

# **ALBERTA**

## **INFORMATION AND PRIVACY COMMISSIONER**

### **ORDER 99-040**

August 22, 2000

#### **ALBERTA TREASURY**

Review Number 1659

#### **I. BACKGROUND**

[para. 1.] The Alberta Pacific Pulp Mill Project (“Al-Pac”) was formed to construct and operate a pulp and paper mill in Athabasca. There were three partners in the Al-Pac Pulp Mill Joint Venture including Crestbrook Forest Industries Ltd. (“Crestbrook”). In 1991, the Government of Alberta approved a \$250 million loan through the Alberta Heritage Savings Trust Fund to facilitate the construction of the Al-Pac pulp mill.

[para. 2.] In 1997, there was correspondence between the Government of Alberta and Crestbrook regarding possible settlement of this loan. Crestbrook acted on behalf of the joint venture partners. The proposed acquisition of the loan by Crestbrook was never completed.

[para. 3.] On March 3, 1998, the Government of Alberta issued a news release announcing that it had accepted a different offer to buy back the province’s interest in Al-Pac for a total consideration of \$260 million. A May 15, 1998, news release announced that the Goepel Shields Valuation of the Al-Pac pulp mill was being publicly released that day as the sale of the loan had been finalized.

[para. 4.] In 1987, the Government of Alberta gave Millar Western Industries Ltd. ("Millar Western") a \$120 million loan from the Alberta Heritage Savings Trust Fund for the construction of the Whitecourt pulp mill. Although loan principal and interest were to be paid out of project cash flow, no payments of interest or principal were made. The outstanding loan to Millar Western with accumulated interest was about \$272 million, although the value of this loan had been written down.

[para. 5.] In 1995, the Government of Alberta entered into discussions to convert Millar Western's quota interests to a Forest Management Agreement ("FMA"). In April 1997, it was anticipated that the FMA would be approved by an Order in Council later that month.

[para. 6.] On April 1, 1997, the Government of Alberta issued a news release announcing that it had entered into agreements to sell its investment in Millar Western to end its financial involvement with Millar Western's Whitecourt pulp mill. To finalize these agreements, approval was required by Cabinet and the Millar Western Board of Directors. To assist the government to get the best value that it could from this investment, TD Securities Inc. prepared an independent valuation of the province's interest in Millar Western.

[para. 7.] On October 5, 1998, Alberta Treasury (the "Public Body") received a request from the Applicant for various documents. The Applicant's original request consisted of the following seven items:

"Please send us a copy of the following:

1. All documents and correspondence relating to the proposed and subsequent write-off of \$145 M of the ALPAC loan and all correspondence and documents relating to the reduction in the size of the ALPAC F.M.A.
2. All correspondence and documents relating to the calculation of the dollar value of the forest that was deleted from the ALPAC F.M.A.
3. Our request includes all documents and correspondence received from other Depts. and those requested or obtained directly by the Treas. Depart. from consultants and/or advisors from the private sector.
4. In 1997 there was a write-off in the Heritage Savings and Trust Fund (sic) of a loan receivable from Millar Western in the amount of approx. \$250 M. In previous years there were write-downs of this account. Please provide us with all correspondence and documents relating to these transactions including correspondence with the third parties and between govt. depts. and agencies and the Auditor General and consultants. We are looking for everything including memos. etc.etc.
5. At about the time of the write-off Millar Western was granted an F.M.A. Please provide us with all documents and correspondence and memo of any nature relating to this item.
6. All correspondence and documents of any nature relating to the calculation of the dollar value and size of the Millar F.M.A.
7. Referring to our #1 above on ALPAC, we are referring to everything as detailed in our #4 above relating to Millar, including documents supporting the note to the Audited Statements of the H.S. + TF as at Mar. 31/97 and Mar. 31/98."

[para. 8.] The Applicant and the Public Body agreed to divide the original request into two requests as confirmed in a letter dated October 6, 1998. The parts of the Applicant's request that relate to Al-Pac were designated as Request #98-A-00126, which corresponds to items one, two, three and seven of the Applicant's request. The parts of the Applicant's request that relate to Millar Western were designated as Request #98-A-00127, which corresponds to items four, five and six of the Applicant's request.

[para. 9.] The Applicant later revised both of these requests, due to fee issues. Request #98-A-00126 (Al-Pac) was revised to limit the request to documents relating to the time period of January 1, 1997 to October 4, 1998. The Applicant and the Public Body agreed to include only the initial drafts of the Goepel Shields Valuation and to exclude from this request all other drafts of this valuation, the final valuation report and the Goepel Shields March 1998 fairness opinion letter. These changes to Request #98-A-00126 are described in a letter dated October 20, 1998.

[para. 10.] Request #98-A-00127 (Millar Western) was also revised to limit the request to documents relating to the time periods from April 1, 1993 to June 30, 1994 and from October 1, 1996 to October 4, 1998. The Applicant and the Public Body agreed to exclude from this request drafts of the Forest Management Agreement ("FMA"), copies of the TD Securities letter, the Option Agreement and Millar Western's prospectus. These changes to the request are described in another letter dated October 20, 1998.

[para. 11.] On December 18, 1998, the Public Body requested the views of Crestbrook (the "Third Party") regarding the disclosure of documents in the files pertaining to Crestbrook. Crestbrook did not respond to this request. The Public Body says that Crestbrook has been asked this question several times before and has always said that the records should not be disclosed.

[para. 12.] On December 18, 1998, the Public Body requested the views of the Auditor General (an "Affected Party") regarding release of the Auditor General's records. The Auditor General reviewed the records and said that section 4(1)(c) applies and the records should not be disclosed.

[para. 13.] On December 18, 1998, the Public Body requested the views of Alberta Environment (an "Affected Party") regarding release of Alberta Environment's records. Alberta Environment reviewed the records and recommended removing one of the records under section 4(1)(l) and severing portions of one of the records under section 23(1)(a) and (c) of the Act.

[para. 14.] On December 18, 1998, the Public Body requested the views of Millar Western regarding release of the Millar Western records. Millar Western did not reply to this letter from the Public Body. In a letter dated January 21, 1999, the Public Body advised Millar Western of its decision to give the Applicant access to Millar Western's records.

[para. 15.] However, notwithstanding this letter from the Public Body, the Public Body says in its submission that records of Millar Western were not disclosed on the basis of an earlier letter from Millar Western that refused consent to disclosure of similar records. The appendix to the Public Body's submission includes a February 3, 1998, letter from Millar Western to the Public Body that refused consent to disclosure of similar records.

[para. 16.] The Public Body reconsidered the request and later released some additional parts of records to the Applicant. The additional information released was the last paragraph of page B162, the first three paragraphs of page B163 and the second paragraph from the bottom of page B229.

[para. 17.] On July 5, 1999, the Applicant requested a review of the Public Body's decision in regard to access requests that were refused. Mediation was authorized but was not successful.

[para. 18.] On November 3, 1999, the parties were notified that both of the requests for review were set down as one written inquiry. The

parties to this inquiry are the Applicant and:

- the Public Body – Alberta Treasury
- the Third Party – Crestbrook Forest Industries Ltd.
- the Affected Party - Auditor General
- the Affected Party - Alberta Environment

I received initial submissions from the Applicant, the Public Body and both the Affected Parties.

[para. 19.] The Public Body applied sections 4(1)(c), 4(1)(j), 4(1)(l), 15, 16, 21(1), 23(1), 24(1) and 26(1) as authority to withhold records or information. The Public Body also considered whether section 31(1)(b) applies to the information.

[para. 20.] The Public Body has claimed exceptions in three places - in the exception list, in the list at the beginning of each section of the submission and throughout the body of the submission. I have

compared these exceptions and they are all slightly different. Although this has been difficult to sort out, I have considered all exceptions claimed regardless of where the Public Body has made the claim.

[para. 21.] This Order proceeds on the basis of the *Freedom of Information and Protection of Privacy Act* (the “Act”) as it existed before the amendments came into force on May 19, 1999.

## **II. RECORDS AT ISSUE**

[para. 22.] The records at issue are divided into two requests – Request #98-A-00126 and Request #98-A-00127.

[para. 23.] Request #98-A-00126 relates to Al-Pac and consists of records numbered from A1 to A161. Request #98-A-00127 relates to Millar Western and consists of records numbered from B1 to B302.

[para. 24.] The records at issue consist of 463 pages that relate to various aspects of loans, FMAs, negotiations, consultants and advisors involved with Al-Pac and Millar Western. I note that the Public Body has withheld information on 269 pages of the 463 pages of records.

[para. 25.] The Public Body lists a number of pages in its exception list that are described as “Third Party Documents”; that is, pages B16-B18, B25-B26, B37-B55 (listed as B36 to B55, but I believe that B36 should read B37), B252-B253 and B256. I note that these are Millar Western documents that have been released to the Applicant. As these pages have already been released, I do not find it necessary to consider them.

[para. 26.] Some of the records at issue deal with the negotiations and the proposed settlement of the loan between Crestbrook as a partner in the Al-Pac joint venture and the Government of Alberta. Some of the records at issue deal with the valuation of Millar Western, Cabinet approval and the FMA.

## **III. ISSUES**

[para. 27.] There are nine issues in this inquiry:

- Issue A: Which information or records are responsive?
- Issue B: Do sections 4(1)(c) or 4(1)(j) or 4(1)(l) exclude certain records?

- Issue C: Did the Public Body correctly apply section 15?
- Issue D: Did the Public Body correctly apply section 16?
- Issue E: Did the Public Body correctly apply section 21(1)?
- Issue F: Did the Public Body correctly apply section 23(1) and properly exercise its discretion?
- Issue G: Did the Public Body correctly apply section 24(1) and properly exercise its discretion?
- Issue H: Did the Public Body correctly apply section 26(1) and properly exercise its discretion?
- Issue I: Does section 31(1)(b) require the Public Body to disclose the information?

#### **IV. DISCUSSION OF THE ISSUES**

##### **Issue A: Which information or records are responsive?**

[para. 28.] The Public Body says that certain information or records are non-responsive such that the Public Body may remove that information or, where the record is not responsive, simply not provide that record to the Applicant. I may nevertheless review the Public Body's decision as to what is non-responsive information or records.

##### **1. The information or records**

[para. 29.] The Public Body originally included B162 (last two paragraphs) and B163 (first three paragraphs) in the category of non-responsive information. However, I note that further information has been released on pages B162 and B163. The first three paragraphs have been released on page B163, so there is no further information to be considered on page B163. The last paragraph has been released on page B162, so only the second last paragraph remains to be considered.

[para. 30.] Therefore, I will consider the following information or pages that the Public Body says are non-responsive:

*Request Number #98-A-00126 (Al-Pac):*  
Page – A46 (part); and  
Computer file address footer (“footers”) only on pages - A45, A107-  
A110.

*Request Number #98-A-00127 (Millar Western):*

Pages – B4, B5 (part), B78 (part), B162 (second last paragraph), B191-B200, B201 (part), B221-B222 (parts), B223, B224 (part), B226 (part), B232-B233 (parts), B234, B235 (part), B237 (part), B293 (part) and B294 (part); and

Footers only on pages - B4-B5, B70, B78, B201, B210-B213, B218, B221-B226 and B232-B237.

## **2. Are the foregoing pages or information responsive?**

[para. 31.] In its submission, the Public Body says that the information removed from pages A46 (part), B162 (last two paragraphs), B163 (first three paragraphs), B191-B200, B293 (part) and B294 (part) is information about third parties that is unrelated to the requests. The Public Body also says that the computer file address footers ("footers") are unrelated to the request.

[para. 32.] The footers are located at the bottom of the pages and contain a file description and the print date and time. I note that this information is difficult to read or illegible on a number of these pages. This information was disclosed on some pages but severed on others. The Applicant has not addressed the Public Body's categorization of this information in the Applicant's submission.

[para. 33.] In Order 97-020, I said that "responsiveness" means anything that is reasonably related to an applicant's request for access. A public body determines whether "information" or "records" are relevant to the request. It is necessary to examine an applicant's request to determine whether "records" or "information" are relevant to the request.

[para. 34.] The Applicant has requested "all documents and correspondence" and memos relating to the write-off of the Al-Pac and Millar Western loans, calculations relating to the Al-Pac and Millar Western FMAs and Treasury Department consultants and advisors from the private sector.

[para. 35.] In this situation, the Applicant has requested "records". Therefore, where copies of memoranda are requested, the entire memorandum is responsive when the subject of the memorandum is what the Applicant requested. In Order 99-002, I said that when determining whether or not a record is responsive, it is better to take a broader view than a narrower view. Therefore, I find that the footers are responsive.

[para. 36.] I find that pages A46, B162 (second last paragraph), B293 (part) and B294 (part) are non-responsive. However, I find that the information contained in the remaining pages is responsive.

### **3. Conclusion**

[para. 37.] In summary, the Public Body has correctly categorized the following information as being non-responsive:

*Request Number #98-A-00126 (Al-Pac):*  
Page - A46 (part); and

*Request Number #98-A-00127 (Millar Western):*  
Pages – B162 (second last paragraph), B293 (part) and B294 (part).

The Public Body may remove the information from the foregoing pages as being non-responsive to the request.

[para. 38.] However, the Public Body has not correctly categorized the following information, as this information is responsive:

*Request Number #98-A-00126 (Al-Pac):*  
Footers only on pages - A45, A107-A110; and

*Request Number #98-A-00127 (Millar Western):*  
Pages - B4, B5 (part), B78 (part), B191-B200, B201 (part), B221-B222 (parts), B223, B224 (part), B226 (part), B232-B233 (parts), B234, B235 (part) and B237 (part), and  
Footers only on pages - B4-B5, B70, B78, B201, B210-B213, B218, B221-B226 and B232-B237.

[para. 39.] As other exceptions have not been claimed, the footers on pages A45, A110, B70, B201, B210-B213, B218, B225 and B236 must be disclosed to the Applicant. As other exceptions have been claimed the information on the remainder of the above pages remains to be further considered under the Act.

### **Issue B: Do sections 4(1)(c) or 4(1)(j) or 4(1)(l) exclude certain records?**

[para. 40.] If a record falls under section 4 of the Act, the Act does not apply to the record. Consequently, there is no obligation on a public body to give an applicant access to the record pursuant to the Act.



## 1. Application of section 4(1)(c)

[para. 41.] The Public Body says that section 4(1)(c) applies to the following:

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A100 to A106.

[para. 42.] Section 4(1)(c) says:

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

- a. The document must constitute a record;
- b. The record must be created by, or be in the custody of or under the control of an officer of the Legislature; and
- c. The record must relate to that officer's functions under an Act of Alberta.

### **a. Do the documents constitute a "record"?**

[para. 44.] The word "record" is defined in section 1(1)(q) of the Act, which says:

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. 45.] After reviewing pages A100 to A106, it is my opinion that these pages are a letter and that this letter constitutes a "record" under the Act.

### **b. Is the record created by, or in the custody of or under the control of an officer of the Legislature?**

[para. 46.] Section 1(1)(m) of the Act defines an officer of the Legislature as:

1(1) In this Act,

...

(m) officer of the Legislature means the Auditor General, the Ombudsman, the Chief Electoral Officer, the Ethics Commissioner or the Information and Privacy Commissioner;

[para. 47.] The Public Body says that pages A100 to A106 were created by the Auditor General of Alberta within the scope and duties of that office, and that the Auditor General is an officer of the Legislature.

[para. 48.] The Public Body asked the Auditor General for his opinion regarding pages A100 to A106. The Auditor General is an Affected Party and also provided a submission in these proceedings. In his submission, the Auditor General says that the Auditor General is an officer of the Legislature within the meaning of section 1(1)(m) of the Act and that the Auditor General created these pages. The Auditor General says that section 4(1)(c) applies and that pages A100 to A106 should not be disclosed.

[para. 49.] I agree that this record was created by the Auditor General and therefore was created by an officer of the Legislature.

**c. Does the record relate to that officer's functions under an Act of Alberta?**

[para. 50.] The Auditor General has a number of duties that are described under the *Auditor General Act*, R.S.A. 1980, c. A-49, as amended, including performing audits, performing special duties assigned by the Assembly and preparing audit reports and opinions. In his submission, the Auditor General says that pages A100 to A106 were created as part of the duties of the Auditor General and that this record should not be disclosed.

[para. 51.] After carefully reviewing the record at issue under section 4(1)(c), it is my opinion that all of these pages relate to the Auditor General's function under the *Auditor General Act*.

**d. Conclusion under section 4(1)(c)**

[para. 52.] Pages A100 to A106 are excluded from the application of the Act by section 4(1)(c). As a result, I have no jurisdiction over that record. I cannot order the Public Body to withhold or give access to that record.

## **2. Application of section 4(1)(j)**

[para. 53.] The Public Body initially applied section 4(1)(j) to page B35, but then withdrew this claim. For this reason, I do not find it necessary to consider whether section 4(1)(j) applies to page B35.

## **3. Application of section 4(1)(l)**

[para. 54.] The Public Body applied section 4(1)(l) to the following:

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A39-A41 and A70-A72.

*Request Number #98-A-00127 (Millar Western):*  
Pages - B27, B28 and B35.

### **a. General**

[para. 55.] The relevant parts of section 4(1)(l) read:

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;

### **b. Does section 4(1)(l) apply?**

[para. 56.] I discussed the interpretation of section 4(1)(l) in Order 97-007. I said that in order for a record to fall outside of 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 to be excluded from the application of the Act.

[para. 57.] In Order 97-007, 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 only among persons listed in section 4(1)(l)(i) to (iii).

[para. 58.] The Public Body says that pages A39 to A41 are a memorandum created by and sent from a member of the Executive Council to another member of the Executive Council as well as to Members of the Legislative Assembly. The Public Body says that pages A70 to A72 are a copy of a memorandum and a two-page attachment that was created by and sent from a member of the Executive Council to a Member of the Legislative Assembly. Alberta Environment, an Affected Party in these proceedings, says in its submission that pages A70 to A72 fall under section 4(1)(l) and are excluded from the application of the Act.

[para. 59.] I have reviewed pages A39 to A41 and pages A70 to A72. I am satisfied that these records were created by and were sent from and to the classes of persons listed in section 4(1)(l)(i) to (iii). Consequently, these pages are excluded from the Act and I have no jurisdiction over them. Furthermore, in Order 99-013, I considered pages A70 to A72 and I found that these pages fell within section 4(1)(l) of the Act and were excluded from the application of the Act. I have no reason to make a different finding in this situation.

[para. 60.] Pages B27, B28 and B35 were all communications between persons in the office of a member of the Executive Council and in the office of a Member of the Legislative Assembly. The Public Body says that page B27 is a memorandum created by and sent from an individual in the office of a member of the Executive Council to an individual in the office of a Member of the Legislative Assembly. The Public Body says that page B28 is a draft of page B27.

[para. 61.] Page B35 is a facsimile transmission that the Public Body says was created by and sent from the office of a Member of the Legislative Assembly to the office of a member of the Executive Council. The Public Body says that the individuals that created, sent and received pages B27, B28 and B35 did so in their official capacity on behalf of the member of the Executive Council or on behalf of the Member of the Legislative Assembly.

[para. 62.] 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), that either the record must indicate that the individual is

acting on that person's behalf, or that this must be evident in some other way.

[para. 63.] I have carefully reviewed page B35. I am satisfied from the content and the context of this communication that this record was created by and sent from a person acting in an official capacity and on behalf of a Member of the Legislative Assembly. Additionally, this record was sent to a person acting in an official capacity on behalf of a member of the Executive Council. Therefore, I find that page B35 is excluded from the application of the Act.

[para. 64.] Page B28 is a draft of page B27. In Order 96-020, I said that the phrase "is to be sent" in section 4(1)(l) could be applied to drafts of records, and that the drafts were excluded from the Act. Pages B27 and B28 were prepared in response to page B35 and were communications between the same individuals as were involved in page B35. For the same reasons as for page B35, I find that pages B27 and B28 meet the requirements of section 4(1)(l) and are excluded from the Act.

### **c. Conclusion under section 4(1)(l)**

[para. 65.] Pages A39 to A41, A70 to A72, B27, B28 and B35 are excluded from the application of the Act by section 4(1)(l). As a result, I have no jurisdiction over those records. I cannot order the Public Body to withhold or give access to those records.

### **Issue C: Did the Public Body correctly apply section 15?**

[para. 66.] The Public Body says that section 15(1) of the Act provides the authority to withhold some of the information that was not disclosed. Section 15 is a mandatory ("must") section of the Act. If section 15 applies, a public body does not have a choice and must refuse to disclose the information.

[para. 67.] The Public Body has refused to disclose the information. Consequently, the burden of proof rests with the Public Body, as set out in section 67(1). I have said in previous orders that a public body may rely on representations from third parties to meet the requirements of section 15(1).

#### **1. The records**

[para. 68.] The Public Body says that section 15 applies to the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages – A46 (part), A57–A64, A66–A67, A88 (part), A90 (part), A115 (part), A116–120, A122, A123 (part), A127 (part), A128–A132, A134, A135 (part), A139 (part), A140–A144, A146, A147 (part) and A158 (part); and

*Request Number #98-A-00127 (Millar Western):*

Pages - B78 (part), B80 (part), B81 (part), B94 (part), B98 (part), B101 (part), B102 (part), B112, B114–B117, B119, B121–B122, B124–B125, B127–B138, B162 (second last paragraph), B164 (part), B167–B168 (part), B170–B172 (part), B175, B177–B179, B181–B182, B184–B185, B187–B190, B191–B200, B224 (part), B226 (part), B227 (part), B235 (part), B237 (part), B238 (part), B239 (part), B240 (part), B268 (parts of third last and last paragraph), B269 (part), B271 (first paragraph), B272 (part), B293 (part) and B297–B298 (parts); and  
Footers only on pages - B78, B224, B226, B235 and B237.

[para. 69.] The Public Body claimed section 15 in the event that certain records were found to be responsive. I found that the information withheld on pages A46, B162 (second last paragraph) and B293 was non-responsive, so I will not consider this information under section 15.

[para. 70.] I found that pages B78, B191 to B200, B224, B226, B235 and B237 and the footers on pages B78, B224, B226, B235 and B237 were responsive and therefore I will consider these pages under section 15. The Public Body claims section 15 for pages A57 to A64, B239 and B240 if section 21 does not apply. As section 15 is a mandatory section that has been claimed for these pages, I will consider pages A57 to A64, B239 and B240 now under section 15.

[para. 71.] In summary, the pages that I will consider under section 15 are as follows:

*Request Number #98-A-00126 (Al-Pac):*

Pages – A57–A64, A66–A67, A88 (part), A90 (part), A115 (part), A116–120, A122, A123 (part), A127 (part), A128–A132, A134, A135 (part), A139 (part), A140–A144, A146, A147 (part) and A158 (part); and

*Request Number #98-A-00127 (Millar Western):*

Pages - B78 (part), B80 (part), B81 (part), B94 (part), B98 (part), B101 (part), B102 (part), B112, B114–B117, B119, B121–B122, B124–B125, B127–B138, B164 (part), B167–B168 (part), B170–B172 (part), B175, B177–B179, B181–B182, B184–B185, B187–B190, B191–B200, B224 (part), B226 (part), B227 (part), B235

(part), B237 (part), B238 (part), B239 (part), B240 (part), B268 (parts of third last and last paragraph), B269 (part), B271 (first paragraph), B272 (part) and B297-B298 (parts), and Footers only on pages - B78, B224, B226, B235 and B237.

[para. 72.] The Public Body says that most of the foregoing pages relating to Al-Pac were involved in the Goepel Shields reports. Other Al-Pac records were memos prepared for Cabinet meetings or received by the Public Body from Crestbrook.

[para. 73.] The Public Body says that pages A57 to A64 are attachments to a draft memorandum prepared for a Cabinet meeting. Pages A66 and A67 are a memorandum and attachment sent from Crestbrook to the Public Body.

[para. 74.] The Public Body says that pages A88 to A90 are part of the Goepel Shields Project Al-Pac Preliminary Report dated July 30, 1997, and that pages A115 to A158 are included in the Goepel Shields Project Al-Pac Reports. I note that pages A115 to A158 are entitled "Project Al-Pac Discounted Cash Flow Analysis" and that this is an Alberta Treasury document.

[para. 75.] I note that the Public Body has already disclosed the information on pages A123, A135 and A147 that relates to the published price of pulp in United States dollars, the published price of pulp in Canadian dollars and the Canadian and United States exchange rate, as directed in Order 98-015. The Public Body has also disclosed information regarding the loan formula in accordance with Order 98-013. I note that the short form of the final TD Securities Inc. valuation report has been made public.

[para. 76.] The Public Body says that the records relating to Millar Western were obtained by the Public Body for purposes of administration of the loan and for exit negotiations. The Public Body says that the Public Body and others created the records about Millar Western's business affairs. The Public Body says that section 15(1) applies to this information as the information was obtained from a third party with the expectation of confidentiality that accompanies the borrower-lender relationship. The Public Body describes those records as follows.

[para. 77.] The Public Body says that the severed parts of pages B78, B80, B81, B239 and B240 contain financial and commercial information about third parties and are part of a Cabinet submission. The Public Body says that the severed parts of other pages are drafts of this Cabinet submission. For example pages B224, B235, B268 and B269 are drafts

of page B78; pages B226, B237 and B271 are drafts of page B80; and pages B227, B238 and B272 are drafts of page B81.

[para. 78.] The other major category of information involved in this request is the TD Securities Inc. valuation report. Pages B92 to B103 are the long form of the report, which has been disclosed with severing to the Applicant. Pages B104 to B108 are the short form of the report. These pages have already been made public. Pages B109 to B138 are the appendices to the report, which have been made available to the Applicant with extensive severing. Pages B161 to B173 are a draft of the long form of the report and pages B174 to B190 are a draft of the appendices to the report.

[para. 79.] The Public Body says that pages B297 and B298 are from the valuation file, and that disclosure of the information severed from these two pages would reveal confidential information about cash flow and banking arrangements of Millar Western.

## **2. General**

[para. 80.] The relevant parts of section 15(1) read:

15(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

.....

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, explicitly or implicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

[para. 81.] For a Public Body to withhold a record under section 15(1), the Public Body must ensure that the record fulfills the criteria under sections 15(1)(a) and (b) and (c). The information must meet all of the following three criteria:

- a. The information would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (section 15(1)(a));
- b. The information was supplied, explicitly or implicitly, in confidence (section 15(1)(b)); and



- c. The disclosure of the information could reasonably be expected to bring about one of the outcomes listed in section 15(1)(c).

[para. 82.] It must also be kept in mind that, even when the information meets all of the criteria set out in section 15(1), the information must be disclosed if section 15(3) applies.

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

#### **a. Would the information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party?**

[para. 83.] The Public Body says that the foregoing pages either contain or would reveal financial or commercial information of a third party.

[para. 84.] I have discussed the interpretation of “commercial” and “financial” information in numerous Orders (see, for example, Orders 96-012, 96-013, 96-018, 97-013, 98-006, 98-013, 98-015, 99-003, 99-007 and 99-017). In Order 96-018, I said that “financial information” includes information regarding the monetary resources of a third party. In Order 96-013, I said that “commercial information” relates to the “buying or selling, or exchange of merchandise or services”, among other things.

[para. 85.] I note that the foregoing pages in Request #98-A-000126 (Al-Pac) contain a wide variety of commercial and financial information, such as wood volume forecasts, estimated value of lumber operations, cash-flow before interest and principal payments, income statements, assets and liabilities, financial position, debt repayment and interest statements and assumptions regarding financial status of third parties as well as a draft contract.

[para. 86.] I also note that the foregoing pages in Request #98-A-000127 (Millar Western) contain a wide variety of commercial and financial information about third parties. The information includes offers and make-up of funds, bank debts, loans and banking arrangements, assessment of worth, investments of third parties, sales contracts with third parties and details of cash-flow, balance sheets and financial position of the third parties.

[para. 87.] I have carefully reviewed all of the foregoing pages. I find that most of these pages contain or would reveal the commercial or financial information of a third party in accordance with section 15(1)(a)(ii).

[para. 88.] However, I find that the information withheld on pages A57 to A64, B239 and B240 and in the footers on pages B78, B224, B226, B235 and B237 does not fall within section 15(1)(a). Pages A57 to A64, B239 and B240 are part of Cabinet submissions and do not contain or reveal commercial or financial information of a third party.

[para. 89.] Having found that the information withheld in pages A57 to A64, B239 and B240 and in the footers on pages B78, B224, B226, B235 and B237 is not the financial or commercial information of a third party and does not fall within section 15(1)(a), I do not find it necessary to consider these pages under sections 15(1)(b) and (c).

[para. 90.] I will consider pages A57 to A64, B239 and B240 and the footers on pages B226 and B237 under other exceptions of the Act. However, as other exceptions have not been claimed for the footers on pages B78, B224 and B235, this information must be disclosed to the Applicant.

**b. Was the information supplied, explicitly or implicitly, in confidence?**

[para. 91.] The Public Body says that all of the information contained in the foregoing pages was supplied either explicitly or implicitly on a confidential basis. The Public Body says that some of the information was provided explicitly in confidence; for example, page A67 is stamped “confidential”.

[para. 92.] The Public Body says that it is evident that the information contained in other pages was intended to be confidential based upon a review of the content of the pages. For example, financial statements are normally required and provided as a condition of a loan agreement with the expectation of confidentiality in the borrower-lender relationship.

[para. 93.] I note that some of these pages contain analyses conducted by employees of the Public Body, and so were not supplied directly by a third party. The Public Body says that this information is inextricably linked with information supplied by the third parties, as this information could not be created without the original information that was supplied by the third parties.

[para. 94.] I am satisfied that disclosure of this information would permit the Applicant to make accurate inferences about sensitive business information of the third parties that would not, in itself, be disclosed under the Act. I find that section 15(1)(b) applies to this information.

[para. 95.] In summary, I find that the information was supplied either explicitly or implicitly in confidence, and meets the criteria of section 15(1)(b). The information considered in these pages remains to be considered under section 15(1)(c).

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

[para. 96.] The Public Body does not say which outcome it is relying on under section 15(1)(c). The Public Body says in its submission that the disclosure of pages A66 and A67 would create a reasonable expectation of harm, because the information refers to future forecasts of commercial information which are still current.

[para. 97.] The Public Body says that both Crestbrook and Millar Western have been contacted in regard to the disclosure of these records, but that neither has replied. The Public Body says that both Crestbrook and Millar Western have replied to similar requests in the past, that they have always refused to consent to the disclosure of such information, and that this refusal applies to the present request. However, the Applicant takes the position in his submission that the failure of Crestbrook to reply should result in the disclosure of pages A66 and A67.

[para. 98.] The third parties have not provided any argument or evidence in these proceedings to show that disclosure of this information could reasonably be expected to bring about one of the outcomes listed in section 15(1)(c). Nevertheless, given the nature of the information contained in the records, I have considered whether disclosure of the information could reasonably be expected to bring about any of those outcomes for a third party.

[para. 99.] I have considered the outcome set out in section 15(1)(c)(i): to harm significantly the competitive position or interfere significantly with the negotiating position of a third party.

[para. 100.] In Order 99-003, I noted that Al-Pac was a stand-alone operation, and competed for sales with other pulp mills in Alberta and across the world and competed for procurement of raw materials and labour and for business opportunities in Alberta. In that application, the third parties argued that disclosure of those records would harm them and put them at a competitive disadvantage.

[para. 101.] In that inquiry, the third parties said that the calculation of net cash flow, annual operating budget, operating levels, operating costs, sales price forecasts and marketing plans is competitively sensitive

information. In Order 99-003, I said that, even though Crestbrook had sold its interest in Al-Pac, and was no longer a borrower under the credit agreement, the disclosure of the records could still reasonably be expected to harm significantly its competitive position.

[para. 102.] The nature of the information contained in the foregoing records is sufficient to establish that the disclosure of the information contained in these pages could reasonably be expected to harm significantly the competitive position of the third parties. If this information were disclosed, a competitor could make accurate inferences about details of the third parties' business.

[para. 103.] Based upon the evidence presented and the nature of the records, I find that disclosure of these records could reasonably be expected to harm significantly the competitive position or to interfere significantly with the negotiating position of the third parties in accordance with section 15(1)(c)(i).

[para. 104.] I note that in Order 98-015, I previously considered 27 of the foregoing pages under section 15(1) of the Act. In Order 98-015, I found that section 15(1) applied with the exception of the information that the Public Body has already disclosed. I see no reason to make a different finding in this case. The pages that I have previously considered under section 15(1) are pages A88, A90, A115-A120, A122-A123, A127-A132, A134-A135, A139-A144, A146-A147 and A158.

[para. 105.] I find that the information withheld in the foregoing pages meets the criteria in section 15(1)(c)(i).

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

[para. 106.] I find that the Public Body correctly applied section 15(1) and that the burden of proof was discharged for the foregoing pages, except as follows:

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A57-A64; and

*Request Number #98-A-00127 (Millar Western):*  
Pages - B239 and B240, and  
Footers only on pages - B78, B224, B226, B235 and B237.

[para. 107.] As section 15(1) does not apply to pages A57-A64, B239 and B240 or to the footers on pages B78, B224, B226, B235 and B237, I do not find it necessary to consider those pages under section 15(3).

#### **4. Do any of the section 15(3) exceptions apply?**

[para. 108.] The relevant parts of section 15(3) say:

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

...

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

[para. 109.] In Order 98-013, the interpretation of section 15(3)(c) was fully considered, and I will not repeat that analysis here. For the purposes of this Order, I note that the definition of the phrase “non-arm's length transaction” in section 15(3)(c) is the common law definition, and not the definition contained in section 4(3) of the Act.

[para. 110.] The Public Body says that a non-arm's length transaction did not exist between the Government of Alberta and the third parties. The Public Body says that the Government of Alberta did not and does not own either Al-Pac or Millar Western and that the government's interest in these companies is limited to loan arrangements. However, the Applicant says that the Government of Alberta had two directors appointed to Millar Western.

[para. 111.] In Orders 98-015, 99-003 and 99-007, I have already considered whether similar information related to an arm's length transaction between Al-Pac and the Government of Alberta. In those orders, I found that the parties were at arm's length, such that section 15(3)(c) did not apply. I see no reason to make a different finding in this case.

[para. 112.] The Public Body says that the Millar Western relationship with the Government of Alberta was analogous to the Al-Pac relationship with the Government of Alberta. I have not received any evidence to the contrary, and I accept the Public Body's submission in this regard.

[para. 113.] There is insufficient evidence before me to show that the parties were “related” or that each party was not acting in its own interest. There is no evidence to suggest that the parties exerted “control, influence, or moral pressure” over the other in the process of negotiating the loan transactions.

[para. 114.] After reviewing all the evidence, I conclude that an arm's length relationship existed between the Government of Alberta and the third parties. Therefore, I find that section 15(3)(c) does not apply to the foregoing pages.

## 5. Conclusion under section 15

[para. 115.] In summary, I find that the Public Body has correctly applied section 15(1) of the Act, the burden of proof has been discharged and the exceptions in section 15(3) do not apply to the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages – A66-A67, A88 (part), A90 (part), A115 (part), A116-120, A122, A123 (part), A127 (part), A128-A132, A134, A135 (part), A139 (part), A140–A144, A146, A147 (part) and A158 (part); and

*Request Number #98-A-00127 (Millar Western):*

Pages - B78 (part), B80 (part), B81 (part), B94 (part), B98 (part), B101 (part), B102 (part), B112, B114-B117, B119, B121-B122, B124-B125, B127-B138, B164 (part), B167-B168 (part), B170-B172 (part), B175, B177-B179, B181-B182, B184-B185, B187-B190, B191-B200, B224 (part), B226 (part), B227 (part), B235 (part), B237 (part), B238 (part), B268 (parts of third last and last paragraph), B269 (part), B271 (first paragraph), B272 (part) and B297-B298 (parts).

However, I find that the Public Body did not correctly apply section 15(1) and did not discharge the burden of proof for the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A57-A64; and

*Request Number #98-A-00127 (Millar Western):*

Pages - B239 and B240, and

Footers only on pages - B78, B224, B226, B235 and B237.

Other exceptions have been claimed, so pages A57 to A64, B239 and B240 and the footers on pages B226 and B237 remain to be considered under other sections of the Act. As other exceptions have not been claimed, the information in the footers on pages B78, B224 and B235 must be disclosed to the Applicant.

### **Issue D: Did the Public Body correctly apply section 16?**

[para. 116.] The Public Body says that section 16 provides authority to withhold the information severed from page B201. Section 16 is a mandatory (“must”) section of the Act. Pursuant to section 67(2) and 67(3)(a), the Applicant has the burden of proof to show that disclosure of personal information about a third party would not be an unreasonable invasion of the third party’s personal privacy. If section 16(1) or section

16(2) apply, a public body does not have a choice and must refuse to disclose the information.

### **1. Is the severed information “personal information”?**

[para. 117.] For section 16 to apply, there must be “personal information” of a third party. Personal information is defined in section 1(1)(n) of the Act.

[para. 118.] The relevant portions of section 1(1)(n) read:

1 (1) In this Act,

...

(n) “personal information” means recorded information about an identifiable individual, including

(i) the individual’s name, home or business address or home or business telephone number,

[para. 119.] The severed information consists of the home telephone number of a third party. The Public Body says that this home telephone number is personal information pursuant to section 1(1)(n)(i) of the Act. I find that the Public Body has correctly identified the severed information as personal information of a third party.

### **2. Would disclosure of the personal information be an unreasonable invasion of the third party’s personal privacy?**

[para. 120.] Section 16(1) says:

16(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.

[para. 121.] Section 16(2) lists a number of circumstances where a disclosure of personal information is presumed to be an unreasonable invasion of a third party’s personal privacy. None of the circumstances in section 16(2) apply to create the presumption of an unreasonable invasion of a third party’s personal privacy in this situation. Additionally, none of the provisions in section 16(4) apply to say that the disclosure of this personal information is not an unreasonable invasion of a third party’s personal privacy.

[para. 122.] A public body must consider the relevant circumstances under section 16(3), in determining whether there is an unreasonable invasion of a third person’s personal privacy under section 16(1) or 16(2). It is important to note that, although section 16(3) lists a number of relevant circumstances, this list is not exhaustive, and there may be

many other relevant circumstances that the public body must consider. None of the relevant circumstances listed in section 16(3) apply to the information severed.

[para. 123.] The Public Body says that the disclosure of the home telephone number would be an unreasonable invasion of the third party's personal privacy. The home telephone number is not listed in the telephone book, although other numbers are listed for this individual. The Public Body says that providing a personal telephone number to a third party in writing does not mean that an individual wishes to further disclose this information.

[para. 124.] It is up to the Applicant to prove that disclosure of personal information would not be an unreasonable invasion of a third party's personal privacy. The Applicant did not address this issue in his submission and has not discharged the burden of proof.

### **3. Conclusion under section 16**

[para. 125.] In summary, I find that the Public Body correctly applied section 16(1) and that disclosure of this personal information would be an unreasonable invasion of a third party's personal privacy. The Applicant did not discharge the burden of proof to show that the disclosure of personal information would not be an unreasonable invasion of the personal privacy of a third party.

[para. 126.] I therefore uphold the Public Body's decision to withhold the personal information severed from:

*Request Number #98-A-00127 (Millar Western):*  
Page B201.

The Public Body must not disclose the information severed from page B201 to the Applicant.

### **Issue E: Did the Public Body correctly apply section 21(1)?**

[para. 127.] The Public Body says that section 21(1) of the Act provides the authority to withhold some of the information that was not disclosed to the Applicant. Pursuant to section 67(1), the public body has the burden of proof to show that the applicant does not have the right of access to the record. Section 21 is a mandatory ("must") section of the Act. If section 21 applies, a public body does not have a choice and must refuse to disclose the information.



## 1. The records

[para. 128.] The Public Body says that section 21 applies to the information that has been withheld as follows:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A4-A15, A24, A32-A38, A42-A44, A51, A52 (part), A53 (part) and A54-A64; and

*Request Number #98-A-00127 (Millar Western):*

Pages - B1, B4, B5 (part), B6, B36, B62, B70, B71 (part), B72, B80 (part), B82-B83, B219 (part), B221 (part), B222 (part), B223, B224 (part), B226 (part), B227 (part), B229 (last paragraph), B230, B231 (part), B232 (part), B233 (part), B234, B237 (part), B239 (part), B240 (part), B250 (part), B257-B266, B268 (top portion), B270 (part) and B271 (bottom portion); and

Footers only on pages - B4, B5, B221, B222, B223, B225, B226, B232, B233, B234 and B237.

[para. 129.] As I have already found that the Public Body has correctly applied section 15 to pages B80, B224, B226, B227 and B237, I do not find it necessary to address this information under section 21. In its submission, the Public Body withdrew the section 21 claim and claimed section 23 for all of page number B232 including the information in the footer on page B232. For that reason, I will not consider page number B232 under section 21.

[para. 130.] In summary, the pages that I will consider under section 21 are as follows:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A4-A15, A24, A32-A38, A42-A44, A51, A52 (part), A53 (part) and A54-A64; and

*Request Number #98-A-00127 (Millar Western):*

Pages - B1, B4, B5 (part), B6, B36, B62, B70, B71 (part), B72, B82-B83, B219 (part), B221 (part), B222 (part), B223, B229 (last paragraph), B230, B231 (part), B233 (part), B234, B239 (part), B240 (part), B250 (part), B257-B266, B268 (top portion), B270 (part) and B271 (bottom portion), and

Footers only on pages - B4, B5, B221, B222, B223, B225, B226, B233, B234 and B237.

[para. 131.] The Public Body says that the information withheld in the foregoing pages is information relating to the substance of deliberations of Treasury Board or Cabinet. The Public Body says that the foregoing

pages contain Cabinet submissions and Treasury Board documents including minutes, briefing notes, memoranda and attachments to these documents. The Public Body says that this information was considered, discussed, deliberated upon or decided by the Cabinet or Treasury Board.

[para. 132.] I note that pages A38 and A62 are copies of page A10. The Public Body says that page B4 is a copy of page B70, page B5 is a copy of page B71, and page B6 is a copy of page B72.

[para. 133.] I note that page B81 is the same as pages B227, B238, B265 and B272. The only differences are that some of these pages have a different print date in the right hand bottom corner, and page B272 is marked as 'Attachment I' whereas the other pages are marked as 'Schedule A'.

[para. 134.] I note that page B266 is substantially the same as page B273. There are some minor differences as page B266 is entitled 'Schedule B' and page B273 is entitled 'Attachment II' and the print dates on the footers are different. Page B266 contains a note that indicates where the actual and projected pulp prices may be obtained, that does not appear on page B273.

[para. 135.] The Public Body says that pages B268 to B271 are a draft of pages B261 to B264. I note there were a number of drafts and copies of this briefing document. Pages B268 to B271 were a draft and were attached to an October 28, 1996 memo. Pages B261 to B264 were part of a Cabinet submission package that was dated November 4, 1996. Pages B235 to B237 were part of a further draft attached to a January 10, 1997 memo. Pages B224 to B226 were part of another draft attached to a January 14, 1997 memo. Pages B78 to B80 were part of a Cabinet submission package that was dated March 21, 1997. I note that copies of some of the foregoing pages have been disclosed to the Applicant.

## **2. General**

[para. 136.] The relevant parts of sections 21(1) and 21(2) say:

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

.....

(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. 137.] For a public body to withhold a record under section 21(1), the public body must ensure that the record meets the criteria in section 21(1). Section 21(1) says 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.

[para. 138.] This section then lists some specific examples of information that fall under this section. For information to be withheld, the information must reveal the substance of deliberations of the 'Executive Council', which is also referred to as the 'Cabinet'.

[para. 139.] It must also be kept in mind that even when the information falls within section 21(2), the information must not be disclosed if the information would reveal the substance of Cabinet deliberations.

### **3. Application of section 21(1)**

[para. 140.] In Order 97-010, I discussed the term, "the substance of deliberations". I said that:

...the term "substance" is to have its normal dictionary meaning of essence, the material or essential part of a thing. "Deliberation" is taken to mean the act of deliberating, the act of weighing and examining the reasons for and against a contemplated action or course of conduct or a choice of acts or means.

[para. 141.] In Order 99-002, I noted the description of a Cabinet submission that was adopted by the British Columbia Court of Appeal, in *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, as follows:

It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would 'reveal'

the substance of Cabinet deliberations, because it would permit the drawing of accurate inferences with respect to the deliberations.

[para. 142.] The Public Body says that if any of the information withheld in the foregoing pages were disclosed, that this would reveal the substance of deliberations of Cabinet or Treasury Board. I agree, except for the following.

[para. 143.] I find that disclosure of the information withheld on pages B239, B240 and B250 would not reveal the substance of deliberations. The information severed on these pages makes reference to past and future Cabinet meetings but would not reveal the substance of deliberations, so these pages do not fall within section 21(1).

[para. 144.] The Public Body says that page B265 was part of a package that was a Cabinet submission that was deliberated upon by Cabinet. When information becomes part of a submission to Cabinet or to Treasury Board, the information may then reveal the substance of deliberations and fall within section 21(1). I find that page B265 falls within section 21(1) and the Public Body must not disclose this information. For the same reason, pages B78-B80, B261-B264 and B266 fall within section 21(1) and must not be disclosed.

[para. 145.] In Order 99-002, I held that the identical records to page A57 to A64 in this inquiry fell under section 21(1) and should not be disclosed. I see no reason to rule differently in this inquiry.

[para. 146.] With the exception of the information withheld on pages B239, B240 and B250 and in the footers on pages B4, B5, B221, B222, B223, B225, B226, B233, B234 and B237, I find that the Public Body has correctly applied section 21(1).

[para. 147.] As section 21(1) does not apply to the information withheld on pages B239, B240 and B250 and in the footers on pages B4, B5, B221, B222, B223, B225, B226, B233, B234 and B237, I do not find it necessary to consider whether section 21(2) applies to these pages.

[para. 148.] I will now consider whether any of the balance of the foregoing pages falls under section 21(2).

#### **4. Application of section 21(2)**

[para. 149.] Section 21(2)(c) has two requirements:

- a. there must be information in a record the purpose of which is to present background facts to the Executive Council or any of its committees, for consideration in making a decision; and
- b. the decision must have been made public, implemented, or five or more years must have passed since the decision was made or considered.

[para. 150.] In Order 99-002, I noted that, although the sale of the loan to someone other than Crestbrook was publicly announced on March 3, 1998, a decision regarding the purchase of the loan by Crestbrook was not made public or implemented. The negotiations between Crestbrook and the Government of Alberta did not result in the settlement of this loan. Consequently, section 21(2)(c) does not apply to require disclosure of these background facts.

[para. 151.] However, I also noted in Order 99-013 that decisions regarding the Al-Pac and Millar Western loans and FMAs were implemented and some of the details of these decisions were made public. However, I note that the information disclosed in the press releases is not the same information as in the foregoing pages.

[para. 152.] Subsection 21(2)(c)(ii) involves information that presents background facts to Cabinet or Treasury Board for consideration in making a decision if the decision has been implemented. I find that the information up to the end of the second paragraph in the Briefing Note for Treasury Board on page A6 falls within section 21(2)(c)(ii), as the decisions described in both the first and the second paragraphs were implemented. For example the loan interest was reversed and Treasury Board approval was given.

[para. 153.] However, I believe that the disclosure of the information in the second paragraph on page A6 would reveal the substance of deliberations of Treasury Board. In Order 99-013, I said that background facts must not be disclosed if the background facts would nevertheless disclose the substance of Cabinet deliberations. In Order 97-010, I said that section 21(2) permits the disclosure of records that do not divulge Cabinet deliberations.

[para. 154.] In this case, the purpose of the information contained in the second paragraph of page A6 is to provide background facts, but the information is interwoven with section 21(1) because disclosure of the background facts would reveal the substance of the deliberations of Treasury Board. Consequently, the information contained in the second paragraph of page A6 must not be disclosed.

[para. 155.] I find that subsection 21(2)(c)(ii) applies to the information up to and including the end of the first paragraph in the Briefing Note for Treasury Board on page A6, as the decision described in this paragraph has been implemented. As there are no other mandatory provisions that apply to this page and the Public Body did not claim any discretionary exceptions, the Public Body must disclose this information to the Applicant. Therefore, I intend to order the Public Body to disclose the information up to and including the end of the first paragraph on page A6.

## **5. Conclusion under section 21**

[para. 156.] In summary, the Public Body has correctly applied section 21 and has discharged its burden of proof for the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A4, A5, A6 (part after the end of the first paragraph), A7-A15, A24, A32-A38, A42-A44, A51, A52 (part), A53 (part) and A54-A64; and

*Request Number #98-A-00127 (Millar Western):*

Pages - B1, B4, B5 (part), B6, B36, B62, B70, B71 (part), B72, B82-B83, B219 (part), B221 (part), B222 (part), B223, B229 (last paragraph), B230, B231 (part), B233 (part), B234, B257-B266, B268 (top portion), B270 (part) and B271 (bottom portion).

[para. 157.] The Public Body has not correctly applied section 21 and has not discharged its burden of proof for the following:

*Request Number #98-A-00126 (Al-Pac):*

Page - A6 (information up to the end of the first paragraph), and

*Request Number #98-A-00127 (Millar Western):*

Pages - B239 (part), B240 (part) and B250 (part), and  
Footers only on pages - B4, B5, B221, B222, B223, B225, B226, B233, B234 and B237.

[para. 158.] Section 21(2)(c)(ii) applies to the following:

*Request Number #98-A-00126 (Al-Pac):*

Page - A6 (information up to the end of the first paragraph).

[para. 159.] As other exceptions have been claimed for pages B239 and B240 and for the footers on pages B4, B221, B226, B233 and B237, these pages remain to be considered under other provisions of the Act.

[para. 160.] As there are no other mandatory provisions that apply and there were no discretionary provisions claimed, the Public Body must disclose the information up to the end of the first paragraph on page A6, and the information withheld on page B250 and in the footers on pages B5, B222, B223 and B234.

**Issue F: Did the Public Body correctly apply section 23(1) and properly exercise its discretion?**

[para. 161.] The Public Body says that section 23(1) of the Act provides the authority to withhold some of the information that was not disclosed to the Applicant. Pursuant to section 67(1), the Public Body has the burden of proof to show that the Applicant has no right of access to the record. Section 23 is a discretionary (“may”) section of the Act. If section 23 applies, a public body has a choice and may disclose or refuse to disclose the information.

**1. The records**

[para. 162.] The Public Body has claimed section 23 for the information withheld in the following pages:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A39–A41, A51, A52 (part), A69 (part), A70-A72 and A107-A109 (parts), and

Footers only on pages - A107-A109; and

*Request Number #98-A-00127 (Millar Western):*

Pages - B4, B70, B80 (part), B162 (top portion), B163 (bottom portion), B216-217, B221 (part), B226 (part), B229 (part), B230, B231(part), B232 (part), B237 (part), B239-B240 (parts), B254-B255, B268 (top portion), B270 (part), B271 (bottom portion) and B294 (part), and

Footers only on pages - B4, B221, B226, B232, B233 and B237.

[para. 163.] I have already found that the Act does not apply to pages A39 to A41 and A70 to A72. Furthermore, I have already upheld the decision of the Public Body not to disclose the information withheld on pages B80, B226 and B237 pursuant to section 15; and pages A51, A52, B4, B70, B221, B229 (part), B230, B231(part), B268 (top portion), B270 (part), and B271 (bottom portion) pursuant to section 21. For that reason, it is not necessary and I will not consider this information again under section 23.

[para. 164.] The Public Body claimed section 23 for page B294 (part). However, I found that this information was non-responsive. For this reason, I do not find it necessary and I will not consider the information withheld on page B294 under section 23.

[para. 165.] I will be considering whether section 23 applies to the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A69 (part), A107 (part), A108 (part) and A109 (part), and Footers only on pages - A107-A109; and

*Request Number #98-A-00127 (Millar Western):*

Pages - B162 (top portion), B163 (bottom portion), B216-217, B232 (part), B239 (part), B240 (part) and B254-B255, and Footers only on pages - B4, B221, B226, B232, B233 and B237.

[para. 166.] The Public Body says that pages A69 and A107 to A109 are communications between senior officials and that the top portion of page B162 and the severed parts of pages B239 and B240 contain advice and confidential information regarding loan negotiations.

[para. 167.] The Public Body says that pages B216 and B217 are part of a consultation between government departments regarding the Millar Western FMA agreement and that pages B254 to B255 are communications within the Treasury department regarding a Millar Western proposal.

## **2. General**

[para. 168.] The relevant parts of section 23(1) read:

23(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to reveal

(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or a member of the Executive Council,

(b) consultations or deliberations involving

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

(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. 169.] In order for a Public Body to withhold information under section 23(1), the Public Body must ensure that the information fulfils 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.

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

[para. 170.] The Public Body says that section 23(1)(a) applies to the information withheld from pages A69 (part), A107 to A109 (parts), B216, B217, B239 (part), B240 (part) and B255. The Public Body does not indicate which part of section 23(1) it has applied to the information withheld from pages B162 (top portion), B163 (bottom portion), B232 (part) and B254. Therefore, I will consider all of these pages initially under section 23(1)(a).

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

[para. 171.] Page A69 relates to proposed amendments to the Al-Pac FMA, and the Public Body says that the information withheld on this page contains advice and analysis regarding this matter. Pages A107 to A109 relate to reducing the Heritage Fund investment income forecast, and the Public Body says that the information withheld on these pages involves analysis and recommendations.

[para. 172.] Pages B216 and B217 relate to amendments to an FMA, and the Public Body says that the information withheld provides alternatives, recommendations and policy options. Pages B239, B240 and B255 relate to the offer of Millar Western to purchase the government’s interest in the pulp mill, and the Public Body says that the information withheld contains analyses, requirements, recommendations and policy options with regards to these negotiations.

[para. 173.] The information withheld on page B162 (top portion) involves positions, comments and opinion regarding the fairness of the Millar Western offer. Similarly, the information withheld on pages B232 (part) and B254 includes the positions of persons who are members of Executive Council, in regards to the offer. These pages involve consultation and deliberation between the staff of members of Executive Council. The information withheld on page B163 (bottom portion) is the name of an attachment to a document.

[para. 174.] In Order 96-006, I described the criteria for “advice” (advice includes advice, proposals, recommendations, analyses or policy options) under section 23(1)(a). I said that the advice should:

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

[para. 175.] Also in that Order, I said that the record must contain more than a bare recitation of facts or summaries of information. The information must relate to a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process. However, in Order 99-001, I said that factual information sufficiently interwoven with other advice, proposals, recommendations or policy options may also be withheld.

[para. 176.] After carefully reviewing the records, I find that the Public Body correctly applied section 23(1)(a) and discharged its burden of proof with respect to the information withheld on pages A69 (part), A107 to A109 (parts), B162 (top portion), B216-B217, B232 (part), B239 (part), B240 (part) and B254-B255. The above criteria were fulfilled and the information was properly withheld under section 23(1)(a).

[para. 177.] However, I find that the information withheld on page B163 (bottom portion) and in the footers on pages A107-A109, B4, B221, B226, B232, B233 and B237 does not fall within section 23(1)(a). Therefore, the information withheld on these pages remains to be considered under subsection 23(1)(b).

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

[para. 178.] The purpose of section 23(1)(b) is to shield consultations or deliberations occurring during the decision-making process. In Order 96-006, I defined the terms “consultation” and “deliberation”.

[para. 179.] I said that a “consultation” occurs when the views of one or more officers or employees are sought as to the appropriateness of particular proposals or suggested actions. I defined a “deliberation” as a discussion or consideration by the persons described in the section, of the reasons for or against an action. I stated that the criteria for advice under section 23(1)(a) should be applied to this section.

[para. 180.] After reviewing the information withheld from the bottom of page B163 and in the footers on pages A107-A109, B4, B221, B226, B232, B233 and B237, I find that section 23(1)(b) does not apply.

Therefore, this information remains to be considered under section 23(1)(c).

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

[para. 181.] For section 23(1)(c) to apply, the disclosure of the information must be reasonably expected to reveal positions, plans, procedures, criteria or instructions (“positions”) which have been developed for the purpose of negotiations or considerations that relate to those negotiations. In Order 96-012, I said that the intent of section 23(1)(c) is to protect information generated during the decision-making process.

[para. 182.] Although the information severed states the name of an attachment to a document, I find that this information does not reveal positions developed for those negotiations. I find that section 23(1)(c) does not apply to the information withheld on the bottom of page B163 and in the footers on pages A107-A109, B4, B221, B226, B232, B233 and B237.

[para. 183.] As the Public Body has claimed another discretionary section for the information withheld on page B163 and for the footers on pages B226 and B237, this information remains to be considered under section 24. However, as other discretionary exceptions have not been claimed for the footers on pages A107 to A109, B4, B221, B232 and B233, the Public Body must disclose this information to the Applicant. I do not find it necessary to consider the exercise of discretion for the information withheld on these pages.

### **4. Exercise of discretion under section 23(1)**

[para. 184.] Section 23(1) is a discretionary (“may”) exception. Therefore, even if this section applies to the information that was withheld 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 it considers the objects and purposes of the legislation in question and it does not exercise its discretion for an improper or irrelevant purpose.

[para. 185.] To properly exercise its discretion in this regard, a public body must consider the purposes of the Act, one of which is to allow access to the information. The Public Body says that it has provided as much information as possible to the Applicant. I note that a great deal of information has been released in earlier inquiries with similar or identical records to the records involved in this inquiry. Further information has been released to the Applicant subsequent to these

requests being made. The Public Body says that it has considered the objects and purposes of the Act with respect to each of the foregoing records.

[para. 186.] Based upon the submission of the Public Body and a review of records, I find that the Public Body has properly exercised its discretion according to the objects and purposes of the Act and has not exercised its discretion for an improper or irrelevant purpose.

## **5. Conclusion under section 23(1)**

[para. 187.] In summary, the Public Body has correctly applied section 23(1), has discharged its burden of proof and has properly exercised its discretion to withhold the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A69 (part), A107 (part), A108 (part) and A109 (part).

*Request Number #98-A-00127 (Millar Western):*

Pages - B162 (top portion), B216-217, B232 (part), B239 (part), B240 (part) and B254-B255.

Therefore, I uphold the Public Body's decision to withhold the information contained in these records.

[para. 188.] However, I find that the Public Body has not correctly applied section 23(1) and has not discharged its burden of proof for the information withheld in page B163 (bottom portion) and in the footers on pages A107-A109, B4, B221, B226, B232, B233 and B237.

[para. 189.] As the Public Body has claimed another discretionary section for the information withheld on page B163 and for the footers on pages B226 and B237, this information remains to be considered under section 24.

[para. 190.] However, as other discretionary exceptions have not been claimed for the footers on pages A107 to A109, B4, B221, B232 and B233, the Public Body must disclose this information to the Applicant.

## **Issue G: Did the Public Body correctly apply section 24(1) and properly exercise its discretion?**

[para. 191.] The Public Body says that section 24(1) of the Act provides the authority to withhold some of the information that was not disclosed to the Applicant. Pursuant to section 67(1), the Public Body has the

burden of proof to show that the Applicant has no right of access to the record. Section 24(1) is a discretionary (“may”) section of the Act. If section 24(1) applies, a public body has a choice and may disclose or refuse to disclose the information.

## **1. The records**

[para. 192.] The Public Body has claimed section 24(1) for the following:

*Request Number #98-A-00127 (Millar Western):*

Pages - B80 (part), B162 (top portion), B163 (bottom portion), B216-217, B226 (part), B237 (part), B239-B240 (parts) and B270 (part); and

Footers only on pages B226 and B237.

[para. 193.] I have already considered and upheld the decision of the Public Body not to disclose the information withheld on pages B80, B226 and B237 pursuant to section 15; pages B239, B240 and B270 pursuant to section 21 and pages B162 (top portion), B216 and B217 pursuant to section 23. I do not find it necessary to decide whether section 24(1) also applies to this information.

[para. 194.] Although the Public Body has claimed section 24(1) for pages B216, B217, B239 and B240 in the exception list, the Public Body has withdrawn this claim in its submission. Therefore, I will not consider these pages under section 24(1). The first three paragraphs on page B163 have been disclosed to the Applicant, so I do not find it necessary to consider this information.

[para. 195.] I will consider whether section 24(1) applies to the following:

*Request Number #98-A-00127 (Millar Western):*

Page - B163 (bottom part), and

Footers only on pages B226 and B237.

[para. 196.] The information withheld on the bottom of page B163 is the description of an item in a list of information and documents provided by the Alberta Crown.

## **2. General**

[para. 197.] The relevant parts of section 24(1)(c) read:

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:

.....

(c) information the disclosure of which could reasonably be expected to

(i) result in financial loss to,

.....

the Government of Alberta or a public body;

### **3. Application of section 24(1)**

[para. 198.] The Public Body claims section 24(1)(c)(i) for the information severed on the bottom of page B163 and says that the disclosure of this information would cause a tangible financial loss to the Government of Alberta. The Public Body has provided me with an additional confidential submission regarding the application of section 24(1)(c) of the Act to this information.

[para. 199.] Section 24(1) is composed of two parts – a general rule and several subsections that provide specific examples of information that may fulfill the general rule.

[para. 200.] 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”. Specific examples that may fall into the general rule are provided in subsections 24(1)(a) to (d), although these examples are not exhaustive.

[para. 201.] In Order 96-003, I established a threefold test that must be satisfied to determine reasonable expectation of harm. The criteria that must be met are:

- a. there must be a clear cause and effect relationship between the disclosure and the harm;
- b. the disclosure must cause harm and not simply interference or inconvenience; and
- c. the likelihood of harm must be genuine and conceivable.

[para. 202.] In Order 96-016, I referred to the Federal Court Trial Division decision of *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054, and I further elaborated on the test of reasonable expectation of harm. The court emphasized that to prove on a balance of probabilities that there is a reasonable expectation of harm

from the disclosure of information, a Public Body must show direct harm.

[para. 203.] The court said that a public body must show a clear and direct linkage between the disclosure of the specific information and the harm alleged, and must give an explanation of how or why the alleged harm would result from the disclosure of the specific information. I also emphasized in that Order that the nature of the information is an important consideration. For example, I said that it is not reasonable to expect harm to result from disclosure of information when the information is in the public domain.

[para. 204.] After carefully reviewing the record, it is my opinion that the Public Body has not correctly applied section 24(1)(c)(i) to this information. It is true that the disclosure of this information may result in some miniscule financial cost and cause inconvenience to the Government of Alberta. However, the Government of Alberta is a large entity. The disclosure of this information could not reasonably be expected to harm the economic interest or the ability of the Government of Alberta to manage the economy.

#### **4. Conclusion under section 24(1)**

[para. 205.] In summary, the Public Body did not correctly apply section 24(1) to the information. The Public Body has not discharged its burden of proof to show that disclosure of the information withheld falls within the general rule in section 24(1). Therefore, I do not need to consider whether the Public Body exercised its discretion properly.

[para. 206.] As there are no mandatory provisions that apply and the Public Body has not claimed any further discretionary provisions, the Public Body must disclose the following:

*Request Number #98-A-00127 (Millar Western):*  
Page – B163 (bottom), and  
Footers only on pages B226 and B237.

#### **Issue H: Did the Public Body correctly apply section 26(1) and properly exercise its discretion?**

[para. 207.] The Public Body says that section 26(1) of the Act provides the authority to withhold some of the information that was not disclosed to the Applicant. Pursuant to section 67(1), the Public Body has the burden of proof to show that the Applicant has no right of access to the record. Section 26(1) is a discretionary (“may”) section of the Act. If

section 26(1) applies, a public body has a choice and may disclose or refuse to disclose the records.

## **1. The Records**

[para. 208.] The Public Body says that subsections 26(1)(a), (b) and (c) apply to the following:

*Request Number #98-A-00127 (Millar Western):*  
Pages - B56-B58, B59-B61, B242-B249 and B274-B292.

[para. 209.] The Public Body says that all of the foregoing pages are communications between the Public Body and its legal counsel with respect to a legal matter. I note that these communications consist of letters and include attachments and fax cover sheets, and that some of the letters are copied to other employees of the Public Body.

## **2. General**

[para. 210.] The relevant parts of section 26(1) read:

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.

[para. 211.] A public body may refuse to disclose information that is subject to any type of legal privilege, including solicitor-client privilege pursuant to section 26(1)(a). It must be kept in mind that even when information falls within section 26(1), the specific kind of information described in section 26(2) must not be disclosed.

## **3. Application of section 26(1)(a)**

[para. 212.] In Order 96-017, I said that to correctly apply section 26(1)(a) (solicitor-client privilege), a public body must meet the common law criteria for that privilege, as established in *Solosky v. The Queen*, (1980) 1 S.C.R. 821. In that case, the Supreme Court of Canada said



that solicitor-client privilege must be claimed document by document, and that each document must meet the following criteria:

- a. it must be a communication between solicitor and client;
- b. that entails the giving or seeking of legal advice; and
- c. which is intended to be confidential by the parties.

[para. 213.] In Order 98-004, I said that documents must be part of the 'continuum of legal advice' for the solicitor-client privilege to apply. I said that where attachments to letters and fax cover sheets are part of the continuum of legal advice, these documents also fall within section 26(1)(a). I also said that where the public body sends copies of the solicitor-client communication to employees within the public body, sending the copies to the employees does not waive the solicitor-client privilege.

[para. 214.] I have carefully reviewed the foregoing pages, and it is evident that all of the foregoing pages are legal opinion letters between the Public Body and its outside legal counsel. I find that the attachments to the letters and the fax cover sheets are part of the continuum of legal advice and fall within section 26(1)(a) (solicitor-client privilege). Providing copies of these communications to other employees within the Public Body did not waive the solicitor-client privilege.

[para. 215.] In my opinion, the Public Body has correctly applied section 26(1)(a) and has discharged its burden of proof in regard to the foregoing pages. I find that the foregoing pages satisfy the criteria for solicitor-client privilege and fall within section 26(1)(a).

[para. 216.] The Public Body has also claimed subsections 26(1)(b) and (c) for all of the foregoing records. As I have already determined that all of the foregoing records fall within section 26(1)(a), I do not find it necessary to consider those records again under subsections 26(1)(b) and (c).

#### **4. Exercise of discretion under section 26(1)**

[para. 217.] To exercise its discretion properly, a public body must show that it considered the objects and purposes of the Act including access to information and did not exercise its discretion for an improper or irrelevant purpose.

[para. 218.] In its submission, the Public Body said that it considered the Applicant's request, the objects and purposes of the Act and the effect of disclosing the records on revealing matters associated with the

negotiating process. The Public Body says that it considered all the circumstances and decided not to disclose the foregoing records.

[para. 219.] 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.

## **5. Conclusion under section 26(1)**

[para. 220.] In summary, I find that the Public Body correctly applied section 26(1)(a) (solicitor-client privilege), discharged its burden of proof, and properly exercised its discretion to withhold the following:

*Request Number #98-A-00127 (Millar Western):*  
Pages - B56-B58, B59-B61, B242-B249 and B274-B292.

I find that section 26(2) does not apply, and I uphold the Public Body's decision to refuse to disclose this information.

## **Issue I: Does section 31(1)(b) require the Public Body to disclose the information?**

[para. 221.] The Public Body says that section 31(1) does not apply and does not compel disclosure of the information to the Applicant. The Applicant has the burden of proof to show that disclosure is clearly in the public interest.

### **1. General**

[para. 222.] The relevant parts of section 31 say:

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. 223.] The Public Body says that the information in the records is mainly the financial aspects of provincial government loans to Al-Pac and Millar Western and that this type of information has not satisfied the section 31 test in previous Orders where similar information was requested. The Public Body says that a great deal of information about Al-Pac and Millar Western has already been disclosed to the public.

Disclosure must be clearly in the public interest before information falls within section 31(1)(b).

## **2. Application of section 31(1)(b)**

[para. 224.] The Applicant says that it is in the public interest to disclose the records “due to the ‘trustee’ nature of the investment”. The Applicant also says that disclosure is in the public interest because the Provincial Treasurer created a false sense of security by saying that the loan to Al-Pac was sound. The Applicant says that this situation requires public disclosure as the loan was sold at a loss to the public coffers and the loan involved trust monies.

[para. 225.] The Public Body says that a threshold of public interest must be met before section 31(1)(b) applies. The Public Body says that there must be a clear interest that affects a considerable part of the public. It is not enough that the information is interesting or of interest to a limited audience.

[para. 226.] I have already addressed the question of whether section 31(1)(b) applies to other records relating to Al-Pac in Orders 99-007, 99-006, 99-003, 99-002 and 98-015. In Order 99-007, I said that a matter must be of “compelling public interest” for section 31(1)(b) to apply. In those orders, I found that this test was not met.

[para. 227.] The Applicant has the burden of proving that disclosure of the information is clearly in the public interest for similar information as discussed in the previous Al-Pac orders. After reviewing the records and the submissions, I find that the Applicant has not established that disclosure is clearly in the public interest.

## **3. Conclusion under section 31(1)(b)**

[para. 228.] In summary, section 31(1) does not require the Public Body to disclose the information. The Applicant has not discharged the burden of proving that disclosure is clearly in the public interest.

## **V. ORDER**

[para. 229.] I make the following Order under section 68 of the Act:

### **Issue A: Which information or records are responsive?**

[para. 230.] The Public Body has correctly categorized the following information as being non-responsive:

*Request Number #98-A-00126 (Al-Pac):*  
Page - A46 (part); and

*Request Number #98-A-00127 (Millar Western):*  
Pages – B162 (second last paragraph), B293 (part) and B294 (part).

The Public Body may withhold the information from the foregoing pages as being non-responsive to the request.

[para. 231.] However, the Public Body has not correctly categorized the following information, as this information is responsive:

*Request Number #98-A-00126 (Al-Pac):*  
Footers only on pages – A45, A107-A110; and

*Request Number #98-A-00127 (Millar Western):*  
Pages - B4, B5 (part), B78 (part), B191-B200, B201 (part), B221-B222 (parts), B223, B224 (part), B226 (part), B232-B233 (parts), B234, B235 (part) and B237 (part), and  
Footers only on pages – B4-B5, B78, B201, B210-B213, B218, B221-B226 and B232-B237.

[para. 232.] As other exceptions have not been claimed, the footers on the following pages must be disclosed to the Applicant:

*Request Number #98-A-00126 (Al-Pac):*  
A45 and A110, and

*Request Number #98-A-00127 (Millar Western):*  
B70, B201, B210-B213, B218, B225 and B236.

[para. 233.] As other exceptions have been claimed, the information on the remaining pages remains to be further considered under other provisions of the Act.

**Issue B: Do sections 4(1)(c) or 4(1)(j) or 4(1)(l) exclude certain records from the Act?**

[para. 234.] The following records are excluded from the application of the Act by section 4(1):

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A100-A106 pursuant to section 4(1)(c); and

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A39-A41 and A70-A72, and  
*Request Number #98-A-00127 (Millar Western):*  
B27, B28 and B35 pursuant to section 4(1)(l) of the Act.

Consequently, I have no jurisdiction over those records. I cannot order the Public Body to withhold or give access to those records.

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

[para. 235.] The Public Body correctly applied section 15(1) of the Act, the burden of proof has been discharged and the exceptions in section 15(3) do not apply to the following:

*Request Number #98-A-00126 (Al-Pac):*  
Pages – A66-A67, A88 (part), A90 (part), A115 (part), A116-120, A122, A123 (part), A127 (part), A128-A132, A134, A135 (part), A139 (part), A140–A144, A146, A147 (part) and A158 (part); and

*Request Number #98-A-00127 (Millar Western):*  
Pages - B78 (part), B80 (part), B81 (part), B94 (part), B98 (part), B101 (part), B102 (part), B112, B114-B117, B119, B121-B122, B124-B125, B127-B138, B164 (part), B167-B168 (part), B170-B172 (part), B175, B177-B179, B181-B182, B184-B185, B187-B190, B191-B200, B224 (part), B226 (part), B227 (part), B235 (part), B237 (part), B238 (part), B268 (parts of third last and last paragraph), B269 (part), B271 (first paragraph), B272 (part) and B297-B298 (parts).

Therefore, the Public Body must not disclose the above information to the Applicant.

[para. 236.] However, the Public Body did not correctly apply section 15(1) and did not discharge the burden of proof for the following:

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A57-A64, and

*Request Number #98-A-00127 (Millar Western):*  
Pages - B239 and B240, and  
Footers only on pages - B78, B224, B226, B235 and B237.

Other exceptions have been claimed, so pages A57 to A64, B239 and B240 and the footers on pages B226 and B237 remain to be considered under other sections of the Act.

[para. 237.] However, as other exceptions have not been claimed, the information in the footers on pages B78, B224 and B235 must be disclosed to the Applicant.

**Issue D: Did the Public Body correctly apply section 16?**

[para. 238.] The Public Body correctly applied section 16(1). The disclosure of this personal information would be an unreasonable invasion of a third party's personal privacy. The Applicant did not discharge the burden of proof to show that the disclosure of personal information would not be an unreasonable invasion of the personal privacy of a third party.

[para. 239.] I therefore uphold the Public Body's decision to withhold the personal information withheld from:

*Request Number #98-A-00127 (Millar Western):*  
Page - B201.

I order the Public Body not to disclose to the Applicant the personal information withheld from page B201.

**Issue E: Did the Public Body correctly apply section 21(1)?**

[para. 240.] The Public Body correctly applied section 21(1) and has discharged its burden of proof for the following:

*Request Number #98-A-00126 (Al-Pac):*  
Pages - A4, A5, A6 (part after the end of the first paragraph), A7-A15, A24, A32-A38, A42-A44, A51, A52 (part), A53 (part) and A54-A64; and

*Request Number #98-A-00127 (Millar Western):*  
Pages - B1, B4, B5 (part), B6, B36, B62, B70, B71 (part), B72, B82-B83, B219 (part), B221 (part), B222 (part), B223, B229 (last paragraph), B230, B231 (part), B233 (part), B234, B257-B266, B268 (top portion), B270 (part) and B271 (bottom portion).

I order the Public Body not to disclose the above information to the Applicant.

[para. 241.] The Public Body did not correctly apply section 21(1) and did not discharge its burden of proof for the following:

*Request Number #98-A-00126 (Al-Pac):*  
Page - A6 (part up to the end of the first paragraph), and

*Request Number #98-A-00127 (Millar Western):*

Pages - B239 (part), B240 (part) and B250 (part), and  
Footers only on pages - B4, B5, B221, B222, B223, B225, B226,  
B233, B234 and B237.

[para. 242.] As other exceptions have been claimed for pages B239 and B240 and for the footers on pages B4, B221, B226, B233 and B237, these pages remain to be considered under other provisions of the Act.

[para. 243.] As there are no other mandatory provisions that apply and there were no discretionary provisions claimed, the Public Body must disclose the information withheld on page B250 and in the footers on pages B5, B222, B223 and B234.

[para. 244.] Section 21(2)(c)(ii) applies to the following:

*Request Number #98-A-00126 (Al-Pac):*

Page – A6 (information up to the end of the first paragraph).

As there are no other mandatory provisions that apply and there were no discretionary provisions claimed for the information up to the end of the first paragraph on page A6, the Public Body must disclose the information withheld up to the end of the first paragraph on page A6.

**Issue F: Did the Public Body correctly apply section 23(1) and properly exercise its discretion?**

[para. 245.] The Public Body correctly applied section 23(1), discharged its burden of proof and properly exercised its discretion to withhold the following:

*Request Number #98-A-00126 (Al-Pac):*

Pages - A69 (part), A107 (part), A108 (part) and A109 (part), and

*Request Number #98-A-00127 (Millar Western):*

Pages - B162 (top portion), B216-217, B232 (part), B239 (part),  
B240 (part) and B254-B255.

Therefore, I uphold the Public Body's decision to withhold the above information.

[para. 246.] However, I find that the Public Body did not correctly apply section 23(1) and did not discharge its burden of proof for the information withheld on page B163 (bottom portion) and in the footers on pages A107-A109, B4, B221, B226, B232, B233 and B237.

[para. 247.] As the Public Body has claimed another discretionary section for the information withheld on page B163 and for the footers on pages B226 and B237, this information remains to be considered under section 24.

[para. 248.] However, as other discretionary exceptions have not been claimed for the footers on pages A107 to A109, B4, B221, B232 and B233, the Public Body must disclose this information to the Applicant.

**Issue G: Did the Public Body correctly apply section 24(1) and properly exercise its discretion?**

[para. 249.] The Public Body did not correctly apply section 24(1) to the information withheld on page B163 (bottom portion). The Public Body has not discharged its burden of proof to show that disclosure of the information withheld falls within the general rule in section 24(1).

[para. 250.] As there are no mandatory provisions that apply and the Public Body has not claimed any further discretionary provisions, the Public Body must disclose the following:

*Request Number #98-A-00127 (Millar Western):*  
Page – B163 (bottom portion), and  
Footers only on pages B226 and B237.

[para. 251.] I order the Public Body to disclose to the Applicant the information withheld on the bottom of page B163 and in the footers on pages B226 and B237.

**Issue H: Did the Public Body correctly apply section 26(1) and properly exercise its discretion?**

[para. 252.] The Public Body correctly applied section 26(1)(a) (solicitor-client privilege), discharged its burden of proof and properly exercised its discretion to withhold the following:

*Request Number #98-A-00127 (Millar Western):*  
Pages - B56-B58, B59-B61, B242-B249 and B274-B292.

I uphold the Public Body's decision to refuse to disclose these records to the Applicant.



**Issue I: Does section 31(1)(b) require the Public Body to disclose the information?**

[para. 253.] Section 31(1)(b) does not require the Public Body to disclose the information. The Applicant has not discharged the burden of proving that disclosure is clearly in the public interest.

[para. 254.] 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.

[para. 255.] Along with this order, I will provide the Public Body with a highlighted copy of the records, indicating the information that is to be disclosed.

Robert C. Clark  
Information and Privacy Commissioner