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

ORDER P-241

Appeal 900186

Stadium Corporation of Ontario

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O R D E R

This constitutes my Final Order disposing of the outstanding issues as referred to in Interim Order 163.

INTRODUCTION:

On June 25, 1989, the requester wrote to the Stadium Corporation of Ontario (the "institution") requesting access to the following records:

> [1]..complete Board Meeting minutes held after...April 12/88..., up to and including June 25, 1988. 2. any updated 1988 briefing notes/binders, 3. any financial summaries of the effects of construction delays, including rearranged financing, 4. any memos/records prepared on my two previous FOI requests of Nov. 20/88 [sic] and May/88, and 5. any technical assessments done on the unique roof design/construction since 1985 until the present or any contemplated.

The institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") responded to the request by providing partial access to the requested records. Access to certain records or parts of the records was denied pursuant to the following provisions of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act"):

1. Complete Minutes of Board Meetings: subsections 13(1), 17(1)(a),(b),(c) and 18(1)(a),(c),(e),(f) and (g)

2. Memos prepared on the requester's two previous requests for access to information under the Act: subsection 13(1) and section 19

3. Technical assessment on the unique roof design: subsections 18(1)(a) and (c)

The requester appealed the head's decision to deny access to the records responsive to parts 1, 4 and 5 of his request.

While mediation efforts resulted in the disclosure of additional information to the appellant, final settlement of the appeal was not effected. Accordingly, the matter proceeded to inquiry.

On April 24, 1990, former Information and Privacy Commissioner Sidney B. Linden issued Interim Order 163. At that time he ordered the institution to take the following action:

1. Disclose to the appellant the records listed in Appendix "C" within twenty (20) days of the date of this Interim Order and advise this office in writing within five (5) days of the date of disclosure of the records, of the date on which disclosure was made. (Appendix "C" lists records that have not been found to be exempt and for which section 17 was not claimed as an exemption, as well as records which the institution, during the inquiry, agreed to release to the appellant.);

2. Provide representations, if the head should exercise his discretion in favour of non-disclosure, within twenty (20) days of the date of this Interim Order, as to the exercise of discretion under sections 18 and 19 in respect of records #6, 9 to 16 inclusive, 23, 27 to 31 inclusive, 34 and 35 as numbered and described in Appendix "B". The head is required to include in his representations the reasons for the exercise of discretion as well as the facts and circumstances that were taken into account; and

3. Notify the third parties to whom the records or parts of records listed in Appendix "D" relate, providing them with copies of the records in question. The head is required to notify the affected parties within twenty (20) days of receipt of this Order and copies of the notices are to be sent to this office within five (5) days of the date on which they were provided to the third parties. The third parties will then be contacted directly to elicit representations from them as to the application of section 17 of the Act to the records at issue.

Appendix "A" to this Order contains a list of records for which section 17 was claimed by the head and for which the head sent out notices pursuant to provision 3 of the Interim Order. Appendix "B" to this Order contains a list of the records for which the institution was ordered to make representations as to its exercise of discretion pursuant to provision 2 of the Interim Order.

In addition, at page 19 of the Interim Order, former Commissioner Linden stated that he would defer his decision on the application of section 23 of the Act to Records 6, 9 to 16 inclusive and 23 until the head had submitted his representations regarding the exercise of his discretion in the application of section 18 of the Act.

BACKGROUND TO THIS ORDER:

On May 14, 1990, the institution provided the appellant with access to the records or parts of records listed in provision 1 of Interim Order 163.

In response to provision 2 of the Interim Order, counsel for the institution provided written representations concerning the head's exercise of discretion under sections 18 and 19 in respect of the records or parts of records listed in Appendix "B" to this Order.

Due to the resignation of Commissioner Linden and the fact that I would be deciding the remaining issues in this appeal, I provided both the institution and the appellant with the opportunity to submit further representations on the applicability of sections 18 and 19 to the relevant records. I also extended to both parties the opportunity to make further representations as to the reasons for the exercise of discretion. No further representations were received from either party.

On May 14, 1990, the institution notified five third parties (the "affected parties") of the existence of the appeal and provided them with copies of the records or parts of records withheld from disclosure pursuant to section 17 of the Act. By letter dated August 28, 1990, this office invited the affected parties to make representations as to the application of section 17.

All five affected parties submitted written responses. Of the five, three requested that the Commissioner uphold the head's decision to deny access to Records 2, 3, 4 and 5 as listed in Appendix "A". The affected party whose interests might be affected by the disclosure of Record 1 did not object to its release. The final party advised this office that it did not wish to make any representations on the issue.

PRELIMINARY ISSUE:

One of the affected parties asserts that as a federal Crown corporation it is not "affected by" the Act. Therefore, it submits that Records 3 and 4 which it feels contain the federal Crown corporation's information, are not subject to the Act.

I have reviewed Records 3 and 4 and in my view there is only one sentence in Record 4 which could be considered to be the information of the federal Crown corporation. I have considered the federal Crown corporation's constitutional argument that it is not "affected by" the Act. However, in my opinion, the application of the Act to this one sentence does not raise an issue of constitutional dimensions. The information is contained in the minutes of the institution's Board of Directors' meeting of May 4, 1988. These minutes are in the custody or control of the institution and are therefore subject to the Act pursuant to section 10(1). Accordingly, any submissions concerning the disclosure of this information will be dealt with in the context of section 17 of the Act.

BURDEN OF PROOF:

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 of the Act lies with the head of the institution. Affected parties who rely on the exemption provided by section 17 of the Act to resist disclosure of a record or parts of a record share with the institution the onus of proving that this exemption applies to the record or parts of it.

ISSUES/DISCUSSION:

The issues that remain to be decided are as follows:

A. Whether the head properly applied the discretionary exemptions provided by sections 18 and 19 of the Act in withholding the records (or parts thereof) listed in Appendix "B" to this Order.

B. Whether the records listed in Appendix "A" to this Order contain information which falls within the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act.

C. 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 provided by sections 17 and 18 of the Act.

ISSUE A: Whether the head properly applied the discretionary exemptions provided by sections 18 and 19 of the Act in withholding the records (or parts thereof) listed in Appendix "B" to this Order.

I have reviewed the institution's original submissions concerning the application of sections 18 and 19 to the relevant records. I have also examined its representations as to the basis on which the head exercised his discretion not to disclose them to the appellant.

I agree with the findings of former Commissioner Linden with respect to the applicability of section 18(1)(a) to Record 26 and section 18(1)(e) to Records 6, 9 to 16 inclusive and 23. I also agree with his finding of the applicability of section 19 to Records 27 to 31 inclusive, 34 and 35.

It is my view that where the head of an institution has exercised his or her discretion in accordance with established legal principles, the exercise of discretion should not be disturbed on appeal. In this case, I am satisfied that the head properly exercised his discretion. Accordingly, I uphold the head's decision to deny access to the records listed in Appendix "B" to this Order.

ISSUE B: Whether the records listed in Appendix "A" to this Order contain information which falls within the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act.

Sections 17(1)(a), (b) and (c) of the Act read 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;

In previous orders, former Commissioner Linden outlined the three part test which must be satisfied in order for a record to be exempt under sections 17(1)(a), (b) or (c). In Order 36, dated December 28, 1988, he stated the test as follows:

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

In addition, Commissioner Linden has described the type of evidence that must be presented to satisfy Part 3 of the test. It must be "detailed and convincing, and describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a)-(c) would occur if the information was disclosed" (see Order 36, supra at p.7).

I will examine the information contained in each record in the context of each part of the section 17 test.

Part One

Record 1 is a one sentence severance which indicates that an electronics company was being approached to supply equipment to the stadium and an ancillary facility.

Record 2 contains the information that negotiations were underway between the institution and the affected party regarding the sharing of certain advertising revenues.

The fact that a proposal was being developed concerning the stadium and another structure is noted in Record 3. The information described in Record 4 is an elaboration of the proposal referred to in Record 3.

Record 5 describes, in summary form, the arrangements that had been made by the institution with the third party regarding the use of one of the stadium facilities.

Based on my review of the records and the submissions of the institution and the affected parties, I am satisfied that the information contained in the above severances consists of commercial information and therefore satisfies the first part of the three part test for exemption under section 17.

Part Two

The second part of the section 17 test raises the issue of whether the information was "supplied in confidence implicitly or explicitly."

Record 1

The institution's position is that disclosure of Record 1 would reveal commercial information supplied implicitly in confidence to permit the Board of Directors to be kept up to date on the progress
of the institution's operations and negotiations. Because the affected party did not eventually receive the contract described, the institution further argues that the affected party's competitive position would be undermined by the public's knowledge of the failed negotiations.

I am of the view that the record does not reveal any information that could be said to have been "supplied" to the institution by the affected party. Furthermore, given that the affected party does not object to the disclosure of the record, I cannot accept the institution's concerns regarding the potentially negative effect on the affected party's competitive position should the information be disclosed.

Records 2 and 5

Counsel for the affected party submits that the information contained in Records 2 and 5 was explicitly supplied in confidence for the following reason:

> It was supplied during and in the course of and as part of negotiations between the Institution and the [affected party] of an agreement to govern the [affected party's] proposed use of the SkyDome facility, which negotiations were carried out in confidentiality amongst representatives of the Institution, the [affected party] and their respective legal counsel. Article XXIV(5) of said agreement acknowledges the parties' explicit intention that all information and documentation relating to or regarding

> the negotiation of the agreement shall be confidential.

Counsel further submits that the information was supplied in confidence implicitly for two reasons:

> The said negotiations referred to in paragraph (i) above are of the type ordinarily intended to be conducted in confidence as a matter of standard commercial practice.
>
> The information is of a commercially sensitive nature to the [affected party] as it reveals a source of revenue of the [affected party] and what the [affected party] were prepared to give up in exchange therefor, and makes reference to the relationship between the [affected party] and sponsors (a relationship in which the institution is not even a party), and would not ordinarily be supplied by them to any member of the public...

In its representations regarding the release of Records 2 and 5, the institution asserts that the records contain commercial and financial information, supplied in confidence, where disclosure could reasonably be expected to prejudice the competitive position of a person, group of persons or organization. The institution has provided no evidence in support of the application of either Part 2, "supplied in confidence" or Part 3, "harms", of the section 17 test.

Records 2 and 5 are severances which were made to the minutes of meetings of the institution's Board of Directors. In each case, the information reflects the status of negotiations between the institution and the affected party. In Order 87, dated August 24, 1989, Commissioner Linden addressed the issue of whether information which appears in a record as a result of

negotiations between the parties falls within the meaning of the word "supplied" in the second part of the three part test. At page 8 of that Order he stated:

> The information contained in these severances was included in the contract as a result of negotiations between the institution and the affected party, and was not "supplied" by the affected party as envisioned by section 17. Although the negotiations were presumably based in part on information "supplied" by the affected party, this is not the same information which has been severed in this appeal, and, in my view, the requirements of the second part of the test have not been satisfied.

I agree with this analysis. After examining the records and considering the representations of all parties, I have concluded that Records 2 and 5 do not, in my view, contain information which was "supplied" by the affected party to the institution within the meaning of section 17(1).

Further, I have previously stated that I will find that information contained in a record would "reveal" information "supplied" by an affected party within the meaning of section 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, dated November 13, 1990, at p.13]. In the circumstances of this appeal, I am not satisfied that disclosure of the information contained in Records 2 and 5 would reveal information that had been supplied to the institution by the affected party during the course of the negotiations.

As the affected party and the institution have failed to satisfy the second part of the test, it is not necessary for me to consider the third part of the test.

Records 3 and 4

At page 4 of this Order, I discussed the position of one of the affected parties regarding the disclosure of the information contained in Records 3 and 4. In my view, only the information contained in one sentence of Record 4 was "supplied" by the affected party.

With respect to the other two affected parties whose interests might be affected by the disclosure of the information contained in Record 3, one did not wish to make any representations concerning Record 3 and one submitted the following:

> When such discussions take place they are treated as confidential by those involved since any disclosure of them before an agreement is reached could seriously jeopardize the particular negotiations as well as hindering potential future negotiations.

The institution made the same arguments for Records 3 and 4 as it did for Records 2 and 5.

Having considered the submissions of the institution and the affected parties, I am of the view that with the exception of one sentence in Record 4, none of the information can be said to have been "supplied" by the affected parties. As with Records 2 and 5, the information reflects the status of negotiations between the institution and the affected parties and does not include information which was "supplied" by the affected parties.

I have also considered whether the disclosure of the information contained in Records 3 and 4 would permit the drawing of accurate inferences with respect to any information actually supplied to the institution. In my view, the disclosure of the information contained in Records 3 and 4 would not reveal information that had been supplied to the institution by the affected parties during the course of negotiations. Therefore, with the possible exception of one sentence in Record 4, the records do not satisfy the second part of the section 17 test.

With respect to the one sentence in Record 4 that was "supplied" by one of the affected parties, this affected party made no representations concerning whether this information was "supplied in confidence". Further, even if this information was "supplied in confidence", the affected party has not supplied me with any evidence to indicate that the disclosure of this information would result in any of the "harms" set out in Part 3 of the section 17 test.

In summary, I am of the view that the information contained in Records 1, 2, 3, 4 and 5 (listed in Appendix "A" to this Order) is not exempt under section 17.

ISSUE C: 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 provided by sections 17 and 18 of the Act.

I have found under Issue B that Records 1, 2, 3, 4 and 5 do not satisfy the test for exemption under section 17. Therefore, Records 6, 9-16 and 23 of Appendix "B" are the only records subject to consideration under section 23 of the Act as these records qualify for exemption under section 18 of the Act.

Section 23 reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

In Order 68, dated June 28, 1989, former Commissioner Linden stated that in order for the so-called public interest override to apply, "there must be a compelling public interest in disclosure; and this compelling public interest must clearly outweigh the purpose of the exemption, as distinct from the value of disclosure of the particular record in question."

I concur with Commissioner Linden's interpretation of section 23 and adopt it for the purposes of this appeal.

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

The issue of the application of section 23 has arisen because of the comments made by the appellant in a letter dated February 10, 1989 to former Commissioner Linden. In that letter he

advanced various arguments addressing both the issues of a fee waiver in the public interest and the public interest override. Specifically, he argued that an attempt would be made to widely disseminate the information received and that the data itself touches on public interest and safety matters. He further argued that:

> "...the data hopefully will contribute to further opening up records and improving public interest in freedom of information."

In its representations dated August 21, 1989, the institution's position was as follows:

> It is our submission that such a compelling public interest cannot be shown to outweigh the exemptions in this appeal. The records under appeal contain commercial and financial data that would be of little use to the average citizens of Ontario. Rather, the damage that could be done to the economic and competitive interest of the Institution would clearly outweigh any public interest in disclosure. The fact of public involvement in the financing of the Institution should not, of itself, be the basis for disclosing this information. Such a disclosure could have a greater detrimental effect on the public's interest than non disclosure.

The institution made further submissions on this issue in its representations dated May 14, 1990, as to the exercise of discretion under sections 18 and 19 of the Act. As far as Records 6, 9-16 and 23 are concerned, the institution advanced the following argument:

> The Head has also considered whether there is a compelling public interest in disclosure of the record that clearly outweighs the purpose of the exemption in Sub-section 18(1)(e). The public interest is the

> interest of the public in general, not of any individual or group of individuals. The requester has not provided the Head with any basis on which to ascertain or infer a public interest in disclosure as opposed to the private interest of the requester in the record. (Order No. 12). The Head has not been provided with any evidence from the requester suggesting a public interest in disclosure, and the requester bears the burden of proof in asserting a compelling public interest in disclosure. (Orders No. 47, 55, 68 and 123). The purpose of the exemption is to protect the integrity of negotiations carried on or to be carried on by an institution by allowing the institution to maintain confidential positions, plans, procedures, criteria or instructions it may wish to apply in such negotiations. The Head has not been presented with nor on reflection has been able to determine, a compelling public interest that clearly outweighs this purpose (Order No. 24, 61, 72, 123, 124 and 149). Any such
>
> public interest must be "compelling" (strong, preponderant or overwhelming), and in addition to being compelling, must "clearly outweigh the purpose of the exemption", in a clear and definitive manner. The Head has instead determined that given the ownership of the institution by the Ministry of Treasury of Ontario, the public has a pecuniary interest in the business health and success of the institution including the success of its business negotiations, and the public interest therefore coincides with the purpose of the exemption.

The records at issue all relate to the same subject matter, namely the proposals to establish a corporation which would operate various facilities ancillary to the stadium. Having reviewed the contents of these records, and considered the representations of the appellant, I have reached the conclusion that the circumstances of this case are not sufficient to invoke the application of section 23. The information contained in these records does not involve any public safety issues. Nor am I satisfied that there is a compelling public interest in disclosure of the information which clearly outweighs the

protection of certain interests, economic and otherwise, of the Government of Ontario and/or institutions which is afforded by virtue of section 18.

ORDER:

1. I order the institution to disclose to the appellant the records listed in Appendix "A" to this Order.

2. I uphold the institution's decision not to disclose the records listed in Appendix "B" to this Order.

3. I further order the institution not to disclose the records listed in provision 1 of this Order until thirty (30) days following the date of the issuance of this Order. This time delay is necessary in order to give the affected parties sufficient opportunity to apply for judicial review of my decision before the records are actually disclosed. Provided notice of an application for judicial review has not been served on the institution or my office within this thirty (30) day period, I order that the records contained in provision 1 of this Order be disclosed within thirty-five (35) days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made.

Original signed by: September 20, 1991
Tom Wright Date

Commissioner

APPENDIX A

ORDER P - 241

The following is a list of records for which section 17 was claimed by the head and for which the head sent out third party notices

Board of Directors' Minutes - April 21, 1988

1. Page 6, second sentence paragraph 9
2. Page 8, paragraph 2
3. Page 9, paragraph 2

Board of Directors' Minutes - May 4, 1988

4. Page 5, paragraph 3

Board of Directors' Minutes - June 15, 1988

5. Page 8, paragraph 7

APPENDIX B

ORDER P - 241

The following is a list of records for which the institution was ordered to make representations as to the exercise of discretion under subsection 18(1) and section 19 of the Act.

Board of Directors' Minutes - April 21, 1988

6. Page 8, paragraph 6

Board of Directors' Minutes - May 4, 1988

9. Page 3, paragraph 5
10. Page 3, paragraph 6
11. Page 3, paragraph 7
12. Page 4, paragraph 1
13. Page 4, paragraph 2
14. Page 4, paragraph 3
15. Page 4, paragraph 5
16. Page 4, paragraph 5

Board of Directors' Minutes - June 15, 1988

23. Page 8, paragraph 8

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27. Letter dated January 12, 1988
28. Telecopy Cover Sheet & Requisition
29. Draft Letter dated January 15, 1988 to appellant
30. Letter dated April 13, 1988
31. Letter dated April 12, 1988
34. Letter dated May 25, 1988

35. Memorandum to File