

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER**

**ADJUDICATION ORDER #1**

May 29, 1996

**ALBERTA FEDERAL AND INTERGOVERNMENTAL AFFAIRS**

Review Number 1063

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER  
(ADJUDICATOR: JUSTICE R.M. CAIRNS)

**ORDER 96-014**

May 29, 1996

ALBERTA FEDERAL AND INTERGOVERNMENTAL AFFAIRS

REVIEW NUMBER 1063

1 FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT  
ADJUDICATION INQUIRY - MAY 21, 1996  
2 LAW COURTS EDMONTON, ALBERTA

3  
4 BEFORE THE HON. MR. JUSTICE R.M. CAIRNS, ADJUDICATOR  
5 INDIVIDUAL APPLICANT:

6 MR. KEVIN BOSCH

7 PUBLIC BODY RESPONDENT:

8 DEPARTMENT OF  
FEDERAL AND INTERGOVERNMENTAL AFFAIRS (FIGA)

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REASONS FOR JUDGMENT OF  
THE HONOURABLE MR. JUSTICE CAIRNS, ADJUDICATOR

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14 THE ADJUDICATOR: These reasons arise from an inquiry  
15 conducted pursuant to the Freedom of Information and  
16 Protection of Privacy Act-.

17 The Background. By letter dated December 13, 1995,  
18 Mr. Kevin Bosch, the applicant herein, a research analyst  
19 for the Liberal caucus in the Alberta Legislature, wrote to  
20 the international division of that public body known as the  
21 Department of Federal and Intergovernmental Affairs,  
22 (hereinafter referred to as "FIGA".) The letter was  
23 entered as Exhibit 1. A review of the letter indicated  
24 that Mr. Bosch sought records from FIGA to include, a  
25 detailed listing of all meetings in which the Premier  
26 of Alberta, the Honourable Ralph Klein, participated in  
27 during the Canadian Trade Mission to Asia, November 3 to

1 16, 1994. It was to include all persons known to FIGA  
2 with whom the Premier met, formally or informally,  
3 including names of companies, governments or associations  
4 that those persons represented. The letter went on to  
5 particularize persons, companies, governments, and  
6 associations who attended the Premier's roundtable meeting  
7 of Alberta companies in China, and, further, those who  
8 attended at an Alberta-sponsored banquet following the  
9 roundtable, both events occurring November 6, 1994,  
10 together with minutes or summaries of the roundtable.  
11 Further, the letter particularized the names of persons  
12 that the Premier met, formally or informally, and their  
13 companies or associations, for the period November 10,  
14 1994, to November 16, 1994, in Hong Kong, Toishan County,  
15 and Guangdong Province. This latter segment of the  
16 Canadian Trade Mission was referred to in the Inquiry as  
17 the "Alberta Arm" of the mission.

18 In response, Mr. Tait, the Freedom of Information  
19 Coordinator in FIGA, wrote to Mr. Bosch by letter dated  
20 January 15, 1996, forwarding the following documents;  
21 namely;

- 22 1. Premier Klein's itinerary for the Team Canada  
23 mission to China, Alberta Final Version;
- 24 2. Alberta delegation list;
- 25 3. Team Canada Program, Official version;'
- 26 4. roundtable meeting with companies, notes by  
27 Dr. Joseph Lui, and list of roundtable attendees;

- 1           5. program for the Alberta roundtable meeting with
- 2 Alberta companies active in China;
- 3           6. Alberta banquet list of attendees;
- 4           7. program for the Alberta banquet;
- 5           8. Canada China Business Council press release and
- 6 federal government press release; and
- 7           9. Premier Klein's meetings in Guangdong Province.

8 This letter and accompanying documents-was also  
9 accompanied by a three page letter explaining the  
10 documents and a table of contents.

11 That cumulative package of documents became Exhibit 2  
12 in these proceedings.

13 Further, the letter transmitting the disclosed  
14 documents declared the following:

15           1) that the document under Tab 5 of the submitted  
16 binder contained accented disclosure pursuant to certain  
17 sections of the Act. This became Exhibit 5 at the inquiry  
18 and will be so referred to in these reasons.

19           2) that access to a complete document, known at the  
20 inquiry as the "20 page document," was denied under  
21 certain sections of the Act. This document will hereafter  
22 be referred to as Exhibit 7.

23 Furthermore, the letter indicated to Mr. Bosch certain  
24 rights of -review available to him under Section 62 of the  
25 Act.

26 In the exercise of those rights, Mr. Bosch then wrote  
27 to Mr. Clark, the appointed information and Privacy

1 Commissioner under the Act. The letter was dated February  
2 21, 1996, however was not introduced as an exhibit at this  
3 inquiry.

4 In his letter Mr. Bosch contested the withholding of  
5 Exhibit 7, the 20 page document and further questioned the  
6 response, asserting that "all reasonable steps" were not  
7 taken by FIGA in providing response, referring to a letter  
8 from the Premier to Mr. Bruseker, M.L.A., dated December  
9 20, 1995, declaring a meeting between he and Mr. Lobsinger  
10 of Multi-Corp. The suggestion was that of either,  
11 intentional or unintentional, withholding of information.

12 By letter dated February 28, 1996, Mr. Clark wrote to  
13 Mr. Bosch declaring an inability to review due to "a  
14 possible conflict" within the meaning of Section 73.1 of  
15 the Act. He referred Mr. Bosch to the provisions of  
16 Section 71 of t-he Act. That section states;

17 "71(l) The Lieutenant-Governor-in-Council may designate a Judge  
18 of the Court of Queen's Bench  
19 of Alberta to act as adjudicator."

19 And then (b) states:

20 ... to review if stated under Section 73  
21 any decision, act or failure to act of the  
22 commissioner as the head of the office of the Office of the  
23 Information and Privacy  
24 Commissioner."

23 Section 73(l) of the Act is also germane. Section 73.1(1)  
24 is also germane and applies to a refusal to act by the  
25 privacy commissioner due to a declared conflict.

26 In any event, I was appointed adjudicator by  
27 Order-in-Council under Section 71(l) of the Act, the

1 Order-in-Council numbered 142/96 dated April 3, 1996.

2 By letter dated May 6, 1996, I wrote to interested  
3 parties as follows: Mr. Bosch; FIGA, care of Mr. Tait;  
4 Mr. Clark, the information and-Privacy Commissioner; and  
5 Department of Public Works, Supply and Services, the  
6 public body which I understand administers the Act,  
7 setting the questions and issues, inviting mediation as  
8 suggested by the Act, (Section 65), and, failing  
9 mediation, setting the inquiry to commence May 21, 1996.  
10 Mediation was not requested and the inquiry commenced  
11 May 21, 1996, and continued for a period of six juridical  
12 days with this- decision being rendered on the seventh  
13 juridical day, May 29, 1996.

14 At the opening of the inquiry and after hearing  
15 submissions, I made three preliminary rulings as follows:

16 One, I ruled that the inquiry would be open to the  
17 applicant Mr. Bosch, the public and the press, save and  
18 except where it was necessary to conduct the same in  
19 private. That latter provision, while reluctantly made,  
20 was necessary to ensure the integrity of the Legislature,  
21 the legislation, and most specifically, the integrity of  
22 the nondisclosed or withheld documents. obviously, to  
23 disclose those documents in evidence would render nugatory  
24 the entire inquiry. Furthermore, apart from evidence  
25 "ex parte " the applicant, press and public, I allowed full  
26 examination and cross-examination of anticipated  
27 witnesses.

1 The inquiry was conducted entirely in public other  
2 than a session with Mr. Tait, Thursday, May 23, 1996, when  
3 a virtual line by line review of Exhibits 5 and 7 was  
4 conducted. That session was, however, and as I undertook,  
5 completely recorded by a court reporter, the tapes being  
6 available only upon my prior written permission.  
7 Furthermore, exhibits entered during that "in camera"  
8 session, being Exhibit 5, a one page document with words  
9 excepted at the "2:15 - 2:30" time slot; Exhibit 6, an  
10 Affidavit of Mrs. Lennie sworn May 21, 1996; Exhibit 7,  
11 the 20 page document; and Exhibit 8, a program or precis  
12 of involved individuals, were entirely sealed. Subsequent  
13 to hearing submissions, I opened to the inquiry and to the  
14 public and to the applicant Exhibits 6 and 8. At the same  
15 time I ordered Exhibits 5 and 7, the true subjects of this  
16 inquiry, to remain sealed and releasable only with my  
17 prior written permission.

18 The second preliminary point upon which I ruled  
19 related to the possible involvement and notice to third  
20 parties. That consideration engaged Section 15(3)(a),  
21 (upon which I will later comment), and Section 29(2) of  
22 the Act. The latter section provides that where a public  
23 body such as FIGA determines not to give access to  
24 documents involving (as In this case), third parties under  
25 Section 15, it may (and thus permissive), give notice to  
26 those third parties. in its wisdom and in view of the  
27 withholding of third party information, FIGA elected not



1 to give notice to the relevant third parties. I  
2 accordingly did not direct notice or attendance by those  
3 third parties at the inquiry.

4 The third preliminary issue upon which I ruled related  
5 to a request by the applicant that I subpoena, under the  
6 Act, and under the Public Inquiries Act, several  
7 witnesses. After submissions, I ruled that Mr. Tait give  
8 evidence, as indeed was the intention of FIGA and its  
9 counsel, Ms. Brook; and that five other requested  
10 witnesses to include Mr. Gordon Young, former Agent  
11 General, Hong Kong office; two Mr. Hugh Dunne, former  
12 Director, Premier's Calgary office; three, Ms. Josephine  
13 Choi, Trade Director, China Economic Development and  
14 Tourism; four, Mr. Christopher Liu, Assistant Trade  
15 Director, Hong Kong office; and Honourable Ralph Klein,  
16 Premier of Alberta, would not be subpoenaed by me as the  
17 adjudicator. The rationale for my determination and  
18 ruling was that there was no nexus between the issues in  
19 this inquiry and the individuals sought, even though they,  
20 might have information relevant to the inquiry. I  
21 determined that the focus of the inquiry was "records of  
22 FIGA and the search therefor." I reserved decision on  
23 other witnesses, including Ms. Lennie and Mr. Clifford,  
24 and later directed their attendance. They and three other  
25 FIGA personnel appeared voluntarily without subpoena.

26 The Issues on the Inquiry

27 (a) was FIGA Justified in excising words from Exhibit

1 5?

2 (b) Was FIGA justified in withholding the entirety of  
3 Exhibit 7, the 20 page document?

4 At the request of the applicant and his counsel I  
5 expanded the issues to also include;

6 (c) Is the applicant entitled to further documentation  
7 from FIGA that had been intentionally or unintentionally  
8 withheld?

9 (d) Did FIGA make a reasonable effort to assist Mr.  
10 Bosch in his request and did it respond openly,  
11 accurately, and completely, all as contemplated by Section  
12 9(1) of the Act?

13 The Act and the Law Generally..

14 While I will later in these reasons address the law,  
15 the authority, the specific sections and the evidence  
16 specific to each issue, it is perhaps worthwhile to  
17 address the Act in a general sense at the outset.

18 The Act is known as the "Freedom of Information and  
19 Protection of Privacy Act." That of itself gives rise to  
20 a balance between two competing interests. That is to  
21 say, one, freedom of information and records within the  
22 government department or agency or public body as defined,  
23 of which FIGA is such a public body; and two, the  
24 protection of privacy of information and records of that  
25 public body.

26 Consistent with that balancing act, reference is made  
27 to the following sections of the Act germane to my

1 deliberations;

2 1) section 2(a) establishes that the purpose of the  
3 Act is to allow a person a right of access to records  
4 within the custody and control of the public body, subject  
5 to limited and specific exceptions as set forth and  
6 enacted by the Act.

7 2) Section 3 establishes that the scope of the Act is  
8 "in addition to and does not replace pre-existing  
9 procedures for access to information and records",

10 3) Section 6(l), consistent with the purposes and  
11 scope of the Act, gives an applicant, such as Mr. Bosch,  
12 the right of access to any record in the care and custody  
13 of the public body. Specifically, by subsection (2), that  
14 right does not extend to specified exemptions, or, stated  
15 another way, is eroded by information that is specifically  
16 excluded by Part 11 of the Act, in this case specifically  
17 by Sections 15, 20, and 23, as asserted by FIGA. In other  
18 words, all records within the care and control of the  
19 public body are producible other than where expressly  
20 excluded by the Act.

21 4) Section 9 provides that the public body must make  
22 every reasonable effort to assist a requesting applicant  
23 and, further, to respond to each request openly,  
24 accurately, and completely.

25 5) Section 14 provides, inter alia, that the subject  
26 public body may (and thus permissive as opposed to  
27 mandatory) transfer the request to another public body if;

1           (a) the record was produced by or for the other public  
2 body or,

3           (b) the other public body was the first to obtain the  
4 record or,

5           (c) the record is under the care and control of the  
6 other public body.

7           6) Section 29 provides that if the public body does  
8 not intend to disclose third party information (within the  
9 ambit of Section 15) the public body may (again  
10 permissive) give notice to that third party.

11           7) Section 31 is what we know as an "overriding  
12 exception" to the withholding of records and information,  
13 if the subject matter relates to a matter involving harm  
14 to the environment, or, to the health or safety of the  
15 public (none of which are germane to my deliberations), or  
16 if their information is clearly (and that is the operative  
17 word) in the public interest. (Emphasis added.)

18           8) Section 67(l) of the Act provides that the onus  
19 or burden of proof of justifying a decision to withhold  
20 access to a record is upon the public body. It is  
21 conceded by FIGA that it has the onus to establish any  
22 exceptions to records of FIGA claimed by it under Sections  
23 15, 20, or 23. Whether that onus extends to Section 31  
24 will 'Later be addressed in these reasons.

25           9) Section 69 provides that the commissioner's  
26 determination is final. However, by Section 70 his  
27 decision might be the subject of judicial review. By

1 Section 76(4), the Act provides that the decision of an  
2 adjudicator (of which I am one), may be reviewed on an  
3 application for judicial review under the Rules of Court,  
4 specifically Part 56.1.

5 The Law and Evidence Specific to the Four Issues  
6 Enumerated.

7 One, as to Exhibit 5, FIGA asserted an exemption or  
8 exception to disclose based upon Section 15 of the Act.  
9 It had originally claimed exception in its response  
10 letter, January 15, 1996, Exhibit 2, pursuant to both  
11 Sections 15(l) as being disclosure harmful to business  
12 interests of a third party, and also Section 20 (1) (a)  
13 being disclosure harmful to intergovernmental relations.  
14 However at this inquiry FIGA abandoned its assertion under  
15 Section 20, and indeed, adduced no-evidence to so  
16 substantiate a Section 20 exception.

17 Section 15 imposes a mandatory (by the word "must"  
18 appearing) obligation on the public body to refuse  
19 disclosure if to disclose would reveal by Section  
20 15(1)(a)(ii), "commercial, financial, labour relations,  
21 scientific or technical information of a third party" and  
22 that information is supplied explicitly or impliedly  
23 in confidence, and if the disclosure could reasonably be  
24 expected to cause significant harm to the competitive  
25 position of the third party or interfere significantly  
26 with the negotiating position of the third party, or could  
27 result in similar information no longer being forthcoming

1 where the public interest indicates similar information  
2 continue.

3 Those three factors, that is to say, in this case  
4 commercial and/or financial information of a third party  
5 obtained in confidence, the disclosure of which would  
6 cause significant harm or cause reluctance to provide  
7 information in the future, are, it is conceded by the  
8 public body FIGA, conjunctive in nature, and therefore all  
9 three must be proven on a balance of probabilities by the  
10 public body to justify its decision to withhold records  
11 and information. The position of the applicant is that  
12 those three factors or tests must be satisfied, together  
13 with two other tests, relating to (a) third party consent  
14 to disclosure being negated, and (b) the so-called  
15 "overriding" provisions of Section 31.

16 The Law and Evidence Specific to Exhibit 5 and FIGA's  
17 Claim to Exception or Exemption to Disclosure Pursuant to  
18 Section 15.

19 As earlier stated, FIGA excised words from this  
20 disclosed document entitled "Roundtable Meeting with  
21 Alberta Companies Active in China," at the "2:15 to 2:30"  
22 time slot following the words "Meeting with Agri-Team  
23 regarding concerns." It will be a question of fact and  
24 proof as to the first two factors. That is to say, one,  
25 third party information of a commercial or a financial  
26 nature, and two, whether or not the information was  
27 received impliedly or implicitly in confidence. As to

1 the third factor asserted by FIGA, and necessary to be  
2 established, it is my view that a mixed question of fact  
3 and law arises. I will also, of course, address the two  
4 other factors as submitted by the applicant as being  
5 necessary to success by FIGA, being consent and the  
6 overriding provision" of Section 31.

7 A) The evidence of FIGA as to third party financial,  
8 or commercial information in confidence.

9 At the inquiry FIGA called six witnesses, five to  
10 establish its various claims to exemptions and a sixth,  
11 Ms. Orr, to explain the source of Exhibit 3, a press  
12 release. I will review the evidence of the so-called five  
13 exemption witnesses relative to Exhibit S.

14 ) Mr. Tait, the "FOIP" coordinator at FIGA, upon  
15 receiving the request from Mr. Bosch, testified in his  
16 public testimony that he received from Ms. Ng the  
17 documents including Exhibit 5 and reviewed the same at  
18 meetings held with various FIGA personnel, January 2 and  
19 January 3, 1996, at which time a decision was made to  
20 excise or sever the words from Exhibit 5. He had  
21 interpreted the letter of Mr. Bosch to request the  
22 following one, produce records of the meetings of the  
23 Premiers and with whom; two, produce names of individuals  
24 and their companies at the roundtable and dinner; three,  
25 produce details of meetings with individuals at the  
26 so-called "Alberta Arm", including Hong Kong, Toishan  
27 County and Guangdong Province. In response he stated that

1 he provided all records of FIGA other than  
2 Exhibit 5 as severed and Exhibit 7 which was withheld  
3 completely. Specifically, he testified that the severed  
4 words indicated discussions between the Premier and  
5 Agri-Team concerning a. certain federal agency. He further  
6 testified that all factors of Section 15(l)(a)(ii) were  
7 relied upon other than "labour relations." That is to  
8 say, a third party's commercial, financial, scientific  
9 and technical information." As to the information having  
10 been received in confidence, he testified in public that  
11 it was both obvious on the face of the document, and that  
12 it had been confirmed to him by others, that this was a  
13 separate and private meeting between the Premier and  
14 Agri-Team, and therefore the information was received in  
15 confidence expressly. In camera, Mr. Tait further  
16 testified as to the commercial nature of the severed  
17 words, and further, introduced the Affidavit of  
18 Ms. Lennie, Exhibit 6, which I subsequently unsealed and  
19 released and made public, to bolster his claim and  
20 assertion that the evidence was received in confidence at  
21 a separate, private meeting as requested by Agri-Team.

22 2) Mrs. Oryssia Lennie, as to the severed words of  
23 Exhibit 5, testified that the information was commercial  
24 in nature regarding a federal agency, and that Agri-Team  
25 had specifically sought and conducted a separate, private  
26 meeting in a private room adjoining the main roundtable  
27 room with the Premier.



1           3) Mr. Wayne Clifford. while he did not specifically  
2 testify as to Exhibit 5, he was part of the collective  
3 group who recommended to Mrs. Lennie that the subject  
4 words be severed as he was concerned about breaching  
5 commercial confidences of third parties. He testified  
6 that the ultimate decision was that of Mrs. Lennie, the  
7 Deputy Minister, and it was made after the meetings,  
8 January 2 and January 3, 1996, involving representatives  
9 of FIGA.

10           4) Mr. Darrel Hanak. He too was part of the so-called  
11 FIGA group to consider severance under Section 15  
12 respecting this document in relation to commercial  
13 information and confidence.

14           5) Mrs. Yvette Ng. She was a senior international  
15 government office of f the Asian section of FIGA. Her  
16 mandate was, inter alia, to gather the various documents  
17 for other representatives of FIGA. She did not  
18 specifically testify as to Exhibit 5 other than the fact  
19 that she retrieved the document, flagged it, put it in a  
20 binder which ultimately was submitted to the meetings,  
21 January 2 and 3, 1996, and ultimately was produced in  
22 severed form as Tab 5 of Exhibit 2 at the inquiry.

23           Quite understandably, no evidence was tendered by the  
24 applicant on this point.

25           Upon the consideration of the evidence, which is  
26 rather overwhelming,, and of course with the benefit of  
27 knowing the severed words, I have no hesitation in finding

1 that the first two elements of Section 15, i.e. third  
2 party information of a commercial nature obtained in  
3 confidence, have been proven by FIGA. Clearly both  
4 factors have been established and proven on a test of a  
5 preponderance of evidence.

6 (B) The third element of Section 15 which must be  
7 established by FIGA to justify exclusion relates to the  
8 issue of whether or not disclosure could reasonably be  
9 expected to either, cause significant harm to the  
10 negotiating or competitive position of the third party,  
11 Agri-Team, or, cause the third party to refuse to  
12 further supply information to the public body when it is  
13 in the public interest that the body continue to receive  
14 such information. As I stated earlier, that determination  
15 gives rise to a mixed consideration, fact and law.

16 Firstly, a consideration of the evidence. Again,  
17 Ms. Brook adduced evidence from FIGA witnesses as follows:

18 1) Mr. Tait. He testified in public that he relied on  
19 all three aspects of "harms." That is to say, competition  
20 and negotiating position and reluctance of the third party  
21 to provide further information to substantiate and satisfy  
22 the third factor. He further testified in camera as to  
23 anticipated harm if the severed words were made public.  
24 That of course related to a certain federal government  
25 agency. Further he testified as to reluctance of the  
26 third party to reveal future information if past  
27 confidential information was to be revealed.

1           2) Mrs. Lennie testified that to reveal the severed  
2 words would harm the negotiating and commercial position  
3 of the third party. Furthermore, if disclosed, the third  
4 party would be reluctant to disclose future information.  
5 That, she stated, would be detrimental to the public  
6 interest in Alberta as it is very reliant on foreign  
7 trade, as, she testified, 80 percent of the Alberta  
8 economy is reliant on trade.

9           3) Mr. Clifford did not specifically testify as to  
10 Exhibit 5 and a reasonable expectation of harm.

11           4) Mr. Hanak, after receipt of the records, scanned  
12 the same and reviewed the Act, Sections 15 as well as  
13 Section 20. He, together with other FIGA personnel at the  
14 January 2 and 3, 1996, meeting, confirmed the decision to  
15 sever Exhibit 5 on the basis that to disclose would be  
16 harmful to Agri-Team's business relations, the information  
17 having been received in confidence.

18           5) Mrs. Ng did not testify specifically as to  
19 Exhibit 5 in relation to anticipated harm.

20           The Law in Relation to "Harm."

21           Counsel have been of great assistance to me in  
22 assisting in the determination of the applicable standard  
23 to be applied in relation to, and application of, the  
24 harm's test. I am informed that there is no Alberta  
25 jurisprudence on the subject but that there is authority  
26 from both British Columbia and Ontario on point, as well  
27 as a practice note issued "for advice purposes" by the

1 office of the Alberta Information and Privacy  
2 Commissioner, Mr. Robert Clark. A review of the  
3 authorities cited and the practice note is desirable.

4 Submitted by the respondent FIGA are the following  
5 decisions; namely:

6 1) Ministry of the Attorney General (1993) O.I.P.C.  
7 246, a decision of the Ontario Information and Privacy  
8 Commissioner. In that case the request related to funding  
9 in relation to a certain police squad in Ontario. The  
10 appropriate government agency provided some documentation  
11 and withheld access to certain other documentation, and  
12 the requester appealed. At issue were the words "could  
13 reasonably be expected to", therefore precisely the same  
14 words as are contained in subsection (c) of Section 15(l),  
15 the section asserted by FIGA to justify exemption on this  
16 third factor.

17 The commissioner stated at page 8 of the decision as  
18 follows:

19 "In Order 188 Former Assistant Commissioner Tom  
20 Wright interpreted the phrase 'could reasonably  
be expected to, as follows:

21 'It is my view that Section 14 of the Ontario  
22 Act similarly requires that the expectation  
of one of the enumerated harms coming to pass  
23 should a record be disclosed not be fanciful,  
imaginary or contrived, but rather one that is  
24 based on reason. An institution relying on the  
Section 14 exemption bears the onus of providing  
sufficient evidence to substantiate the  
25 reasonableness of the expected harm(s) by  
virtue of Section 53 of the Act.' ""

26 in that case the commissioner further reflected on a  
27 case involving the Federal Access to Information Act in

1 the case Canada Packers Inc. v. Canada (Minister of  
2 Agriculture) reported at (1989) 1 F.C. 47, which  
3 interpreted the words to relate to "probable harm."

4 2) Also referred to me by FIGA was the case Canada  
5 (Information Commissioner) v. Canada (Prime minister), a  
6 more recent decision of the federal court reported at  
7 12 Administrative Law Reports (2nd) 81, a 1992 decision.  
8 In that case Mr. Justice Rothstein of the federal court  
9 held, inter alia, that;

- 10 1. mere possibility of harm was not sufficient;
- 11 2. the court sought an honestly held, although  
12 perhaps subjective, view of harm based on references to  
13 the record;
- 14 3. there must be a clear and direct linkage between  
15 the information and the harm alleged;
- 16 4. if it is self-evident little explanation would be  
17 required.

18 3) Also referred to me was Workers Compensation Board  
19 and the information and Privacy Commissioner (Ontario), a  
20 decision of the Ontario General Divisional Court, reported  
21 at (1995) 85 O.A.C. 43. In the Ontario legislation  
22 Section 17(l) contained words similar to our Section 15,  
23 " - could reasonably be expected to --". At page 51, the  
24 Court, consisting of three jurists, stated:

25 "There is nothing in Section 17(l)(c) that  
26 requires 'detailed and convincing' evidence.  
27 The Act only requires that there be evidence  
that disclosure 'could reasonably be expected'  
to cause harm, which of necessity involves  
some speculation This point has been

1 considered and settled by the Federal  
Court of Appeal in Canada Packers Inc. v.  
Canada (Minister of Agriculture) et al  
2 (1989) 1 F.C. 47 at pp. 57 and 60 where it  
3 considered similar wording. There need only  
4 be evidence of a reasonable expectation of  
probable harm, which of necessity involves  
some speculation."

5  
6 On this same point, and submitted by the applicant  
7 Mr. Bosch, were the following decisions.

8 1) Order Number 56-1995, a decision of the British  
9 Columbia Information and Privacy Officer, wherein the  
10 commissioner applied an objective test as to confidential  
11 documents.

12 2) Order Number 77-1996, a decision again of the  
13 British Columbia commissioner respecting Smithers Ski  
14 Corporation. Section 21 of the British Columbia Act is a  
15 mandatory section, similar to our Section 15, similarly  
16 using the words " - which could reasonably be expected  
17 to -- harm significantly --". That case involved a  
18 newspaper seeking information of a financial nature from  
19 the Town of Smithers as to the third party ski  
20 corporation. In accepting the submissions of the public  
21 body and third party ski corporation that disclosure would  
22 cause significant harm, the commissioner stated at page 4;

23 "As I noted in Order 19-1994 July 26, 1994  
24 -- the harm's test is met where there is  
reasonable expectation of significant harm,  
25 not a certainty that harm will follow from  
disclosure."

26 Both parties have directed me to the instructional  
27 practice note (Humber 1) issued by the Alberta information

1 and Privacy Commissioner, Mr. Robert Clark. The practice  
2 note, relying on the Federal Court of Appeal decision  
3 earlier cited in Canada Packers v. Canada (Minister of  
4 Agriculture) relates to "reasonable expectation of  
5 probable harm." That definition is consistent with the  
6 tenets of the Act and emphasizes the need for the harm to  
7 be genuine, and conceivable, and that there be a link  
8 between disclosure and harm. The practice note goes on  
9 to suggest a threshold test whereby damage or detriment is  
10 caused, not merely hinderance or minimal interference.  
11 There must be a "cause and effect" relationship --  
12 disclosure must cause the harm. To satisfy the test, the  
13 harm must be genuine and conceivable, more than a chance  
14 occurrence, and the public body must provide detailed  
15 evidence.

16 The practice note, and I say this of course with  
17 respect to Mr. Clark, appears to me to be a compendium of  
18 the reasons for judgment of various earlier cases, some  
19 cited above.

20 Taking all of the evidence into consideration and  
21 applying the law as I understand it, I again have no  
22 hesitation in finding that this test has also been met by  
23 FIGA. The evidence, particularly that of Mr. Tait and  
24 Mrs. Lennie, have satisfied me that to disclose the  
25 severed words could reasonably be expected to cause  
26 probable, genuine and conceivable harm to Agri-Team from  
27 competitive and negotiating position, and further would

1 cause it to be reluctant to provide future information so  
2 necessary to the Alberta Government in view of the  
3 significance of and its reliance upon foreign trade.

4 That however does not end the analysis as the  
5 applicant raises two other issues which it asserts must  
6 be negated or addressed by the applicant. They, as I  
7 earlier stated, relate to: one, consent, Section 15(3)(a);  
8 and two, the "overriding" Section 31 of the Act.

9 As to consent, the evidence of FIGA witnesses is that  
10 consent to release was not requested of the third party  
11 Agri-Team for the following reasons:

12 1) the meeting was private and in confidence.

13 2) there was no reasonable expectation that consent to  
14 disclose would be forthcoming if sought.

15 3) the information if disclosed would be harmful to  
16 Agri-Team.

17 4) if permission to disclose were requested reluctance  
18 as to further information would heighten.

19 While one never knows the actual response until one  
20 seeks such a consent, under the circumstances, and again,  
21 of course, knowing the severed words, that response of  
22 FIGA appears sensible and reasonable to me, albeit  
23 somewhat circuitous. I have no previous authority to  
24 assist me. Accordingly, it is not available to the  
25 applicant to cause Section 15 to be inapplicable in accord  
26 with that subsection (3) of Section 15. None of the other  
27 subsections of 15(3) were raised in argument.



1           As to the overriding Section 31, the applicant relies  
2 upon subsection (b) which provides that whether or not  
3 there is a request for access, the head of a public body  
4 must (mandatory) disclose:

5           (b) information the disclosure of which is  
6           -- clearly in the public interest."

7 I have considered this section in the context of both its  
8 purpose and onus, and notwithstanding Section 67(i) which  
9 imposes a general onus and burden of proof upon the  
10 government official, I am of the view that here the onus  
11 is upon the applicant. This is an exception to the  
12 exception. Indeed, by the introduction of Exhibit 12, a  
13 series of newspaper clippings, the applicant attempted  
14 (unsuccessfully I might add), to meet that onus. While  
15 this matter may well be of interest to the public, it is  
16 by no means a matter of public interest. It relates to a  
17 private relationship between Agri-Team, a federal  
18 government agency, and the provincial government.

19           Furthermore, the principle "he who asserts must prove!"  
20 ought to apply, thereby militating against the public body  
21 effectively having to prove a negative, i.e., that it is  
22 not clearly in the public interest. In this case the  
23 applicant asserts its applicability. It thereby must  
24 prove that applicability. It has not done so.

25           For all of those reasons, I confirm the decision of  
26 FIGA to sever and withhold information from Exhibit 5.

27           2) Was FIGA justified in withholding the entirety of

1 Exhibit 7 the 20 page document?

2           During the course of the inquiry I made it clear to  
3 the applicant and his counsel that at the very least he  
4 was going to receive a severed copy of Exhibit 7,  
5 consistent with the intent of the Act to provide freedom  
6 of information and also consistent with the Act  
7 (Section 6(2)) that the preferred position is severance.  
8 That is to say, if severance is reasonable, the applicant  
9 is entitled to the remainder of the record.

10           From the evidence tendered on this inquiry I am  
11 satisfied that FIGA representatives, indeed with no "mala  
12 fides", simply determined to withhold the entirety of  
13 Exhibit 7 without an adequate consideration for severance.  
14 Indeed, during the in camera portion of the evidence of  
15 Mr. Tait, he inasmuch as confirmed that position to me and  
16 made certain concessions an release, most of which appear  
17 in a severed portion of Exhibit 7, which I intend to  
18 release with these reasons as Appendix 1. That will be  
19 made available to counsel at the end of these reasons.

20           Exhibit 7, the evidence establishes, is a word for  
21 word typed transcription of notes taken by Mrs. Lennie,  
22 the Deputy Minister of FIGA, during the course of this  
23 trade mission to Asia, November 3 to 16, 1994, to include  
24 both the Team Canada Trade Mission portion, November 3 to  
25 November 12, 1994, and the so-called "Alberta Arm,"  
26 November 13 to November 16, 1994. As will be obvious from  
27 the severed copy of Exhibit 7, which will be delivered to

1 the applicant and to the respondent and to anyone else who  
2 might be interested, it can be conveniently broken down by  
3 subject matter as follows;

4 Page I relates to briefing of the Prime minister and  
5 First Ministers by the Canadian Ambassador to China,  
6 Ambassador Bild, November 6th, 1994.

7 Page 2 relates to a private meeting with a  
8 representative of Agri-Team and the Premier and other government  
9 officials, as earlier referenced in Exhibit 5.

10 Page 3 relates to a private meeting between the  
11 Premier, other Alberta government officials, and three  
12 Alberta companies who are named as are their  
13 representatives.

14 The bottom portion of page 3 and upper portion of  
15 page 4 relates to a private meeting between Government of  
16 Alberta officials with named representatives of Hole  
17 Ventures.

18 The second half of the page 4 to the top half of  
19 page 8 relates to meetings of Alberta government  
20 officials, including the Premier and Mrs. Lennie, and  
21 approximately 35 Alberta companies at the so-called  
22 "Alberta Business Roundtable".

23 The bottom half of page 8 and top portion of page 9  
24 are notes taken by Mrs. Lennie, on debriefing by the  
25 Premier, of his meeting with Li Peng, the Premier of  
26 China, November 7, 1994.

27 The bottom two-thirds of page 9 and top two-thirds or

1 page 10 relate to the First Ministers, meeting with  
2 Madame Wu, Chinese Foreign Trade Minister, November 7,  
3 1994.

4 The bottom one-third of page 10 and the upper half of  
5 page 11 relate to the Prime Minister's debriefing with  
6 Premiers, November 7, 1994.

7 The middle one-third of page 11 relates to a meeting  
8 with Jiang Zemin, President of China, November 7, 1994.

9 The bottom one-third of page 11 relates to First  
10 Ministers' briefing, November 8, 1994.

11 The top one-third of page 12 relates to Team Canada  
12 Forum, November 8, 1994.

13 The balance of page 12 and all of pages 13 to 15 and  
14 the top one-quarter of page 16 relate to the Premier's  
15 meeting with Wang Tao, President of China National  
16 Petroleum Company, a government agency, November 8, 1994.

17 The middle portion of page 16 relates to First  
18 Ministers, briefing, Shanghai, November 9, 1994.

19 The bottom one-quarter of page 16 relates to the  
20 Premier's Hong Kong visit, November 12.

21 The top one-third of page 17 relates to the Premier's  
22 visits to Jiangmen City, Guangdong Province, November 13,  
23 1994.

24 The bottom two-thirds of page 17 relate to the  
25 Premier's visit to Toishan City, Guangdong Province,  
26 November 14, 1994.

27 The top three-quarters of page 18 relate to the

1 Premier's meeting with Mayor Lin of Nanhai, November 15,  
2 1994.

3 The bottom one-quarter of page 18 and the top half of  
4 page 19 relate to the Premier's meeting with Governor  
5 Zhu Shen-Lin and other Chinese government officials and  
6 Alberta government officials, November 15, 1994.

7 The middle one-third of page 19 relates to dinner  
8 hosted by the vice-governor, November 15, 1994.

9 The bottom one-quarter of page 19 relates to private  
10 meeting of the Premier and Timothy Fok, a Chinese  
11 businessman, November 15.

12 Page 20 relates to a visit by the Premier to Nansha  
13 and a tour of Mr. Fok's development.

14 Thus it will be obvious from that summary of Exhibit 7  
15 that the transcription of Mrs. Lennie's notes relate to  
16 business meetings and intergovernmental meetings and  
17 advice, consultations and deliberations involving officers  
18 and employees of a public body, i.e., Mrs. Lennie, the  
19 Deputy minister of FIGA, and in addition the Premier of  
20 Alberta, a member of the Executive Council, Government of  
21 Alberta. Accordingly, FIGA claims exemption and exception  
22 pursuant to the following sections of Division 2 of the  
23 Act, namely Section 15 (1) being disclosure harmful to  
24 business interests off a third party; Section 20 (1) (a)  
25 being disclosure harmful to intergovernmental  
26 relations; and Section 23 (1)( b) advice from  
27 officials.

1           The Law.

2           Both Section 15, as earlier discussed, and Section  
3 21 (a) contain the words "could reasonably be expected to  
4 harm." I will not restate the law as I earlier analyzed,  
5 suffice it to say that the same criteria apply to this  
6 exhibit and claim for exemption. Section 23 refers to the  
7 words"- could reasonably be expected to reveal --". It  
8 would appear therefore that an objective standard is to  
9 be applied.

10           The Evidence

11           The severed portions of Exhibit 7 relate essentially  
12 to business meetings (Section 15), and to government  
13 meetings (Section 20), and to debriefings (Section 23).

14           Mr. Tait testified in the public portion of the  
15 inquiry that Exhibit 7 related to that portion of the  
16 request of Mr. Bosch seeking minutes or summaries of  
17 Exhibit 1. He testified that Exhibit 7 was a typed  
18 transcription of Mrs. Lennie's handwritten notes and  
19 reflected the content of a variety of meetings involving  
20 the Premier. Again, the decision to withhold Exhibit 7  
21 was made by FIGA personnel at the January 2 and January 3,  
22 1996, meetings. He admitted in cross-examination that his  
23 concern was not that the meetings occurred but rather the  
24 subject of the meetings and the content of discussions.  
25 He further testified that the "Alberta Arm" consisted of  
26 meetings in Hong Kong, Toishan, and Guangdong Province,  
27 but that he was not aware of meetings or dinners between

1 the Premier and Mr. Lobsinger of Multi-Corp on Lama  
2 Island and therefore there was no involvement of FIGA and  
3 no records in relation to that admitted dinner meeting.  
4 He testified unequivocally that FIGA produced or declared  
5 all documents relative to the request in the care and  
6 custody of FIGA. He specifically denied having seen  
7 in the FIGA documents any record regarding Multi-Corp.  
8 Again on behalf of FIGA he claimed exemption under  
9 Section 15 (1) (a) (ii), and all facets thereof, other than  
10 "labour relations," and, secondly, that the meetings  
11 s with the businesses reflected in the notes, Exhibit 7,  
12 were confidential, private meetings, and, thirdly to  
13 disclose records would cause significant harm to both  
14 competition and negotiating positions, and, further,  
15 would cause a reluctance of companies to provide further  
16 information if confidences were breached. Further, his  
17 evidence as to "no consent obtained" applied to these  
18 companies as it did to Agri-Team, on the analysis of  
19 Exhibit 5.

20 As to Section 20 (1) (a) he testified that under this  
21 section the withholding was discretionary. The  
22 information flowing between the Government of Alberta and  
23 the Governments of Canada and China was tendered in  
24 confidence in accord with subsection (b) of Section 20 (1).  
25 He confirmed that no consents to release had been  
26 obtained.

27 Furthermore, he claimed an exemption on behalf of

1 FIGA pursuant to Section 23 (1) (b) "- advice of officials"  
2 of a public body, and also advice involving a member of  
3 Executive Council.

4 He acknowledged that he and FIGA personnel had  
5 conducted a line by line review of Exhibit 7 and that the  
6 names could have been severed and provided to the  
7 applicant. He concluded his evidence in public by  
8 testifying that FIGA personnel exercised a "collective  
9 discretion" and thereby withheld the entire 20 page  
10 document, Exhibit 7.

11 Mr. Tait also testified in camera and amplified his  
12 evidence respecting Exhibit 7. As to the company  
13 meetings, he proceeded through the document virtually line  
14 by line. He broke the roundtable session into four  
15 separate and distinct portions, as follows:

- 16 1. the private meeting involving Agri-Team;
- 17 2. meeting with the Premier of three companies,  
18 Agri-Team, X-Can, and Hole Ventures;
- 19 3. private meeting with the Premier and the two  
20 Messrs. Hole; and
- 21 4. meeting of the approximate 35 Alberta companies  
22 at the confidential roundtable meeting.

23 As to government meetings and debriefings, Mr. Tait  
24 testified as to various matters including confidences,  
25 government practice, protocols, and debriefing sessions,  
26 and understood implied confidences. He further testified  
27 as to his perception of the real harm caused if government



1 discussions were divulged.

2 Similar claims were made for all government meetings  
3 and notes on debriefing on the basis of, inter alia,  
4 protocols, harm as specified, Section 20, were details  
5 were disclosed. The harm would accrue in relation to  
6 Government of Canada and the provinces, as well as to the  
7 foreign government, that is to say, China, he testified.

8 Mrs. Lennie, the Deputy Minister of FIGA, was the  
9 person with the ultimate responsibility respecting  
10 documents and records, including Exhibit 7. She testified  
11 that Exhibit 7 was a typed transcription of the record of  
12 minutes of meetings she attended or a record of debriefing  
13 sessions by Premier Klein. The meetings with businesses  
14 and government officials were private and her notes were  
15 a direct transcription with, to use her expression,  
16 "no massaging."

17 She specifically claimed exemptions under Section 15,  
18 as to disclose would divulge commercial secrets of the  
19 various companies, would adversely affect ongoing  
20 negotiations, and would harm already tenuous business  
21 relationships. Furthermore, at the opening of the  
22 roundtable session per se, the Premier had sought candour  
23 and had informed that the meeting would be in confidence.  
24 In keeping with the confidential meeting, the various  
25 companies addressed their business problems in China and  
26 with the Canadian federal government, in candour.

27 She further testified that the Chinese are sensitive,

1 have very fluid international relations, such that it is  
2 relatively easy to upset a relationship. They are a  
3 closed society where government is heavily involved, she  
4 testified. Due to perceptions, government support of a  
5 business project is important to the Chinese government  
6 and thereby opens doors, facilitates negotiation and  
7 breaks down regulatory barriers in China. She further  
8 testified that the relationship of business and government  
9 enhances relationships and creates inroads into the  
10 Chinese government and business. Furthermore she  
11 testified that the Chinese government is just developing,  
12 and is thereby cautious and examines government statements  
13 very closely. She stated unequivocally that if the  
14 information conveyed to Alberta politicians, specifically  
15 the Premier, were to be disclosed, harm would come to the  
16 discloser, who would be regarded as not forthcoming. As a  
17 result, they would not be frank and candid and future  
18 information would not be conveyed. Furthermore, the  
19 Chinese government constantly are reassessing their  
20 relationships, and both government and business would  
21 sustain harm by disclosure. As a result, she testified,  
22 that she invoked the mandatory position set out in Section  
23 15 and exercised her discretion to withhold access to the  
24 information pursuant to Section 20.

25 She did not seek consents from either business or  
26 governments to disclose the information, believing that it  
27 would not be forthcoming.

1 In cross-examination she testified that the  
2 transcription was accurate, that she had no specific  
3 instruction on note-taking, and that her purpose was to  
4 accurately, record parties attending meetings, their  
5 locations, the substance of the discussions, and for a  
6 reference an the follow-up.

7 She testified that she had attended the Saturday,  
8 November 12, Lama Island dinner arranged by the Agent  
9 General of Hong Kong, Mr. Gordon Young. That dinner was  
10 informal, not on any itinerary and had been arranged the  
11 afternoon of November 12. She was not aware of any  
12 records such as a guest list or invitations being in  
13 existence, however candidly admitted that FIGA made no  
14 effort to obtain the Agent General's documents. She  
15 testified that on no documents within FIGA, including  
16 guest lists, invitations, or itineraries, or any of the  
17 drafts thereof, was there mention of Multi-Corp.

18 In conclusion of her cross-examination she testified  
19 that Exhibit- 7 was a listing of meetings she attended, or  
20 was debriefed upon, through the entire Asian Mission  
21 including the "Alberta Arm" and that Multi-Corp was not  
22 mentioned or discussed in any meetings or debriefings.  
23 She further testified that FIGA had received no  
24 representations from Multi-Corp or any third party  
25 to promote it (Multi-Corp), in China.

26 Mr. Clifford testified that he initially found an  
27 incomplete version of Exhibit 7, but later found a

1 completed copy of Mrs. Lennie's transcription. He  
2 testified as to concerns about its release as it  
3 discussed strategies of companies relating to  
4 competitive pressures and envisaged problems for the  
5 Alberta government in both China and Canada if the  
6 confidential document were to be released. He further  
7 testified as to access to the document as it related to  
8 private intergovernmental meetings between the First  
9 Ministers and the Prime Minister and Chinese diplomats  
10 where there is, according to diplomatic protocol, an  
11 implied or understood confidence. To release the  
12 information would be highly inappropriate he testified,  
13 and damage "our reputation" and create reduction  
14 in trust in the future. To release would result in the  
15 Alberta government being regarded as untrustworthy by  
16 Canadian politicians, and, even more to the point, by  
17 Chinese politicians who have no apparent conception of  
18 openness, are very sensitive to human rights and would be,  
19 to use his expression, "quick to react." Mr. Clifford  
20 has been the Assistant Deputy Minister in FIGA for the  
21 past seven years and in the Department for 23 years.

22 Mr. Hanak, the international trade council in FIGA,  
23 testified very generally as to harm to both business and  
24 government by release of the complete Exhibit 7.

25 Ms. Yvette Ng. As I stated earlier, she was the  
26 senior international government officer in FIGA's Asian  
27 section. She is of Chinese descent,, and, while not

1 qualified as an expert, shared cultural experiences with  
2 the inquiry. She was very concerned about release of the  
3 document, Exhibit 7, due to the frankness and sensitivity  
4 of the comments it contained. She testified as to "brutal  
5 honest" comments in Exhibit 7 and expressed, without  
6 hesitation, that they would have an adverse impact on  
7 relations between the Alberta and Chinese government  
8 officials were they to be released. She testified as to  
9 Asians losing "face" if humiliated or embarrassed; and  
10 further, that their image is very important to them.  
11 Due in large measure to this potential for embarrassment,  
12 she "flagged" the document following retrieval and prior  
13 to turning the same over to her superiors in FIGA.

14           Having considered the evidence in connection with  
15 Exhibit 7 and, of course, again being aware of its  
16 content, I have no hesitation in finding that for the most  
17 part representatives of FIGA properly withheld this  
18 document on the basis of the exemptions, Sections 15, 20,  
19 and 23. I say "for the most part" for as I stated earlier  
20 a more appropriate manner of dealing with this document,  
21 and indeed more consistent with the Act, would have been  
22 to sever out the nonproduced information and produce to  
23 the applicant a severed copy of Exhibit 7.

24           It is in my view entirely conceivable that had FIGA  
25 done that this inquiry might well not have been necessary,  
26 required, or conducted. One can, of course, say the same  
27 of mediation pursuant to Section 65. That step too might

1 have precluded the necessity for this rather lengthy  
2 hearing. Neither party responded favourably to my  
3 suggestion of mediation.

4 3) The third issue that I must specifically address  
5 relates to information that this inquiry has heard that  
6 exists, but was not properly produced by FIGA.

7 In making these next comments I do not impute  
8 "mala fides" in any sense to FIGA. These are documents  
9 which they, in good conscience I believe, did not produce  
10 when they ought to have been so produced. They have valid  
11 explanations for their omissions. In this connection I  
12 specifically refer to the following documents:

13 1) the press release, Exhibit 3. That document is  
14 dated December 12, 1994, and the source material was that  
15 of FIGA. In fact it was prepared by Ms. Fay Orr, who  
16 testified that she, in December of 1994, was seconded to  
17 FIGA as communications director. The evidence established  
18 that on receipt of the Bosch request, Ms. Ng was assigned  
19 the retrieval of the relevant documents. Indeed, her  
20 responsibility, about one year earlier upon the conclusion  
21 of the Trade Mission, was to gather the various personal  
22 files and consolidate the same for filing, vetting  
23 duplicates, and the like. Upon her retrieval of the  
24 so-called "archival box" containing all the files and  
25 documents of FIGA, she noticed, but did not "flag", the  
26 press release. Accordingly it did not form part of FIGA's  
27 disclosed documents in Exhibit 2. Her reasons for not

1 "flagging" this document for her superiors, and, thus it  
2 not being produced were threefold.

3 1. the document was not current.

4 2. the document was in the so-called "public  
5 domain."

6 3. she felt that the document was not within the ambit  
7 or purview of the request of Mr. Bosch.

8 In my opinion this document ought to have been  
9 produced and it is now ordered formally produced,  
10 notwithstanding the fact that it is an exhibit in the  
11 proceedings.

12 2) Similarly, I am of the view that all draft  
13 itineraries currently in the possession of FIGA should now  
14 be produced to Mr. Bosch, and it is so ordered. The  
15 rationale for not so producing those draft itineraries was  
16 that FIGA produced by way of documentation the final or  
17 last, and best itinerary, being of the view that that was  
18 the most accurate and the one most responsive to the  
19 request. All draft itineraries are to be forthwith  
20 produced to Mr. Bosch.

21 3) Similarly, there shall be forthwith produced to Mr.  
22 Bosch all guest lists and invitations relative to the  
23 entire Trade Mission, November 3 to 16, 1994, in the  
24 possession, care and control of FIGA. Specifically any  
25 and all guest lists and invitations in connection with the  
26 roundtable and Alberta banquet, November 6, 1994.

27 4) The fourth issue that I must address relates to a

1 duty to respond and to assist as envisioned by section  
2 9 (1) of the Act, which section reads as follows:

3 "9.(1) The head of a public body must take every  
4 reasonable effort to assist applicants and to  
5 respond to each applicant openly, accurately,  
6 and completely."

7 I will first address the head of FIGA's duty to respond.

8 This is obviously a positive duty imposed on a public  
9 body. I have found in issue number three that FIGA ought  
10 to have produced the press release, the draft itineraries,  
11 and guest lists and invitations. In making that finding,  
12 I have made it clear that in my opinion there was nothing  
13 overt, deliberate, or sinister in the Department's  
14 omission. Failure or omission or oversight in producing  
15 documents giving rise to a "judgment call" cannot be held  
16 to taint the entire production, as Mr. Bosch's counsel  
17 would argue. Indeed, at least the press report and draft  
18 itineraries were known to some officials in FIGA and not  
19 produced as a result of valid explanations.

20 The Act is new, having been proclaimed, I understand,  
21 October 1, 1995, and Government departments are not  
22 certain as to their requirements, duties, and obligations  
23 under the Act. For instance, the evidence established  
24 that this was only the seventh application received by  
25 FIGA. The evidence establishes that the "modus operandi"  
26 on the retrieval followed this procedure:

27 1), the request was received by Mr. Tait, to whom it  
was addressed as FIGA's "FOIP" coordinator.



1           2), he notified certain individuals in the Department  
2 of the request and then transmitted the same to Ms. Ng.

3           3), she testified that she was very familiar with the  
4 documents in her office, her mandate, inter alia, being to  
5 assemble programs and itineraries for Trade Missions,  
6 including, indeed, the 1994 Asian Trade mission. She also  
7 put together what she described as a "briefing book.,  
8 Ordinarily following a mission she gathered and collated  
9 the various working files from staff at FIGA who worked on  
10 aspects of the mission. Her expression was that she  
11 "gathered the working files, sorted them, discarded  
12 duplicates, and generally tidied up the files from this  
13 mission." She ordinarily did that one to two months  
14 following the mission. She consolidated the files of  
15 Mrs. Lennie, Mr. Schneider, and herself, and together with  
16 Mr. Clifford's file, (boxed separately), placed the files  
17 in an archival box and stored the same in the Department's  
18 research center.

19           4), upon receiving Mr. Bosch's request from Mr. Tait  
20 or Mr. Clifford the afternoon of December 15 and upon  
21 being asked to assemble the documents, she signed out the  
22 collection of files from the so-called resource center.

23           5, she worked on the files for about three hours,  
24 tagged relevant documents using a "broad brush" as she  
25 described it, sought clarification from Tait and Clifford  
26 and went on holidays the next day. She had read the Bosch  
27 question, sought clarification, however, was familiar with

1 the documents, assembled the same and left the box with  
2 Clifford. She had "flagged" Exhibit 7, but not Exhibit 3,  
3 for reasons earlier stated.

4 6), she returned from vacation on or about January 2,  
5 1996, and met and discussed the documents with  
6 Mr. Clifford.

7 7), she then met with Ms. Lennie and Messrs. Tait and  
8 Hanak, and I believe also Clifford, January 3 and made  
9 recommendations on the documents and proposed response,  
10 which ultimately became Exhibit 2.

11 8), she had earlier received some training from her  
12 predecessor on the Freedom of Information Act and had had  
13 two or three meetings with both her predecessor and  
14 speakers from Public Works.

15 9), in cross-examination she testified that she made  
16 no inquiries of trade offices in Asia or Hong Kong for  
17 documents as "I believe we have accurate documents in that  
18 we coordinate Trade Missions."

19 10), nor did she go to any other Alberta Government  
20 Department such as Economic Development and Trade stating,  
21 "They keep their own records and I honestly felt no need  
22 to go to them."

23 11) she further testified that she found the request  
24 of Mr. Bosch to be clear and that she found all of the  
25 documents in one box. Indeed, that box was the source of  
26 all documents which ultimately comprised the documentary  
27 portion of Exhibit 2.

1           12), she testified as to the drafts of documents and  
2 found no reference to Multi-Corp.

3           13), in the final analysis, she testified that she  
4 tabled about 25 percent of the box, and that about 20  
5 percent of those documents were produced, thereby forming  
6 Exhibit 2 documents.

7           All other FIGA witnesses essentially confirmed this  
8 evidence as to "retrieval instructions," the tagging with  
9 yellow "stickies" of the documents, a review by  
10 Mr. Clifford, the meetings January 2 and 3, 1996, and the  
11 collective decision to produce and respond with the  
12 Exhibit 2 documents.

13           On the basis of the evidence and despite the oversight  
14 in not producing the press release, draft itineraries and  
15 invitations, I am satisfied, on a balance of  
16 probabilities,, that the positive duty to search and  
17 respond was fulfilled openly, accurately, and completely.

18           Section 9 (1) also imposes on the public body a  
19 positive duty to assist an applicant. That term "assist"  
20 is not defined in the definition section, Section 1 (l).

21           The positions of the parties are as follows:

22           FIGA asserts that because Mr. Bosch was a  
23 "sophisticated researcher" he needed no assistance, as he  
24 was familiar with both Government, public bodies, and  
25 freedom of information legislation. Moreover; it was  
26 unaware of documents in any other Government department,  
27 and felt that its records were accurate. Furthermore,

1 that Mr. Bosch knew, from experience as a researcher for  
2 the Liberal Caucus, how to access appropriate information.

3 The position of Mr. Bosch was that while he was a  
4 Liberal Caucus researcher and had been so for the past  
5 three years, he did not understand the inner workings of  
6 FIGA or Government, although he was familiar with the Act.  
7 He also testified that he was familiar with the directory  
8 published by Public Works respecting the Act.

9 Generally speaking, the evidence of FIGA personnel was  
10 to the effect that they thought Mr. Bosch was  
11 "sophisticated" and would seek information from all  
12 relevant departments of Government, including Economic  
13 Development and Trade, the Premier's office, executive  
14 council, etc. Mr. Tait did know upon advising, (as a  
15 courtesy), Mr. Hitchfield, the "FOIP" coordinator of  
16 Economic Development and Tourism, that a similar request  
17 had not been received by that Department. Mr. Tait also  
18 notified Mr. Henke, the "FOIP" coordinator for the  
19 Premier's office, and the executive council, of the  
20 request for information. He did not request documents  
21 from either of those Departments, believing that FIGA had  
22 all relevant records to respond. Furthermore, FIGA  
23 witnesses testified that they had no expectation that  
24 other Departments would have records germane to the  
25 request. Furthermore, they felt that their records were  
26 complete and accurate. They had "care and control" of  
27 them, and further, envisaged no document with other

1 Departments over which they (FIGA) had "care and control."  
2 Tait did testify, however, that had it been someone  
3 requesting other than Mr. Bosch, he might have phoned that  
4 person. He did not in this case communicate with  
5 Mr. Bosch.

6 Mr. Bosch testified that, inter alia, one of his  
7 mandates was "freedom of information" and "federal and  
8 intergovernmental affairs," i.e. FIGA, within his purview  
9 as a research analyst for the Liberal Caucus. He, of  
10 course, has numerous other duties which he enumerated for  
11 the Inquiry. He testified that since proclamation of the  
12 Act, October 1, 1995, he has coordinated and signed over  
13 200 freedom of information requests, of which five,  
14 (including the present request), have gone to Mr. Tait at  
15 FIGA. This was, however, the first request he had made to  
16 FIGA of its international division. He testified that he  
17 had had no telephone or personal communication with  
18 Mr. Tait regarding the request. He was aware of the Act,  
19 the law, and his own department, but he was unaware of the  
20 inner workings of Government generally, and FIGA in  
21 particular, he testified. In response to a question by  
22 his counsel, he made what I find to be a rather  
23 preposterous statement when he testified: "I have no more  
24 information about the inner workings of Government than  
25 any other citizen of Alberta." Plainly and simply, I do  
26 not accept that evidence after I hear that he has been a  
27 Caucus researcher for three years, takes directions from

1 MLA's and has been involved in over 200 "FOIP"  
2 applications.

3 Surely a Department head or "FOIP" coordinator such as  
4 Mr. Tait can have regard to the source of the inquiry.  
5 While the duty to assist is positive, I do not find that  
6 under the circumstances of this case there was a failure  
7 to comply. Indeed, as Mr. Tait testified, he would likely  
8 have communicated with a requester of lesser knowledge or  
9 sophistication than Mr. Bosch. There was then ,and there  
10 is now, no impediment upon Mr. Bosch to request records  
11 from other Government Departments under the Act, rather  
12 than imposing a duty by extension upon FIGA. In my  
13 opinion, the response of FIGA was reasonable, particularly  
14 in view of their evidence that they had no reasonable  
15 expectation that these other Government Departments had  
16 documents in addition to their own over which they clearly  
17 had care and control.

18 In conclusion and in summary form, my decision and  
19 determinations are as follows:

20 1), as to Exhibit 5, the one-page document entitled  
21 "Roundtable Meeting With Alberta Companies Active in  
22 China" I confirm in accord with Section 68 (2) (b) of the  
23 Act, FIGA's refusal to provide the complete document and  
24 its decision to sever the words from the "2:15 to 2:30"  
25 entry on the basis of Section 15 of the Act. That is to  
26 say, to disclose the information would reveal commercial  
27 and financial information of Agri-Team. The information

1 was received by the Premier in a confidential, private  
2 meeting with Agri-Team and further, to disclose would in  
3 my view, significantly harm the future competitive and/or  
4 negotiating position of Agri-Team. Furthermore, to  
5 disclose would bring the office of the Premier into  
6 disrepute and militate against further confidential advice  
7 being supplied to it, thereby causing a detriment to all  
8 stakeholders: the company, the province, and the public.  
9 Furthermore, to not seek consent as envisaged by Section  
10 15 (3) does not assist the applicant as; it was  
11 inconsistent with the-public body's intent to refuse  
12 access, Section 29 (2) of the Act, (a permissive section),  
13 and secondly, the evidence satisfies me, on a  
14 preponderance of evidence, that consent would not have  
15 been granted by Agri-Team, even if sought. Furthermore,  
16 as I have determined earlier in these reasons, the  
17 applicant, who had the onus, has not satisfied me that it  
18 was clearly in the public interest to reveal the  
19 information, thus the considerations are not overridden by  
20 Section 31 (1) (b).

21 2), as to Exhibit 7, the typed 20 pages which are a  
22 literal word-for-word transcription, complete with "typos"  
23 and obvious errors, of Mrs. Lennie's notes taken during  
24 the following meetings:

25 1), the Premier's meetings with Alberta companies at  
26 the roundtable, and prior private meetings;

27 2), during the course of diplomatic meetings with (a)

1 the Canadian Ambassador to China; (b), the Premier of  
2 China; (c), other high ranking state and business  
3 officials of China; and (d) meetings with the Prime  
4 Minister and other Premiers of Canadian Governments and  
5 debriefings thereof;

6 3), nongovernmental related business meetings.  
7 The decision of FIGA was to withhold that entire document  
8 in response to the Bosch request. That decision in its  
9 entirety I am not prepared to confirm. In my opinion,  
10 that document, similar to Exhibit 5, ought to have been  
11 severed. That decision is prompted by the following  
12 considerations: The basic purpose of the Act as set forth  
13 in Section 2 (a) is "freedom of information." That is to  
14 say "open government" subject only to specific exceptions  
15 contained in the Act. Similarly, Section 6 (1) of the Act  
16 states clearly and unequivocally that an applicant has a  
17 right to any record in the "custody and control of a  
18 public body." It is only as a result of Section 6 (2) that  
19 that right is eroded in accord with disclosure exceptions  
20 contained in Division 2, and in that event severance is  
21 obviously the preferred position. That is to say, even if  
22 non-disclosure is necessary to any or some extent, the Act  
23 directs the public body to provide the remainder of the  
24 information through severance. Consistent with that  
25 philosophy I will provide a severed version to the parties  
26 and it shall be attached to these reasons and marked  
27 Appendix I. It is for the reasons that I earlier



1 discussed that Exhibit 7 as severed is provided to the  
2 applicant.

3 I should comment that in my letter May 6th, 1996, to  
4 the parties interested in this inquiry, I set the question  
5 for determination as follows:

6 "Is Mr. Bosch entitled to access to all, some, or none  
7 of the documentation and information withheld by FIGA in  
8 response to his request dated December 13, 1995?"

9 In retrospect that question was too narrow.  
10 Accordingly, I went on to consider two further issues as  
11 follows:

12 A) Should further documentation, of which I am now  
13 aware, be provided, and in summary my determination is  
14 that that further documentation ought to be provided to  
15 include, one, draft itineraries; two, invitation letters  
16 and lists as to the roundtable and banquet; three, that  
17 document entered in the inquiry as Exhibit 3, the  
18 so-called press release.

19 B) The second issue that I addressed related to  
20 whether or not there was an adequate search, and  
21 assistance to the requester, having regard to Section 9 (1)  
22 of the Act. For the reasons earlier stated, there was, in  
23 my opinion, no failure in those duties by FIGA.

24 Accordingly, it is ordered that:

25 1), the decision of FIGA to sever Exhibit 5, thereby  
26 refusing information severed, is confirmed.

27 2), the decision of FIGA to completely withhold

1 Exhibit 7 is not confirmed, but rather modified to provide  
2 to the applicant a severed copy of Exhibit 7 attached as  
3 Appendix 1.

4 3), the decision to withhold the other documents such  
5 as the draft itineraries, the invitation lists, and  
6 accompanying letters and the press release, Exhibit 3, is  
7 reversed, and those documents are ordered forthwith  
8 produced to the applicant by FIGA.

9 4), the conduct of FIGA in not seeking documents from  
10 the other public bodies, Section 9, was reasonable in view  
11 of the considerations raised in this case and the evidence  
12 tendered.

13 In conclusion, let me unhesitatingly state that this  
14 inquiry was not "the Multi-Corp inquiry" to inquire into  
15 the relationships of that company, the Government of  
16 Alberta, the Premier, the Premier's wife, certain shares  
17 and the like. I did, however, perceive that Multi-Corp  
18 Inc. and those relationships were the central focus of the  
19 applicant, indeed the principal reason for the request.  
20 Having said that, I did find it strange that nowhere in  
21 any of the documentation either produced or withheld by  
22 FIGA, or, I am frank to admit, in Exhibit 7, was there  
23 mention of Multi-Corp Inc. That mission, as  
24 Mr. Collingwood stated, (in his speech during the inquiry  
25 as opposed to a question) would have provided, one would  
26 have thought, a "golden opportunity," to use his  
27 expression, to assist Multi-Corp in its business

1 endeavors, and in overcoming certain business hurdles  
2 which existed in Asia. It is, however, not for me to  
3 speculate, but rather to fulfill my mandate as adjudicator  
4 appointed by order in Council under the provisions of the  
5 Act, Section 71. I believe that I have done that in  
6 answering the posed questions, (as expanded) .

7 I would thank counsel, Ms. Brook on behalf of FIGA,  
8 and Mr. Collingwood and Mr. Dickson on behalf of the  
9 applicant for their materials submitted and their courtesy  
10 at this inquiry. I would also thank Mr. Lefebvre for his  
11 representations on behalf of Southam Inc. on the first day  
12 of this inquiry. I would also thank the court reporters  
13 and the Court House clerical staff for their assistance  
14 provided me during this six or seven-day inquiry.

15 Mr. Dickson, Ms. Brook, there you have it.

16 MR. DICKSON: Thank you, My Lord.

17 MS. BROOK: Thank you, Sir.

18 THE ADJUDICATOR: I will provide to you the  
19 severed Exhibit 7. I have not endorsed it as  
20 Appendix 1, --

21 MR. DICKSON: Thank you.

22 THE ADJUDICATOR: -- but it is known as that in  
23 the reasons.

24 Thank you.

25 \_\_\_\_\_  
26 PROCEEDINGS CONCLUDED  
27 \_\_\_\_\_

1 Delivered orally at Edmonton, Alberta, on the 29th day of

2 May, 1996

3 B. Collingwood, Esq.  
and G. Dickson, Esq.

4 For the Applicant

5 M. Brook, Ms.  
For FIGA

6 T. Shepard  
Court Official

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10 db/jc

11 Typed - 29 May 1996

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