ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-006

April 21, 1998

ALBERTA ENERGY

Review Number 1369

BACKGROUND

[para1] On September 2, 1997, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Energy (the "Public Body") for access to:

> *...all records and documents from July, 1995, to the present relating to: ethane exports; ethane extraction; ethane refining; ethane feedstock for Alberta's petrochemical industry; economics of or relating to ethane extraction, refining, upgrading within Alberta. Such records and documents to include, but not limited to, the following: Ministerial or other records (including cabinet agendas and minutes, cabinet submissions, briefing notes, speech drafts and texts, speaking notes, working papers, policy statements, internal departmental records and communications, correspondence to and from parties interested in or affected by Alberta's policies relating to the above, such as: the Canadian Association of Petroleum Producers; Dow Chemical, NOVA Corporation, its subsidiaries and affiliates, e.g. NOVA Chemicals and NOVA Gas Transmission Ltd.; and Alliance Pipeline Ltd.)*

[para2] Some of the requested records contained information relating to the Third Party. These records included presentation documents as well as letters sent by the Third Party to the Public Body which provided general information, detailed opinions of the Third Party, and requested assistance.

[para3] By letter dated November 21, 1997, the Third Party objected to the disclosure of these records, citing section 15(1) ("disclosure harmful to business interests") as an exception to disclosure.

[para4] On December 15, 1997, the Public Body made a decision to disclose the majority of the information in the records, notwithstanding the Third Party's section 15(1) objection. It decided to withhold only a small portion which it severed under discretionary exceptions in sections 20, 23, and 24.

[para5] On December 19, 1997 the Third Party asked this Office to review the Public Body's decision to release the information. Mediation was not successful and the matter was set down for inquiry on March 4, 1998.

[para6] Representations were made both in person and in writing, by the Public Body, the Third Party, and the Applicant.

[para7] It should be noted the issue in this inquiry is limited to whether the records should be withheld from disclosure under section 15(1). The Public Body's severance of the documents under sections 20, 23 and 24 will not be addressed, but may be the focus of a future inquiry.

RECORDS AT ISSUE

[para8]

- Record #E48a: Presentation Documents date stamped April 16, 1996 submitted by the Third Party to another Public Body, copies of which were sent to this Public Body (Alberta Energy);

- Record #E120: Letter dated November 16, 1996 from the Third Party to the Public Body;

- Records #E238

and #E238a: Letter dated July 23, 1997 from the Third Party to the Public Body along with a draft letter composed by the Third Party (record #E238a).

PRELIMINARY MATTERS

[para9] There are four preliminary matters in this inquiry:

1) Whether the Third Party was entitled under section 66(3) to an *in camera* session, which excluded both counsel for the Public Body and counsel for the Applicant;

2) Whether the Third Party's response to the section 29 notice was adequate;

3) Whether portions of the records should have been released to the Applicant due to the Third Party's alleged consent under section 15(3);

4) Whether my jurisdiction to review mandatory exceptions under section 15(1) is limited as a result of an agreement between the parties.

Was the Third Party Entitled Under Section 66(3) to an *In Camera* Session Which Excluded Both Counsel for the Public Body and Counsel for the Applicant?

[para10] At the beginning of the inquiry, the Third Party requested that a portion of its submission be presented in an *in camera* session, excluding both counsel for the Applicant and counsel for the Public Body. The Third Party stated it wanted to make *in camera* submissions regarding the "harm" which would result from the disclosure of the records to the Applicant. It argued that due to the sensitive nature of this submission, an *in camera* session was necessary in order to make full and complete representations. The Third Party stated its *in camera* submission would address the context, and background of the records, including how they were prepared, by whom, and for what purpose.

[para11] The Public Body and the Applicant both objected to this *in camera* session. In particular, the Applicant argued that there was no reason why the Public Body should be excluded as they were already privy to the content of the records. Furthermore, the Applicant argued that any submissions made by the

Third Party should be made way of evidence, and should be subject to cross-examination by the Public Body.

[para12] During the inquiry, I decided to allow the *in camera* session, subject to the following two stipulations:

> 1) that the Third Party's *in camera* representation be limited to general submissions and not include evidence; and
>
> 2) that following the *in camera* session, my counsel, while not disclosing the content of the Third Party's representations, would provide a description of the session to the other two parties.

[para13] In making this decision, I had to determine whether allowing the *in camera* session would breach the principle of procedural fairness. In my view it did not. Procedural fairness, includes both the concepts of "natural justice" and the "duty to be fair". James L.H. Sprague, in his article, "Natural Justice and Fairness in a Nutshell", (1997), 3 Administrative Agency Practice 15, states the principles of procedural fairness apply to any person who, acting under the authority of a statute, makes a decision affecting the rights, privileges or interests of an individual. A decision having a substantial impact on an individual attracts the higher procedural standard, called natural justice, while a decision having a lesser impact attracts the lesser procedural standard called fairness (the "duty to be fair"). One of the main principles of procedural fairness is that a person must be given an adequate opportunity to be heard, or in other words, the person must know the case being made against him or her, and be given the opportunity to answer to it.

[para14] In determining the standard of procedural fairness for administrative tribunals, I believe the best place to start is with the principles I established in my prior Order 97-009. In that Order I adopted the approach of the Supreme Court of Canada in the case of *2747-3174 Quebec Inc.* v. *Quebec (Regie des permis d'alcool)*, [1996] 3 S.C.R. 919 where the court cited, with approval, a quote from an earlier decision *Syndicat des employes de production du Quebec et de l'Acadie* v. *Canada (Canadian Human Rights Commission)*, [1989] 2 S.C.R. 879 at pp. 895-896:

> Both the rules of natural justice and the duty of fairness are variable standards. Their content will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided. The distinction between them therefore becomes blurred as one approaches the lower end of the scale of judicial or quasi-judicial tribunals and the high end of the scale with respect to administrative or

> executive tribunals. Accordingly, the content of the rules to be followed by a tribunal is now not determined by attempting to classify them as judicial, quasi-judicial, administrative or executive. Instead, the court decides the content of these rules by reference to all the circumstances under which the tribunal operates.

[para15] Accordingly, to determine the standard of procedural fairness for an inquiry, I must consider three things: the statutory provisions under the Act; the nature of the matter to be decided; and the circumstances of the case.

[para16] As I stated in Order 97-009, the standard of procedural fairness required under the Act is less than required of other decision makers. While the Act maintains certain rights related to natural justice or the duty to fair, it specifically limits certain other rights. Particularly relevant to this inquiry is section 66(3). While section 66(3) provides an opportunity to make representations to the Commissioner, it specifically limits the right to be present during, to have access to, or to comment on another person's representations made to the Commissioner. Section 66(3) states:

> *(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given the opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

[para17] The issue of access to representations of another party has been addressed in numerous cases by the Ontario Commissioner. In particular, Order 164 (1990) and Order 207 (1990), are the foundation cases which outline the duty on a Commissioner to exchange or disclose representations. Both of these cases address section 52(13) of the Ontario *Freedom of Information and Protection of Privacy Act*, which is the equivalent to our section 66(3). In these cases, the Ontario Commissioner stated that while the wording of the Act does not prohibit him from ordering access in the proper case, it would be extremely unusual. The reason why representations should not be exchanged is because in the vast majority of cases, the representations would allude to the content of the information at issue, and therefore defeat the purpose of the inquiry.

[para18] In this inquiry, there was no risk of disclosing the content of the information at issue to the Public Body, as the Public Body already had access to the records. Nevertheless, in my view, the use of *in camera* sessions should not be limited only to situations where there is a risk that the representations

may disclose the content of information. Rather, the use of *in camera* sessions should also be considered, where a party is reluctant to express sensitive or confidential submissions in open court. If I find that after an *in camera* session has begun, the session is not used to express sensitive or confidential information, I will, of course, conclude the session and continue the inquiry with all parties present.

[para19] Though the Act does not specifically address circumstances of this nature, in my view, it is within my power to develop a set of procedures and to control the process during inquiries. In Ontario Order 164 (1990) the Commissioner agreed. He stated:

> ...while the Act does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries under the Act. By necessary implication, in order to develop a set of procedures for the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.

[para20] Furthermore, in Ontario Order 207 (1990), the Commissioner stated:

> In my view, the Commissioner or his/her delegate has the fundamental power to control the inquiry process. In Re Cedarvale Tree Services Ltd. and Labourers' Int'l Union of North America, Local 183, (1971) 3 O.R. 832 (Ontario Court of Appeal), Mr. Justice Arnup, at page 841, stated as follows:
>
> > [T]he Board [Ontario Labour Relations Board] is a master of its own house not only as to all questions of fact and law falling within the jurisdiction conferred upon it by the Act, but with respect to all questions of procedure when acting within that jurisdiction. In my view, the only rule which should be stated by the Court (if it be a rule at all) is that the Board should, when its jurisdiction is questioned, adopt such procedure as appears to be just and convenient in the particular circumstances of the case before it.

[para21] In my view, a party should be allowed an *in camera* session for submissions which are of a sensitive or confidential nature. Though I am not

advocating that an *in camera* session be allowed in every situation where a party claims its representations are of a sensitive or confidential nature, it should be allowed if it is necessary to promote full and open representations.

[para22] In the *Lincoln County Board of Education* v. *Ontario (Information and Privacy Commissioner)* (1995), 85 O.A.C. 21 (Div. Ct.), the Divisional Court of Ontario emphasized the importance for the Commissioner to maintain confidentiality throughout the decision-making process. It stated:

> The process under the Act [Ontario Municipal Freedom of Information and Protection of Privacy Act] requires the maintenance of confidentiality throughout. This puts considerable administrative and other burdens on the Commissioner. His task is not an enviable one. He cannot hold a hearing with all interested parties present. He cannot provide each party with the representations of the others. The language of his decision must be restricted to preserve confidentiality.

[para23] In this inquiry, the nature of the matter to be decided was whether section 15(1) exception under the Act applied to the information in the records at issue thereby preventing disclosure of the records to the Applicant. Though the Public Body had access to the records at issue, the Third Party had not disclosed detailed reasons to the Public Body as to why they thought the disclosure would be harmful to their future business interests. Due to the sensitive nature of these reasons, an *in camera* session was the only way to ensure these submissions were kept confidential, yet at the same time allow the Third Party to make full and complete representations. I want to however emphasize that my decision was limited to the issue of whether general submissions of a sensitive or confidential nature may be presented *in camera*, and not whether sensitive or confidential evidence may be presented *in camera.* The issue of whether evidence may be presented *in camera* may involve other factors and considerations which were not addressed in this Order.

[para24] In any event, it is my view that the Public Body and the Applicant did not need access to the *in camera* submissions in order to make a full argument. Before the inquiry began, the Public Body and the Applicant were made aware of the issues to be determined, and the nature of the Third Party's arguments. First, the Third Party's response to the section 29 notice informed the Public Body of its intent to rely on the section 15(1) exception, and therefore defined the exception to disclosure under section 15(1) as the issue to be decided. Second, the Notice of Inquiry sent to all Parties by my office, set

out, among other things, the details regarding the inquiry (date, time, and place), the parties (the Third Party, the Public Body and the Applicant), the issues under the Act, a statement about who bore the burden of proof, and information on the submissions of briefs. Third, prior to this inquiry, my Office sent a copy of the Third Party's written brief to the other parties. Though my Office severed the portions of the brief which addressed the *in camera* submissions, the severed brief nevertheless gave the other parties adequate notice of the Third Party's arguments.

Was the Third Party's Response to the Section 29 Notice Adequate?

[para25] The Public Body argued that since the burden of proof in this inquiry was on the Third Party, the Third Party's written response to the Public Body's section 29 notice should have provided greater particulars of its objections to disclosure. The Public Body submits the Third Party's November 21, 1997 response to the section 29 notice was largely a restatement of section 15(1) and provided few if any specific facts upon which the Public Body could make a considered assessment of the objections.

[para26] The relevant portions of section 29 and section 30 state:

> *29(1) When the head of a public body is considering giving access to a record that may contain information*
>
> > *(a) that affects the interests of a third party under section 15, ...*
>
> *the head must, subject to section 28, where practicable and as soon as practicable, give written notice to the third party in accordance with subsection (3).*
>
> *(3) A notice under this section must...*
> > *(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or make representations to the public body explaining why the information should not be disclosed.*
>
> *30(1) Within 30 days after notice is given pursuant to section 29(1) or (2), the head of the public body must decide whether*

or not to give access to the record or to part of the record, but no decision may be made before the earlier of

(a) 21 days after the day notice is given, and
(b) the day a response is received from the third party.

(emphasis added)

[para27] After reviewing these sections it is clear there is no obligation on a Third Party to even respond to a section 29 notice, much less provide detailed particulars of their objection. Section 29(3)(c) states that a notice to the Third Party must inform the Third Party that they "may ", as opposed to "must", make written representations to the Public Body. Furthermore, section 30 provides for the possibility that the Third Party may make no response whatsoever. Section 30 provides that the Public Body may only make a decision 21 days after giving notice under section 29, even if no response is received from the Third Party.

Was the Applicant Entitled to Portions of the Records As a Result of the Third Party's Alleged Consent?

[para28] At beginning of the inquiry, the Applicant argued that during prior discussions, the Third Party consented to the release of portions of record E48a. It therefore requested that those portions of the record be released to them.

[para29] The alleged consent occurred on December 3, 1997, after the issuance of the section 29 notice of November 4, 1997, but prior to the section 30 notice of December 15, 1997. In essence, the consent occurred during what I would call a "consultation period" period between the section 29 and section 30 notices.

[para30] Under section 29(1), the Public Body must give a written notice to the Third Party if it is considering disclosing a record about the Third Party. This notice informs the Third Party of the Public Body's intention to disclose the record and essentially begins a "consultation period" between the parties. During the consultation period, the parties should discuss why they believe certain records should or should not be disclosed. The Public Body may be able to convince the Third Party to agree to the disclosure of the records, or perhaps the Third Party may be able to convince the Public Body that the records should be withheld under an exception such as section 15(1).

[para31] Within 30 days after the section 29 notice is given, the Public Body must make a "final" decision and issue a section 30 notice which closes the consultation period. This section 30 notice must inform the Third Party of its decision, as well as the reasons for its decision. It is critical that the Public Body set out the reasons for its decision in a comprehensive way, because pursuant to section 62(2), it is this section 30 decision which I review.

[para32] In this inquiry I reviewed all the sections of the Act which refer to consent of a Third Party, and in particular, section 15(3). This section is perhaps the most cited provision in regards to a Third Party's consent. It does not, however, assist me in determining the nature of consent. It merely states:

> (*3) Subsections (1) and (2) do not apply if*
> *(a) the third party consents to the disclosure...*

[para33] As the Act does not elaborate on the nature of "consent", I decided this issue based on the extent of my jurisdiction under the Act. In particular, I held that because it is the section 30 notice that officially discloses the Public Body's position, because it is the section 30 notice which is "appealed" to me, and since it is the section 30 decision which I review, I will not review what occurred prior to the issuance of the section 30 notice to determine whether implied or explicit consent exists. Instead, if the Public Body believes the Third Party agrees to disclosure, it should state this in its section 30 notice. It is then up to the Third Party to either confirm the alleged consent and allow the 20 day "review period" under section 30(3) to pass, or deny consent was given and appeal to this Office for a review. If the Third Party denies an agreement exists and appeals to this Office, it is my view that no "consent" exists. Only after the Third Party lets the 20 day period pass without a request for a review, can it be said that "consent" has occurred. As such, if the Public Body believes the Third Party is consenting to the disclosure of the records, it is important that they first confirm this with the Third Party through the issuance of a section 30 notice.

[para34] Using this procedure to confirm whether consent occurred, may be the best way to prevent misunderstandings between the parties.

Is My Jurisdiction Under Section 15(1) Limited as a Result of an Agreement Between the Parties?

[para35] Before I begin my analysis of Section 15(1), I think it is important to address an apparent misconception as to the extent of my jurisdiction to review mandatory exceptions under the Act.

[para36] The Third Party submits that prior to this inquiry, the parties agreed that certain parts of the section 15(1) test were fulfilled, and that this agreement was evidenced in the Public Body's section 30 notice, dated December 15, 1997. As such, it submits I need only address those parts of the test which remain outstanding. In particular, the Third Party submits that after taking into account all the "agreements" between the parties, the only real issue left is whether records E238 and E238a contain "commercial information" under Part 1 of the test.

[para37] I do not agree with this submission. First of all, I am doubtful whether the content of the section 30 notice constitutes such a wide-ranging agreement by the Public Body. In any event, even if this notice could be interpreted as containing such an agreement, I do not accept that it is within the power of the Parties to enter into agreements which limit my review of a mandatory exception to disclosure under the Act. Mandatory exceptions are absolute prohibitions on disclosure imposed by the Legislature, which means that records which fall within the exception must not be disclosed. Therefore, I must make sure the head of the Public Body has fully, completely, and correctly applied a mandatory exception. If a mandatory exception such as section 15(1) is at issue in an inquiry, the parties must be prepared to provide submissions on all parts of the exception, and for all the records at issue.

ISSUES

[para38] There are two issues in this inquiry:

1) Which Party has the burden of proof in this inquiry?
2) Does the section 15(1) exception apply to the records at issue?

ISSUE A: Which Party Has the Burden of Proof?

[para39] The relevant portion of section 67 states:

> *67(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*

> *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
>
> *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

[para40] This inquiry relates to the Public Body's decision to give the Applicant access to records which contain information about the Third Party. Since "personal information" is not involved, the Third Party has the burden of proof as per section 67(3)(b).

ISSUE B: Does the Section 15(1) Exception Apply to the Records At Issue?

[para41] Section 15(1) reads:

> *15(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
> *(i) trade secrets of a third party, or*
> *(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,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*

> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[para42] Section 15 is a mandatory exception. This means that if a head of a Public Body determines the information falls within the exception, he must refuse access.

[para43] For information to fall under section 15(1), the Third Party must satisfy the following three-part test:

> Part 1: The information must reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party (Section 15(1)(a));
>
> Part 2: The information must be supplied, explicitly or implicitly, in confidence (Section 15(1)(b)); and
>
> Part 3: The disclosure of the information could reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

Discussion Re: Part 1 - Section 15(1)(a)

Third Party's Position

[para44] The Third Party submits that the information in the records fulfills Part 1 of the test. Specifically, it argues:

> 1) That records E238 and E238a contain commercial information. Since the Act does not define the term "commercial", the Third Party submits this term is intended to have a broad interpretation, and as a result, the Commissioner should consider what the records "constitute" and not only what they "contain". More specifically, the Third Party submits that since the disclosure of the information would be harmful to the Third Party's business interests, by implication, the information must be considered commercial. In support of this argument, the Third Party refers to the Federal Court decision of *Air Atonabee Ltd.* v. *Canada (Minister*

of Transport) (1989) F.C.J. No. 453 (QL) and makes limited reference to the marginal notes corresponding to s. 15(1) of the Act.

2) That, in regards to records E48a and E120, the Public Body has implicitly agreed in its December 15, 1997 letter that these records contain commercial information and therefore discussion as to these records' commercial nature is not necessary .

3) That though certain historical facts, concepts and/or ideas were publicly stated or are currently in the public realm, the business interest and "commercial information" of the Third Party can only be ascertained from a view of the record as a whole. Since the record as a whole has not been released to the public, the business interest or commercial information it represents has not been revealed.

4) That, under section 15(1)(a)(ii), the information must be considered "of" the Third Party, because the information "belongs to" the Third Party.

Public Body's Position

[para45] The Public Body argues the information in the records at issue does not fulfill part 1 of section 15(1). Specifically, it argues:

1) That the content of the records should not be classified as commercial information. Though the Third Party is a commercial entity and engaged in commerce, it does not necessarily follow that the records created by that entity are of a commercial nature. The Public Body submits the records do not specifically provide information regarding actual business or financial matters of the Third Party but instead generally discuss policy initiatives, or request the government take certain policy directions or actions.

2) That in addition, only small portions of the documents could be considered "financial" information under section 15(1)(a), and, in any event, these portions are already in the public domain and therefore would not be "revealed" through a disclosure by the Public Body.

3) That, under section 15(1)(a)(ii), the information is no longer considered "of" or belonging to the Third Party as this information has been released in the public domain.

Applicant's Position

[para46] The Applicant agrees with the Public Body that the records should be disclosed. However, as the Applicant did not have access to the records, it did not make specific submissions regarding Part 1 of the section 15(1) exception. The Applicant did however make some general submissions. It stated the Applicant has a prima facie right of access under section 2(a) of the Act, that the onus falls on the Third Party as to why the records should not be released, and that the Applicant must be given access unless there is clear and convincing evidence that all the information falls within the exception.

Analysis - Part 1: Do the Records Contain "Commercial" Information?

[para47] I have carefully reviewed all the records at issue, and in my view, none of these records contain commercial information.

[para48] Simply because the records are authored by a commercial enterprise, does not in itself mean they are of a commercial nature. If this were the case, any document written on company letterhead would be considered "commercial". I do not think the section 15(1) exception was intended to have such a wide-ranging application. The Ontario Commissioner also adopted this view in Orders 16(1988) and P-400 (1993), where he interpreted similar sections of the Ontario *Freedom of Information and Protection of Privacy Act.*

[para49] In determining whether the information at issue is commercial, I rely on the principles I established in my previous orders 96-013, 96-018, and 97-013. In these orders I held that merely labeling a record as "commercial" is insufficient. Consideration must be given to the content of the record. I also decided that dictionary definitions should be used to define the term, and adopted part of Ontario Order P-489 (1993) which defined commercial information as that "...which relates to the buying, selling, or exchange of merchandise or services...". In my prior orders I held this type of information included Third Party associations, past history, references, and insurance policies.

[para50] The records in this inquiry consist of presentation documents submitted to the Public Body and letters written to the Public Body which either: provide general information; detail the Third Party's views and opinions;

or request the Public Body take a certain policy action or direction. In my view, this type of information does not specifically relate to the buying, selling, or exchange of merchandise or services of the Third Party and therefore does not constitute commercial information.

[para51] In Ontario Order P-946 (1996), the Ontario Information and Privacy Commissioner addressed a similar situation. In that inquiry, a Requester asked a Ministry for information which related to franchising and the creation of franchising legislation. One of the records at issue included an executive summary on the "Need for Franchising Legislation in Ontario" which had been sent to the Ministry by a Third Party "Federation". This executive summary consisted of information, views and opinions, all of which was provided to the Ministry in order to influence government policy. The Commissioner had doubts as to whether information in the executive summary was commercial. He stated:

> *In essence, the Federation is a lobby group which supports the development and implementation of franchise legislation in the province. To this end it has provided the Ministry with information, including record (1)16 to advance this position. The contents of this document are not based on any commercial information related to the Federation itself. That is to say, information related to the buying, selling or exchange of goods or services undertaken by the Federation. Rather, it sets out the views and opinions of this group with respect to the position of the government on a particular issue.* (emphasis added)

[para52] Furthermore, I do not accept the Third Party's broad interpretation of the term "commercial". In my view, just because the disclosure of information may harm future business interests does not automatically mean that information should be considered "commercial". My decision is based on a number of reasons.

[para53] First, the structure of section 15(1), implies there are three parts to this exception. The information must first be categorized as either "commercial", or another type of information described under Part 1, and then fulfill the confidentiality requirement under Part 2, and the harms test under Part 3. According to the current structure of section 15(1) it is quite conceivable for information to fulfill the "categorization" test under Part 1, but not fulfill Part 3 of the test, and vice versa.

[para54] Second, the Third Party's reference to the Federal Court decision of *Air Atonabee Ltd.* v. *Canada (Minister of Transport)* (1989) F.C.J. No. 453 (QL) does not assist their argument. This decision interpreted portions of the Federal *Access to Information Act*, R.S.C. 1985, c. A-1, which are similar to our Act. It held that dictionary definitions provide the best guide to interpret the meaning of commercial information. A negative business impact on a Third Party was not a factor in determining whether the information was "commercial". The negative impact was only considered in establishing harm under sections similar to part 3 of our section 15(1) test. This indicates to me that harm is not a factor in determining whether the records contain commercial information.

[para55] Lastly, I do not agree the marginal notes corresponding to section 15(1) assist the Third Party's argument. The marginal notes read "Disclosure harmful to business interests of a third party". The Third Party submits these notes are an indication that the drafters of the legislation intended the term "commercial" in Part 1 to be defined as information whose disclosure would be harmful to the Third Party's business interests. I do not agree. Section 12(2)(b) of the Alberta *Interpretation Act* R.S.A. 1980 c. I-7 states marginal notes are "not part of the enactment, but are inserted for convenience of reference only". Though *Driedger on the Construction of Statutes,* 3rd ed. (Toronto: Butterworths, 1994) at pages 272 to 274 states there is a current movement to greater use of marginal notes in statutory interpretation, traditionally, these notes have not been used in interpretation, and where they were used, they have not been given much weight.

[para56] Even if I were to refer to the marginal notes to assist in my decision, I would not agree with the Third Party's interpretation of these notes. As I previously mentioned, the structure of section 15(1) implies that there are 3 steps to this mandatory exception. The information must first be categorized as commercial under Part 1, and then must fulfill the confidentiality requirement under Part 2 and the harm requirement under Part 3 . It is my opinion that the marginal notes serve only to highlight that all 3 parts of the section 15(1) test must be fulfilled, and in particular, the "harm" test in Part 3. Or to phrase it another way, if the information does not pass through all the steps, this exception will not apply.

[para57] There is one more argument of the Third Party that I would like to address. The Third Party states in its written argument that though certain historical facts, concepts and ideas are public knowledge, the commercial information and the Third Party's "business interest" can only be ascertained from a review of the record as a whole. Since the record as a whole has not been released to the public, the business interest or commercial information it represents has not been revealed.

[para58] In other words, the Third Party appears to be arguing that in order to determine whether the records contain commercial information, I should look not only at portions of the records, but rather at the nature, context and aggregate of the record as a whole.

[para59] Though I have not dealt in a previous order with this type of argument in the context of section 15(1), Order 96-019 addressed a similar argument in regards to section 19(1). Section 19(1) states that a Public Body may refuse to disclose information that could reasonably be expected to reveal the identity of a confidential source. In Order 96-019 I held that under section 19(1), records should be viewed cumulatively to determine whether the nature and content would have an aggregate effect of identifying the confidential source.

[para60] I agree with the Third Party that, the records should be viewed as a whole. However, in this case, they do not have the aggregate effect of revealing commercial information under section 15(1). As I previously stated, the records at issue in this inquiry provide general information, detail the Third Party's views or opinions, or request assistance from the Public Body, and therefore do not reveal commercial information. This remains true whether one looks at only a portion of the records, or if one looks at the nature, context, and aggregate of the information in the records as a whole.

Analysis - Part 1: Do the Records Contain "Financial" Information?

[para61] In my prior orders 96-018 and 97-013 I held that "financial" information was information regarding "financial transactions" or "monetary resources". Examples included information regarding insurance, past performance, estimated advertising costs and expected or proposed commission.

[para62] After carefully reviewing the records at issue, I find there are only three pieces of information which are of a financial nature. They include the description of the Third Party's assets and investments on page 4 of Record E48a, the description of the Third Party's petrochemical investment on page 6 of Record E48a, and other information in paragraphs 1 and 2 on page 2 of Record E120.

[para63] However, even though portions of the records are of a financial nature, Part 1 of the section 15(1) test will only be fulfilled if the Third Party proves disclosure of these portions would "reveal" financial information. In other words, the Third Party must prove this information is not in the public

domain. In my view, the Third Party has not discharged this burden. Instead, I accept the Public Body's evidence that all the financial information is currently in the public domain as a result of the EUB proceedings, financial statements, or other documents such as the Third Party's presentation to the Government of Alberta Standing Policy Committee on Natural Resources and Sustainable Development.

Conclusion - Part 1

[para64] In summary, I find the Third Party has not met the burden of proof in regards to Part 1 of the test. The information in the records cannot be considered commercial, and those small portions which are financial have already been disclosed to the public.

Discussion Re: Part 2 and Part 3 - Sections 15(1)(b) and 15(1)(c)

[para65] As previously mentioned, the Third Party must satisfy all 3 parts of section 15(1) in order for the information to be withheld under that exception. As I have decided that the Third Party has not discharged its burden of proof in regards to Part 1, the information cannot fall within this exception. I therefore do not need to address the confidentiality requirement under Part 2 or the harm requirement under Part 3 of section 15(1).

ORDER

[para66] As I have decided that the section 15(1) exception of the Act is not fulfilled, I confirm the Public Body's decision to disclose the information in records E48a, E120, E238, E238a. The Public Body has however applied discretionary exceptions in sections 20, 23, and 24 to portions of the information within the same records, and has reserved the right to have me decide these issues at a later date. As such, the Public Body should now sever and withhold those portions falling under these exceptions, and inform the Applicant accordingly so that the issues concerning those sections are resolved either through mediation or through an inquiry.

[para67] Pursuant to section 70(1), I order the Public Body to give the Applicant access to the unsevered portions at anytime, but not later than 30 days after being given a copy of this Order. Furthermore, I ask the Public Body to notify me in writing, not later than 30 days after being

given a copy of this Order, that access has been given to the unsevered portions.

Robert C. Clark
Information and Privacy Commissioner