequently, I have no jurisdiction over these records.

[para 36.] However, the handwritten portions of records C86, C96, and C102 do not fulfill the requirements of section 4(1)(c), and I therefore have jurisdiction over those portions of the records. Furthermore, since the Public Body applied section 23(1)(b) to these records, I have considered those portions under that section.

(ii) Application of section 4(1)(l)

[para 37.] The Public Body applied section 4(1)(l) to the following records:

B22, C07(typewritten portion), C15-C20, C23-C26, C29, C108, C109

[para 38.] In addition, I will also address section 4(1)(l) in regard to the handwritten portion of record C07 as the body of this record was authored by one Executive Council member and addressed to another Executive Council member.

[para 39.] Section 4(1)(l) 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: ...

(l) a record created by or for

(i) a member of the Executive Council,

(ii) a Member of the Legislative Assembly, or

(iii) a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly

that has been sent or is to be sent to a member of the Executive Council, a Member of the Legislative Assembly or a chair of a Provincial agency as defined in the Financial Administration Act who is a Member of the Legislative Assembly;

[para 40.] In Order 97-007, I discussed the interpretation of section 4(1)(l). I said that in order for a record to fall outside the Act by reason of section 4(1)(l), the record must be created by or for any of those classes of persons listed in section 4(1)(l)(i) to (iii). I interpreted the word “for” to mean “on behalf of”, and said that “for” did not mean “intended to go to” or “destined for” because that interpretation would allow a record created by anyone in the world to be excluded from the application of the Act.

[para 41.] In that Order, I also said that the concluding part of section 4(1)(l) requires that the record “has been sent or is to be sent” to one of the same three classes of persons listed in section 4(1)(l)(i) to (iii). Therefore, section 4(1)(l) is intended to exclude from the application of the Act communications among only those persons listed in section 4(1)(l)(i) to (iii).

[para 42.] In Order 96-020, I said that if a record is created by a person who acts on behalf of one of the classes of persons listed in section 4(1)(l)(i) to (iii), either the record must indicate that the individual is acting on that person’s behalf, or it must be evident in some other way.

[para 43.] In my opinion, records B22, C07(typewritten portion), C15–C20, C23–C26, C29, C108, and C109 clearly meet the requirements of section 4(1)(l), because they are records created by one of the classes of persons listed in section 4(1)(l)(i) to (iii), and sent to one of those same classes of persons. Therefore, section 4(1)(l) excludes all of these records

from the application of the Act. Consequently, I have no jurisdiction over these records.

[para 44.] In addition, I find that the handwritten portion of record C07 also fulfills the requirements of section 4(1)(l). Although a review of this record shows that the Public Body added these handwritten notations to the record after it was sent from one member of the Executive Council to another member of the Executive Council, after carefully reviewing the content of these notations, it is my opinion that these notations do not change the character of record C07. As such, the Public Body is not required to treat these notations as separate and distinct from the typewritten portion of record C07. Consequently, I find that I do not have jurisdiction over the handwritten portions of record C07.

Issue C: Did the Public Body correctly apply section 15 to the records?

[para 45.] The Public Body cited section 15(1) as the authority to withhold records B08 (2nd bullet), B10-B20, and C111.

[para 46.] As it is my opinion that the Public Body correctly categorized records B08 (2nd bullet) and B10-20 as non-responsive, I do not find it necessary to address these records under section 15(1). In addition, because the Public Body disclosed record C111 to the Applicant, I will not address this record under this section.

Issue D: Did the Public Body correctly apply section 21(1) to the records?

[para 47.] The Public Body cites section 21(1) as the authority to withhold records B34-B37.

[para 48.] Sections 21(1) and 21(2) read:

21(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.

(2) Subsection (1) does not apply to

(a) information in a record that has been in existence for 15 years or more,

(b) information in a record of a decision made by the Executive Council or any of its committees on an appeal under an Act, or

(c) information in a record the purpose of which is to present background facts to the Executive Council or any of its committees or to the Treasury Board or any of its committees for consideration in making a decision if

(i) the decision has been made public,

(ii) the decision has been implemented, or

(iii) 5 years or more have passed since the decision was made or considered.

[para 49.] Section 21(1) states that a public body must not disclose information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees. This section then lists some specific examples of information that falls under this section.

[para 50.] After carefully reviewing the information in records B34-B37, I find that these records do not fulfill the requirements of section 21(1) as all of the information has already been revealed in the public domain through the Auditor General's report. In addition, evidence before me shows that records B35 and B36 have been disclosed through the court process. Furthermore, as there are no other mandatory provisions that apply to these records and the Public Body did not claim any discretionary exceptions, I order the Public Body to disclose these records to the Applicant.

Issue E: Did the Public Body correctly apply sections 23(1)(a), (b) and (c) to the records and properly exercise its discretion under those sections?

[para 51.] 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 to 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,

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Alberta or a public body, or considerations that relate to those negotiations

[para 52.] It should also be noted that section 23(2) sets out the specific kinds of information that must not be withheld, even though the information might otherwise fall within section 23(1). Section 23(2) reads:

(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 53.] In order for a public body to withhold a record under section 23(1), the public body must ensure that the record fulfills the criteria applicable under one of the provisions of section 23(1). In addition, the public body must ensure that the disclosure of information could reasonably be expected to “reveal” the information described in this section. That is, the public body must not have previously disclosed the information in the public domain.

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

[para 54.] The Public Body applied section 23(1)(a) to withhold the following records:

A01 – A12, B04-B09, C66, C67, C70, C71, C112

[para 55.] As it is my opinion that the Public Body correctly removed B05 (para. 1 & 3), B06 (non-asterisked portion), B08 (2nd bullet) as non-responsive, I will not address these records under section 23(1)(a).

[para 56.] 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 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 57.] In order to fulfill this section, the information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. The record must contain more than a bare recitation of facts or summaries of information, although, as I stated in Order 99-001, factual information sufficiently interwoven with other advice, proposals, recommendations or policy options may also be withheld.

[para 58.] After carefully reviewing the records, I find that the Public Body properly withheld the following records under section 23(1)(a):

AO2, B05 (heading, 1st line, para. 2), B06 (asterisked portion), C112

[para 59.] All of these records fulfill the above criteria. In addition, I do not think that these records have been revealed in the public domain. I have reviewed the Auditor General's report and the court documents included in the Applicant's submission. In my opinion, neither reveal the information contained in these records. Although the Auditor General's report discusses the final proposal or decisions that were agreed upon by the ATB, it does not reveal the advice, consultations, deliberations, positions, plans, procedures, criteria or instructions that were developed during the decision-making process.

[para 60.] Section 23(1) is a discretionary exception. Consequently, even if this section applies to the information in the records, a public body may nevertheless decide to disclose the information. 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 61.] After reviewing the submissions and the records, it is my opinion that the Public Body properly exercised its discretion according to the objects and purposes of the Act and did not exercise its discretion for an improper or irrelevant purpose.

[para 62.] However, it is my opinion that the Public Body did not correctly apply section 23(1)(a) to the following records:

A01, A03-A12, B04, B07, B08 (headings & 1st bullet), B09, C66, C67, C70, C71

[para 63.] The Public Body applied section 23(1)(b) to these records and I have, therefore, considered these records under that section.

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

[para 64.] The Public Body applied section 23(1)(b) to the following records:

A01 – A12, B01-B09, B38-B40, C02 (para.5), C64 (typewritten portion), C65 (handwritten portion), C66, C67, C70-C85, C86 (handwritten portion), C96 (handwritten portion), C102 (handwritten portion), C104, C110 (handwritten portion), C113

[para 65.] As it is my opinion that the Public Body correctly categorized records B05 (para. 1 & 3), B06 (non-asterisked portion), and B08 (2nd bullet) as non-responsive, I will not address these records under section 23(1)(b). Furthermore, as it is my opinion that the Public Body correctly applied section 23(1)(a) to records A02, B05 (heading, 1st line, & para. 2), and B06 (asterisked portion), I will not address these records under section 23(1)(b).

[para 66.] The purpose of section 23(1)(b) is to shield consultations or deliberations that occurred during the decision-making process. In Order 96-006, I said that a “consultation” occurs when the views of one or more officers or employees is sought as to the appropriateness of a particular proposal or suggested action. 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 67.] After carefully reviewing the records, it is my opinion that the Public Body properly applied section 23(1)(b) and properly exercised its discretion to withhold the following records:

A01, B01-B03, B07, B09, B38-B40, C65 (handwritten portion), C66 (para.3-5), C67, C70 (para. 3 – 5), C71-C74, C76-C85, C86 (handwritten portion), C96 (handwritten portion), C110 (handwritten portion), C113

[para 68.] However, the Public Body did not correctly apply section 23(1)(b) to the following records, as the information in these records are neither a consultation nor a deliberation or, alternatively, are revealed on pages 46 and 47 of the Auditor General’s report:

A03-A12, B04, B08 (heading and 1st bullet), C02 (para. 5), C64 (typewritten portion), C66 (para 1 & 2), C70 (para. 1 & 2), C75, C102 (handwritten portion), C104

[para 69.] Furthermore, as there are no mandatory exceptions that apply and the Public Body did not claim any further discretionary exceptions in regard to the following records, the Public Body must disclose these records to the Applicant:

B04, B08 (heading and 1st bullet), C02 (para.5), C64 (typewritten portion), C66 (para 1 & 2), C70 (para. 1 & 2), C75, C102 (handwritten portion), C104

[para 70.] However, the Public Body applied section 23(1)(c) to records A03-A12 and I have, therefore, considered these records under that section.

(iii) Section 23(1)(c) (positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations)

[para 71.] The Public Body applied section 23(1)(c) to records A01 – A12.

[para 72.] As it is my opinion that the Public Body correctly applied section 23(1)(a) to record A02 and section 23(1)(b) to A01, I will not address these records under section 23(1)(c).

[para 73.] In Order 96-012, I said that the intent of section 23(1)(c) is similar to sections 23(1)(a) and (b), in that it is to protect information generated during the decision-making process, but not to protect the decision itself. Furthermore, the information must relate to negotiations.

[para 74.] After carefully reviewing the records it is my opinion that the Public Body correctly applied section 23(1)(c) and properly exercised its discretion to withhold records A03-A12. These records consist of information generated during the decision-making process and relate to negotiations. Furthermore, there is no evidence before me that this information has been revealed in the public domain.

Issue F: Did the Public Body correctly apply section 24(1) to the records and properly exercise its discretion under those sections?

[para 75.] The Public Body cites section 24(1) as its authority to withhold the records B23-B29, C68 and C69. However, as I have come to the conclusion that the non-asterisked portion of C69 is non-responsive to the access request, I will not address that portion of the record under section 24(1).

[para 76.] Section 24(1) reads:

“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:

(a) trade secrets of a public body or the Government of Alberta;

(b) financial, commercial, scientific, technical or other information in which a public body or the Government of Alberta has a proprietary interest or a right of use and that has, or is reasonably likely to have, monetary value;

(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;

(d) scientific or technical information obtained through research by an employee of a public body, the disclosure of which could reasonably be expected to deprive the employee or public body of priority of publication.”

[para 77.] Section 24(1) is composed of two parts: (1) a general rule, and (2) several subsections that provide specific examples of information that may fulfill the general rule.

[para 78.] 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 79.] 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 80.] 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 in order to prove on a balance of probabilities that there is a reasonable expectation of economic harm from the disclosure of the records, a public body must show direct harm. This means: (1) a 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 81.] 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 82.] After carefully reviewing the records, it is my opinion that the disclosure of the information in record C68 and the asterisked portion of record C69 could reasonably be expected to harm the economic interest of the ATB and, in particular, could reasonably be expected to result in financial loss under section 24(1)(c)(i) or prejudice its competitive position under section 24(1)(c)(ii).

[para 83.] Record C68 and the asterisked portion of C69 consist of an internal memorandum discussing the internal business operations of the ATB. In my view, a disclosure of this information could reasonably be expected to prejudice the ATB's competitive position, and therefore fulfills section 24(1)(c)(ii). In addition, I also find that the Public Body properly exercised its discretion in withholding this information under that section.

[para 84.] However, the Public Body did not correctly apply section 24(1) to records B23-B29. After reviewing the submissions of the parties and the content of records B23-B29, it is my view that the Public Body has not proven that the disclosure of the information in these records could reasonably be expected to harm the economic interest of the ATB. The

Public Body has not shown a clear and direct linkage between the disclosure and the harm alleged, nor offered a sufficient explanation of how or why the harm alleged would result from the disclosure. In addition, the evidence before me shows that records B26-B28 have been disclosed in the public realm via the court process, which also indicates that the disclosure of the information in these records, in particular, could not reasonably be expected to harm the economic interests of the ATB.

[para 85.] As there are no mandatory provisions that apply to records B23-B29, and the Public Body did not claim any other discretionary exceptions, I order the Public Body to disclose these records to the Applicant.

Issue G: Did the Public Body correctly apply section 26(1) to the records and properly exercise its discretion under that section?

[para 86.] Section 26(1) reads:

“26(1) The head of a public body may refuse to disclose to an applicant

(a) information that is subject to any type of legal privilege, including solicitor-client privilege or parliamentary privilege,

(b) information prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of legal services, or

(c) information in correspondence between an agent or lawyer of the Minister of Justice and Attorney General or a public body and any other person in relation to a matter involving the provision of advice or other services by the agent or lawyer.

(i) Section 26(1)(a)

[para 87.] The Public Body cited section 26(1)(a) as the authority to withhold records A13-A19 and C58-C63. As I have already come to the conclusion that the Public Body correctly applied section 4(1)(c) to records C58-C63, the only records to be considered under section 26(1)(a) are A13-A19.

[para 88.] Section 26(1)(a) gives a public body the discretion to refuse to disclose information that is subject to any type of legal privilege including solicitor-client privilege. In Order 96-017, I said that to correctly apply section 26(1)(a) (solicitor-client privilege), the Public Body must meet the common law criteria for that privilege, as set out in *Solosky v. The Queen*, (1980) 1 S.C.R. 821. In that case, the Supreme Court of Canada stated that solicitor-client privilege must be claimed document by document, and each document must meet the following criteria: (i) it must be a communication between solicitor and client; (ii) that entails the seeking or giving of legal advice; and (iii) which is intended to be confidential by the parties.

[para 89.] Records A13-A19 consist of a legal opinion letter from the ATB's solicitor to the ATB. These records meet the criteria for solicitor-client privilege.

[para 90.] The Applicant argues that the records at issue cannot be withheld under section 26(1) because the ATB waived solicitor-client privilege by revealing the information through the media, the court process and through the Auditor General's Report.

[para 91.] I do not agree with the Applicant. I have carefully reviewed whether these records were "cc'd" (copied), and to whom. Furthermore, I reviewed the portions of the court documents, the copy of the newspaper article provided by the Applicant, as well as the Auditor General's Report. I did not find any evidence that privilege has been waived.

(ii) Section 26(1)(b)

[para 92.] The Public Body cited section 26(1)(b) as the authority to withhold records C9-C14, C44-C55 and C58-C63. As I have already come to the conclusion that records C58-C63 are excluded under section 4(1)(c), the only remaining records to be considered under this section are C9-C14, and C44-C55.

[para 93.] Section 26(1)(b) gives the Public Body the discretion to refuse to disclose information which is prepared by or for an agent or lawyer of the Minister of Justice and Attorney General or a public body in relation to a matter involving the provision of "legal services". In Order 96-017, I held that the term "legal services" should be given its ordinary dictionary meaning, and would include any law-related service performed by a person licensed to practice law.

[para 94.] Records C9-C14 consist of a memorandum prepared by an Alberta Justice lawyer, in relation to a matter that involves providing

legal services to a public body. Consequently, it is my opinion that the Public Body correctly applied section 26(1)(b) to those records.

[para 95.] Similarly, records C44-C55 consist of information prepared by a public body's lawyer in relation to a matter that involves providing legal services to a public body. Consequently, it is my opinion that the Public Body also correctly applied section 26(1)(b) to those records.

(iii) Section 26(1)(c)

[para 96.] The Public Body cited section 26(1)(c) as the authority to withhold records C58-C63. As I have already come to the conclusion that these records are excluded under section 4(1)(c), I do not find it necessary to apply section 26(1)(c) to these records.

(iv) Did the Public Body properly exercise its discretion under section 26(1)?

[para 97.] In its submission, the Public Body stated that it properly exercised its discretion to withhold the records under this section because it considered the purposes and objects of the Act, in light of the substance and subject matter of the legal services provided, and decided that disclosure of the records would be imprudent.

[para 98.] After reviewing the records and the submissions, it is my opinion that the Public Body properly exercised its discretion according to the objects and purpose of the Act and did not exercise its discretion for an improper or irrelevant purpose.

Issue H: Does section 31(1)(b) require the Public Body to disclose the records?

[para 99.] 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 100.] The Applicant states that it is in the public interest to disclose, under section 31(1)(b), the extent of the Public Body's role in the ATB financing of West Edmonton Mall, since the operations of the ATB

fell under the purview of the Public Body at the time of refinancing. The Applicant states that by disclosing this information, it will contribute to an open and transparent government.

[para 101.] The Applicant also submits that the criteria for determining public interest under section 87(4)(b) are relevant to determining public interest under section 31(1)(b).

[para 102.] I have already determined that the Public Body properly withheld a number of records as non-responsive, and that sections 4(1)(c) and 4(1)(l) exclude certain records from the application of the Act. In addition, I have already determined that the Public Body did not correctly apply sections 21(1), 23(1)(a), 23(1)(b), and 24(1) to a portion of the records and must therefore disclose those records to the Applicant. Therefore, I only find it necessary to consider whether the following records should be disclosed under section 31(1)(b):

AO1- A19, B01-B03, B05 (heading, 1st line, para. 2), B06 (asterisked portion), B07, B09, B38-B40, C9-C14, C44-C55, C65 (handwritten portion), C66 (para.3-5), C67, C68, C69 (asterisked portion), C70 (para. 3 – 5), C71-C74, C76-C85, C86 (handwritten portion), C96 (handwritten portion), C110 (handwritten portion), C112, C113,

[para 103.] As a preliminary matter, the criteria for public interest under section 31(1)(b) are not the same as the criteria for public interest under section 87(4)(b). I dealt with this in Order 98-011.

[para 104.] In this case, I am of the view that the extent of the Public Body's involvement in the refinancing of West Edmonton Mall is a public interest issue. The ATB guaranteed a loan to West Edmonton Mall and took a second mortgage at a time when ATB was under the purview of the Public Body. The refinancing potentially makes the taxpayers of Alberta liable for hundreds of millions of dollars. There is an issue as to whether the loan guarantee was economically sound. These are matters of compelling public interest.

[para 105.] However, the Executive Council instructed the Auditor General to prepare a report and to release that report. In Order 96-011, I said that disclosure of information, rather than records, was the likely outcome under section 31(1)(b). In my view, disclosure of the Auditor General's Report and the information contained in the report satisfies the requirement for disclosure under section 31(1)(b). I do not believe that disclosure of the foregoing records under section 31(1)(b) would

accomplish any greater purpose than disclosure of the information contained in the Auditor General's Report.

[para 106.] Since the Executive Council gave instructions to release the Auditor General's Report, I find that there is compliance with the requirement of section 31(1)(b) to disclose the information. Therefore, the Public Body is not required to disclose the records under section 31(1)(b).

VI. ORDER

[para 107.] Under section 68 of the Act, I make the following Order disposing of the issues in this inquiry.

Issue A: Did the Public Body properly remove non-responsive information from the records?

[para 108.] The Public Body properly removed the following records as non-responsive:

B05 (para. 1 & 3), B06 (non-asterisked portion), B08 (2nd bullet), B10-B20, C01 (except title), C03-C05, C69 (non-asterisked portion)

[para 109.] Therefore, I uphold the Public Body's decision to withhold these records.

[para 110.] The Public Body did not properly remove the following records as non-responsive:

B05 (1st line), B21 (para. 1 & 3, stamped and handwritten notations), B30 (para. 1 - 4), B31 (para. 1 - 5), B32 (para. 1, 3, 4, 5), B33 (para. 1 - 3), B35 (para. 2 - 5), B36, B37, C01 (title), C02 (para.1- 4), C07 (handwritten portion), C64 (handwritten portion), C82-C85

[para 111.] Furthermore, as there are no mandatory exceptions that apply, and the Public Body did not claim any discretionary exceptions in regard to the following records, these records must be disclosed to the Applicant:

B21 (para. 1 & 3, stamped and handwritten notations), B30 (para. 1 - 4), B31 (para. 1 - 5), B32 (para. 1, 3, 4, 5), B33 (para. 1 - 3), C01 (title), C02 (para.1- 4), C64 (handwritten portion)

[para 112.] However, the Public Body applied section 23(1)(a) to record B05(1st line), section 23(1)(b) to records C82-C85, and section 21(1) to records B35 (para. 2 - 5), B36 and B37. In addition, I have addressed the handwritten portion of record C07 under section 4(1)(l). As such, I have considered these records under sections 4(1)(l), 21(1), 23(1)(a), and 23(1)(b).

Issue B: Do sections 4(1)(c) and 4(1)(l) exclude certain records from the application of the Act?

[para 113.] The Public Body correctly applied section 4(1)(c) to records C56-C63 and the typewritten portion of C86-C103. In addition, the Public Body correctly applied section 4(1)(l) to records B22, C07, C15-C20, C23-C26, C29, C108, and C109. Consequently, I have no jurisdiction over these records.

[para 114.] Conversely, the handwritten portions of records C86, C96, C102 do not fulfill section 4(1)(c), and I find that I have jurisdiction over those portions of the records. Furthermore, as the Public Body applied section 23(1)(b) to those records, I have therefore considered those records under that section.

Issue C: Did the Public Body correctly apply section 15 to the records?

[para 115.] The Public Body cited section 15(1) as the authority to withhold records B08 (2nd bullet), B10-B20, and C111.

[para 116.] As it is my opinion that the Public Body correctly categorized records B08 (2nd bullet), and B10-20 as non-responsive and because the Public Body has already disclosed record C111 to the Applicant, I did not find it necessary to address these records under section 15(1).

Issue D: Did the Public Body correctly apply section 21(1) to the records?

[para 117.] The Public Body did not correctly apply section 21(1) to records B34-B37. As there are no other mandatory provisions that apply to these records and the Public Body did not claim any discretionary exceptions, I order the Public Body to disclose these records to the Applicant.

Issue E: Did the Public Body correctly apply sections 23(1)(a), (b) and (c) to the records and properly exercise its discretion under those sections?

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

[para 118.] The Public Body correctly applied section 23(1)(a) and properly exercised its discretion to withhold records AO2, B05 (heading, 1st line, para. 2), B06 (asterisked portion) and C112. Therefore, I uphold the Public Body's decision to withhold these records.

[para 119.] The Public Body did not correctly apply section 23(1)(a) to records A01, A03-A12, B04, B07, B08 (headings & 1st bullet), B09, C66, C67, C70, and C71. However, the Public Body applied section 23(1)(b) to these records. As such, I have considered these records under section 23(1)(b).

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

[para 120.] The Public Body correctly applied section 23(1)(b) and properly exercised its discretion to withhold the following records:

A01, B01-B03, B07, B09, B38-B40, C65 (handwritten portion), C66 (para.3-5), C67, C70 (para. 3 – 5), C71-C74, C76-C85, C86 (handwritten portion), C96 (handwritten portion), C110 (handwritten portion), C113

[para 121.] Therefore, I uphold the Public Body's decision to withhold these records.

[para 122.] The Public Body did not correctly apply section 23(1)(b) to the following records:

A03-A12, B04, B08 (heading and 1st bullet), C02 (para. 5), C64 (typewritten portion), C66 (para. 1 & 2), C70 (para. 1 & 2), C75, C102 (handwritten portion), C104

[para 123.] Furthermore, as there are no mandatory exceptions that apply, and the Public Body did not claim any further discretionary exceptions in regard to following records, the Public Body must disclose these records to the Applicant:

B04, B08 (heading and 1st bullet), C02 (para.5), C64 (typewritten portion), C66 (para 1 & 2), C70 (para. 1 & 2), C75, C102 (handwritten portion), C104

[para 124.] However, the Public Body applied section 23(1)(c) to records A03-A12. As such, I have considered these records under section 23(1)(c).

(iii) Section 23(1)(c) (positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations)

[para 125.] The Public Body correctly applied section 23(1)(c) and properly exercised its discretion in regard to records A03 – A12. Therefore, I uphold the Public Body’s decision to withhold these records.

Issue F: Did the Public Body correctly apply section 24(1) to the records and properly exercise its discretion under those sections?

[para 126.] The Public Body correctly applied section 24(1) and properly exercised its discretion in regard to record C68 and the asterisked portion of C69. Therefore, I uphold the Public Body’s decision to withhold these records.

[para 127.] The Public Body did not correctly apply section 24(1) to records B23-B29. As there are no mandatory provisions that apply to these records, and the Public Body did not claim any other discretionary exceptions, I order the Public Body to disclose these records to the Applicant.

Issue G: Did the Public Body correctly apply section 26(1) to the records and properly exercise its discretion under that section?

(i) Section 26(1)(a)

[para 128.] The Public Body correctly applied section 26(1)(a) and properly exercised its discretion to withhold records A13-A19. I also find that the Public Body did not waive privilege in regard to these records. Therefore, I uphold the Public Body’s decision to withhold these records from the Applicant.

(ii) Section 26(1)(b)

[para 129.] The Public Body correctly applied section 26(1)(b) and properly exercised its discretion to withhold records C9-C14, and C44-C55. Therefore, I uphold the Public Body’s decision to withhold these records from the Applicant.

(iii) Section 26(1)(c)

[para 130.] The Public Body cited section 26(1)(c) as the authority to withhold records C58-C63. As I have already come to the conclusion that these records are excluded under section 4(1)(c), I do not find it necessary to apply section 26(1)(c) to these records.

Issue H: Does section 31(1)(b) require the Public Body to disclose the records?

[para 131.] The extent of the Public Body's involvement in the refinancing of West Edmonton Mall is a public interest issue. However, since the Executive Council gave instructions to release the Auditor General's Report, I find that there is compliance with the requirement of section 31(1)(b) to disclose information. Therefore, the Public Body is not required to disclose the records under section 31(1)(b).

[para 132.] I further order the Public Body to notify me in writing, within 50 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