Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-218

Appeal 890364

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O R D E R

INTRODUCTION:

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act,1987, as amended (the "Act") which gives a person who has made a request for access to a record under subsection 24(1) a right to appeal any decision of a head to the Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and procedures employed in making this Order are as follows:

1. On October 15, 1989, Stadium Corporation of Ontario (the "institution") received a request for access to:

> Documents related to the approach by Pepsi to become a consortium member, and any replies and internal data on this, and reasons for non-entry to the consortium. Why are three breweries allowed to be consortium members and only one soft drink company? (1984-1989 period).

2. On November 21, 1989, the institution's Freedom of Information and Privacy Co_ordinator wrote to the requester

advising that access was denied to the requested records as they were exempt from disclosure under subsections 18(1)(a), (c), (d), (e), and (g) and section 19 of the Act.

3. By letter dated November 29, 1989, the requester appealed the head's decision. Notice of the appeal was given to the institution and the appellant.

4. The institution originally identified five records as being responsive to the request. These records were obtained and reviewed by an Appeals Officer. At the request of the Appeals Officer, a further search was conducted at the institution and four additional records were identified as being responsive to the request.

   The requested records consist of nine letters between the institution, Dome Consortium Investments Inc., Pepsi_Cola Canada, and Pepsi/Seven_Up Toronto (Division of Seven-Up Canada Inc.). The records were withheld from disclosure in their entirety.

   During the course of mediation, the Appeals Officer contacted representatives of both Pepsi_Cola Canada and Pepsi/Seven_Up Toronto. Pepsi_Cola Canada is the franchisor and sells franchises across Canada. Pepsi/Seven_Up Toronto is the franchisee for the Toronto area. Pepsi_Cola Canada and Pepsi/Seven_Up Toronto are separate legal identities.

5. Settlement of the appeal was not effected and the matter proceeded to inquiry.

6. Notice of Inquiry was sent to the institution and the appellant. Notice of Inquiry was also sent to Pepsi-Cola Canada Limited, Pepsi/Seven-Up Toronto, Dome Consortium Investments Inc., and the Ministry of Treasury and Economics, (the "affected parties") as disclosure of the requested records might affect their interests. The Notice of Inquiry was accompanied by a report prepared by the Appeals Officer. This report is prepared in order to assist the parties in making representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or

   any other parties, to be relevant to the appeal. Those sections of the Act paraphrased in the report include exemption sections cited by the head in refusing access to a record or a part thereof. The report indicates that the parties, in making their representations, need not limit themselves to the questions set out in the report.

7. Representations were received from the institution, the four affected parties and the appellant. I have considered all of the representations in making my Order.

8. In its representations, the institution addressed the application of the section 17 exemption which was referred to in the Appeals Officer's Report.

The following records, which have been withheld from disclosure in their entirety, are at issue in this appeal:

1. A one page letter from Pepsi-Cola Canada Ltd. to the institution, regarding Pepsi's membership in Dome Consortium Investments Inc., dated October 29, 1987.

2. A one page letter from Dome Consortium Investments Inc. to Pepsi-Cola Canada Ltd., dated November 9, 1987.

3. A two page letter from Pepsi/Seven-Up Toronto to the institution, dated June 29, 1989.

4. A two page letter from Pepsi/Seven-Up Toronto to the institution, dated July 14, 1989.

5. A two page letter from the institution to Pepsi/Seven-Up Toronto, dated July 24, 1989.

6. A two page letter from Pepsi/Seven-Up Toronto to the institution, dated August 4, 1989.

7. A one page letter from the institution to Pepsi/Seven-Up Toronto, dated August 21, 1989.

8. A one page letter from Pepsi-Cola Canada Ltd. to the institution, dated October 25, 1989.

9. A one page letter from the institution to Pepsi-Cola Canada Ltd., dated November 10, 1989.

PURPOSES OF THE ACT/BURDEN OF PROOF:

It is important to note at the outset the purposes of the Act as outlined in subsections 1(a) and (b). Subsection 1(a) provides a
right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Subsection 1(b) sets out the counter_balancing privacy protection purpose of the Act. This subsection provides that the Act should protect the privacy of individuals with respect to personal information about themselves held by institutions and should provide

individuals with a right of access to their own personal information.

Furthermore, section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the Act lies with the head of the institution. Affected parties who rely on the exemption provided by section 17 of the Act share with the institution the onus of proving that this exemption applies to the requested records or parts of the requested records.

ISSUES/DISCUSSION:

The issues arising in this appeal are as follows:

A. Whether the head properly applied the mandatory exemption provided by section 17 of the Act to exempt Records 1-9 from disclosure.

B. Whether the head properly applied the discretionary exemption provided by section 18 of the Act to exempt Records 1-9 from disclosure.

C. Whether the head properly applied the discretionary exemption provided by section 19 of the Act to exempt Records 3-9 from disclosure.

D. Whether there is a compelling public interest in the disclosure of the records or parts of the records which clearly outweighs the purpose of the exemptions.

ISSUE A: Whether the head properly applied the mandatory exemption provided by section 17 of the Act to exempt Records 1-9 from disclosure.

Subsection 17(1) of the Act reads as follows:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial,

> financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer, or other person appointed to resolve a labour relations dispute[0].

In Order 36 (Appeal Number 880030), dated December 28, 1988, former Commissioner Sidney B. Linden outlined the three_part test which must be satisfied in order for a record to be exempt under the
mandatory provisions of subsection 17(1) of the Act:

> 1. the record must reveal information that is a trade secret or scientific, technical,

[0]On January 1, 1990, subsection (d) was added to subsection 17(1) by virtue of the coming into force of the Freedom of Information and Protection of Privacy Amendment Act, 1989. This new subsection is not relevant to this appeal.

commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

Failure to satisfy the requirements of any part of this test will render the subsection 17(1) exemption claim invalid.

I concur with Commissioner Linden's view of the subsection 17(1) test and adopt it for the purposes of this appeal.

In determining whether the first part of the test has been satisfied, I must consider whether disclosure of the records would "reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information".

In its representations, the institution claims that disclosure of Records 1-9 would reveal commercial information and disclosure
of Records 1 and 2 would reveal financial information. I accept the institution's position and find that the information contained in the Records 1-9 constitutes commercial information. Further, I find the information contained in Records 1 and 2 constitutes financial information. Therefore, the first part of the section 17 test is established with respect to the records at issue in this appeal.

The second part of the section 17 test raises the question of whether the information contained in the records was "supplied in confidence implicitly or explicitly". In its representations, the institution indicates that the information contained in Records 1-9 was supplied in confidence by representatives of each of the parties involved in the subject matter of this request. In my view, the information contained in Records 1, 3, 4, 6, and 8 was supplied by the third parties to the institution in confidence implicitly and therefore meets the requirements of the second part of the test.

Record 2 was prepared by legal counsel for Dome Consortium Investments Inc. and sent to legal counsel for Pepsi-Cola Canada Ltd. A copy of Record 2 was given to the institution. Considering how the record was prepared and supplied to the institution, and reviewing the contents of the record, it is my view that the disclosure of the information in Record 2 would reveal information which was supplied in confidence implicitly to the institution by Pepsi-Cola Canada Ltd. Therefore, the information in Record 2 meets the requirements of the second part of the test.

Records 5, 7, and 9 are letters prepared by the institution in response to correspondence from the third parties. I have stated previously that I will find that information contained in a record would "reveal" information "supplied" by an affected party, within the meaning of subsection 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. [See Order 203 (Appeal 890131), dated November 5, 1990 at p.13].

It is my view that the disclosure of Records 5, 7, and 9 would reveal information supplied in confidence implicitly by Pepsi/Seven-Up Toronto or Pepsi-Cola Canada Ltd. to the institution.

The third part of the section 17 test raises the question of whether the prospect of disclosure of the record could reasonably be expected to give rise to one of the types of harms specified in subparagraphs (a), (b), or (c) of subsection 17(1). The institution in its representations has cited subsections 17(1)(a) and (c).

The institution indicated that the disclosure of the information could reasonably be expected to prejudice significantly the competitive position of the institution and/or Dome Consortium Investments Inc. (an affected party) and interfere significantly with the contractual negotiations relating to additional members of the Consortium of investors. In my view, the scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed by a claim for exemption pursuant to section 18 of the Act and not section 17. Accordingly, I have considered only the institution's representations regarding the impact that disclosure would have on the affected parties in my discussion of section 17. I will consider the institution's
submission relating to harms to the institution under section 18 - Issue B.

In my view, the institution has failed to show how the disclosure of the information in the records would prejudice significantly the competitive position of Dome Consortium Investments Inc. or interfere significantly with the ability of

Dome Consortium Investments Inc. to negotiate for sponsors and/or investors.

Pepsi-Cola Canada and Pepsi/Seven-Up Toronto were given the opportunity to provide representations regarding the effect of the release of the records. Pepsi-Cola Canada indicated that it did not object to the disclosure of the letters dated October 25, 1989 and November 10, 1989 (Records 8 and 9), and that it was not in a position to consent to the release of the other records.

Pepsi/Seven-Up Toronto indicated that it did not object to the release of the records but requested only the identity of the appellant prior to the release of the records.

It is my view that there is insufficient evidence to satisfy the requirements of the third part of the section 17 test. As indicated above, failure to satisfy any one of the three requirements renders section 17 inapplicable to the records at issue. Accordingly, I find that Records 1-9 do not qualify for exemption under section 17 of the Act.

ISSUE B: Whether the head properly applied the discretionary exemption provided by section 18 of the Act to exempt Records 1-9 from disclosure.

At the time of its original decision, the institution relied upon subsections 18(1)(a), (c), (d), (e) and (g) to withhold all the records from disclosure. In its representations, the institution cited only subsections 18(1)(c) and 18(1)(e). Therefore, I have based my decision on the application of these two subsections.

Subsections 18(1)(c) and (e) of the Act read as follows:

> A head may refuse to disclose a record that contains,
>
> (c) Information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

In addressing section 18, in an Order related to the same institution which is involved in this appeal, Commissioner Linden stated that:

> Broadly speaking, section 18 was drafted to protect certain interests, economic and otherwise, of the Government of Ontario and/or institutions. Subsections 18(1)(c) and (g) both take into consideration the consequences which could reasonably be expected to result from disclosure of a record. Subsections 18(1)(a) and (e) are both largely concerned with the content of a record, rather than the consequences of disclosure. [See Order 163 (Appeal 880262) dated April 24, 1990 p. 5-6]

I will first deal with the application of subsection 18(1)(c) to the records at issue. To qualify for exemption under subsection 18(1)(c), the records in question must contain information the

disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

In its representations, the institution submitted that the consequences of disclosure of the records would affect its ability to compete for investors and stated "... [that release could] reasonably be expected to prejudice the economic interest of Stadco in obtaining additional Consortium investors and competitive position of Stadco in the market place in vying for investors."

In considering the evidence required to support a claim of reasonable expectation of harm or loss under section 17, Commissioner Linden indicated that the evidence must be "detailed and convincing". Commissioner Linden also indicated that the standard of proof is no less stringent under section 18 than in section 17 of the Act [see Order Numbers 36 and 163 supra] I concur with Commissioner Linden's position and adopt it for the purposes of this appeal.

As previously stated, in order to qualify for exemption under subsection 18(1)(c), the record in question must contain information the disclosure of which could reasonably be expected to prejudice the economic interests or competitive position of an institution. I have considered the meaning of the words "could reasonably be expected to" in the context of subsection 14(1) of the Act and found that the expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason [see Order 188 (Appeal Number 890265), dated July 19, 1990 at p.11]. In my view, subsection 18(1)(c) similarly

requires that the expectation of prejudice to the economic interests or competitive
position of an institution, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one which is based on reason.

It is my view that the records at issue in this appeal do not contain information the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of the institution and therefore do not qualify for exemption under subsection 18(1)(c) of the Act.

The institution also argues that the disclosure of the records would reveal positions, plans, procedures and criteria applied to negotiations carried on or to be carried on, and therefore are exempt from disclosure pursuant to subsection 18(1)(e) of the Act.

In Order 141 (Appeal Number 890214), dated January 23, 1990, Commissioner Linden stated as follows:

> Because subsections 18(1)(e) and (f) contemplate on-going or future events, a severance containing information about a past event such as a "failed negotiation" could not possibly qualify for exemption under either of these provisions.

I concur with Commissioner Linden's view of the subsection 18(1)(e) and adopt it for the purposes of this appeal.

I do not accept the institution's arguments. In my view, the records do not contain information about negotiations. Further, I am unable to accept that disclosure of the information

contained in the records would expose criteria that the institution would apply to other future negotiations. In my view, these records do not contain any information about positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by the institution. Accordingly, I find that the records at issue in this appeal do not qualify for exemption under subsection 18(1) of the Act.

ISSUE C: Whether the head properly applied the discretionary exemption provided by section 19 of the Act to exempt Records 3-9 from disclosure.

Section 19 of the Act reads as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section provides an institution with the discretion to refuse to disclose:

(1) A record that is subject to the common law solicitor-client privilege; (Branch 1)

(2) A record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation. (Branch 2)

The institution has claimed that Records 3-9 were either subject to solicitor-client privilege or prepared in contemplation of or for use in litigation.

In order for a record to be subject to the common law solicitor-client privilege the institution must provide evidence that the record satisfies either of the following tests:

1. (a) There is a written or oral communication, and

(b) The communication must be of a confidential nature, and

(c) The communication must be between a client (or his agent) and a legal adviser, and

(d) The communication must be directly related to seeking, formulating or giving legal advice;

OR

2. The record was created or obtained especially for the lawyer's brief for existing or contemplated litigation [See Order 49 at p. 13-14]. supra

Records 3-9 are written communications and have either been prepared by the institution and provided to an affected party or vice versa. It is not evident from the institution's representations that the records were prepared by or sent to a legal advisor or counsel. In addition, the communications do not include the seeking, formulating or giving of legal advice.

It is not evident from a review of the records that they were created or obtained especially for a lawyer's brief for litigation, either existing or contemplated. Accordingly, I find that Records 3-9 are not subject to the common law solicitor-client privilege and therefore do not qualify for exemption under the first branch of section 19.

A record can be exempt under the second branch of section 19 regardless of whether the common law criteria relating to the first branch of the exemption are satisfied.

The institution has submitted that Records 3-9 fall within the second branch of the section 19 exemption - specifically, that they were prepared in contemplation of litigation. To meet the requirements for inclusion under this second branch, the institution must demonstrate that:

(1) The record was prepared by or for "Crown counsel"; and

(2) The dominant purpose for the preparation of the record was for use in giving legal advice, or in contemplation of litigation, or for use in litigation [See Order 165 (Appeal Numbers 890223 and 890240), dated April 24, 1990 at p.10].

In Order 52 (Appeal Number 880099), Commissioner Linden dealt with the issue of the proper interpretation of "Crown counsel" under section 19 and determined that "Crown counsel" should include any person acting in the capacity of legal advisor to an institution covered by the Act. The institution has not provided any evidence that Records 3-9 were prepared by or for a person acting in the capacity of legal advisor to the institution and has therefore failed to meet the first part of the test for exemption under the second branch of the section 19 exemption. Accordingly, I will not consider whether the second part of the test applies to these records.

After reviewing Records 3-9 and considering the representations of the institution, it is my view that they do not meet the requirements of either branch of the section 19 exemption.

ISSUE D: Whether there is a compelling public interest in the disclosure of the records or parts of the records which clearly outweighs the purpose of the exemptions.

As I have found that no exemptions apply to Records 1-9, I do not need to consider whether section 23 applies.

ORDER:

1. I order the head to disclose Records 1-9 to the appellant in their entirety.

2. I order the head not to disclose Records 1-9 until thirty (30) days following the date of issuance of this Order. This time delay is necessary in order to give any party to the appeal sufficient opportunity to apply for judicial review of my decision before the record is actually released. Provided notice of an application for judicial review has not been served on the Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that Records 1-9 be disclosed within thirty-five (35) days of the date of this Order.

3. I order the head to advise me in writing within five (5) days of the date on which disclosure was made. The said notice should be forwarded to my attention c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: January 31, 1991
Tom A. Wright Date
Assistant Commissioner