

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 99-003

May 18, 1999

Alberta Treasury

Review Number 1389

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:

Copies of cash flow reports, budget estimate reports and financial statements, in the possession of the Ministry of Treasury, for the period January 1, 1996 to October 31, 1997, as required from the Alberta Pacific (Al-Pac) Forest Industries joint venture under articles 4.3(b), 8.2(b) and 8.2 (h) of the Alberta Pacific (Al-Pac) Pulp Mill Project Credit Agreement.

[para 2.] The Alberta-Pacific Pulp Project Credit Agreement ("Credit Agreement") is the loan agreement provided by the Province of Alberta to Crestbrook Forest Industries Ltd., MC Forest Investment Inc., Kanzaki Paper Canada Inc. and the Alberta-Pacific Forest Industries Inc. as Operator ("Third Parties") in connection with the development and operation of the Al-Pac Joint Venture. It is a public document that defines "Joint Venture" as the unincorporated joint venture relationship of the Third Parties relating to the construction, ownership and operation of the Al-Pac Pulp Mill. The Third Parties are the Borrowers under the Credit Agreement.

[para 3.] The provisions referenced in the Applicant's request are as follows:

4.3(b) On or before April 30 of each year, each Borrower will provide to Alberta a statement setting forth such Borrower's Net Cash Flow for the immediately preceding Fiscal Year, and showing that the Net Cash Flow of such Borrower has been applied or distributed as required pursuant to Section 4.3(a).

8(2)(b) Maintain Existence and Licenses

Each of the Borrowers and Al-Pac shall:

- (i) preserve and keep in full force and effect its respective corporate existence, status and authority; and*
- (ii) maintain all licenses, permits, governmental permissions, franchises and other qualifications necessary for the construction, ownership and operation of the Project and the conduct of such Borrower's Sales Operations.*

8(2)(h) Budget Estimates

Each of the Borrowers and Al-Pac shall provide Alberta, not less than 60 days before the beginning of each Fiscal Year commencing the earlier of the first Fiscal Year after Final Completion occurs and November 30, 1995, with annual budget estimates (based on monthly time periods) for the Project and such Borrower's Sales Operation for the next Fiscal Year, and for the months of January, February and March of the Fiscal Year next following the next Fiscal Year, which budget estimates shall include Net Cash Flow estimates for such Borrower and shall be prepared in good faith by such Borrower or Al-Pac.

[para 4.] Alberta Treasury found 76 records that were responsive to section 4.3(b) and 8.2(h). No records were identified pertaining to section 8(2)(b) of the Credit Agreement. Alberta Treasury disclosed 12 records in their entirety, partially disclosed 3 records, and withheld 61 records in their entirety.

[para 5.] Alberta Treasury withheld the records under section 15(1) of the Act (disclosure harmful to business interests of a third party).

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 transaction) of the Act applies to the information requested by the Applicant.
2. To provide a copy of the Alberta Pacific Pulp Project Credit Agreement dated September 4, 1991.

[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 20, 1999.

III. RECORDS AT ISSUE

[para 9.] All of the 76 records were created by the Third Parties. The records consist mostly of letters from the Third Parties to the Loans & Guarantees Division of Alberta Treasury, with various attachments of tables, budgets and calculations.

[para 10.] The following records were withheld:

1-9, 11-19, 21(partially), 24-29,31-39, 41-44, 46-49, 50 (partially), 52-53 (partially), 55-60, 62-68, 70-71, 73-76. For the purposes of this Order, I will refer to those records collectively as the “Records”.

[para 11.] The remaining records were disclosed.

IV. ISSUES

[para 12.] There are three issues in this inquiry:

- A. Does section 15(1) (disclosure harmful to the business interest of a third party) apply to the Records?
- B. Does section 15(3)(c) of the Act (non-arm’s length transaction) apply to the Records?
- C. Is Alberta Treasury required to disclose the Records under section 31(1)(b) of the Act (disclosure in the public interest)?

V. DISCUSSION

Issue A: Does section 15(1) (disclosure harmful to the business interest of a third party) apply to the Records?

1. Application of section 15(1)

[para 13.] Sections 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 14.] Section 67(1) places the burden of proof on a public body when, as here, the public body has refused access to a record that does not contain the personal information of a third party. In order to prove that section 15(1) applies, Alberta Treasury must establish that:

- a. the information would reveal trade secrets, commercial, financial, labour relations, scientific or technical information of the Third Parties;
- b. the information was supplied, explicitly or implicitly, in confidence; and,
- c. disclosure of the information could reasonably be expected to bring about one of the outcomes listed in section 15(1)(c).

a) Would the information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Parties?

[para 15.] It is Alberta Treasury's position that disclosure of the calculation of how much money was available to be disbursed and how it

was disbursed, within a given time period, in accordance with the provision of paragraph 4.3(a) of the Credit Agreement, would clearly indicate the revenues, expenditures and the cash flow of each business involved in the Al-Pac project and reveal their abilities to honour their commitments under the Agreement.

[para 16.] Alberta Treasury also argued that disclosure of information provided under paragraph 8.2(h) would disclose highly detailed budget information, including assets, inventories, expected production, projected revenues for sales, capital expenditures for equipment, roads, operating expenses, etc.

My decision

[para 17.] I find that the Records contain and would reveal financial and commercial information of the Third Parties in accordance with section 15(1)(a)(ii).

(b) Is the information supplied, explicitly or implicitly, in confidence?

[para 18.] Although there is no explicit confidentiality clause in the Credit Agreement, it is Alberta Treasury's and the Third Parties' position that the information was supplied implicitly in confidence.

[para 19.] According to the Third Parties, the financial arrangement for the Al-Pac Project were concluded in September 1991, following protracted negotiations among a syndicate of banks and other financial institutions, the government of Alberta and the Third Parties.

[para 20.] The Third Parties oppose disclosure and stated that this information was provided in confidence as part of the ongoing compliance requirement under the loan facility even though the terms of the Agreement are public. The Third Parties stated in their submissions that the information being provided to the Province of Alberta is information that is normally provided by a borrower to their lender in a normal lending relationship.

[para 21.] According to the Third Parties, although the government was a subordinated lender, the financing was on normal commercial terms; in fact, the Alberta Credit Agreement and the security in favour of the government are identical in all substantial respects to those in favour of the banks. These sorts of provisions, which require information that would normally not be publicly available, are usual in commercial credit agreements as a means of allowing the lender to monitor compliance with the agreement and be forewarned of possible defaults.

[para 22.] The Third Parties stated that it was and remains their expectation that financial and operating information relating to Al-Pac, provided to the government under the Credit Agreement, be kept confidential.

My decision

[para 23.] I find that the evidence shows that the Third Parties supplied the information implicitly in confidence to Alberta Treasury.

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

Applicant's Position

[para 24.] The Applicant submitted that disclosure of the records would not harm significantly the competitive position or interfere significantly with the negotiating position of the Al-Pac Mill Project, result in undue financial loss or gain, or result in similar information no longer being provided.

[para 25.] The Applicant argued that harm would not occur because the Alberta Government is no longer involved in the Al-Pac loans.

[para 26.] The Applicant also asserted that there could be no harm, because the information was used to prepare valuations or fairness assessments that were published in Crestbrook Forest Industries Inc.'s Information Circular, which was publicly released.

Alberta Treasury's Position

[para 27.] Alberta Treasury stated in its written submission:

Although the Government of Alberta is no longer involved in the Al-Pac loans, information provided to it pursuant to the Agreement is still current and continues to be confidential and should not be disclosed without the permission of the companies concerned. This applies whether or not the companies have an ongoing connection with Al-Pac at this time.

Third Parties' positions

[para 28.] The Third Parties said that disclosure of the Records would harm them and put them at a competitive disadvantage. Al-Pac is a stand-alone operation, competing for sales with other pulp mills in

Alberta and worldwide, and also competing for procurement of raw materials and labour, and for business opportunities in Alberta.

[para 29.] Further, the Third Parties stated that they object to the release of the calculation of Net Cash Flow filed with Alberta Treasury as required by Article 4.3(b) on the basis that the information is competitively sensitive and primarily involves an independent third party, i.e., the syndicate of Term Lenders.

[para 30.] The Third Parties also stated that they object to the release of the annual Operating Budgets that have been filed as required by Article 8.2(h). The Operating Budget is a competitively sensitive management document prepared primarily as a management planning tool and guide. The Budget contains sensitive information regarding mill operating levels, operating costs, sales price forecasts and marketing plans.

My decision

[para 31.] I have reviewed Crestbrook Forest Industries Inc.'s Information Circular dated March 1, 1998 and I find that the information that Alberta Treasury received from the Third Parties was more detailed than that disclosed in the Circular. Evidence also showed that even though Crestbrook Forest Industries Inc sold its interest in Al-Pac, and is no longer a Borrower under the Credit Agreement, disclosure of the Records could still reasonably be expected to harm significantly its competitive position.

[para 32.] Based on the evidence, I find that disclosure of the Records could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the Third Parties in accordance with section 15(1)(c)(i).

2. Conclusion under section 15(1)

[para 33.] I find that section 15(1) applies to the Records.

ISSUE B: Does section 15(3)(c) of the Act (non-arm's length transaction) apply to the Records?

[para 34.] Section 15(3) reads:

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

...

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

[para 35.] The Applicant argued that a non-arm's length transaction did exist. The Applicant stated in its November 30, 1998 submission:

Evidence of the application of section 15(3)(c) to the request records is through the establishment of a direct financial relationship between the Government of Alberta and the Alberta-Pacific Pulp Mill Project from the execution of a June 29, 1990 memorandum of understanding which specifies certain rights and obligations of the parties.

The Applicant is of the view that there is evidence of control or influence being exerted by Alberta-Pacific Forest Industries Inc. over the Government of Alberta by virtue of the substance of clause 6 of the MOU...under clause 6 the Government of Alberta is required to provide an additional \$100 million to finance the construction of the Al-Pac Pulp Mill on the basis of the portion of the increased costs due to inflation and Project delays. Given that the Project Credit Agreement between the parties was concluded on September 4, 1991, it would be reasonable to assume that the additional \$100 million in financing was made available on the basis of the terms and conditions of the MOU. The Applicant submits that this is sufficient evidence of control and influence to meet the test established by the Freedom of Information and Privacy Commissioner in Order 98-013.

[para 36.] The interpretation of section 15(3)(c) was fully considered in Order 98-013, and I do not intend to repeat that analysis here. For the purposes of this Order, I simply note that the definition of the phrase "non-arm's length transaction" in section 15(3)(c) is the common law definition, and not the definition contained in section 4(3) of the Act.

[para 37.] After reviewing the evidence, I conclude that the Credit Agreement between the Government of Alberta and the Third Parties was an arm's length transaction. There is no evidence that the parties were "related" or that either party was not acting in its own interest. In other words, there is no evidence to suggest that either party exerted "control, influence, or moral pressure" over the other in the process of negotiating the loan transaction. As a result, section 15(3)(c) does not apply to the Records. Therefore, Alberta Treasury is not required to disclose the Records under section 15(3)(c).

ISSUE C: Is Alberta Treasury required to disclose the Records under section 31(1)(b) of the Act (disclosure in the public interest)?

[para 38.] The relevant parts of section 31 read:

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 39.] The Applicant submitted that it is in the public interest to disclose records including cash flow reports, budget estimate reports and financial reports required under the Al-Pac Pulp Mill Project Credit Agreement to ensure that all leverages available were maximized by the Government of Alberta.

[para 40.] As I stated in Order 96-011, for section 31(1)(b) to apply, the matter must be of “compelling public interest”. In the Applicant’s submissions, the Applicant has not established that this is a matter of “compelling public interest”. Therefore, I find that section 31(1)(b) does not apply to the Records. Alberta Treasury is not required to disclose the Records under section 31(1)(b).

VI. ORDER

[para 41.] Under section 68 of the Act, I make the following Order.

[para 42.] Alberta Treasury correctly applied section 15(1) to the Records. In addition, as section 15(3)(c) does not apply the Records, Alberta Treasury is not required to disclose the Records under section 15(3)(c).

[para 43.] Section 31(1)(b) does not apply to the Records. Therefore, Alberta Treasury is not required to disclose the Records under section 31(1)(b).

[para 44.] Therefore, I uphold Alberta Treasury’s decision to refuse access to the Records.

Robert C. Clark
Information and Privacy Commissioner