

**ALBERTA**

**INFORMATION AND PRIVACY COMMISSIONER**

**ORDER 2000-013**

August 31, 2000

**EXECUTIVE COUNCIL OFFICE**

Review Number 1731

**I. BACKGROUND**

[para 1.] On September 14, 1999, the Applicant sent the Executive Council Office (the "Public Body") an access request under the *Freedom of Information and Protection of Privacy Act* (the "Act") for

"Any and all memos and/or pieces of correspondence between the Premier and government members of the legislative assembly regarding "pine shakes", "untreated pine shakes" or the "Alberta Pine Shake Homeowners Association".

[para 2.] On September 15, 1999, the Applicant orally revised the request to limit the access request to the time period between January 1, 1997 and September 15, 1999.

[para 3.] On October 14, 1999, the Public Body responded to the access request denying access to the records. The Public Body cited sections 4(1)(l) and 21 as its authority to withhold the records.

[para 4.] On October 21, 1999, the Applicant requested a review of the Public Body's decision. Mediation was unsuccessful and the matter was set down for a written inquiry.

[para 5.] The Public Body sent an initial submission to my Office on April 14, 2000. The Applicant did not make an initial submission. On May 19, 2000, I asked the parties to provide me with a supplementary written submission regarding the application of section 21(1) of the Act. In response, the Public Body provided me with an open and an *in camera* supplementary submission. A copy of the Public Body's open supplementary submission was sent to the Applicant. The Applicant did not submit a supplementary submission.

[para 6.] This inquiry proceeds on the basis of the Act as written after the amendments to the Act came into force on May 19, 1999.

## **II. RECORDS AT ISSUE**

[para 7.] The records at issue consist of 60 pages of memos and/or pieces of correspondence numbered as follows: 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, and 68. In this Order, I will refer to each record by page number where necessary, and will refer to all the pages collectively as the "records".

## **III. BURDEN OF PROOF**

[para 8.] Section 67 of the Act addresses the burden of proof. The relevant portion of section 67 states:

*67(1) If the inquiry relates to a decision to refuse an applicant access to all or part of a record, it is up to the head of the public body to prove that the applicant has no right of access to the record or part of the record.*

[para 9.] In this inquiry, the Public Body refused to give the Applicant access to the records at issue. Therefore, the Public Body has the burden of proof.

## **IV. ISSUES**

[para 10.] There are three issues in this inquiry:

- A. Does section 4(1)(l) exclude certain records from the application of the Act?
- B. Did the Public Body properly decide that certain records were not responsive to the access request?
- C. Does section 21 apply to the records?

## V. DISCUSSION

### A. Does section 4(1)(l) exclude certain records from the application of the Act?

[para 11.] If a record falls under section 4(1)(l) of the Act, the Act does not apply to the record, and I have no jurisdiction over that record. An applicant cannot obtain access to that record under the Act. Section 4(1)(l) reads:

*4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:*

...

*(l) a record created by or for*

*(i) a member of the Executive Council,*

*(ii) a Member of the Legislative Assembly, or*

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

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

[para 12.] The Public Body states that each of the following records fulfill the requirements under section 4(1)(l) and are thereby excluded from the application of the Act:

2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64

[para 13.] In particular, the Public Body argues that records 41, 42, 43, 44, 45, 51, 57, 58, 61, 62 and 63 fall under section 4(1)(l) even though these records consist of attachments to other records. The Public Body states that section 4(1)(l) refers to “a record created by” rather than “information prepared by” a Member of the Executive Council or a Member of the Legislative Assembly (“M.L.A.”). As such, the Public Body states that a “record” under section 4(1)(l), refers to a coherent piece of correspondence, which includes attachments.

[para 14.] The Public Body also states that, in the alternative, pages 41, 42, 43, 44 and 45 fall under section 4(1)(l) as they were created in contemplation of communicating the information to Members of the Executive Council and to M.L.A.s. The Public Body states that the Minister, through his Executive Assistant or a senior staff member, requested that these records be created.

[para 15.] In addition, the Public Body argues that records 2, 3, and 54 also fall under section 4(1)(l) as these pages were sent from an M.L.A. to a person who acts on behalf of a Member of the Executive Council or sent from a person who acts on behalf of a Member of the Executive Council to an M.L.A.

[para 16.] In Order 97-007, I discussed the interpretation of section 4(1)(l). I said that in order for a record to fall outside the Act by reason of section 4(1)(l), the record must be created by or for any of those classes of persons listed in section 4(1)(l)(i) to (iii). I interpreted the word “for” to mean “on behalf of”, and said that “for” did not mean “intended to go to” or “destined for” because that interpretation would allow a record created by anyone in the world to be excluded from the application of the Act. In that Order, I also said that the concluding part of section 4(1)(l) requires that the record “has been sent or is to be sent” to one of the same classes of persons listed in section 4(1)(l)(i) to (iii). Therefore, section 4(1)(l) is intended to exclude from the application of the Act communications among only those persons listed in section 4(1)(l)(i) to (iii).

[para 17.] In addition, in Orders 96-020 and 96-021, I said that if a record was created by, or sent to, a person who acts on behalf of one of the classes of persons listed in section 4(1)(l)(i) to (iii), the record will be excluded from the application of the Act if the record indicates that the individual is acting on that person’s behalf, or it is evident in some other way.

[para 18.] After a review of the records, it is my opinion that records 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 60 and 64 fulfill section 4(1)(l) as they were created by, or on behalf of, one of the classes of persons listed in section 4(1)(l)(i) to (iii), and were sent to one of those same classes of persons or an individual acting on their behalf. As such, these records are excluded from the application of the Act, and I have no jurisdiction over them.

[para 19.] Furthermore, records 12, 13, 22 and 23 also fulfill the requirements of section 4(1)(l). In Order 96-020, I said that the phrase “is to be sent” in section 4(1)(l) functions to exclude drafts of records. Although the Public Body did not apply section 4(1)(l) to records 12, 13, 22, and 23, I find that these records are drafts of records 53 and 64. As such, these records are also excluded from the application of the Act, and I have no jurisdiction over these records.

[para 20.] However, records 41, 42, 43, 44, 45, 51, 57, 58, 59, 61, 62 and 63 do not fulfill section 4(1)(l). These records consist of attachments to other records authored by a Member of the Executive Council. In order for an attachment to fall under section

4(1)(l), the attachment must individually fulfill the requirements found in this section. The fact that a Member of the Executive Council attaches a covering letter to a record authored by someone else does not mean that the Member of the Executive Council “created” the record or that the record was created on behalf of that Member of the Executive Council. To find otherwise would enable a Member of the Executive Council to shield any record from the Act simply by attaching it to a covering letter.

[para 21.] Consequently, I find that records 41, 42, 43, 44, 45, 51, 57, 58, 59, 61, 62 and 63 do not fulfill section 4(1)(l) and are not excluded from the application of the Act. Therefore, I have jurisdiction over these records. Furthermore, since no mandatory exceptions apply to the information in records 51, 57, 58 and 59, and the Public Body did not claim any discretionary exceptions in regard to these records, I intend to order the Public Body to disclose these records to the Applicant.

[para 22.] However, the Public Body stated that records 61, 62 and 63 are non-responsive to the access request and that records 41, 42, 43, 44 and 45 fulfill section 21(1). As such, I will address these records under those headings.

**B. Did the Public Body properly decide that certain records were not responsive to the Applicant’s access request?**

[para 23.] The Public Body argues that the information in records 61, 62 and 63 is not responsive to the Applicant’s access request.

[para 24.] In Order 97-020, I said that information or records that do not reasonably relate or, in other words, are not relevant to an applicant’s access request will be considered “not responsive” to the request.

[para 25.] Records 61, 62 and 63 are attached to an interoffice memo from one Member of the Executive Council to all Government M.L.A.s. After carefully reviewing these records, it is my opinion that the Public Body properly decided that these records are not responsive to the Applicant’s access request. The information in each of these records does not reasonably relate or, in other words, is not relevant to the Applicant’s access request. Therefore, I intend to uphold the Public Body’s decision to not provide these records to the Applicant.

**C. Does section 21 apply to the records?**

[para 26.] Section 21 reads:

*21(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the*

*Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

*(2) Subsection (1) does not apply to*

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

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

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

*(i) the decision has been made public*

*(ii) the decision has been implemented, or*

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

[para 27.] The Public Body claimed section 21(1) as its authority to withhold the following records:

12, 13, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 41, 42, 43, 44, 45, 53, 64, 65, 66, 67, 68

[para 28.] However, as I have already decided that records 12, 13, 22, 23, 53 and 64 fulfill the requirements of section 4(1)(l) and are therefore excluded from the Act, I do not find it necessary to address whether section 21 applies to these records.

[para 29.] The Public Body states that the information in records 21, 24, 25, 26, 27, 28, 29, 30, 41, 42, 43, 44, 45, 65, 66, 67 and 68 fulfill section 21(1) because they reveal the substance of deliberations of either the Agenda and Priorities Committee or the Executive Council.

[para 30.] In addition, the Public Body states that the exception in section 21(2) does not apply to any of the information in the remaining records at issue as (a) the information has not been in existence for 15 years or more; (b) the information does not consist of a decision made by the Executive Council or any of its committees on an

appeal under an Act; and (c) the purpose of the information is not to present background facts for consideration in making a decision that has been made public, been implemented or is more than five years old.

[para 31.] After a review of the records, I find that section 21(1) applies to records 21, 24, 25, 26, 27, 28, 29, 30, 41, 42, 43, 44, 45, 65, 66, 67 and 68. The information in these records would reveal the substance of deliberations of the Executive Council or a committee of the Executive Council. Therefore, the Public Body must not give access to these records unless section 21(2) applies to them.

[para 32.] In addition, I find that section 21(2) does not apply to records 21, 24, 25, 28, 29, 30, 41, 42, 43, 44, 45, 65, 66, 67 and 68. There is no evidence before me that the information in these records (1) has been in existence for 15 years or more; (2) is information regarding a decision made by Executive Council or any of its committees on an appeal under an Act; or (3) is information that consists of background facts for consideration in making a decision that has been made public, been implemented or is more than five years old. Therefore, access to these records must be denied.

[para 33.] Similarly, I find that section 21(2) does not apply to records 26 and 27. There is no evidence before me that the information in records 26 and 27 has been in existence for 15 years or more, or is information regarding a decision made by the Executive Council or any of its committees on an appeal under an Act. Although a small portion of the information in these records consists of background facts that were presented to a committee of the Executive Council for consideration in making a decision that has been implemented, these background facts nevertheless reveal the substance of deliberations under section 21(1) and, therefore, for the reasons discussed in Order 99-013, must not be disclosed.

## **VI. ORDER**

[para 34.] I make the following Order under section 68 of the Act.

**Issue A: Does section 4(1)(l) exclude certain records from the application of the Act?**

[para 35.] I find that section 4(1)(l) excludes the following records from the application of the Act:

2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 22, 23, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 60, 64

[para 36.] Consequently, I have no jurisdiction over these records. The Applicant cannot obtain access to these records under the Act.

[para 37.] However, I find that section 4(1)(l) does not exclude records 41, 42, 43, 44, 45, 51, 57, 58, 59, 61, 62 and 63 from the application of the Act. Therefore, I have jurisdiction over these records.

[para 38.] Furthermore, since no mandatory exceptions apply to the information in records 51, 57, 58 and 59 and since the Public Body did not claim any discretionary exceptions in regard to these records, I order the Public Body to disclose these records to the Applicant.

[para 39.] However, the Public Body argues that the information in records 61, 62 and 63 is non-responsive to the access request and that the information in records 41, 42, 43, 44 and 45 fulfills section 21(1). I have, therefore, considered these records under those headings.

**Issue B: Did the Public Body properly decide that certain records were not responsive to the Applicant's access request?**

[para 40.] I find that the Public Body properly decided that records 61, 62 and 63 are not responsive to the access request. Therefore, I uphold the Public Body's decision to not provide these records from the Applicant.

**Issue C: Does section 21 apply to the records?**

[para 41.] I find that section 21(1) applies to the information in the following records:

21, 24, 25, 26, 27, 28, 29, 30, 41, 42, 43, 44, 45, 65, 66, 67, 68

[para 42.] Therefore, I uphold the Public Body's decision to refuse the Applicant access to the information in these records.

[para 43.] In conclusion, I order the Public Body to disclose only records 51, 57, 58 and 59 to the Applicant. I further order the Public Body to notify me in writing, within 50 days of receiving a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark  
Information and Privacy Commissioner