

# ALBERTA

## INFORMATION AND PRIVACY COMMISSIONER

### ORDER 99-017

November 25, 1999

#### EXECUTIVE COUNCIL OFFICE

Review Numbers 1487 and 1518

#### I. BACKGROUND

[para 1.] On August 24, 1998, the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the Executive Council Office, now called the Premier and President of Executive Council (the "Public Body"), for access to records relating to the West Edmonton Mall, for the period of January 1, 1994 to August 24, 1998. The Applicant's request was subsequently clarified, as follows:

*Copies of minutes, memoranda, studies, correspondence, and background documents prepared by and for, as well as sent to the Executive Council, the Office of the Premier, the Agenda and Priorities Committee, Treasury Board, the provincial cabinet, and provincial cabinet committees and sub-committees, for the period January 1, 1994-August 24, 1998, in the possession of Executive Council/Office of the Premier, relating to the West Edmonton Mall refinancing.*

[para 2.] On October 27, 1998, the Applicant applied to the Public Body for access to the same records, but this time for the period of January 1, 1993 to December 31, 1993.

[para 3.] As the Public Body found third party information in some of the records requested for the period of January 1, 1994 to August 24, 1998, the Public Body issued notices to third parties. The Public Body

ultimately disclosed some records to the Applicant, but withheld other records and third party information under the following sections of the Act: sections 4(1)(l), 15, 16, 21, 23, 24, and 26.

[para 4.] On September 24, 1998 and again on October 23, 1998, the Applicant requested that I review the Public Body's decisions to withhold certain records and third party information, respectively, for the records requested for the period of January 1, 1994 to August 24, 1998. My Office combined those two requests into one review (Review Number 1487).

[para 5.] The Public Body withheld the records requested for the period of January 1, 1993 to December 31, 1993, under sections 4(1)(l) and 21 of the Act.

[para 6.] On December 8, 1998, the Applicant requested that I also review the Public Body's decision to withhold the records requested for the period of January 1, 1993 to December 31, 1993 (Review Number 1518).

[para 7.] Mediation was authorized for both Review Numbers 1487 and 1518, but was held in abeyance, pending the release of the *Report of the Auditor General on the 1994 Refinancing of West Edmonton Mall* (the "Auditor General's Report").

[para 8.] On February 9, 1999, the Auditor General's Report was released. As a result, the Public Body decided not to apply sections 23, 24 and 26 to the records. Furthermore, as the Auditor General had referred to a number of Cabinet decisions in his report, the Public Body said that section 21 (Cabinet confidences) no longer applied to some of the records, withdrew section 21 as an exception for those records, and disclosed part of one record, which previously had been excepted in its entirety under section 21 (Review Number 1487 – Record Number 15).

[para 9.] However, the Public Body was of the opinion that section 15 (third party business information) and section 16 (personal information) still applied to the records for which section 21 had been withdrawn as an exception. The Applicant objected to the Public Body's "retroactive" application of these mandatory ("must") exceptions.

[para 10.] Mediation ultimately did not succeed, and Review Numbers 1487 and 1518 were set down for a combined written inquiry. I received initial written submissions from the Applicant, the Public Body and two of the three affected parties, by the April 30, 1999 deadline for those submissions. One affected party did not provide a submission. I

received rebuttal submissions from the Applicant and the Public Body only, by the May 14, 1999 deadline for those submissions.

[para 11.] This Order proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

## **II. RECORDS AT ISSUE**

[para 12.] The following records are at issue:

### *Review Number 1487*

24 numbered groups of records (record numbers 1-19, 21, 23-26), most of which contain more than one document (127 pages in total). The Public Body says that it disclosed to the Applicant parts of record number 7 (13 pages of the original 36-page record), as well as record numbers 17a, 20, 22 and 23a.

### *Review Number 1518*

9 numbered groups of records, only one of which contains more than one document (12 pages in total)

[para 13.] In this Order, I will refer to the review number and the numbered group of records, and will refer to a specific document within a group of records, where necessary.

## **III. ISSUES**

[para 14.] There are five issues in this inquiry:

A. Are certain records excluded from the application of the Act by section 4(1)(l) (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly)?

B. Did the Public Body correctly apply section 15 (third party business information)?

C. Did the Public Body correctly apply section 16 (personal information)?

D. Did the Public Body correctly apply section 21 (Cabinet confidences)?

E. Is the Public Body required to disclose the records under section 31(1)(b) (disclosure in the public interest)?

#### **IV. DISCUSSION OF THE ISSUES**

**ISSUE A: Are certain records excluded from the application of the Act by section 4(1)(l) (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly)?**

[para 15.] The Public Body says that the following records are excluded from the application of the Act by section 4(1)(l):

*Review Number 1487*  
Record Numbers 2, 16, 21, 24, 25

*Review Number 1518*  
Record Numbers 3, 5, 6, 7, 8, 9

[para 16.] Section 4(1)(l) reads:

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

*...*

*(l) a record created by or for*

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

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

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

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

[para 17.] I have reviewed all the foregoing records, which consist of draft letters, letters, draft memos, memos, and fax cover sheets created by or for members of the Executive Council or Members of the Legislative Assembly, which have been sent or are to be sent to members of the Executive Council or Members of the Legislative Assembly. As the records meet the requirements of section 4(1)(l), they are excluded from the application of the Act by section 4(1)(l).

[para 18.] The Applicant nevertheless submits that a number of the records to which the Public Body has said that section 4(1)(l) applies have already been released publicly in the Legislative Assembly of Alberta and through a lawsuit (the “court action”) between Alberta Treasury Branches and the owners of West Edmonton Mall, among others, or have been referred to extensively in the Auditor General’s Report. The Applicant claims that the Public Body has therefore implicitly consented to the release of the records and cannot now selectively apply section 4(1)(l).

[para 19.] In Order 99-005, I said that, as long as a record meets the criteria of section 4(1)(l), that record is excluded from the application of the Act. The matter of whether or not a record is subject to the Act (i.e., jurisdiction) cannot be waived. What a public body does subsequently with the record does not in any way affect the application of section 4(1)(l); that is, the record does not thereby become subject to the Act by the public body’s having sent a copy of the record to someone, for example. Similarly, the application of section 4(1)(l) to the foregoing records is not affected by the Public Body’s (or anyone else’s) having disclosed those records in the public domain. However, I note here that disclosure of records in the public domain may well have a different consequence when considering whether the exceptions under the Act apply to a record, such as sections 15, 16 and 21.

[para 20.] Therefore, I find that the following records are excluded from the application of the Act by section 4(1)(l):

*Review Number 1487*  
Record Numbers 2, 16, 21, 24, 25

*Review Number 1518*  
Record Numbers 3, 5, 6, 7, 8, 9

[para 21.] Consequently, I have no jurisdiction over those records. The Applicant cannot obtain access to those records under the Act.

**ISSUE B: Did the Public Body correctly apply section 15 (third party business information)?**

**1. General**

[para 22.] The Public Body says that section 15(1) of the Act applies to information (other than certain personal information) contained in the following records:

*Review Number 1487*

Record Numbers 3 (two-page letter and one-page attachment to two-page letter), 4 (same two-page letter and one-page attachment as in Record Number 3), 5a, 5b, 6a, 6b, 6c (same as Record Number 5b), 7b (same as Record Number 6a), 7c (same as Record Number 6b), 7d (same as Record Number 5b), 7f, 7g, 7h, 7i (same two-page letter and one-page attachment as in Record Number 3), 7j (one-page letter and one-page attachment), 7k, 9 (four-page letter and one-page attachment), 11, 12, 13 (one-page letter and fax cover sheet), 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 23.] The Applicant objects to what the Applicant says is the Public Body's "retroactive" application of section 15 to the three records contained in Review Number 1518. The Applicant says that the Public Body's original letter to the Applicant outlining its refusal to provide access did not cite section 15.

[para 24.] The Public Body says that it applied section 15 to the records after it removed section 21 as an exception. The Public Body argues that section 15 is a mandatory ("must") provision, which it must comply with because the third parties did not give consent to disclosure.

[para 25.] I agree with the Public Body that section 15 is mandatory and must be applied at whatever stage of the inquiry proceedings the issue of the application of section 15 may arise. Furthermore, in numerous Orders, I have said that I will consider the application of mandatory provisions of the Act, even if a public body does not.

[para 26.] 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 27.] For section 15(1) to apply to information, the information must meet all of the following three criteria:

a. 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));

b. The information must be supplied, explicitly or implicitly, in confidence (section 15(1)(b)); and

c. The disclosure of the information must reasonably be expected to bring about one of the outcomes set out in section 15(1)(c).

[para 28.] As the Public Body has refused to disclose the information, the burden of proof is on the Public Body, as set out in section 67(1) of the Act. However, I have said in previous Orders that a Public Body must, of necessity, rely on a third party's representations to meet the requirements of section 15(1). The Public Body said that would be relying on the evidence of one third party in particular in support of the application of section 15.

**a. 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 29.] I have reviewed all the foregoing records. The records do not contain, nor would they reveal, any trade secrets of a third party, or labour relations, scientific or technical information of a third party.

[para 30.] I have discussed the interpretation of "commercial" and "financial" information in numerous Orders (see, for example, Orders 96-012, 96-013, 96-018, 97-013 and 98-006). However, the following records do not contain, nor would they reveal, commercial or financial information of a third party:

*Review Number 1487*

Record Numbers 5a, 5b, 6c, 7d, 7j, 7k, 9 (one-page attachment to four-page letter), 12, 13 (fax cover sheet)

*Review Number 1518*

Record Number 4

[para 31.] As the criteria of section 15(1)(a) have not been met for the information contained in the foregoing records, section 15(1) does not apply to that information. The Public Body must disclose that information, subject only to my consideration as to whether personal information must be withheld under section 16.

[para 32.] I find that the following records contain commercial or financial information of a third party:

*Review Number 1487*

Record Numbers 3 (two-page letter and one-page attachment to two-page letter), 4 (two-page letter and one-page attachment), 6a, 6b, 7b, 7c, 7f, 7g, 7h, 7i (two-page letter and one-page attachment), 9 (four-page letter), 11, 13 (one-page letter), 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2



[para 33.] However, of those records, the information contained in the following records would not reveal the financial or commercial information of a particular third party referred to in those records (the “Third Party”), because the Third Party itself has revealed that information by putting it into the public domain in the court action:

*Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 6b, 7c, 7i (two-page letter), 9 (four-page letter), 13 (one-page letter), 14, 23b

[para 34.] As the criteria of section 15(1)(a) have not been met for the information contained in the foregoing records, section 15(1) does not apply to that information. The Public Body must disclose that information, subject only to my consideration as to whether personal information must be withheld under section 16.

[para 35.] In summary, I find that only the information contained in the following records meets the criteria of section 15(1)(a) and remains to be considered under section 15(1)(b):

*Review Number 1487*

Record Numbers 3 (one-page attachment to two-page letter), 4 (one-page attachment to two-page letter), 6a, 7b, 7f, 7g, 7h, 7i (one-page attachment to two-page letter), 11, 17b, 17c

*Review Number 1487*

Record Numbers 1, 2

**b. The information must be supplied, explicitly or implicitly, in confidence (section 15(1)(b))**

[para 36.] As to the records containing information that remains to be considered under section 15(1)(b), the Third Party argues that the information was supplied explicitly on a confidential basis. The Third Party says that each of the documents was marked “confidential”, reflecting an understanding that the documents were supplied in confidence and would be so maintained upon receipt. The Third Party says it refused to consent to disclosure of the records.

[para 37.] I agree that the information contained in the following records was supplied explicitly in confidence, as that information has been marked “confidential” or is part of other information so marked:

*Review Number 1487*

Record Numbers 3 (one-page attachment to two-page letter), 4 (one-page attachment to two-page letter), 6a, 7b, 7f, 7g, 7i (one-page attachment to two-page letter), 17b, 17c

[para 38.] I also find that the information contained in the following records was supplied implicitly in confidence, given the content of the records and the context in which the information was supplied:

*Review Number 1487*

Record Numbers 7h, 11

*Review Number 1518*

Record Numbers 1, 2

[para 39.] The Applicant nevertheless submits that it cannot be said that the information contained in the records has been supplied implicitly or explicitly in confidence when that information has already been released publicly in the Legislative Assembly of Alberta or through the court action, or has been referred to extensively in the Auditor General's Report.

[para 40.] In Order 96-013, I said that if I were to find that the disclosure by one party nullifies the other party's proven expectation of confidentiality, it would mean that one party could deprive the other of the protection afforded by section 15(1)(b) by unilaterally making disclosure of the information. Therefore, in this case, disclosure by the Legislative Assembly of Alberta or the Auditor General does not nullify section 15(1)(b). I have already dealt with the consequences of disclosure by the Third Party under section 15(1)(a).

[para 41.] In summary, I find that the information contained in the following records meets the criteria of section 15(1)(b) and remains to be considered under section 15(1)(c):

*Review Number 1487*

Record Numbers 3 (one-page attachment to two-page letter), 4 (one-page attachment to two-page letter), 6a, 7b, 7f, 7g, 7h, 7i (one-page attachment to two-page letter), 11, 17b, 17c

*Review Number 1487*

Record Numbers 1, 2

**c. The disclosure of the information must reasonably be expected to bring about one of the outcomes set out in section 15(1)(c)**

[para 42.] As to the records containing information that remains to be considered under section 15(1)(c), the Third Party did not provide any argument or evidence that disclosure of the information could reasonably be expected to bring about one of the outcomes listed in section 15(1)(c).

[para 43.] Nevertheless, I have considered whether disclosure of the information could reasonably be expected to bring about any of those outcomes for the Third Party or any other third party. In particular, I have considered whether disclosure could reasonably be expected to harm significantly the negotiating position of the Third Party in the court action (section 15(1)(c)(i)).

[para 44.] On the face of the foregoing records (as well as all the records to which the Public Body said that section 15(1) applies), there is nothing from which I can infer that disclosure could reasonably be expected to harm significantly the negotiating position of the Third Party or any other third party, or bring about any of the other outcomes listed in section 15(1)(c) for the Third Party or for any other third party.

[para 45.] Besides the lack of evidence necessary to meet the criteria under section 15(1)(c), it is also significant that (i) the information contained in the foregoing records relates to various refinancing proposals concerning the Third Party, whose refinancing was completed five years ago; and (ii) much of the information contained in the foregoing records was disclosed in other records the Third Party disclosed in the court action.

[para 46.] In summary, I find that the information contained in the following records does not meet the criteria for section 15(1)(c):

*Review Number 1487*

Record Numbers 3 (one-page attachment to two-page letter), 4 (one-page attachment to two-page letter), 6a, 7b, 7f, 7g, 7h, 7i (one-page attachment to two-page letter), 11, 17b, 17c

*Review Number 1487*

Record Numbers 1, 2

**2. Conclusion under section 15(1)**

[para 47.] I find that the Public Body did not correctly apply section 15(1) to the information contained in the following records:

*Review Number 1487*

Record Numbers 3 (two-page letter and one-page attachment to two-page letter), 4, 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i, 7j, 7k, 9, 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 48.] I intend to order that the Public Body disclose to the Applicant the information contained in the foregoing records, subject only to my consideration as to whether personal information contained in those records must be withheld under section 16.

[para 49.] Having found that the Public Body did not correctly apply section 15(1) and that the information contained in the foregoing records must be disclosed, I do not find it necessary to decide whether the information relates to a non-arm's length transaction between the Government of Alberta and another party, and must be disclosed, as provided by section 15(3)(c).

### **ISSUE C: Did the Public Body correctly apply section 16 (personal information)?**

#### **1. General**

[para 50.] The Public Body says that section 16 applies to Review Number 1487, Record Number 26, in its entirety. The Public Body also says that section 16 applies to the same records to which the Public Body applied section 15.

[para 51.] However, having reviewed the records, I find that not all the records to which the Public Body applied section 15 contain personal information. Therefore, I will consider only the following records under section 16:

*Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i (two-page letter), 7j (one-page letter), 7k, 9 (four-page letter), 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 52.] The Applicant objects to what the Applicant says is the Public Body's "retroactive" application of section 16 to the three records contained in Review Number 1518. The Applicant says that the Public Body's original letter to the Applicant outlining its refusal to provide access did not cite section 16.

[para 53.] The Public Body says that it applied section 16 to the records after it removed section 21 as an exception. The Public Body argues that section 16 is a mandatory ("must") provision, which it must comply with because the third parties did not give consent to disclosure.

[para 54.] I agree with the Public Body that section 16 is mandatory and must be applied at whatever stage of the inquiry proceedings the issue of the application of section 16 may arise. Furthermore, in numerous Orders, I have said that I will consider the application of mandatory provisions of the Act, even if a public body does not.

[para 55.] For section 16 to apply, there must be "personal information", as set out in section 1(1)(n) of the Act, and the disclosure of the personal information must be or must be presumed to be an unreasonable invasion of a third party's personal privacy, as provided by section 16(1) or section 16(2) of the Act, respectively.

## **2. Do the foregoing records contain "personal information"?**

[para 56.] The Public Body says that the foregoing records contain personal information consisting of the names and signatures of individual third parties. In some cases, the records contain the titles of individual third parties who authored letters.

[para 57.] As to Review Number 1487, Record Number 26, the Public Body says that that record is personal correspondence from one individual third party and reflects the third party's personal views and opinions. In some cases, the correspondence also reflects the third party's opinions about other individuals, which is the personal information of those other individuals.

[para 58.] The definition of "personal information" is contained in section 1(1)(n) of the Act, and reads:

*1(1)(n) "personal information" means recorded information about an identifiable individual, including*

*(i) the individual's name, home or business address or home or business telephone number,*

*(ii) the individual's race, national or ethnic origin, colour or religious or political beliefs or associations,*

*(iii) the individual's age, sex, marital status or family status,*

*(iv) an identifying number, symbol or other particular assigned to the individual,*

*(v) the individual's fingerprints, blood type or inheritable characteristics,*

*(vi) information about the individual's health and health care history, including information about a physical or mental disability,*

*(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,*

*(viii) anyone else's opinions about the individual, and*

*(ix) the individual's personal views or opinions, except if they are about someone else.*

[para 59.] I have reviewed all the foregoing records and find that they contain personal information consisting of the kinds identified by the Public Body, as set out in section 1(1)(n).

[para 60.] Those records also contain third parties' initials, educational qualifications, employment history, official designations, business addresses, business telephone numbers and business fax numbers. I find that that information is also personal information, as it is either included in the list of personal information or it is otherwise "recorded information about an identifiable individual", as set out in section 1(1)(n).

**3. Would disclosure of the personal information be an unreasonable invasion of a third party's personal privacy, as provided by section 16(1) or section 16(2)?**

**a. General**

[para 61.] The Public Body says that the personal information contained in the foregoing records meets the criteria for section 16(2)(g) or section 16(2)(h), particularly Review Number 1487, Record Number 26.

[para 62.] Section 16(1) and the relevant parts of section 16(2) read:

*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.*

*(2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*

*...*

*(g) the personal information consists of the third party's name when*

*(i) it appears with other personal information about the third party, or*

*(ii) the disclosure of the name itself would reveal personal information about the third party,*

*(h) the personal information indicates the third party's racial or ethnic origin, or religious or political beliefs or associations.*

[para 63.] I have reviewed all the foregoing records. For Review Number 1487, Record Number 26, I find that all the personal information meets the criteria for section 16(2)(g) or section 16(2)(h). I find that the personal information contained in the remaining records meets the criteria for section 16(2)(g), except for Review Number 1487, Record Numbers 7g, and Review Number 1518, Record Number 4. Nevertheless, the personal information contained in those two records remains to be considered under section 16(1).

**b. In determining under section 16(1) or section 16(2) whether the disclosure of personal information is or would be presumed to be an unreasonable invasion of a third party's personal privacy, what relevant circumstances did the Public Body consider under section 16(3)?**

[para 64.] Under section 16(3), a public body must consider all the relevant circumstances when determining under section 16(1) or section 16(2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy.

[para 65.] In refusing to disclose the personal information, the Public Body says it considered that it did not receive any responses to notices sent to the third parties under section 29 of the Act. The Public Body also says that it considered section 16(3)(g) and section 16(3)(h) for Review Number 1487, Record Number 26.

[para 66.] The Applicant says that the Public Body should have considered section 16(3)(a).

[para 67.] The relevant portions of section 16(3) read:

*16(3) In determining under subsection (1) or (2) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether*

*(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Alberta or a public body to public scrutiny,*

*...*

*(g) the personal information is likely to be inaccurate or unreliable, and*

*(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.*

**(1) Disclosure of personal information desirable for public scrutiny (section 16(3)(a))**

[para 68.] The Applicant submits that the disclosure of the personal information by the Public Body is necessary to the goal of enhanced public scrutiny under section 16(3)(a) as a means of determining the full



extent of the government's involvement in the West Edmonton Mall refinancing.

[para 69.] If found to be a relevant circumstance, section 16(3)(a) weighs in favour of disclosing a third party's personal information.

[para 70.] In Order 97-002, I discussed the interpretation of section 16(3)(a). I said that evidence had to be provided to demonstrate that the activities of the Government of Alberta or a public body had been called into question, necessitating disclosure of personal information to subject the activities of the Government of Alberta or a public body to public scrutiny. I also said that:

- (i) It was not sufficient for one person to have decided that public scrutiny was necessary;
- (ii) The applicant's concerns had to be about the actions of more than one person within the public body; and
- (iii) Where the public body had previously disclosed a substantial amount of information, the release of personal information was not likely to be desirable for the purpose of subjecting the activities of the public body to public scrutiny. This was particularly so if the public body had also investigated the matter.

[para 71.] In this case, I find the following:

- (i) The Executive Council itself decided that public scrutiny into the refinancing of West Edmonton Mall was necessary.
- (ii) The Applicant's concerns are about the actions of the government as a whole.
- (iii) The Executive Council asked the Auditor General to investigate the matter. However, the Auditor General's Report was inconclusive as to the extent of the government's involvement in the refinancing. That matter is now before the courts.

[para 72.] Therefore, on balance, I find that section 16(3)(a) is a relevant circumstance weighing in favour of disclosing all the personal information (that which both I and the Public Body have identified) contained in the following records:

*Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i (two-page letter), 7j (one-page letter), 7k, 9 (four-page letter), 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 73.] However, I find that section 16(3)(a) is not a relevant circumstance and does not weigh in favour of disclosing the personal information contained in Review Number 1487, Record Number 26.

***(2) Personal information likely to be inaccurate or unreliable (section 16(3)(g)) and unfair damage to reputation (section 16(3)(h))***

[para 74.] If found to be relevant circumstances, section 16(3)(g) and section 16(3)(h) weigh in favour of not disclosing personal information.

[para 75.] The Public Body says that section 16(3)(g) and section 16(3)(h) are relevant circumstances only with respect to Review Number 1487, Record Number 26.

[para 76.] I have reviewed that record. Given the circumstances under which the record was created, I agree with the Public Body that section 16(3)(g) and section 16(3)(h) are relevant circumstances that weigh in favour of not disclosing the personal information contained in that record.

***(3) Other relevant circumstances under section 16(3)***

[para 77.] The list of relevant circumstances under section 16(3) is not exhaustive. Therefore, there may be other relevant circumstances that a public body must consider.

[para 78.] The Public Body says that it sent notices to the individual third parties under section 29 of the Act, but it did not receive any responses. Therefore, the Public Body decided not to disclose the personal information contained in the records.

[para 79.] In previous Orders, I have said that refusal to consent to disclosure is a relevant circumstance to consider in determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy under section 16(3). However, I do not believe that lack of a response to a section 29 notice, of

itself, is a relevant circumstance weighing in favour of not disclosing personal information.

[para 80.] In this case, it is a relevant circumstance that individual third parties have put their personal information in the public domain in the court action. I find this to be a relevant circumstance weighing in favour of disclosing personal information of certain third parties contained in the following records:

*Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 7i (two-page letter), 9 (four-page letter), 13 (one-page letter), 14, 23b

**c. Conclusion under section 16(3)**

[para 81.] I have reviewed the Public Body's process under section 16(3).

[para 82.] For Review Number 1487, Record Number 26, I find that the Public Body considered all the relevant circumstances under section 16(3) and, after considering all the relevant circumstances, properly came to the conclusion that the disclosure of the third parties' personal information would be presumed to be an unreasonable invasion of those third parties' personal privacy under section 16(2).

[para 83.] Therefore, the Public Body correctly applied section 16(2) to the personal information contained in that record.

[para 84.] However, for the personal information contained in the following records, I find that the Public Body did not consider all the relevant circumstances under section 16(3) and did not properly come to the conclusion that disclosure of the third parties' personal information would be or would be presumed to be an unreasonable invasion of those third parties' personal privacy under section 16(1) or section 16(2):

*Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i (two-page letter), 7j (one-page letter), 7k, 9 (four-page letter), 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 85.] Therefore, the Public Body did not correctly apply section 16(1) or section 16(2) to the personal information contained in those records.

#### **4. Did the Applicant meet the burden of proof under section 67(2)?**

[para 86.] Section 67(2) of the Act provides that if the record or part of the record to which the applicant is refused access contains personal information of a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of a third party's personal privacy.

[para 87.] As to the personal information to which I have found that the Public Body did not correctly apply section 16(1) or section 16(2), it is not an unreasonable invasion or a presumed unreasonable invasion of the third parties' personal privacy to disclose that personal information because the relevant circumstances considered under section 16(3) weigh in favour of disclosing the personal information. Therefore, the Applicant has no burden of proof with regard to the personal information contained in those records.

[para 88.] However, as to the personal information contained in Review Number 1487, Record Number 26, to which I have found that the Public Body correctly applied section 16(2), disclosure of that personal information is presumed to be an unreasonable invasion of the third parties' personal privacy because the relevant circumstances considered under section 16(3) weigh in favour of not disclosing the personal information. Therefore, with respect to that personal information, the Applicant must prove that it is not an unreasonable invasion of the third parties' personal privacy to disclose that personal information.

[para 89.] The Applicant contends that the Public Body and third parties were well aware that providing access to documents through the courts and the Auditor General would result in the public disclosure of personal recommendations or evaluations, third party names and personal information about those third parties, and result in discussion surrounding the reputation of any person referred to in the record requested. According to the Applicant, the fact that permission was granted by the Public Body and third parties for others (the Auditor General and the courts) to gain access to this information means that the disclosure of the records cannot be considered an unreasonable invasion of a third party's personal privacy.

[para 90.] I disagree. The personal information contained in Review Number 1487, Record Number 26, would not have been disclosed to the Auditor General or in the court action. That personal information exists in a context separate from the records directly related to the refinancing of the West Edmonton Mall. The Applicant's arguments are not relevant to that record.

[para 91.] The Applicant also argues that the access provided by the Public Body and third parties to the records constitutes implied consent for the release of the records under section 16(4)(a).

[para 92.] I disagree. Section 16(4)(a) requires written consent. There is no evidence of written consent before me.

[para 93.] Therefore, I find that the Applicant has not met the burden of proving that disclosure of the personal information contained in Review Number 1487, Record Number 26, would not be an unreasonable invasion of the third parties' personal privacy.

## **5. Conclusion under section 16(1) and section 16(2)**

[para 94.] I find that the Public Body correctly applied section 16(2) to the personal information contained in Review Number 1487, Record Number 26.

[para 95.] As the Applicant has not met the burden of proving that the disclosure of the personal information contained in Review Number 1487, Record Number 26, would not be an unreasonable invasion of the third parties' personal privacy, I uphold the Public Body's decision to refuse to disclose that personal information to the Applicant. I intend to order that the Public Body not disclose that personal information to the Applicant. The Public Body is to withhold Review Number 1487, Record Number 26, in its entirety.

[para 96.] I find that the Public Body did not correctly apply section 16(1) or section 16(2) to the personal information contained in the following records:

### *Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i (two-page letter), 7j (one-page letter), 7k, 9 (four-page letter), 11, 12, 13, 14, 17b, 17c, 23b

### *Review Number 1518*

Record Numbers 1, 2, 4

[para 97.] Therefore, I do not uphold the Public Body's decision to refuse to disclose that personal information to the Applicant. I intend to order that the Public Body disclose that personal information to the Applicant.

**ISSUE D: Did the Public Body correctly apply section 21 (Cabinet confidences)?**

**1. General**

[para 98.] The Public Body says that section 21(1) of the Act applies to information contained in the following records:

*Review Number 1487*

Record Numbers 1, 3 (except two-page letter and one-page attachment to two-page letter), 7a, 8, 10, 15 (except the part the Public Body has already disclosed to the Applicant), 18, 19

[para 99.] The Public Body says that the majority of the foregoing records show, on their face, that they are records of the Agenda and Priorities Committee, which is a committee of the Executive Council (also known as the “Cabinet”). I agreed in Order 97-010 that the Agenda and Priorities Committee is one of the Cabinet committees of government.

[para 100.] The Public Body also says that, for Record Numbers 1 and 7a, it relies on evidence contained in two affidavits submitted *in camera*, which attest that those records were located in a file of the Agenda and Priorities Committee and included with other records of that Committee.

[para 101.] The Applicant argues that the information contained in the records is background information and must be disclosed, as provided by section 21(2)(c).

[para 102.] Section 21 reads:

*21(1) The head of a public body must refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees or of the Treasury Board or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees or to the Treasury Board or any of its committees.*

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

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

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

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

*(i) the decision has been made public,*

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

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

[para 103.] I have reviewed all the foregoing records. I find that the information contained in Review Number 1487, Record Number 7a, does not meet the requirements of section 21(1) because that record would not reveal the substance of deliberations of the Executive Council or any of its committees or the Treasury Board or any of its committees. The substance of those deliberations referred to in Record 7a has already been revealed in the Auditor General's Report. The Executive Council authorized the Auditor General's Report.

[para 104.] However, I find that the information contained in the following records would reveal the substance of deliberations of the Executive Council or one of its committees:

*Review Number 1487*

*Record Numbers 1, 3 (except two-page letter and one-page attachment to two-page letter), 8, 10, 15 (except the part the Public Body has already disclosed to the Applicant), 18, 19*

[para 105.] The information contained in the foregoing records has not been disclosed in the Auditor General's Report.

[para 106.] The Applicant says that the information contained in the foregoing records must be disclosed because all the provisions of section 21(2)(c) have been met: the decision about the refinancing has been made public, the decision has been implemented, and five or more years have passed since the decision was made or considered.

[para 107.] However, section 21(2)(c) contains two requirements: (i) there must be information in a record the purpose of which is to present background facts to the Executive Council or any of its committees, for consideration in making a decision; and (ii) the decision must have been made public, implemented, or five or more years must have passed since the decision was made or considered.

[para 108.] In this case, the information to which section 21(1) applies cannot be said to be information in a record the purpose of which is to present background facts to the Executive Council or any of its committees, for consideration in making a decision. As both requirements of section 21(2)(c) have not been met, section 21(1) applies. Therefore, the Public Body must withhold the information contained in the foregoing records.

## **2. Conclusion under section 21**

[para 109.] The Public Body correctly applied section 21(1) to the information contained in the following records:

*Review Number 1487*

Record Numbers 1, 3 (except two-page letter and one-page attachment to two-page letter), 8, 10, 15 (except the part the Public Body has already disclosed to the Applicant), 18, 19

[para 110.] Therefore, the Public Body must not disclose the foregoing records to the Applicant.

[para 111.] The Public Body did not correctly apply section 21(1) to the information contained in the following record:

*Review Number 1487*

Record Number 7a

[para 112.] Therefore, I intend to order that the Public Body disclose the foregoing record to the Applicant.

### **ISSUE E: Is the Public Body required to disclose the records under section 31(1)(b) (disclosure in the public interest)?**

[para 113.] The Applicant says that, under section 31(1)(b), a public body must disclose information, the disclosure of which is clearly in the public interest. The Applicant submits that it is in the public interest to know the extent of the government's involvement in Alberta Treasury Branches' refinancing of West Edmonton Mall.



[para 114.] The Applicant also submits that the criteria for determining public interest under section 87(4)(b) are relevant to determining public interest under section 31(1)(b).

[para 115.] I have already determined that the following records are not subject to the Act by virtue of section 4(1)(l). Therefore, section 31(1)(b) cannot apply to the following records:

*Review Number 1487*

Record Numbers 2, 16, 21, 24, 25

*Review Number 1518*

Record Numbers 3, 5, 6, 7, 8, 9

[para 116.] Furthermore, I have already determined that the information contained in the following records is to be disclosed to the Applicant under section 15, section 16 and section 21. Therefore, it is not necessary that I consider whether the same information contained in the following records should be disclosed to the Applicant under section 31(1)(b):

*Review Number 1487*

Record Numbers 3 (two-page letter and one-page attachment to two-page letter), 4, 5a, 5b, 6a, 6b, 6c, 7a, 7b, 7c, 7d, 7f, 7g, 7h, 7i, 7j, 7k, 9, 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 117.] I find it necessary to consider only whether the following records should be disclosed under section 31(1)(b):

*Review Number 1487*

Record Numbers 1, 3 (except two-page letter and one-page attachment to two-page letter), 8, 10, 15 (except the part the Public Body has already disclosed to the Applicant), 18, 19, 26

[para 118.] Section 31(1)(b) 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 119.] As a preliminary matter, the criteria for public interest under section 31(1)(b) are not the same as the criteria for public interest under section 87(4)(b). I dealt with that issue in Order 98-011.

[para 120.] In this case, I am of the view that the extent of the government's involvement in the refinancing of West Edmonton Mall is a public interest issue. Alberta Treasury Branches guaranteed a loan to West Edmonton Mall and took a second mortgage at a time when Alberta Treasury Branches was under the purview of Alberta Treasury. The refinancing potentially makes the taxpayers of Alberta liable for hundreds of millions of dollars. There is an issue as to whether the loan guarantee was economically sound. These are matters of compelling public interest.

[para 121.] However, the Executive Council instructed the Auditor General to prepare a report and to release that report. In Order 96-011, I said that disclosure of information, rather than records, was the likely outcome under section 31(1)(b). In my view, disclosure of the Auditor General's Report and the information contained in the report satisfies the requirement for disclosure under section 31(1)(b). I do not believe that disclosure of the foregoing records under section 31(1)(b) would accomplish any greater purpose than disclosure of the information contained in the Auditor General's Report.

[para 122.] Since the Executive Council gave instructions to release the Auditor General's Report, I find that there is compliance with the requirement of section 31(1)(b) to disclose information. Therefore, the Public Body is not required to disclose the foregoing records under section 31(1)(b).

## **V. ORDER**

[para 123.] I make the following Order under section 68 of the Act.

**Issue A: Application of section 4(1)(l) (record created by or for a member of the Executive Council or a Member of the Legislative Assembly and sent to a member of the Executive Council or a Member of the Legislative Assembly)**

[para 124.] The following records are excluded from the application of the Act by section 4(1)(l):

*Review Number 1487*  
Record Numbers 2, 16, 21, 24, 25

*Review Number 1518*  
Record Numbers 3, 5, 6, 7, 8, 9

[para 125.] Consequently, I have no jurisdiction over those records. The Applicant cannot obtain access to those records under the Act.

**Issue B: Application of section 15 (third party business information)**

[para 126.] The Public Body did not correctly apply section 15(1) to the information contained in the following records:

*Review Number 1487*  
Record Numbers 3 (two-page letter and one-page attachment to two-page letter), 4, 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i, 7j, 7k, 9, 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*  
Record Numbers 1, 2, 4

[para 127.] Therefore, I do not uphold the Public Body's decision to refuse the Applicant access to the information contained in the foregoing records. I order the Public Body to disclose that information to the Applicant. Given my decision under section 16 below, I order the Public Body to disclose to the Applicant the foregoing records in their entirety.

**Issue C: Application of section 16 (personal information)**

[para 128.] The Public Body correctly applied section 16(2) to the personal information contained in Review Number 1487, Record Number 26.

[para 129.] Therefore, I uphold the Public Body's decision to refuse the Applicant access to that personal information. I order that the Public Body not disclose that personal information to the Applicant. The Public Body must withhold Review Number 1487, Record Number 26, in its entirety.

[para 130.] The Public Body did not correctly apply section 16(1) or section 16(2) to the personal information contained in the following records:

*Review Number 1487*

Record Numbers 3 (two-page letter), 4 (two-page letter), 5a, 5b, 6a, 6b, 6c, 7b, 7c, 7d, 7f, 7g, 7h, 7i (two-page letter), 7j (one-page letter), 7k, 9 (four-page letter), 11, 12, 13, 14, 17b, 17c, 23b

*Review Number 1518*

Record Numbers 1, 2, 4

[para 131.] Therefore, I do not uphold the Public Body's decision to refuse the Applicant access to the personal information contained in the foregoing records. I order the Public Body to disclose that personal information to the Applicant. Given my decision under section 15 above, I order the Public Body to disclose to the Applicant the foregoing records in their entirety. The foregoing records are encompassed in the records I have ordered the Public Body to disclose under section 15 above.

**Issue D: Application of section 21 (Cabinet confidences)**

[para 132.] The Public Body correctly applied section 21(1) to the information contained in the following records:

*Review Number 1487*

Record Numbers 1, 3 (except two-page letter and one-page attachment to two-page letter), 8, 10, 15 (except the part the Public Body has already disclosed to the Applicant), 18, 19

[para 133.] I uphold the Public Body's decision to refuse the Applicant access to the information contained in the foregoing records. I order the Public Body not to disclose the foregoing records to the Applicant.

[para 134.] The Public Body did not correctly apply section 21(1) to the information contained in the following record:

*Review Number 1487*

Record Number 7a

[para 135.] I do not uphold the Public Body's decision to refuse the Applicant access to the information contained in the foregoing record. I order the Public Body to disclose the foregoing record to the Applicant.

**Issue E: Application of section 31(1)(b) (disclosure in the public interest)**

[para 136.] The extent of the government's involvement in the refinancing of West Edmonton Mall is a public interest issue. However, since the Executive Council gave instructions to release the Auditor

General's Report, I find that there is compliance with the requirement of section 31(1)(b) to disclose information. Therefore, the Public Body is not required to disclose the records under section 31(1)(b).

[para 137.] I further order that the Public Body notify me in writing, within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

Robert C. Clark  
Information and Privacy Commissioner