

# **ALBERTA**

## **INFORMATION AND PRIVACY COMMISSIONER**

### **ORDER 99-002**

May 10, 1999

#### **ALBERTA TREASURY**

Review Number 1376

#### **I. BACKGROUND**

[para 1.] The Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Treasury for access to:

*Background copies of all correspondence, memoranda, legal opinions and agreements between the Government of Alberta and the Alberta-Pacific joint venture partners between January 1, 1997 and October 31, 1997, in the possession of the Ministry of Treasury, where the undertaking of financial assistance by the Government of Alberta to facilitate the construction of a paper mill is referred to.*

[para 2.] Alberta Treasury released some of the records, but refused to release others on the grounds that the following exceptions in the Act applied: section 21(1) (Cabinet confidences), section 15(1) (disclosure harmful to the business interests of a third party) and section 23(1)(a) (advice and recommendations).

[para 3.] The Al-Pac Pulp Mill Project was formed to construct and operate a bleached kraft pulp mill and paper mill in Athabasca. The Al-Pac Pulp Mill Joint Venture Partners were: Crestbrook Forest Industries Ltd. (CFI), MC Forest Investment Inc., and Kanzaki Paper Canada Inc.

[para 3.] In 1991, the Government of Alberta approved a \$250 million loan (“Alberta Loan”) through the Alberta Heritage Savings Trust Fund to facilitate the construction of the Al-Pac Pulp Mill.

[para 4.] In 1997, there was correspondence between the Government and CFI regarding possible settlement of the Alberta Loan. The records at issue deal with the negotiations of the proposed settlement of the Alberta Loan between CFI and the Alberta Government.

[para 5.] By way of background, the proposed acquisition of the Alberta Loan by CFI was never brought to completion. On March 3, 1998, the Government of Alberta issued a news release announcing that it had accepted an offer from Mitsubishi Corporation and Oji Paper Company to buy back the province’s interest in the Al-Pac Pulp Mill Project for total consideration of \$260 million.

## **II. PRELIMINARY MATTERS**

[para 6.] In reviewing the records, it became clear that I would need further information before I could make a decision. I asked Alberta Treasury to provide the following additional information.

1. Whether section 15(3)(c) (non-arms length transactions) of the Act applies to the information requested by the Applicant.
2. Alberta Treasury’s submissions stated that Records 009-024 consist of earlier drafts of Records 001-008. Where in Records 001-008, does the information contained in records #010, 011, 012, 013 014, 015 appear in order for them to meet the criteria of section 21(1) of the Act.
3. The only third party submission from CFI dates from December 16, 1997. Since that time, CFI is no longer in the process of negotiating the acquisition of the Al-Pac loan. To determine whether this information meets the criteria of section 15(1), current submissions should be provided on this point.
4. To provide the CFI’s Information Circular of March 1, 1998.
5. Explanation why certain records were not considered responsive to the request.

[para 7.] The following question was also put to the Applicant: “Does section 15(3)(c) of the Act apply to the information requested by the Applicant?”

[para 8.] Once I received the additional information, the matter was set down for written inquiry on January 19, 1999.

### III. RECORDS AT ISSUE

[para 9.] Alberta Treasury identified 34 records and numbered them 001 to 034. For the purposes of this Order, I have categorized the records into four packages.

Package	Description	Record
Package 1  Numbered 001-008	Faxed from CFI to Alberta Treasury on October 24, 1997. These 8 pages were attached as an addendum to a Cabinet Submission. These records are a refined version and amalgamation of the information contained in the following packages.	<ul style="list-style-type: none"> <li>• Record 001 is a letter with the following attachments:               <ul style="list-style-type: none"> <li>– a two page Memorandum of understanding (numbered 002-003);</li> <li>– a two page Schedule 1 attached (numbered 004-005);</li> <li>– and a one page Schedule 2 (numbered 006).</li> </ul> </li> <li>• Records 007 and 008 are letters.</li> </ul>
Package 2  Numbered 009-024	Faxed from CFI to Alberta Treasury on October 22, 1997.  These records are mostly draft letters and schedules of Records 001-008.	<ul style="list-style-type: none"> <li>• Record 009 is a cover sheet (disclosed)</li> <li>• Record 010 is a letter with a draft schedule (numbered 011-012).</li> <li>• Record 013 and 014 is a two-page letter with an attached schedule (numbered 015).</li> <li>• Record 016 is a draft three-page letter with draft Schedules 1, 2 and</li> </ul>

		<p>3 attached (numbered 019-022).</p> <ul style="list-style-type: none"> <li>Records 023 and 024 are two draft letters.</li> </ul>
<p>Package 3 Numbered 025-027</p>	<p>Faxed from Alberta Economic Development to CFI on October 8, 1997 regarding a revised version of the proposed amendments to the Al-Pac Forest Management Agreement.</p>	<ul style="list-style-type: none"> <li>Record 025 is a fax cover letter with attached two page Proposed Amendments to the Alberta-Pacific FMA (numbered 026-027).</li> </ul>
<p>Package 4 Numbered 028-024</p>	<p>Records 028-034 (disclosed to the Applicant) are copies of press releases with attachments.</p>	

[para 10.] Where one page is a complete document in and of itself, I have treated that page as a “Record”. Each of the following pages is a “Record” for the purposes of this Order:

007, 008, 009, 023, 024, 028, 033, 034.

[para 11.] Where a document is comprised of two or more pages, I have treated those pages as a “Record”. Each of the following groups of pages is a Record for the purposes of this Order:

001-006, 010-012, 013-015, 016-022, 025-027, 029-032.

[para 12.] Alberta Treasury withheld the following Records: 001-006, 007, 008, 010-012, 013-015, 016-022, 023, 024, 025 (disclosed in part)-027.

#### **IV. ISSUES**

[para 13.] There are five issues in this inquiry:

- A. What is responsive to the Applicant's request for access?
- B. Does section 21(1) (Cabinet confidences) apply to the Records?
- C. Does section 15(1) (disclosure harmful to the business interest of a third party) apply to pages 013-014 of Record 013-015?
- D. Did Alberta Treasury correctly apply section 23(1) (advice and recommendations) to the Records?
- E. Is Alberta Treasury required to disclose the Records under section 31(1)(b) (disclosure in the public interest) of the Act?

## **V. DISCUSSION**

### **Issue A: What is responsive to the Applicant's request for access?**

[para 14.] Before the exceptions can be applied to the records, I must decide which records are appropriately responsive to the Applicant's request.

#### **i) Alberta Treasury's Position**

[para 15.] When Alberta Treasury responded to the Applicant, it first considered all 34 pages of the records responsive and severed on that basis. However, Alberta Treasury reconsidered its position and stated in its submission that only the following portions of the records withheld are responsive to the Applicant's request:

- 003-only section 3(a)
- 006-only section 1(c) and 1(d)
- 017-only section 2(a)
- 022-sections 1(c), 1(d)
- 026-section 1, bullets 3, 4
- 025-pertains to 026.

[para 16.] According to Alberta Treasury, only portions of pages 003 and 006, and drafts pertaining to them, contain information that is responsive to the request for access. At page 4 of Alberta Treasury's submissions, it stated:

The Head has reconsidered the records and has determined that some records are not responsive to the Applicant's Request and that others are only partially responsive. In brief, only portions of records 003 and 006 and drafts pertaining to them contain information that is responsive to the Request.

[para 17.] And at page 5 of Alberta Treasury's submissions it stated:

Because records 001-008 represent a complete package of records considered by Cabinet, they were included in the original set of records pertaining to the Applicant's Request (even though only the noted parts of records 003 and 006 are responsive). Other records were included in the original set of Request records, because of their relationship to records 001-008.

**ii) Applicant's Position**

[para 18.] The Applicant disagrees with Alberta Treasury's position on responsiveness. The Applicant stated in its reply submissions at page 3:

The "Paper Mill Commitment" was set out in the Forest Management Agreement (FMA) between the Government of Alberta and the Al-Pac Joint Venture. The Applicant submits that any divestiture of the province's interest in the Al-Pac Pulp Mill Project must take into account the rights and obligations of the parties under the "Paper Mill commitment". Therefore, the Applicant requests that all records be included as part of its request.

[para 19.] The Applicant also states that Alberta Treasury initially informed the Applicant that records 007 and 023 were exempted in their entirety under sections 23(1)(a), 21(1) and 24(1)(c). In the Applicant's view, this would suggest that the records were responsive to the Applicant's request.

**iii) My Decision**

[para 20.] In Order 97-020, I dealt at length with the issue of "responsiveness". In paragraph 33 of that Order, I said that "responsiveness" must mean anything that is reasonably related to an applicant's request for access. In determining "responsiveness", a public body is in fact determining whether "information" or "records" are relevant to the request.

[para 21.] To decide whether a record or information is responsive, it is necessary to examine an applicant's request. The request itself

circumscribes whether “information” or “records” will ultimately be identified as being responsive to the request.

[para 22.] I have reviewed the Applicant’s request, which is for “copies of all correspondence, memoranda, legal opinions and agreements”. Also, the Applicant requested access to documents “where the undertaking of financial assistance by the Government of Alberta to facilitate the construction of a paper mill is referred to”.

[para 23.] From Alberta Treasury’s submissions, it appears that Alberta Treasury proceeded on the basis that the Applicant asked for information, and that Alberta Treasury determined that portions of the records were non-responsive.

[para 24.] Alberta Treasury erred in two ways: first, it took a too narrow view of the Applicant’s request. The Applicant asked for “records”, not “information”; second, Alberta Treasury focused only on a few words of the request, and thereby limited itself to looking for that particular information (almost like a key-word search).

[para 25.] It is clear from the Access Request that the Applicant requested copies of **records**, versus simply “information”. Generally, when an applicant asks for “records” rather than “information”, a public body cannot withhold portions of the records on the basis of non-responsiveness. For instance, the Applicant here requested copies of memorandum. So where information dealing with the paper mill is identified within a memorandum, the entire memorandum is deemed to be responsive.

[para 26.] In responding to an access request, a public body should go beyond doing a “key word search”. Rather, the documents should be put in the proper context, and a search made for the documents that may be relevant or reasonably related to the request.

[para 27.] In identifying which records are responsive, public bodies should take a broader view rather than a narrower view of the scope of responsive records. While the Applicant here qualified its request with the following condition: “where the undertaking of financial assistance by the Government of Alberta to facilitate the construction of a paper mill is referred to”, it is too narrow for Alberta Treasury to only seek records which contain the words “paper mill”.

[para 28.] In this case, the evidence of the parties shows that the FMA was issued by the Alberta Government in 1991 to the Al-Pac Joint Venturers over an area of 6.0 million hectares in Alberta. Under the 1991

FMA, the Joint Venturers (including CFI) were obligated to develop a paper mill, subject to a favourable economic and feasibility study.

[para 29.] If a study found such a mill feasible, the Alberta Government, as set out in the FMA, would provide some financing for the development of the paper mill.

[para 30.] Since the eventual construction of a paper mill was a condition in the loan to the Joint Venturers, including CFI, for the construction of the pulp mill, one might reasonably expect a search for records on the development of a paper mill to include records on the financing of it. For this reason, I disagree with Alberta Treasury that only the portions of the records that speak of the “paper mill” are responsive. I think Alberta Treasury’s approach is too narrow.

[para 31.] Moreover, at page 6 of its submissions, Alberta Treasury stated that the records collectively pertain to the proposed acquisition of the Al-Pac loans by CFI. The documents refer to the financial details, the process for concluding the purchase, terms and conditions, details concerning financial notes, and amendments to the Alberta–Pacific Forest Management Agreement (FMA). Consequently, Alberta Treasury’s own description of the records supports the finding that all the records are responsive to the request.

#### **iv) Conclusion**

[para 32.] To find that only the portions of information responsive, would render Alberta Treasury’s response to the Applicant’s access request meaningless. Consequently, I find that the Records are “reasonably related” to the Access Request and are therefore responsive.

[para 33.] Since Alberta Treasury has already applied certain exceptions of the Act to the Records themselves, it is not necessary for me to return the Records to Alberta Treasury for severing under the Act.

#### **B. Does section 21(1) (Cabinet confidences) apply to the Records?**

[para 34.] Alberta Treasury claimed that section 21(1) applied to all the Records withheld except pages 013-014 of Record 013-015.

[para 35.] 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 fact 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.*

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

[para 36.] Evidence showed that the Records were part of a submission to Cabinet. Since “Cabinet” is the common term for the “Executive Council of Alberta”, the records pertain to the Executive Council.

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

[para 37.] Section 21(1) is a mandatory exception intended to cover information that would reveal “Cabinet confidences”. If information falls within that section, it must not be disclosed.

[para 38.] In Order 97-010, the history and rationale for not disclosing Cabinet confidences was reviewed.

[para 39.] Section 21(1) contains a general rule as well as specific examples. To be withheld, the information must reveal the “substance of the deliberations of the Executive Council”. In paragraph 28 of Order 97-010, I stated that “substance of deliberations” means the following:

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

[para 40.] Alberta Treasury provided evidence to show that Records 001-008 were part of a submission to Cabinet. The remainder of the records withheld (with the exception of pages 013-014 of Record 013-015) are drafts of Records 001-008.

[para 41.] In *Aquasource Ltd. v. British Columbia (Information and Privacy Commissioner)*, the Court of Appeal adopted the following characterization of a Cabinet submission:

It is prepared for Cabinet and its committees. The information contained in Cabinet submissions forms the basis for Cabinet deliberation and therefore disclosure of the record would ‘reveal’ the substance of Cabinet deliberations, because it would permit the drawing of accurate inferences with respect to the deliberations.

[para 42.] Consequently, Records 001-008 are excepted under section 21(1) of the Act.

[para 43.] Evidence showed that the remainder of the records withheld under section 21(1) (Records 010-012, 015, 016-022, 023, 024, 025 (in part)-027) were drafts of Records 001-008. Evidence showed that they have not been placed before Cabinet. I stated in Order 97-010, that it is possible that a record that has never been placed before Executive Council or its committees may qualify for exception under the introductory wording of section 21(1). This will occur where a public body establishes that the disclosure of the information contained in the record would reveal the substance of deliberations of Cabinet, or that its release would permit the drawing of accurate inferences with respect to the substance of deliberations.

[para 44.] I have reviewed these records, and I find that disclosure of these records would reveal the substance of Cabinet deliberations. For this reason, since the final copies (Records 001-008) meet section 21(1), I find that the draft copies of these records would also reveal the substance of the deliberations of the Executive Council as set out in section 21(1).

**iii) Does section 21(2) apply to the Records?**

[para 45.] The Applicant claims that section 21(2)(c)(i)(ii) (background facts to be disclosed if the decision has been made public or implemented) applies to these records and therefore these records may not be withheld under section 21(1).

[para 46.] Even though the sale of the Alberta loans to Mitsubishi Corporation and Oji Paper Company was announced publicly on March 3, 1998, no decision regarding the purchase of the Alberta Loan by CFI was made public or implemented. The negotiations between CFI and the Alberta Government never resulted in the settlement of the Alberta Loan. Consequently, section 21(2) would not apply to require disclosure of the background facts.

#### **iv) Conclusion**

[para 47.] Alberta Treasury correctly applied section 21(1) to the following Records: 001-008, 010-012, 015, 016-022, 023, 024, 025 (disclosed in part)-027).

[para 48.] Section 21(2) does not apply to the above Records. Therefore, I uphold the head's decision to refuse access to the information in the above Records.

### **C. Does section 15(1) (disclosure harmful to the business interest of a third party) apply to pages 013-014 of Record 013-015?**

#### **i) Application of section 15(1)**

[para 49.] 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.*

[para 50.] Alberta Treasury claimed section 15(1) applied to pages 013-014 of Record 013-015.

[para 51.] 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.

[para 52.] 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).

**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))**

[para 53.] For the purposes of section 15, CFI is the Third Party.

[para 54.] Pages 013-014 of Record 013-015 is a letter from CFI's financial advisor to CFI regarding a proposed capital reorganization. This information is financial information and therefore meets the test in section 15(1)(a).

**Part 2: The information must be supplied, explicitly or implicitly, in confidence (Section 15(1)(b))**

[para 55.] With respect to section 15(1)(b), the Applicant submitted that this information could not have been supplied explicitly or implicitly in confidence to the Alberta government, since the government claims that no financial commitment for the paper mill exists under current policy. I agree with Alberta Treasury that the fact that the Government no longer issues loans or guarantees does not mean that a third party's records are no longer confidential.

[para 56.] Furthermore, given the content of the letter and the context in which it was given, I am satisfied that this letter (pages 013-014 of Record 013-015) was supplied in confidence to Alberta Treasury.

**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)**

[para 57.] Based on the submissions of CFI and on my review of the letter, I am also satisfied that the disclosure that this letter (pages 013-014 of Record 013-015) could reasonably be expected to harm significantly the competitive position of CFI.

**Conclusion**

[para 58.] In my view, section 15(1) applies to pages 013-014 of Record 013-015.

**ii) Application of section 15(3)(c) (non-arm's length transaction between the Government of Alberta and another party)**

[para 59.] Based on my reasoning in Order 98-013 and on the submissions and evidence of the parties, I am satisfied that section 15(3)(c) (non-arm's length transaction between the Government of Alberta and another party) does not apply to pages 013-014 of Record 013-015.

[para 60.] This means that the information is not part of a non-arm's length transaction. Therefore it can be withheld.

**D. Did Alberta Treasury correctly apply section 23(1)(a) (advice and recommendations) to the Records?**

[para 61.] Having decided that sections 21(1) and 15(1) apply to the Records, I do not find it necessary to decide whether section 23(1)(a) of the Act also applies to the Records.

**E. Is Alberta Treasury required to disclose the Records under section 31(1)(b) of the Act (disclosure in the public interest)?**

[para 62.] Section 31(1) reads:

*31(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people, to any person or to an applicant...*

*(b) information the disclosure of which is, for any other reason, clearly in the public interest.*

[para 63.] The Applicant says that the Records should be disclosed under section 31(1) of the Act. The Applicant's submission states:

The Applicant submits that it is in the public interest to disclose records relating to any financial commitment to the paper mill under the Al-Pac Pulp Mill Project; cash flow reports, budget estimate reports and financial reports required under the Al-Pac Pulp Mill Project Credit Agreement; the reversal of \$15.735 million of interest capitalized under the Al-Pac Pulp Mill Project; and annual and interim financial statement analyses prepared by Alberta Treasury under the Loans and Guarantees manuals, to ensure that adequate financial control systems and monitoring was in place and that all leverages available were maximized by the Government of Alberta on behalf of taxpayers when exiting this arrangement. This has particular relevance in this review since the loan at issue was directly advanced by Alberta taxpayers.

[para 64.] The criteria for "public interest" in the context of section 31(1) have been dealt with in Order 96-011.

[para 65.] In Order 96-011, I said that because section 31 is an "override" provision in the Act, the definition of what is "caught" by the provision must be defined narrowly. I held that a matter must be of compelling public interest to qualify as matter "clearly in the public interest". Furthermore, in Order 96-014, Mr. Justice Cairns considered what type of information would qualify as "clearly in the public interest". He made an important distinction between information that "may well be of interest to the public" and information that is a "matter of public interest".

[para 66.] In my view, the Applicant has not established that the information regarding the negotiations of the proposed settlement of the Alberta Loan between CFI and the Government of Alberta is a matter of

“compelling public interest” to warrant the disclosure under section 31(1)(b). Therefore, I find that, under section 31(1), Alberta Treasury is not required to disclose the information contained in the Records.

## **VI. ORDER**

[para 67.] I make the following Order under section 68 of the Act.

### **Issue A:**

[para 68.] I find that all the Records are responsive to the Applicant’s request for access. Therefore, I find that Alberta Treasury erred in determining that only some of the information contained in the Records was responsive to the Applicant’s access request.

### **Issue B:**

[para 69.] Alberta Treasury correctly applied section 21(1) to the following Records: 001-008, 010-012, 015, 016-022, 023, 024, 025 (disclosed in part)-027).

[para 70.] Section 21(2) does not apply to the above records. Therefore, I uphold the head’s decision to refuse access to the information withheld in the above records.

### **Issue C:**

[para 71.] Alberta Treasury correctly applied section 15(1) to pages 013-014 of Record 013-015. Section 15(3)(c) is not applicable to that Record. Therefore, I uphold the head’s decision to refuse access to the information withheld in that Record.

### **Issue D:**

[para 72.] Having decided that sections 21(1) and 15(1) apply to the Records, I do not find it necessary to decide whether section 23(1)(a) of the Act also applies to the Records.

**Issue E:**

[para 73.] Alberta Treasury did not err in not disclosing the information contained in the Records, under Section 31(1) (disclosure of information about a risk of significant harm to health or safety, or disclosure in the public interest).

Robert C. Clark  
Information & Privacy Commissioner