ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-033

January 19, 2000

ALBERTA TREASURY BRANCHES

Review Numbers 1485, 1486, and 1497

I. BACKGROUND

[para 1.] On August 24, 1998, the Applicant submitted two access requests to Alberta Treasury Branches (the "Public Body") under the *Freedom of Information and Protection of Privacy Act* (the "Act"). In the first access request (Review Number 1485), the Applicant asked for access to:

> *Copies of all studies, reports, memoranda, background documents, correspondence, loan agreements, and guarantee agreements, prepared by or for the Alberta Treasury Branches, for the period January 1, 1994 – August 24, 1998 relating to the West Edmonton Mall (WEM).*

[para 2.] The Public Body responded that access to all the information the Applicant requested was denied under 4(1)(m) of the Act (record in the custody or control of a treasury branch that does not relate to a non-arm's length transaction between the Government of Alberta and another party).

[para 3.] In the second access request [Review Number 1486], the Applicant asked for access to:

> *Copies of all studies, reports, and background documents, prepared by or for the Alberta Treasury Branches, for the period January 1, 1995 – August 24, 1998 relating to the review of all commercial and business loans exceeding $5 million and all loans exceeding $1 million with a higher than normal risk rating.*

[para 4.] The Public Body again responded that access to all the information the Applicant requested was denied under section 4(1)(m). The Public Body further said that disclosure of such information would result in financial loss and would prejudice the Public Body's competitive position; therefore, the information was also exempt under section 24(1)(c) of the Act.

[para 5.] On September 10, 1998, the Applicant submitted a third access request to the Public Body. In that access request (Review Number 1497), the Applicant asked for access to:

> *Copies of all correspondence, memoranda, studies and reports prepared by or for the Alberta Treasury Branches and received by the Provincial Treasurer, the Deputy Provincial Treasurer Finance and Revenue, the Deputy Provincial Treasurer Management and Control and the Ministry of Alberta Treasury, between January 1, 1994 and March 31, 1997, relating to the refinancing of the West Edmonton Mall.* [Review Number 1497]

[para 6.] The Public Body once again responded that access to all the information the Applicant requested was denied under section 4(1)(m).

[para 7.] By letter dated September 18, 1998 and received September 21, 1998, the Applicant asked that I review the Public Body's responses to all three access requests.

[para 8.] Mediation was authorized for Review Numbers 1485, 1486 and 1497. However, the parties suggested, and my Office agreed, that mediation be held in abeyance, pending the release of the *Report of the Auditor General on the 1994 Refinancing of West Edmonton Mall* (the "Auditor General's Report"). On February 9, 1999, the Auditor General's Report was released.

[para 9.] On February 24, 1999, the Applicant asked to narrow the scope of the access request for Review Number 1486, which was now to read:

> *Copies of all studies, reports, and background documents, prepared by or for the Alberta Treasury Branches, for the period January 1, 1995 – August 24, 1998 relating to the review of all commercial and*

business loans exceeding $5 million and all loans exceeding $1 million with a higher than normal risk rating only as it pertains to the West Edmonton Mall (WEM) [emphasis added].

[para 10.] On February 25, 1999, I gave notice to the head of the Public Body that my office required the records for review, as provided by section 54(2) of the Act. That notice gave the Public Body until March 9, 1999 to produce the records to my Office.

[para 11.] On March 4, 1999, the Applicant asked that all three reviews be put on hold, pending the Applicant's discussions with the Public Body.

[para 12.] On April 14, 1999, the Applicant informed my Office that discussions with the Public Body did not resolve the issues, and the Applicant requested that all three reviews proceed to inquiry. My Office informed the Public Body that the Applicant had requested an inquiry. At the same time, my Office asked that the records be produced to my Office by April 23, 1999.

[para 13.] When, by April 26, 1999, the Public Body had not yet produced the records to my Office, I notified the head of the Public Body, by letter, that I required production of the records under section 54(2) of the Act. I said that the records were to be produced by April 30, 1999, failing which I would instruct legal counsel to take the necessary steps to have the Court of Queen's Bench order production of the records.

[para 14.] The Public Body responded by telephone and by letter on April 29, 1999, indicating that the Public Body's files were voluminous (initially estimated at 35 boxes, then subsequently estimated at 70 boxes), were located at the offices of its outside legal counsel, and were currently being used and reviewed to prepare the Public Body's affidavit of documents, to be produced in the ongoing litigation between the Public Body and West Edmonton Mall. Given the Public Body's explanation, my staff agreed to speak to the Public Body's outside legal counsel to arrange a process for reviewing the records.

[para 15.] In its April 29, 1999 letter, the Public Body also said that the Public Body was continuing to refuse to disclose the records to the Applicant under section 4(1)(m) of the Act. The Public Body said that additional grounds for refusal to disclose included sections 15(1), 16(1), 21(1), 23(1), 24(1) and 26(1) of the Act. The Applicant did not receive a copy of that letter.

[para 16.] On May 3, 1999, the Public Body asked my Office to confirm with the Applicant that the Applicant would limit the inquiry to those

records outlined in a March 5, 1999 letter the Applicant sent to the Public Body.

[para 17.] On May 3, 1999, the Applicant agreed to revise the three access requests into one access request for the following records:

> *Copies of all studies, reports, memoranda, background documents, briefing documents, correspondence, etc. exchanged between Alberta Treasury Branches and the Alberta government relating to ATB's refinancing of the West Edmonton Mall for the period January 1, 1994 to August 24, 1998.*

[para 18.] After my Office had further telephone discussions and an exchange of letters with the Public Body, the Public Body agreed to produce the records to my Office by June 4, 1999. The Public Body ultimately produced 26 records, but continued to refuse to provide those records to the Applicant.

[para 19.] Given that the Public Body had estimated between 35 to 70 boxes of records, then produced only 26 records, my Office decided to prepare a table of records from Review Numbers 1485, 1486 and 1497, and compare those records with the records provided by other public bodies in cases before my Office in which the Public Body was an affected party.

[para 20.] On June 29, 1999, General Counsel for my Office wrote to the head of the Public Body, informing the head that my Office had identified a number of records provided by those other public bodies, which appeared to be responsive to the Applicant's access request, but which the Public Body did not include in records provided to my Office. That letter expressed a concern that the Public Body had not identified all the records responsive to the Applicant's access request, and thereby had not fulfilled its duty to the Applicant under section 9(1) of the Act. That letter also asked for an explanation to account for the discrepancies, and further indicated that, if the Public Body did not provide a satisfactory explanation, my Office would consider conducting an investigation of the Public Body.

[para 21.] In its response to the June 29, 1999 letter, the Public Body said that it had filed an affidavit in the ongoing litigation, indicating that the Public Body's files regarding the West Edmonton Mall were found to be incomplete, did not contain the documents that would normally be found on a file relating to a loan of that magnitude, and that an individual no longer employed by the Public Body had been seen shredding documents relating to the West Edmonton Mall file. My Office

accepted that explanation. Nevertheless, the Applicant thought that section 9(1) should be included as an issue for the inquiry.

[para 22.] On July 30, 1999, my Office issued a Notice of Written Inquiry to the Applicant, the Public Body and five affected parties. My Office also asked for an affidavit from the appropriate individual, to address the issue of whether the Public Body conducted an adequate search and otherwise fulfilled its duty to the Applicant under section 9(1).

[para 23.] I received initial written submissions from the Public Body, the Applicant and two affected parties, by the September 20, 1999 deadline for submissions. I accepted the Public Body's affidavit *in camera*.

[para 24.] I received rebuttal submissions from the Public Body and the Applicant only, by the October 4, 1999 deadline.

[para 25.] 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 26.] There are 26 records at issue. In this Order, I will refer to those records collectively as the "Records".

III. ISSUES

[para 27.] The Notice of Inquiry sets out three issues for this inquiry:

> A. Did the Public Body fulfill its duty to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act?
>
> B. Are the records at issue excluded from the application of the Act by section 4(1)(m)?
>
> C. If the records are not excluded from the application of the Act by section 4(1)(m), did the Public Body correctly apply:
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> - section 15(1)(a), (b) and (c) (harm to the business interests of a third party)

- section 16(1), 16(3)(e) and 16(3)(f) (unreasonable invasion of a third party's personal privacy)
- section 21(1) (Cabinet and Treasury Board confidences)
- section 23(1)(a) (advice from officials)
- section 24(1) (disclosure harmful to economic and other interests of a public body)
- section 26(1) (privileged information)

[para 28.] The Applicant's submission added a fourth issue:

> D. Does section 31(1)(b) (disclosure in the public interest) require the Public Body to disclose the information?

IV. DISCUSSION OF THE ISSUES

ISSUE A: Did the Public Body fulfill its duty to respond to the Applicant openly, accurately and completely, as provided by section 9(1) of the Act?

1. Applicant's position

[para 29.] The Applicant generally complains that the Public Body did not fulfill its duty to the Applicant under section 9(1) of the Act.

[para 30.] Section 9(1) of the Act reads:

> *9(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.*

[para 31.] Specifically, the Applicant complains that the Public Body:

> a. did not respond to the Applicant, as provided by section 11(1)(c), and thereby did not follow the policies and practices for establishing clear procedures for making and processing a formal request for information under the Act, as discussed in Investigation Report 98-IR-009 and as set out in the *Freedom of Information and Protection of Privacy Policy and Practices* manual (the "FOIP Manual"), published by the Information Management and Privacy Branch of Alberta Labour in August 1998.
>
> b. did not indicate in its response as to whether it conducted a thorough and complete search for responsive records.

2. Public Body's position

[para 32.] The Public Body argues that the May 10, 1999 letter from my Office notified the Public Body that my Office would be proceeding to inquiry on the basis of the Applicant's access request that was revised on May 3, 1999. Consequently, what was now before me as Commissioner was the inquiry directed by my Office, not the Applicant's original three access requests. The Public Body says that the Applicant's complaints are outside the parameters of the inquiry established by the Notice of Written Inquiry.

[para 33.] The Public Body nevertheless maintains that it complied with all its obligations in responding to the Applicant's original three access requests.

[para 34.] The Public Body concludes that the section 9(1) duty has been met with respect to the Applicant, and now must be considered in light of the Public Body's compliance with my directives during the course of the review and inquiry. The Public Body takes the position that its duty to the Applicant relates only to the Applicant's access request that was revised on May 3, 1999.

3. Discussion of the issues under section 9(1)

a. The scope of the issues

[para 35.] As the Public Body and the Applicant disagree about the scope of the issues for the inquiry, I intend to deal with that matter first.

[para 36.] As I see it, the issue is whether the Public Body's duty to the Applicant under section 9(1) of the Act is confined to the period of time after which the Applicant agreed to revise the access request, and is otherwise restricted by the Notice of Written Inquiry issued by my Office. Another way of looking at the issue is to determine whether the Applicant agreed to "waive" or give up any rights the Applicant may have had, based on the Applicant's original three access requests, and whether the Notice of Written Inquiry has prevented me from considering the issues related to the Applicant's original three access requests.

[para 37.] To decide the issue, it is necessary to look at the circumstances surrounding the Applicant's revised access request. In the course of reviewing the Public Body's decisions on the Applicant's three access requests, my Office compelled the Public Body to produce records under section 54 of the Act. The Public Body responded that its

voluminous files were with its outside counsel as a result of the ongoing litigation between the Public Body and West Edmonton Mall.

[para 38.] Subsequently, the Public Body asked if the Applicant would revise the access requests to narrow the scope of the records the Applicant wanted. The Applicant agreed. It also appears from the Applicant's submission that the Applicant has forgotten about that agreement.

[para 39.] In my view, the purpose of the Public Body's request to narrow the scope of the records was directly related to my requirement to produce records.

[para 40.] The Act contemplates that an applicant may modify a request for access before a public body decides whether it will allow access: see section 12(4) of the *Freedom of Information and Protection of Privacy Regulation*, Alta. Reg. 200/95. However, this is not a case of the Applicant's requesting a revision of the access request after the Applicant has applied for access. This is a case in which the Public Body has asked for the revision of the access request to comply with my requirement to produce records.

[para 41.] It seems to me that it would be unfair for the Applicant to lose any rights as a result of the Public Body's request and the Applicant's agreement to revise the access request in these circumstances. I am also concerned that the Applicant does not remember the agreement and may well not have agreed if the Applicant had thought that any rights would be lost.

[para 42.] Therefore, by agreeing to narrow the access request in these particular circumstances, I find that the Applicant did not thereby give up any rights to have issues decided, and the Public Body is not relieved of its obligations to the Applicant under the Act.

[para 43.] It could also be said that the agreement to revise the access request relates only to what records will ultimately be at issue, but otherwise is not a new access request for the purposes of the Public Body's duties to the Applicant under the Act. The Public Body's duties under section 9(1) remain the same, other than that the duties may now encompass a different number of records. In other words, the revision of the access request does not have the effect of submitting a new request such that the Public Body's duties under section 9(1) commence only at the time the Applicant revised the request.

[para 44.] In any event, the Notice of Written Inquiry did not limit my ability to consider issues other than those specifically set out (the Notice

of Inquiry said: "Without limiting the Commissioner [emphasis added], the issues in this inquiry are…"). Moreover, I may independently review a decision of the Public Body under the Act, which includes the power to independently review records and any other relevant documents in coming to a decision. Consequently, in this Order, I also intend to comment on the Public Body's duty to the Applicant under section 9(1), in relation to the Applicant's three original access requests and three requests for review.

b. Response to the Applicant

i. Response under section 11(1)(c)

[para 45.] The Applicant says that the Public Body's response did not fully meet the three requirements of section 11(1)(c), as follows:

> (i) Only section 4(1)(m) and section 24(1)(c) were cited to exclude records and to except information, respectively. The Public Body did not cite any other provisions prior to the date set down for the written inquiry.
>
> (ii) The Public Body's Vice-President, Public Affairs, signed the letters, not the Public Body's designated Freedom of Information and Privacy Coordinator. Furthermore, there was no indication as to whom the Applicant could contact.
>
> (iii) There was no mention that the Applicant could ask for a review.

[para 46.] Section 11(1)(c) reads:

> *11(1) In a response under section 10, the applicant must be told*
>
> *…*
>
> *(c) if access to the record or to part of it is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*

> *(iii) that the applicant may ask for a review of that decision by the Commissioner or an adjudicator, as the case may be.*

[para 47.] On the face of the response letters the Public Body sent to the Applicant, I find that the Public Body breached section 11(1)(c)(ii) and (iii) because the Public Body did not provide the name, etc., of someone who could answer the Applicant's questions about the Public Body's refusal. The response letters also did not tell the Applicant that the Applicant could ask for a review. To that extent, the Public Body did not respond to the Applicant openly, accurately and completely, as provided by section 9(1).

[para 48.] I find that signing a letter is not equivalent to telling an applicant whom the applicant may contact under section 11(1)(c)(ii).

[para 49.] I note that the FOIP Manual contains a model letter for responding under section 11(1)(c). The Public Body did not use anything equivalent to that letter. To the limited extent that the Public Body could have used the model letter but did not, I agree with the Applicant that the Public Body did not follow the policies and practices for establishing clear procedures for making and processing formal requests for information under the Act, as set out in the FOIP Manual.

[para 50.] However, it would serve no useful purpose to require the Public Body to comply with its duty under section 11(1)(c)(ii) and (iii) now. Nevertheless, I would remind the Public Body that it has duties to fulfill under section 11(1)(c)(ii) and (iii) of the Act, even in the unique circumstances of the ongoing litigation that touched this case.

[para 51.] I find that the Public Body did not breach section 11(1)(c)(i) of the Act when it did not cite all the exceptions to disclosure before the date set for the written inquiry.

[para 52.] After providing a response to an applicant, a public body is not prevented from claiming other exceptions to disclosure under the Act, as long as the applicant is notified of the exceptions in enough time to make representations during an inquiry. The Notice of Written Inquiry notified the Applicant about all the exceptions, which allowed the Applicant sufficient time to make representations. Furthermore, I would consider mandatory ("must") exceptions at any time, even if a public body did not raise them.

[para 53.] Another purpose for notifying the Applicant about exceptions is to give the Applicant an opportunity to meet any burden of proof the

Applicant may have. I have previously discussed such issues of procedural fairness, most notably in Order 97-009. However, I would still review the Public Body's decision, even if the Applicant did not provide a submission.

[para 54.] In this case, the Applicant has a burden of proof only under section 16: see section 67(2). The Public Body otherwise has the burden of proof.

[para 55.] The Public Body's responses to the Applicant's three access requests make it clear that the Public Body is relying on section 4(1)(m) to exclude the records from the application of the Act.

[para 56.] I will discuss section 4(1)(m) in detail later in this Order. For now, it is sufficient to say that section 4(1)(m) raises a "jurisdictional" issue. Practice Note 4, issued by my Office, discusses jurisdictional issues under section 4 of the Act, as follows:

> …Section 4 marks out the jurisdiction of the Act and the standard in applying that jurisdiction should be a standard of correctness. In other words, a record either is or is not subject to the Act: there is no discretion involved.
>
> Public Bodies applying section 4 exclusions may wish to argue, in the alternative, the applicable exceptions to disclosure in the event that section 4 is not applied correctly. This is not a requirement. However, by doing this, the public body will have given notice that, if the record is found to be subject to the Act, exceptions to disclosure under the Act will be applied. Also, by turning their minds to the exceptions early on, there should be a saving in time if the record is found to come under the Act. This will not prejudice the public body nor will it preclude the matter from being remitted to the public body if the jurisdictional argument does not succeed.
>
> Where section 4 jurisdiction is an issue and where the Commissioner finds that the record in question comes within the Act, the normal practice will be to remit the record in question back to the public body to consider it under the Act and respond to the applicant on the basis of the exceptions to disclosure contained in the Act. The normal practice will be to allow the public body the time allowed by section 10 to deal with the record in question.

[para 57.] The Public Body was relying on the jurisdictional argument. Consequently, in its response to the Applicant, it was not necessary that the Public Body notify the Applicant about all the exceptions to disclosure on which the Public Body intended to rely.

[para 58.] Finally, I do not otherwise accept the Applicant's argument that the omissions in the Public Body's response indicate the Public Body's failure to follow the policies and practices for establishing clear procedures for making and processing a formal request for information under the Act.

[para 59.] I am not making excuses for the Public Body, but in the four years that the Act has been in force, this is the first time I have had to deal with a complaint about the Public Body's FOIP processes. I am prepared to consider that the unique circumstances of the Public Body's ongoing litigation with the West Edmonton Mall played a role in its less than adequate FOIP processes in this particular case.

ii. Response as to the search conducted

[para 60.] The Applicant complains that the Public Body did not tell the Applicant about the search it conducted, in responding to the Applicant's three access requests.

[para 61.] In Orders 96-022 and 98-012, I said that there are two components to a proper search: (i) the public body must make every reasonable effort to search for the records requested, and (ii) the public body must inform the applicant in a timely fashion about what it has done.

[para 62.] However, in this case, there is no evidence before me that the Public Body conducted a search on the Applicant's three access requests. I find it unlikely that the Public Body searched, given that the Public Body admitted that its files were with its outside legal counsel for the purpose of the ongoing litigation.

[para 63.] Should the Public Body have searched for responsive records before responding to the Applicant, and then informed the Applicant about the search it conducted?

[para 64.] The Public Body's responses to the Applicant's three access requests make it clear that the Public Body is relying on section 4(1)(m) to exclude the records from the application of the Act. Section 4(1)(m), discussed later in this Order, requires that a record be in the Public Body's custody or control, and that a record not relate to a non-arm's length transaction.

[para 65.] Section 4(1)(m) is unique, in that all the records in the Public Body's custody or control are not subject to the Act (with one exception). Consequently, it is not necessary for the Public Body to conduct a search in order to decide whether records are in its custody or control.

[para 66.] The only time that a record in the Public Body's custody or control is subject to the Act is if the record relates to a non-arm's length transaction, as defined by section 4(3). Again, given the subject matter of the records an applicant has asked for, it is possible for the Public

Body to decide, without conducting a search, whether a record of the kind an applicant seeks relates to a non-arm's length transaction, as defined.

[para 67.] So it is possible that the Public Body's response to an applicant under section 4(1)(m) does not necessarily have to be made after a review of all the records. Compared to other public bodies, the Public Body is uniquely situated in its ability to respond to an applicant under section 4(1)(m), without actually searching for records.

[para 68.] However, once I have asked the Public Body to produce records for my review of the Public Body's decision under section 4(1)(m), it becomes necessary that the Public Body search for responsive records if it has not already done so. Section 54(3) of the Act says that I may ask for records to be produced on 10 days' notice. Given that section 10 of the Act gives the Public Body a 30-day time limit to search for records and respond to an applicant, it is probably in the Public Body's best interests to search for records on an applicant's initial access request, rather than wait until I order production.

[para 69.] Since the Public Body is uniquely situated, as discussed, I find that the Public Body was not required to search for records and to respond to the Applicant about the search it conducted on the Applicant's three original access requests.

c. My requirement to produce records

[para 70.] It is my invariable practice in any review that involves records, to require that a public body produce records to me. In this case, I required the Records to determine whether the Public Body correctly decided that section 4(1)(m) excluded the Records from the application of the Act, and to otherwise determine whether the Public Body responded to the Applicant openly, accurately and completely, as provided by section 9(1).

[para 71.] To assist in that review and to ensure that the Public Body located all the relevant records, my Office asked for an affidavit regarding the Public Body's search for records. The Public Body provided an affidavit from one of its legal counsel who conducted the search.

[para 72.] The Public Body's rebuttal submission claims that the section 9(1) duty to the Applicant must be considered in light of the Public Body's compliance with my directives during the course of the review and inquiry. I disagree.

[para 73.] A public body's duty under section 9(1) is a duty owed solely to an applicant. A public body will have other duties under the Act, such as the duty to provide records to me under section 54, but that duty is not a duty under section 9(1).

[para 74.] The Public Body should not confuse the requirements that my Office placed on the Public Body to produce records under the Act and to provide an affidavit, with the Public Body's duty to the Applicant under section 9(1) of the Act. The two are not one and the same thing. Nevertheless, the two are related in that my review is to ensure that the Public Body has fulfilled its duty to the Applicant under the Act.

[para 75.] Given the unique circumstances of this case, as outlined in the Public Body's affidavit, I find that the Public Body conducted an adequate search for records after I required that records be produced. However, I note what I will call the Public Body's general reluctance to respond to my Office during that process. It appears as though the Public Body approached dealing with my Office in the same cautious manner as would lawyers who are parties to litigation.

4. Conclusion under section 9(1)

[para 76.] I find that the Public Body did not comply with its duty to respond to the Applicant openly, accurately and completely under section 9(1), only in that the Public Body did not comply with section 11(1)(c)(ii) and (iii) of the Act. However, I also find that it would serve no useful purpose to order the Public Body to now comply with its duty to respond to the Applicant under section 11(1)(c)(ii) and (iii).

ISSUE B: Are the records at issue excluded from the application of the Act by section 4(1)(m)?

1. General

[para 77.] Section 4(1)(m) reads:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*
>
> *…*
>
> *(m) a record in the custody or control of a treasury branch other than a record that relates to a non-arm's length transaction*

between the Government of Alberta and another party.

[para 78.] "Non-arm's length transaction" is defined in section 4(3), which reads:

4(3) For the purposes of subsection (1)(m) and (n), a non-arm's length transaction is any transaction that has been approved

(i) by the Executive Council or any of its committees,

(ii) by the Treasury Board or any of its committees, or

(iii) by a member of the Executive Council.

[para 79.] To be excluded from the application of the Act by section 4(1)(m), there must be a "record", the record must be in the "custody or control" of a "treasury branch", and the record must not relate to a "non-arm's length transaction" between the "Government of Alberta" and another party.

2. Is there a "record"?

[para 80.] Section 1(1)(q) of the Act defines "record", as follows:

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 81.] I find that all the Records meet the definition of "record" in this case.

3. Are the records in the "custody or control" of a "treasury branch"?

[para 82.] The Applicant argues that the Records are not excluded from the application of the Act because the records are not in the Public Body's "custody or control". The Applicant argues that, to meet the criterion for "custody or control", the Public Body must have physical possession or control of all the Records at issue. According to the Applicant, possession of duplicates or file copies is not sufficient for a finding of custody or control. The Applicant relies on Order 98-019 to support this argument.

[para 83.] Order 98-019 dealt with an access request made to Alberta Treasury, which was the public body for the purposes of that Order. Alberta Treasury had responsive records that originated from Alberta Treasury Branches. In that Order, I said:

> The records are not in the physical possession of the ATB and therefore cannot be considered to be in the "custody" of the ATB. While the ATB may have physical possession of duplicates or file copies, this is not sufficient. In order to have "custody" of the records, the ATB must have physical possession of the actual records at issue.
>
> Furthermore, the ATB does not have "control" of the records as there is no evidence before me that the ATB has the authority to manage those records. While the ATB may have physical possession of duplicates or file copies of many of the records, this does not give the ATB the authority to manage or, in other words, "control" the records that are in the physical possession of the Public Body.

[para 84.] In my view, the Applicant has misinterpreted Order 98-019. That Order dealt with an access request to Alberta Treasury, a public body that is separate from Alberta Treasury Branches under the Act. The records originating from Alberta Treasury Branches were in the custody of Alberta Treasury as a separate public body. Order 98-019 says that an applicant may obtain access to records originating from Alberta Treasury Branches that are in the custody or control of a public body other than Alberta Treasury Branches.

[para 85.] Order 98-018 has no application to this case, which is an access request made directly to Alberta Treasury Branches, the Public Body. I received the Records from the head office of the Public Body. Therefore, I find that the Records are in the Public Body's custody if not control.

[para 86.] Section 4(1)(m) requires that the records be in the custody or control of a "treasury branch". Can the Public Body, namely, Alberta

Treasury Branches, be considered to be a "treasury branch" for the purposes of section 4(1)(m)?

[para 87.] Section 1(k) of Alberta Treasury Branches Act, S.A. 1997, c. A-37.9, defines "treasury branch" to mean "a treasury branch established under section 10, whether the branch carries on business with the public directly or serves as an administrative or head office". Section 2(1) of that legislation establishes a corporation, consisting of a board of directors, with the name "Alberta Treasury Branches". Under section 10, Alberta Treasury Branches has the power to establish and operate treasury branches.

[para 88.] In my view, the definition of "treasury branch" focuses on the business structure of the Alberta Treasury Branches system, rather than on a particular business location of a treasury branch (i.e., a "treasury branch facility", as defined by section 1(l) of the *Alberta Treasury Branches Act*). Because the Public Body operates the entire system, I do not believe that a treasury branch can be considered to be an entity separate and distinct from the Public Body. It follows that the records produced anywhere within the Alberta Treasury Branches system cannot be considered to be within the custody or control of any particular treasury branch facility.

[para 89.] I conclude that a record in the custody or control of a treasury branch refers to a record located anywhere within the Alberta Treasury Branches system, including a record located at the head office of the Public Body.

[para 90.] I further find that the Public Body is a treasury branch for the purposes of section 4(1)(m). I am reinforced in this view by section 36(3) of the *Alberta Treasury Branches Act*, which reads:

> *36(3) A reference in any enactment, agreement, document, regulation or order to "treasury branch", "Treasury Branch", "Alberta treasury branch", "Alberta Treasury Branch", "Province of Alberta Treasury Branch", or any other designation determined by the Minister, shall be read as a reference to "Alberta Treasury Branches".*

[para 91.] Consequently, the criterion under section 4(1)(m) that the Records be in the custody or control of a treasury branch has been met.

4. Do the records relate to a "non-arm's length transaction" between the "Government of Alberta" and another party?

a. Preliminary matter

[para 92.] The Applicant wants access to the Public Body's affidavit. The Applicant says that the Applicant must be given access, in order to fully respond to the Public Body's claim that the onus is on the Applicant to establish that the Public Body's refinancing of the West Edmonton Mall was a non-arm's length transaction.

[para 93.] However, the onus is not on the Applicant, but on the Public Body, as set out in the Notice of Written Inquiry. Furthermore, the onus does not shift to the Applicant. I review the Public Body's decision, and the burden remains on the Public Body.

[para 94.] Finally, the Applicant has no right of access to the affidavit, as provided by section 66(3) of the Act. In my view, there are no special circumstances entitling the Applicant to access.

b. Interpretation of section 4(1)(m)

[para 95.] The Applicant argues that the Records relate to a non-arm's length transaction. By "transaction", I take the Applicant to mean the Public Body's October 31, 1994 refinancing of the West Edmonton Mall in the form of a $353 million loan guarantee and a $65 million second mortgage.

[para 96.] Before dealing with whether there is a "non-arm's length" transaction, I first want to deal with whether the transaction that occurred in 1994 can be said to be between the "Government of Alberta" and another party, as required by section 4(1)(m). Since the transaction was between the Public Body and the West Edmonton Mall, among others, I must decide whether, in 1994, the Public Body could be considered to be the "Government of Alberta".

[para 97.] Section 25(1)(f.1) of the *Interpretation Act*, R.S.A. 1980, c. I-7, defines "Government of Alberta" to mean "Her Majesty in right of Alberta", sometimes referred to as "the Crown" (see also section 25(1)(i) of the *Interpretation Act*, which refers to "the Crown" in the context of "Her Majesty").

[para 98.] Section 2 of the *Treasury Branches Act*, R.S.A. 1980, c. T-7, as that section existed in 1994, set out the status of the Public Body at that time. That section reads:

2(1) The Minister may, on behalf of the Crown, establish and operate branches of the Treasury Department at any places in Alberta that he selects.

(2) A branch of the Treasury Department established and operated pursuant to subsection (1) shall be called a "Province of Alberta Treasury Branch".

(3) The Superintendent, the employees of the treasury branches and that part of the staff establishment of the Treasury Department assigned to the general administration and supervision of the treasury branches are a division of the Treasury Department called the "Province of Alberta Treasury Branches".

(4) The powers, duties and functions conferred or imposed on the Minister or the Superintendent by this Act or by any contract, arrangement or other transaction made pursuant to this Act

> *(a) may be exercised and performed in the name of the Province of Alberta Treasury Branches or in the name of a Province of Alberta Treasury Branch, and*
>
> *(b) shall be deemed to be exercised and performed on behalf of the Crown,*

whether those powers, duties and functions are exercised or performed by the Minister or the Superintendent or any employee of the treasury branches or an agent of the Minister.

[para 99.] Therefore, given section 2(4)(b) above, I find that, in 1994, the Public Body could be considered to be the "Government of Alberta" for the purposes of section 4(1)(m).

[para 100.] The Applicant says that the Records are not excluded from the application of the Act because the Records relate to a "non-arm's length transaction", that is, a transaction that was approved, as provided by section 4(3).

[para 101.] The Applicant argues that the February 14, 1994 decision by the Agenda and Priorities Committee not to finalize the ATB/Gentra deal, as summarized in the Premier's February 22, 1994 memo to the Deputy

Premier and the Provincial Treasurer, is evidence that the Government of Alberta approved a transaction that resulted in the October 31, 1994 refinancing agreement.

[para 102.] The February 22, 1994 memo to which the Applicant refers has been publicly released almost verbatim in the Auditor General's Report. The Auditor General's Report contains the following quotation from that memo:

> …[I]t was clear that an Alberta solution would be preferable relative to West Edmonton Mall. We need to protect the Alberta Treasury Branch (ATB) loans and, at the same time, ensure that the potential of West Edmonton Mall can be maximized for the economic benefit of Alberta. It would be most helpful if Alberta Treasury Branch and Triple Five undertook very serious discussions to find a positive resolution to this matter. As we discussed, I would ask you to follow up with Alberta Treasury Branch to make sure there is "good faith" and good will in discussions with West Edmonton Mall and/or First Boston. Our February 14th meeting agreed that no agreement between Alberta Treasury Branch and Gentra should be finalized.

[para 103.] In my view, the above quotation from the February 22, 1994 memo is evidence that one of the persons or bodies listed in section 4(3)(a) to (c) (such as the Executive Council, any of its committees, or a member of the Executive Council) did not approve an agreement between the Public Body and Gentra. However, disapproval of that agreement does not imply that any of the persons or bodies listed in section 4(3)(a) to (c) approved the Public Body's refinancing of the West Edmonton Mall. In other words, disapproval of one transaction does not equate with approval of another transaction for the purposes of section 4(3) of the Act.

[para 104.] For a transaction to be "approved", as required by section 4(3), it seems to me that there must be some evidence that the transaction has been positively consented to or agreed upon by any of the persons or bodies listed in section 4(3)(a) to (c). There is no such evidence before me, nor did I find any evidence contained in the Records. While I agree with the Auditor General that there was the capacity for elected officials to influence an outcome, I find that the assertion of "influence" does not equate with a transaction that has been "approved" for the purposes of section 4(3).

[para 105.] As there is no approval of a transaction by any of those persons or bodies listed in section 4(3)(a) to (c), there is not a non-arm's length transaction.

[para 106.] Therefore, I find that the Records do not relate to a non-arm's length transaction between the Government of Alberta and another party.

5. Conclusion under section 4(1)(m)

[para 107.] As the Records meet all the criteria for section 4(1)(m), I find that the Records are excluded from the application of the Act by section 4(1)(m). Consequently, I have no jurisdiction over the Records. The Applicant cannot obtain access to the Records by making an access request to the Public Body under the Act.

ISSUE C: If the records are not excluded from the application of the Act by section 4(1)(m), did the Public Body correctly apply various exceptions under the Act?

[para 108.] I have found that the Records are excluded from the application of the Act by section 4(1)(m). Therefore, there can be no issue as to whether the Public Body correctly applied various exceptions under the Act to the Records.

ISSUE D: Does section 31(1)(b) (disclosure in the public interest) require the Public Body to disclose the information?

[para 109.] I have found that the Records are excluded from the application of the Act by section 4(1)(m). Therefore, there can be no issue as to whether section 31(1)(b) applies to require the Public Body to disclose the information.

V. ORDER

[para 110.] I make the following Order under section 68 of the Act.

A. Application of section 9(1)

[para 111.] The Public Body did not comply with its duty to respond to the Applicant openly, accurately and completely under section 9(1), only in that the Public Body did not comply with section 11(1)(c)(ii) and (iii) of the Act. However, it would serve no useful purpose to order the Public Body to now comply with its duty to respond to the Applicant under section 11(1)(c)(ii) and (iii), and I make no such order.

B. Application of section 4(1)(m)

[para 112.] The Records are excluded from the application of the Act by section 4(1)(m). Therefore, I have no jurisdiction over the Records. The Applicant cannot obtain access to the Records by making an access request to the Public Body under the Act.

C. Application of various exceptions under the Act

[para 113.] As the Records are excluded from the application of the Act by section 4(1)(m), there can be no issue as to whether the Public Body correctly applied various exceptions under the Act to the Records.

D. Application of section 31(1)(b)

[para 114.] As the Records are excluded from the application of the Act by section 4(1)(m), there can be no issue as to whether section 31(1)(b) applies to require the Public Body to disclose the information.

Robert C. Clark
Information and Privacy Commissioner