

**ALBERTA**

**INFORMATION AND PRIVACY COMMISSIONER**

**ORDER 97-010**

**October 29, 1997**

**ALBERTA TREASURY AND ALBERTA COMMUNITY  
DEVELOPMENT**

Review Numbers 1234, 1235

**Background:**

[1.] The Government of Canada awarded Calgary the right to present to the Bureau International des Expositions (the "BIE") Canada's bid to host "Expo 2005", the World's Fair in the year 2005.

[2.] On October 29, 1996, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Community Development ("Community Development") and Alberta Treasury ("Treasury") (or "Public Bodies" when referred to together) for: "any information about government funding or paying for Expo 2005 including memos to cabinet."

[3.] Canada Expo 2005 Corporation, (the "Third Party"), a volunteer and non-profit organization, was incorporated as the vehicle to present and pursue the bid.

[4.] The Public Bodies provided some of the records to the Applicant with information severed claiming that the severed information fell within the exceptions to disclosure contained in sections 15(1)(disclosure harmful to business interests of a third party), 21(1)(cabinet and treasury board

confidences), 23(1)(advice from officials), 20(1)(a)(disclosure harmful to intergovernmental relations) and 16(2)(disclosure harmful to personal privacy).

[5.] An inquiry was scheduled for May 7, 1997. At the inquiry, representations were made both in writing and in person by the Public Bodies, the Applicant and the Third Party.

[6.] Subsequent to the inquiry, the BIE awarded Japan, not Calgary, the right to host Expo 2005. As a result, the Third Party consented to have the section 15(1) information disclosed. It has come to my attention that the Public Bodies disclosed these records to the Applicant with the exception of six pages which will be discussed later in the Order. For this reason, the section 15(1) records are no longer at issue and will not be dealt with in this Order.

### **Records:**

#### Department of Community Development

[7.] Community Development has an assortment of 12 Records which are either partially severed or completely withheld. They can be described as memos, Minister's recommendations, drafts of Minister's recommendations, and briefing notes.

[8.] Community Development's Records will be categorized by using "C" before each record number. The records at issue for Community Development are:

C7, C8, C9, C11, C15, C16, C17, C18, C19, C23, C25, C26.  
(Three pages have been released from C8 and C18 on the basis of section 21(2)(c)(i)(See "Background facts".))

#### Treasury

[9.] Treasury's Records are similar to those of Community Development's. There are several Minister's reports to Cabinet, memos, analyses of financial data, and drafts of same. Treasury has numbered each page sequentially, thus each page is considered to be a Record for the purposes of this Order. Treasury's Records will be categorized by using "T" before each record number. The records at issue for Treasury are:

T1-17, T18, T55, T56, T57-79, T80-102, T107-122, T150, T152, T153, T154, T156, T158, T159, T160-179, T178, T179-180, T181-198, T204-206, T207-212, T213-218, T219-220, T249-252, T253-254, T255-260, T262-263, T264-269, T270-271, T273-274, T276-277, T285, T302-304, T306, T308-309, T315-316.

### **Applicant's Case:**

[10.] The Applicant submitted that in light of the Premier of Alberta's public announcement that the Government would provide public financing for Expo 2005 and unspecified financial support should the fair run a deficit, there will be background facts which were made available to the Premier and the Cabinet concerning the profit/loss potential of the fair. The Applicant stated that it is reasonable to expect that the Premier's decision will have been made, in part, on detailed background facts concerning the precise nature of the province's financial commitment to Expo 2005. Background facts are not protected under section 21 as Cabinet confidences. It is the Applicant's position that the public has a right under the Act to information concerning potential fiscal liabilities arising from the province's support for Expo 2005 and that the confidentiality of this information is not protected.

### **Public Bodies' Case:**

[11.] The Public Bodies stated that the records at issue concern the Government's analysis of the bid by the Third Party, and Cabinet's consideration of whether and in what manner and to what extent it ought to support that bid.

[12.] Regarding section 21(1), Treasury submitted that Cabinet confidentiality is fundamental to the functioning of the executive branch of government. Treasury submitted that the section 21 exception should apply to records that would reveal the "theme or subject" of Cabinet discussions.

[13.] Treasury also submitted with respect to the exercise of discretion under section 23, that Treasury withheld the records to avoid potential harm to Calgary's bid for Expo 2005 and to deal in a respectful and businesslike manner with the Third Party. Treasury submitted that these reasons provide an appropriate basis for the exercise of discretion not to release the records.

[14.] Community Development submitted with respect to the section 23 exception, that the records do meet the criteria of section 23 and that because this was a very competitive situation, it is not possible to know with any degree of certainty what information could have resulted in lessening the competitive position of the Third Party's bid for the World Fair.

### **Issues:**

Issue I: Does section 21(1) apply to the Records?

Issue II: Do sections 23(1)(a) and (b) apply to the Records?

Issue III: Does section 16(2) apply to Record T306?

Issue IV: Does section 20(1)(a)(ii) apply to Records T153 and T156?

**Discussion:**

[15.] I will first discuss the interpretation of the sections before applying the specific sections to the records at issue.

**Issue I: Does section 21(1) apply to the Records?**

[16.] 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.*

**a) History of protecting Cabinet confidences<sup>1</sup>**

[17.] I believe it would be useful to briefly review the history of Cabinet confidences as an aid to understanding section 21 of the Act.

---

<sup>1</sup> For convenience, "Executive Council" will be referred to as "Cabinet" and this exception in general will be referred to as "Cabinet confidences".

[18.] The rationale for protecting Cabinet confidences and for excluding them from the coverage of the federal Act is because the government is based on a Cabinet system. Thus, responsibility rests not on a single individual, but on a committee of ministers sitting in Cabinet. As a result, the collective decision-making process has traditionally been protected by the rule of confidentiality. This rule protects the principle of the collective responsibility of ministers by enabling them to support government decisions, whatever their personal views. The rule also enables ministers to engage in full and frank discussions necessary for effective functioning of a Cabinet system of government.<sup>2</sup>

[19.] These principles give rise to the public interest immunity privilege which used to be absolute.

[20.] However, the public interest immunity privilege in Canada has evolved. Courts now review the evidence for which immunity is being sought in order to assess whether or not the injury to the public interest which might arise from disclosure, outweighs the injury which might arise from non-disclosure. If the court is not persuaded that any harm to the public interest will ensue, the evidence will be disclosed.

[21.] As a result of recent decisions such as the Supreme Court of Canada in *Carey v. Ontario* [1986] 2 S.C.R. 637, and *Leeds v. Alberta (Minister of Environment)* [1990] A.J. no. 370, the Courts will now weigh the facts in each particular case to determine whether the public interest in the administration of justice should prevail over the public interest in non-disclosure. The claim of privilege will prevail only when it is in the public interest.

[22.] The Cabinet confidences exception in the Act does not reflect the evolution of public interest immunity privilege as set out above. Unlike the common law, section 21 has no provision to allow the decision maker to assess whether or not the injury to the public interest which might arise from disclosure outweighs the injury which might arise from non-disclosure. Rather, under section 21, public interest immunity or Cabinet confidence is determined by whether the information or document in question falls within a certain class. Consequently, section 21 does not codify the common law, but abrogates it or returns it to the status it had before *Carey*. As a result, as Commissioner, I cannot use the common law to aid in my interpretation of section 21.

**b) Do the Records pertain to the Executive Council and its Committees or the Treasury Board and its Committees?**

---

<sup>2</sup> *Confidences of the Queen's Privy Council for Canada, Access to Information Act: Policies and Guidelines*, Treasury Board Secretariat (Ottawa, 1993).

[23.] According to the *Interpretation Act of Alberta*, “Executive Council” means Executive Council of Alberta. The Executive Council is more commonly known as the Cabinet. The Records exempted under this section are records which pertain to the Cabinet and the Agenda and Priorities Committee. The Agenda and Priorities Committee is one of the Cabinet committees of government.

**c) General interpretation of section 21(1)**

[24.] Section 21(1) is a mandatory exception intended to cover specific types of Cabinet documents. If information falls within that section, it must not be disclosed.

[25.] Section 21, like other sections in the Act, contains a general rule in addition to specific examples. To be withheld, the information must fall at least within the general rule: whether the “substance of the deliberation of the Executive Council” is being revealed.

[26.] The use of the term “including” in section 21(1) is intended to present some examples, but any information that would be presumed to reveal the substance of Cabinet deliberations could be protected under section 21. This phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition. Consequently, if a record is captured by these opening words, it does not matter that it does not fall within any of the specific examples. This is consistent with Orders 96-013 and 97-005 where I interpreted section 24 in the same manner.

[27.] What does “substance of deliberations” mean?

[28.] I take 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. This interpretation is consistent with the study prepared by RPG Information Services Inc. for the Information Commissioner of Canada, “The Access to Information Act and Cabinet Confidences, A Discussion of New Approaches”, 1996.

[29.] Accordingly, it is reasonable to assume that if a release of information in a record would ‘explicitly or implicitly’ reveal the substance of deliberations of Cabinet, then the information must not be disclosed. A release of information implicitly reveals the substance of Cabinet deliberations if it is reasonable to expect that the released information could be combined with other information

to reveal the substance of Cabinet deliberations. The information, by itself may not reveal the substance of Cabinet deliberations.

[30.] I agree with the Ontario Order P-1371 which held that it is possible that a record which has never been placed before an Executive Council or its committees may qualify for exemption under the introductory wording of section 21 (section 12(1) in Ontario). This result will occur where a Public Body establishes that the disclosure of the record would reveal the substance of deliberations of an Executive Council or its committees, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations.

[31.] It may be problematic in some instances to determine whether, in fact, a particular record affected the “substance of deliberations”. In most cases, as in this case, there is no record of Cabinet deliberations. On this issue, in *Aquasource Ltd v. The Information and Privacy Commissioner for the Province of British Columbia*, (1996) B.C.S.C., Mr. Justice Vickers held that the Commissioner’s interpretation of section 12 (equivalent to Alberta’s section 21) was not unreasonable. The Commissioner stated:

*Applying the concept of the “substance of deliberations” to Cabinet Submissions is problematic because outsiders, including most government officials, remain unaware of just what went on inside the meetings of Cabinet and its committees. Assumptions about what Cabinet members did and did not read are just that, at least for the record at issue in this inquiry. I do not automatically assume that Cabinet Submissions in all cases reflect the “substance of Cabinet deliberations” without some at least inferential evidence. I agree that disclosure of a record would “reveal” the substance of deliberations if it would permit the drawing of accurate inferences with respect to the substances of those deliberations (see Ontario Order P-266, a decision of T.A. Wright then Assistant Commissioner, March 26, 1991)*

[32.] I agree with the approach followed by the B.C. Commissioner in this regard. If a review of the records fails to produce inferential evidence that the record motivated a particular Cabinet decision, the public body would be required to produce evidence to show that the records if disclosed, would reveal the substance of Cabinet deliberations.

[33.] What does “submitted or prepared” mean?

[34.] The RPG study also states that “submitted or prepared” means that information went before Cabinet or one of its committees or that it was incorporated into a Cabinet submission or used as the basis for developing a Cabinet submission. Information that is reasonably expected to be placed before Cabinet or one of its committees qualifies for this purpose. Records or

information which might be incorporated into a Cabinet submission are not considered to be “submitted or prepared” for Cabinet.

[35.] Generally, a memorandum presenting proposals to Cabinet will be signed by the minister recommending the action proposed. However, this is not always so. Memoranda may be signed by the Secretary to the Cabinet or by a Secretary to a committee of Cabinet and still be a Confidence. Drafts of memoranda are also Confidences. Thus, a draft memorandum which was created for the purpose of presenting proposals and recommendations to Cabinet but which was never actually presented to Cabinet is still a Confidence. Equally a memorandum in final form is a Confidence even if it has not been presented to Cabinet. This is consistent with the *Treasury Board of Canada Policy Manual -Access to Information Volume, Part 2- Guidelines, Chapter 2-6* dealing with confidences of the Queen’s Privy Council for Cabinet (in the federal Act confidences are excluded rather than excepted as in our Act; see s. 69(1)).

[36.] Consequently, section 21(1) provides mandatory general protection for the confidentiality of the Cabinet decision-making process.

**d) What information falls within section 21(2)(c)?**

[37.] The Applicant submitted that the Records contained background facts as set out in 21(2)(c), and are therefore excluded from the application of section 21(1).

[38.] Information in a record, the purpose of which is to present background facts to the Cabinet or any of its committees or to the Treasury Board and its committees for its consideration in making a decision is considered a Cabinet Confidence but is an exception to section 21(1) if:

- the decision has been made public;
- the decision has been implemented, or
- five or more years have passed since the decision was made or considered.

[39.] Section 21(2) applies to records which meet all the criteria in section 21(1). Thus, information which falls within section 21(2) is still considered a Cabinet confidence. However, section 21(2)(c) permits the disclosure of records that do not divulge Cabinet deliberations. Consequently, section 21(2)(c) promotes more accountability for the decisions actually taken by exposing the background facts on which they were based. This exception for background facts is considered crucial in opening up the information which forms the general basis on which Cabinet acted without exposing its deliberations.

[40.] Therefore, for section 21(2)(c) to apply: first, the information must be presented to Cabinet for the purpose of presenting “background facts” for its



consideration in making a decision and second, the information must fall into one of the criteria of 21(2)(c)(i), (ii) or (iii).

[41.] I therefore have to determine what are “background facts”?

[42.] In Order 97-002 I discussed what kind of information constitute “facts”. I stated at page 10:

*The Concise Oxford Dictionary defines “fact”, in part, to mean “a thing that is known to have occurred, to exist, or to be true’ an item of verified information”...a “fact” would be a person’s employment position, date of employment, or reason for leaving employment...By definition, a “fact” may be determined objectively.*

[43.] Material appended to a memorandum presented to Cabinet may be background facts. Such material should be examined independently of its attachment to the memorandum. If a record was not prepared to present recommendations or proposals to Cabinet but rather was prepared for use unrelated to the Cabinet process, it is not by itself exempted by section 21(1). For example, memoranda to Cabinet may have as appendices newspaper clippings, tables of statistics, reports prepared for use within a department. These records in their original state are not exempted by section 21(1) and they do not become exempted simply because they were attached to a memorandum and are thereby distributed to Cabinet or to Ministers of the Crown for use in Cabinet deliberations.

[44.] For background facts to be disclosed, one of the criteria of section (21)(2)(c)(i), (ii), or (iii) must be satisfied. In this situation, since 5 years has not passed, only criteria (i) or (ii) are possible. Therefore the question I must determine is whether “a decision has been made public or implemented”.

[45.] According to the *Government of Alberta, Freedom of Information and Protection of Privacy Policy Manual*, page 86, a decision is made public when the decision has been communicated to the public in an authorized way, such as a statement by a Minister, a statement or release by a communications officer, a statement in Question Period, presenting the Budget in the Legislative Assembly, or a statement to the media. According to the *Concise Oxford Dictionary*, “implemented” means to put a decision, plan into effect.

[46.] It follows that the same background facts may relate to several cabinet decisions. Section 21(2)(c) would apply to permit disclosure of only the decision which has been made public or implemented.

[47.] Due to section 21(2), Cabinet confidences do not have absolute protection from disclosure. Section 21(2) provides a window of access to Cabinet confidences under limited circumstances.

**e) How does section 21 relate to section 23?**

[48.] For a number of records, both section 21 and section 23 were applied as exceptions. Both sections 21 and 23 deal with advice, recommendations and policy options and considerations. How does a public body determine whether section 21 or section 23 applies to a particular record?

[49.] Following the statutory interpretation principle of presumed coherence, all sections of an act should work together. In my view, sections 4(1)(l), 21(1) and 23(1) correspond to the levels of information within the government hierarchy. The Act may reflect the fact that, as information moves up the decision-making hierarchy of government, that is from research and analysis levels towards Cabinet decision-making levels, it is assumed to take on an increasing amount of sensitivity. Hence, communications between ministers are excluded, Cabinet deliberations, which are the ultimate decision-making forum, receive a strong, mandatory exception to disclosure while the research and analysis levels have a discretionary exception.

[50.] The main difference between records described in section 21 and those in section 23 is the purpose for which they were prepared. Memos and briefs and other forms of records prepared for the purpose of presenting recommendations or proposals to Cabinet fall within section 21. Records prepared for or by a public body for consideration by the Minister but which are not records prepared for consideration by the Cabinet fall into section 23.

[51.] Like the Alberta Act, the federal access to information legislation provides that advice or records to brief ministers in relation to matters that are before, or are proposed to be brought before Cabinet are not discloseable (in fact, Cabinet confidences are excluded from the Federal Act). The *Treasury Board of Canada Policy Manual -Access to Information Volume, Part 2- Guidelines, Chapter 2-6* offers some insight. With respect to records which are used to brief Ministers the Manual states at page 5:

*Again, care must be taken to distinguish these records from those described in paragraph 21(1)(a) [equivalent to Alberta's section 23(1)] concerning advice or recommendations developed by or for a government institution for a Minister of the Crown. Policy recommendations can appear in a record created independent of the Cabinet process, which record was not prepared for the purpose of briefing a minister in relation to matters before Cabinet or for use in a discussion with other ministers. The purpose for which the record was prepared is the crucial factor.*

*For example, take a situation where a formal Record of Decision directs a government department to develop policy recommendations for its minister on a particular subject. The officials in that department have meetings for which agendas are prepared, notes are made of the proceedings and reports are developed to be the basis of subsequent discussions on the same subject. Although the ultimate purpose of the meetings and reports is to develop policy recommendations for the use of the minister in his or her presentation to Cabinet, the records themselves are not Confidences. The records were created for the use of officials while they are developing policy, not for the use of the minister. However, if any of the information in these records provides a link to Cabinet, that information should be protected. In the same view, the end product (e.g.) what the minister uses to make a presentation to Cabinet) is a Confidence.*

[52.] Therefore, unlike section 23, to fall within section 21(1) exemption, the record must be generated for or received by Cabinet members or officials while taking part in the collective process of making government decisions or formulating government policy.

#### **f) Review of the Records at Issue**

[53.] Applying the above analysis, I will now consider whether the section 21(1) exemption applies to the records for which it has been claimed by the Public Bodies. For ease of analysis, I have grouped the records together according to document type.

#### Ministerial Reports and Ministerial Draft Reports for Cabinet

[54.] The following records fall into this category:

T1-17, T57-79, T80-102, T107-122, T160-177, T181-198, C8, C9, C18.

[55.] Several of the above records are duplicates or very similar in content.

[56.] The Public Bodies stated that the contents of the Ministerial Reports would reveal the position taken and recommendations being made by the Minister to Cabinet, and thus reveal the substance of the discussion of Cabinet.

[57.] I agree. A review of these records show that they contain advice and recommendations and that they were submitted or prepared for submission to Cabinet. Moreover, I find that since the information contained in a Ministerial Report formed the basis for Cabinet deliberations, disclosure of these records would reveal the substance of Cabinet deliberations, because it would permit

the drawing of accurate inferences with respect to the deliberations. Section 21(1) has been met for all of the above records.

**“Background facts”- section 21(2)(c)**

[58.] The Applicant argued that the Premier has publicly announced a decision to provide public financing for Expo 2005 and unspecified financial support for Expo 2005, should the fair run a deficit.

[59.] The Public Bodies’ position is that they accept that there has been some interim decisions adopted by Cabinet but stated that no decision has yet been made on the final approval of funding or on the amount of funding for Expo 2005.

[60.] Community Development advised that Records C8, and C18 have 3 pages disclosed to the Applicant as they represent background information related to a decision that has been made public regarding financial support for Expo 1998 in Lisbon.

[61.] In reviewing Community Development’s disclosure of three pages from Records C8 and C18 as background facts under section 21(2), I note that one page is a duplicate of the other, so we are really dealing with two pages. The first page is a letter from the Premier of Alberta to the Prime Minister of Canada regarding Alberta’s willingness to participate in the 1998 World Exposition in Lisbon. The second page is a letter from the Prime Minister in response.

[62.] It is necessary to examine the context in which the information was presented to Cabinet. It is not sufficient to say a decision has been made public so the background facts can be disclosed. One must look at what decision was being deliberated when these records were submitted for Cabinet deliberation. The decision being deliberated was not the decision to support the 1998 Expo in Lisbon but rather Expo 2005.

[63.] Although these letters may meet the first part of the test contained in section 21(2)(c), i.e. the purpose of the letters was to present background facts to Cabinet for consideration in making a decision, the second part of the test has not been satisfied. Section 21(1) applies because none of the criteria in section 21(2)(c)(i), (ii), or (iii) have been met. These letters should not be disclosed.

[64.] Because section 21(1) is a mandatory exception, Community Development has no discretion regarding disclosure. Since these pages of Records C8 and C18 have already been disclosed, it is no longer practical to order that the pages be withheld. Nevertheless, I consider these three pages to be improperly disclosed since they fall within section 21(1).

### Memorandum to Ministers

[65.] T158 is a memo from a Deputy Minister to the Provincial Treasurer regarding information prepared for the Agenda and Priorities Committee and indicates the contents of a meeting. It contains some analysis and policy options being considered.

[66.] T302- T304 is a memo to the Provincial Treasurer regarding the Cabinet agenda with supporting documentation attached.

[67.] C19 is a three page record. The first page is a memo from the Deputy Minister to the Minister regarding her draft Ministerial Report. The last two pages consist of portions of the draft Ministerial Report with suggestions written directly on the document.

[68.] The contents of these records relate to various Cabinet or Committee submissions. While they were not put before the Cabinet or the Committee, they either reveal the contents of the Cabinet submissions or at least provide sufficient information that one could deduce or infer the contents of such submissions or deliberations of Cabinet or the Committee.

[69.] The contents of these records would, if disclosed, either directly disclose Cabinet's discussions or permit the drawing of accurate inferences with respect to the substance of those deliberations. Therefore, the criteria in section 21(1) has been met and I uphold the Public Bodies' decision to withhold these records.

### Memos from Deputy Secretary to Cabinet to the Minister of Community Development

[70.] The following records fall within this category: C7, C15, T55, T154.

[71.] Records T55 and T154 are duplicates of C7 and C15. These records are both single page memoranda from the deputy secretary of cabinet to the Minister of Community Development, outlining instructions and/or results of a cabinet meeting. I find that these records reveal the substance of deliberations as set out in section 21(1).

### Cabinet Agenda

[72.] The following records fall within this category: T178-180

[73.] This three page document outlines the Cabinet agenda. I accept that it meets the criteria of section 21(1) since it reveals the substance of deliberations of two Cabinet meetings.

**Issue II: Do sections 23(1)(a) and (b) apply to the Records?**

**a) Section 23(1)(a) (“Advice from officials”)**

[74.] Treasury claimed section 23(1)(a) to the following records:

T18, T56, T150, T152, T153, T156, T158, T159, T160-177, T181-198, T204-212, T213-218, T219-220, T249-252, T253-254, T255-260, T262-263, T264-269, T270-271, T273-274, T276-277, T285, T302-304, T308-309, T315-316.

[75.] I do not intend to deal with the records severed under section 23(1)(a) for Records T158, T160-177, T181-198 and T302-304, as Treasury correctly applied section 21(1) to those records.

[76.] Community Development claimed section 23(1)(a) to the following records:

C11, C19, (1st page), C23, C25( 1st three pages), C26.

[77.] Section 23 (1) is a discretionary (“may”) exception.

[78.] The information contained in these records is in the form of advice, analyses, and policy options prepared by the officials for their respective Ministers regarding the information provided by the Third Party.

[79.] I have considered section 23(1) in Orders 96-006 and 97-007. In order to meet the criteria of section 23(1)(a) the advice, proposal, recommendation, analyses or policy option must be:

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

[80.] Having reviewed the records, I am satisfied that the records in question meet the criteria for section 23(1)(a).

[81.] The Applicant stated that it relied upon the proposition contained within Order 96-012 to the effect that once a decision on a matter has been reached, section 23(1) no longer applies to documents created in the decision-making process.

[82.] In Order 96-012 I stated that I take section 23(1) to contemplate the non-disclosure of information generated during the decision-making process. If the record indicates that a decision has already been made, it should not be withheld.

[83.] The Records at issue for which section 23(1)(a) are being claimed were clearly generated as part of the decision-making process regarding the analysis of the bid by the Third Party. Moreover, evidence given by the Public Bodies at the inquiry shows that no decision was made regarding final approval of funding or on the amount of funding. As a result, I find that section 23(1) still applies.

[84.] Record C25 is a nine page document. Community Development claimed section 23(1)(a) for the first three pages and section 15(1)(a)(ii),(b),(c)(i) (disclosure harmful to business interests of a third party) for the last six pages. To my knowledge, Community Development has not disclosed these records to the Applicant even though the Third Party has consented to the disclosure of all section 15(1) information. With the exception of these pages, all other records in which section 15(1) was claimed have been disclosed. I am somewhat puzzled why Community Development has not disclosed these last six pages since according to section 15(3)(a), if the Third Party consents to the disclosure, section 15(1) does not apply.

[85.] I note that the last six pages of C25 are identical to Records T207-212. Treasury claimed section 23(1)(a) for these records. What I have before me in this inquiry are two public bodies who have claimed two different exceptions for the identical document. Since Community Development has claimed section 15(1) and no other exception for these last six pages, I have no choice but to order that these six pages should be disclosed.

[86.] To conclude, based on the Public Bodies' evidence, I hold that the Public Bodies exercised their discretion properly under section 23(1)(a). I find that the Public Bodies have correctly applied section 23(1)(a) to the above records, and I uphold their decision to sever the information.

[87.] In addition, in accordance with section 68(2)(a), I require that Community Development give the Applicant access to the last six pages of Record C25.

**b) Section 23(1)(b)(i) (“Advice from officials”)**

[88.] Community Development claimed section 23(1)(b)(i) to Records C16 and C17. Community Development described these records as “drafts of summary of discussions on possible objections to government funding of third party and strategies to counter them”. Community Development submitted that

disclosure of these records would reveal the substance of the discussions and compromise the bid process.

[89.] In Order 96-012 I stated that the purpose of section 23(1)(b) is to protect the consultations or deliberations occurring during the decision-making process. Having reviewed the records and having considered the evidence of Community Development regarding the exercise of its discretion, I uphold Community Development's decision to refuse disclosure to Records C16 and C17 under section 23(1)(b).

**Issue III: Does section 16(2) apply to Record T306?**

[90.] Record T306 has an unidentified telephone number written on the side in handwriting. Treasury claimed section 16(2) as an exception to the disclosure of the telephone number because it is Treasury's position that this telephone number may be an individual's personal telephone number.

[91.] Section 16(1)(disclosure harmful to personal privacy) reads:

*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.*

[92.] Section 16(2) provides a list of various presumptions of disclosures which would be unreasonable invasions of a third party's personal privacy.

[93.] I find that section 16(1) is the more appropriate exception to be applied to Record T306. Because section 16(1) is a mandatory ("must") section, I will apply that section even if the public body does not: see Order 96-008 for my general comments about applying a mandatory section.

**Issue IV: Does section 20(1)(a)(ii) apply to Records T153 and T156?**

[94.] It is not necessary to deal with Issue IV since it has been determined that section 23(1)(a) exempts these two records.

**Order:**

1. For the reasons stated in this Order, I uphold the Public Bodies' decisions to sever information and under section 68(2)(c) I require the heads of the Public Bodies to refuse access to:



T1-17, T55, T57-79, T80-102, T107-122, T154, T158, T160-177, T178, T179-180, T181-198, T302-304,

C7, C8, C9, C15, C18, C19.

2. Under section 68(2)(b) I confirm the decision of the Public Bodies to withhold the following records:

T18, T56, T150, T152, T153, T156, T159, T204-206, T207-212, T213-218, T219-220, T249-252, T253-254, T255-260, T262-263, T264-269, T270-271, T273-274, T276-277, T285, T306, T308-309, T315-316

C11, C16, C17, C23, C25, C26.

3. Under section 68(2)(a) I require the head of Community Development to give the Applicant access to Record C25 (last six pages).
4. Under section 68(2)(c), I require the head of Community Development to refuse access to three pages that were disclosed under section 21(2) in Records C8 and C18. In practical terms, I realize that this condition of the Order can not be carried out since the Records have already been disclosed.
5. I ask that the Public Bodies notify me in writing within 30 days, that this Order has been complied with.

Robert C. Clark  
Information and Privacy Commissioner

Post Script:

Both Public Bodies argued that they exercised their discretion properly in light of the highly competitive situation of the bid for Expo 2005 which existed at the time of the inquiry. The desire to avoid harming Canada 2005's competitive position was the basis for the exercise of discretion to withhold the records under section 23.

After the inquiry, on June 14, 1997, Calgary lost the bid to Japan. Presumably, the potential for harm to the Third Party's position no longer exists.

It is beyond my jurisdiction to examine the exercise of the discretion of public bodies post inquiry. However, the Public Bodies may consider re-examining their discretion at this point in time in view of respecting the principles of access as outlined in the Act.