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

ORDER 203

Appeal 890131

Stadium Corporation of Ontario

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I N T E R I M 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, (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 Interim Order are as follows:

1. On February 16, 1989, Stadium Corporation of Ontario (the "institution") received a request for access to:

> ... any document regarding financial projections for consortium members doing business at SkyDome. It is my understanding that these projections exist for at least members Bitove and Cogan, and perhaps more.

2. Upon receipt of the request, the head issued notice to persons whose interests might be affected by the disclosure of the requested records, in accordance with section 28 of the Act. The head received representations from The Bitove Corporation, Cogan Corporation and Controlled Media Communications Inc. On May 2, 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 17(1)(a), (b) and (c) and subsections 18(1)(a), (c), (d), (e), (f) and (g) of the Act.

3. By letter dated May 3, 1989, the requester appealed the head's decision. Notice of the appeal was given to the institution, the appellant and The Bitove Corporation, Cogan Corporation and Controlled Media Communications Inc., the three affected parties (the "third parties").

4. The institution produced three records as being responsive to the request. These records were obtained and reviewed by an Appeals Officer. Initially, the institution indicated that the only corporations which were members of the Consortium and for whom relevant records existed at the time the request was made were The Bitove Corporation, Cogan Corporation and Controlled Media Communications Inc. As indicated above, only these corporations were given notice under section 28 of the Act. Accordingly, the records produced by the institution were only those related to these three corporations.

5. Settlement of the appeal was not effected and the matter proceeded to an inquiry. Notice that an inquiry was being held to review the decision of the head was sent to the institution, the appellant and the three third parties.

6. After representations were received from the parties, additional financial projections which were in the custody or under the control of the institution at the time of the appellant's request were identified. These are financial projections for "Baseball Rentals __ August 8, 1988" and

"Skydome Tours ... August 8, 1988". These projections relate to the Toronto Blue Jays Baseball Club and the Toronto Sun Publishing Corporation, respectively.

7. The institution advised that these records were not included in the initial decision because the request was for financial projections for "Consortium members", and the Corporations to whom these new records related were not Consortium members on February 16, 1989, when the appellant's request was received. It indicated that the execution of all legal documents making these corporations members of the Consortium did not occur until May, 1989. The appellant indicated that he wished to have access to financial projections for all Consortium members. He stated, "it makes no difference to my request that legal paperwork for six members was allegedly not completed until May. The SkyDome announced publicly that these companies were members many months before I made my request".

8. The institution agreed to treat these additional records as responsive to the initial request and denied access under sections 17 and 18 of the Act. It was agreed that the additional corporations (the Toronto Sun Publishing Corporation and the Toronto Blue Jays Baseball Club) would be notified of the appeal by the this office and would be given an opportunity to make representations. The appellant was advised of and agreed to this course of action.

9. On November 24, 1989, a further Notice of Inquiry was sent to the institution, the appellant and the two additional third parties. In accordance with the usual practice of

this office, both the first and second Notice of Inquiry were accompanied by a report prepared by the Appeals Officer. This report is prepared in order to assist the parties in making the 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 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.

10. Representations were received from the institution, four of the third parties and the appellant and I have considered them in making my Order.

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

Record 1. This one page schedule contains a projection of estimated sale of food and beverages by The Bitove Corporation and the projected rental payments to be paid by the corporation to the institution for the years 1989 to 1999 and is dated August 8, 1989.

Record 2. The institution's projected revenues for the years 1989 to 1999 are indicated in this one page schedule and entitled "Product Licensing and Royalties" and dated August 8, 1988. (This record is identified by the institution as relating to Cogan Corporation.)

Record 3. The projected revenues for the years 1989 to 1999 are indicated in this one page schedule entitled "Advertising Revenue _ Scoreboard and Signs" and dated

August 8, 1988. (This record is identified by the institution as information pertaining to Controlled Media Communications Inc.)

Record 4. This one page schedule of projected revenues for the years 1989 to 1999 is entitled "SkyDome Tours" and dated August 8, 1988. (This record is identified by the institution as information pertaining to the Toronto Sun Publishing Corporation.)

Record 5. Projected revenues to the institution from baseball rentals for the years 1989 to 1999 are identified in this one page schedule entitled "Stadium Rentals Revenue" and dated August 8, 1988. (This record is identified by the institution as information pertaining to the Toronto Blue Jays Baseball Club.)

PURPOSES OF THE ACT/BURDEN OF PROOF:

It is important to note at the outset the purpose 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. Third 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 record or parts of the record.

PRELIMINARY MATTERS:

There is a preliminary matter which I will address prior to considering the application of the exemptions claimed by the institution and the affected parties.

In his letter of appeal, the appellant stated that:

> ...part of the information I seek has been released to the public. On November 10, 1988, Associate Chief Justice James Jerome of the Federal Court of Canada ruled it would not be detrimental to release financial projections of one of the SkyDome partners. His ruling came during the case of the Ontario Stadium Corporation vs. Wagon Wheel Concessions Ltd., Environmental Innovations Limited and Gary Gladman.

An investigation was conducted by the Appeals Officer to determine whether any of the records at issue in this appeal are publicly available as a result of having been filed in conjunction with the above mentioned court action. As part of the investigation the Federal Court file was examined. The Index of Exhibits contained in the court file listed, among other documents, Exhibits 65 and 66 which are identical to Records 2 and 4 which are at issue in this appeal, and Exhibit 73 which is an earlier version of Record 5. Copies of these exhibits were not found in the court file. The institution provided copies of these records to the Appeals Officer.

The Appeals Officer's investigation indicates that some of the records at issue in this appeal were also exhibits to an application by the institution (the Plaintiff in the above

matter) for an interlocutory injunction asking the Federal Court to order that the records be held in confidence by the defendants. This application was dismissed by the Federal Court. Counsel for the institution has indicated that these records were never filed with the Court, although copies were handed to counsel for the defendants immediately following the decision of the Associate Chief Justice. Court officials were unable to confirm whether these records were filed with the court. The position of the institution is that these records were not given to the court and were never filed as exhibits.

Based upon the information available to me, I am unable to conclude that these records were in fact filed with the court. Accordingly, I am unable to conclude that any of the records at issue in this appeal are presently or were at any time publicly available. In my view, the decision of Associate Chief Justice Jerome does not address the issue of public availability of the records.

In my view, the decision of the Federal Court to dismiss the application of the institution requesting confidentiality for the records is not in itself determinative of the issue of the application of an exemption under the Act. The Court's decision would be relevant if it actually ordered the filing of records in the court file, thereby making them public 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, 2, 4 and 5 from disclosure.

B. Whether the head properly applied the discretionary exemption provided by subsections 18(1)(a), (c), (d), (e) and (g) of the Act to exempt Records 1, 2, 3, 4 and 5 from disclosure.

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 section 18 exemption.

ISSUE A: Whether the head properly applied the mandatory exemption provided by section 17 of the Act to exempt Records 1, 2, 4 and 5 from disclosure.

At the time of its original decision on access, the institution relied upon the section 17 exemption to withhold Record 3 from disclosure. However, Record 3 will not be discussed under Issue A as neither the institution nor the third party, Controlled Media Communications Inc., made any representations as to the applicability of section 17 of the Act to this record.

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.

In Order 36 (Appeal Number 880030), dated December 28, 1988, 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, commercial, financial or labour relations information; and

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

* 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.

3. the prospects of disclosure of the record must give rise to a reasonable expectation that one of the types of harms 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 the records contain commercial and financial information. I accept the institution's position and find that the information contained in the records at issue in this appeal constitutes commercial and/or financial information and therefore the first part of the section 17 test is established with respect to these records.

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 certain of the information contained in Records 1, 2, 4 and 5 was supplied to the institution implicitly in confidence by the third parties to allow the institution to generate revenue projections.

The following are the representations of the institution and third parties with respect to the second part of the test as it applies to each record:

Record 1:

The institution submits that "the projections of sales and revenue contained in this record were supplied by Bitove. This record was provided implicitly in confidence to enable the Institution to make financial and operating decisions".

The third party, The Bitove Corporation states that "this information, when supplied to Stadco, although not required to, was only an estimation. The information supplied to the Stadium Corporation, if released to the public, could result in highly damaging financial records being obtained by our competition and our suppliers".

Record 2:

The institution submits that "Certain of the information contained in this record was supplied by Brockum, on behalf of Cogan Corporation, to the Institution implicitly in confidence to allow the Institution to generate revenue projections".

The third party, Cogan Corporation has indicated that it wishes to make no representations with regard to the application of section 17 to this information.

Record 4:

The institution submits that:

> The information contained in this record was partially supplied by third party in confidence. Items such as the estimated operating expenses were supplied by the Toronto Sun, implicitly in confidence, for the Institution's use in generating revenue and operating projections.

The third party, the Toronto Sun Corporation, indicates that:

> The information contained in the document relating to operating expenses, estimated ticket sales, revenue sharing and capital contribution constitute information which was supplied verbally by the Sun to the Institution in the course of negotiations of the Sun's agreement with the Institution relating to its leasing and use of the SkyDome facility for the purpose of tours. This information was implicitly supplied in confidence for two reasons:
>
> i) It was supplied during and in the course of and as part of negotiations between the Institution and the Sun of an agreement to govern the Sun's proposed use of the SkyDome facility and operation of the tour facility therein, which negotiations were carried out in confidentiality amongst representatives of the Institution, the Sun, and their respective legal counsel;
>
> ii) The information is of a commercially sensitive nature to the Sun as it reviews aspects of its commercial arrangement with the Institution that would not ordinarily be supplied by the Sun to any member of the public as such information could be used to the detriment of the Sun by its competitors.

Record 5:

The institution submits that:

> This record contains commercial and financial information supplied to the Institution, in confidence, by a third party.
>
> ...
> Parts of this record, for example figures such as the amount of money paid to the American Baseball League were provided implicitly in confidence by the Blue Jays and American Baseball League. The information in this record was supplied in order to enable the Institution to calculate its projected revenue over the next decade and to make financial and operating decisions. This information would implicitly be supplied in confidence as such specific revenue figures are in the nature of commercial information that a private corporation would not wish released.

The third party, the Blue Jays Baseball Club, submits that:

> The information contained in the document relating to the Blue Jays game schedule of playing days, historically average attendances, historical ticket sales, ticket prices and revenue sharing amongst the league and teams was supplied verbally by the Blue Jays, to the Institution, in the course of negotiations of the Blue Jays agreement with the Institution relating to the Blue Jays proposed use of the SkyDome facility. This information was implicitly supplied in confidence for two reasons:
>
> i) It was supplied during and in the course of and as part of negotiations between the Institution and the Blue Jays of an agreement to govern the Blue Jays proposed use of the SkyDome facility, which negotiations were carried out in confidentiality amongst representatives of the Institution, the Blue Jays and their respective legal counsel;
>
> ii) The information is of a commercially sensitive nature to both the Blue Jays and the American League of Professional Baseball Clubs and Office of the Commissioner of

> Baseball as it reveals aspects of their relationships amongst each other and with the other professional teams and would not ordinarily be supplied by any of them to any member of the public. In accordance with American League rules of professional baseball, the Office of the Commissioner of Baseball was kept apprised of certain aspects of negotiations between the Blue Jay and the Institution and monitored information supplied regarding the terms of the agreement under negotiation.

It is my opinion that only the information about revenue sharing between the Blue Jays and the American Baseball League contained in Record 5 was supplied in confidence implicitly by the Blue Jays to the institution. Accordingly, only this information satisfies the second part of the section 17 test.

It is my view that the balance of the information contained in the records at issue in this appeal was not "supplied" by a third party within the meaning of subsection 17(1) of the Act. The information that may have been "supplied" to the institution by the third parties for the purpose of creating the records at issue in this appeal is not one and the same as that contained in the records themselves. The projections are based on certain assumptions and are mathematical calculations of long term forecasts. These projections were not supplied to the institution by a third party; they were created by the institution. Therefore, I find that the requirements of the second part of the subsection 17(1) test have not been met.

It should be noted that I would have found that the information contained in the requested records was "supplied" by the third parties, had I been satisfied that its disclosure would permit

the drawing of accurate inferences with respect to the information actually supplied to the institution.

As far as the third part of section 17 test is concerned, I am unable to conclude that disclosure of the revenue sharing information contained in Record 5 would result in any of the harms described in subsections 17(1)(a), (b) or (c) of the Act. Therefore, I find that the third part of the section 17 test has not been met.

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, 2, 4 and 5 do not qualify for exemption under section 17 of the Act.

ISSUE B: Whether the head properly applied the discretionary exemption provided by subsections 18(1)(a), (c), (d), (e) and (g) of the Act to exempt Records 1, 2, 3, 4 and 5 from disclosure.

Subsections 18(1)(a), (d), (e) and (f) were cited by the institution in withholding all of the records at issue. As no representations were received with respect to the application of subsection 18(1)(f), it will not be considered. Subsections 18(1)(e) and (g) were cited in relation to Record 5 only.

The relevant subsections of section 18 of the Act read as follows:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an

> institution and has monetary value or potential monetary value;
>
> ...
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (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;
>
> ...
>
> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

In addressing section 18, in an Order related to the same institution as is involved in this appeal, Commission 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]

In its representations, the institution submitted a theoretical framework and argument in support of its position:

> This institution acknowledges the spirit and purpose of that Act as set out in Section 1(a) and wants to make every effort to ensure the purpose of the Act is fulfilled. However, certain anomalies exist in its application to this Institution. Unlike every other institution to which this Act applies, this Institution must compete openly and directly in the private marketplace. The fact that this Institution does not operate in a monopoly environment should be considered by the Commission in the application of the Act to this Institution. This Institution has direct competitors in the marketplace, such as the CNE, Maple Leaf Gardens, Varsity Stadium, and other facilities in Toronto, as well as similar facilities across the continent. Any particular party, group, organization or franchise will only deal with this Institution if it can offer the most attractive and competitive facility of its kind. It is qualitatively different from other government agencies which operate in the private sector. Even an agency such as Ontario Hydro does not compete in the marketplace in a way equivalent to the Institution. A group wishing to
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> deal with a sports/entertainment multi_purpose facility has many options. Such a group can, and will, seek out the most appealing of the alternatives. The SkyDome, being just one such alternative, cannot afford, in a business sense, to have its competition gain an upper hand in the market place. Such a situation would result from competitors, suppliers, advertisers, etc., gaining specific information on the internal operation of this Institution.

Having explained its unique situation the institution then went on to state:

> Many, if not all, of the exemptions sought by the Institution in the present appeal arise from such considerations. For the purpose of this appeal, the Institution has applied certain policies consistent with the above_mentioned considerations. Most of the

> exemptions sought in this appeal fall under one or more of three principles. Firstly, we submit the Institution should not release specific details of financial, commercial or business arrangements with other parties. Disclosure of this type of information would give competitors of the Institution an unfair bargaining advantage in the competition for business. Secondly, we submit the Institution should not release records which disclose long term operating, capital or income forecasts. Knowledge of such information would give third parties dealing, or competing, with the Institution an unfair advantage in the marketplace. Thirdly, we submit the Institution should not disclose the names of companies or groups that have failed to successfully negotiate an arrangement with the Institution. Further, the details of such negotiations should not be released. The companies justifiably fear negative public relations and the release of such information would prevent full and open negotiations in the future.

In its representations the institution seems to be suggesting that it is "different" from other institutions covered by the Act. I am prepared to accept that the milieu in which the institution operates is "different" from that in which the majority of institutions conduct business. However, it appears to me that there is one overriding characteristic that is common to this institution and to all other institutions covered by the Act, i.e.

public monies are at stake in the operation of the institution. I believe that the exemptions from disclosure available under the Act can adequately address the legitimate interests and concerns of the institution. In this sense any unique circumstances related to the environment in which the institution operates can be addressed in the context of the application of particular exemptions.

The institution also provided me with two schedules by which it documented its current financial projections and future financial projections, should there arise a minimal drop_off in revenue of 10% due to a deterioration in the institution's competitive position. These schedules purport to document the economic consequences flowing to the institution if release of the records at issue in this appeal would result in a drop_off in revenue of 10%.

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 record in question must contain information the disclosure of which could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

The institution in its representations has stated that disclosure of the information contained in these records would give competitors of the institution an unfair bargaining advantage in the competition for business and that knowledge of long term financial forecasts would give third parties dealing or competing with the institution an unfair advantage in the marketplace. A review of the records exempted under subsection 18(1)(c) supports the institution's statement that the records contain details of financial, commercial or business arrangements with other parties and disclose long term financial forecasts.

The institution's argument specific to each record is as follows:

Record 1:

Bitove has the preferred supplier rights to supply catering, fine dining, and beverage services to promoters, users of the SkyDome, SkyBox holders and people visiting the Bitove on_site dining facilities. In negotiations which are constantly ongoing, the Institution is attempting to contract with potential promoters of SkyDome events, advertisers and suppliers. Such negotiations will be undermined if such potential promoters of SkyDome events, advertisers and others have access to the figures contained in this report. It would become more difficult for the Institution to negotiate the best of deals possible. The type of information contained in this record outlines one of the most substantial areas of revenue for the Institution. Knowledge of this information would give suppliers, promoters and advertisers the means to more competitively bid for contracts with the Institution, to the Institution's detriment. Also, competitors of the Institution would more effectively be able to bid business away from the Institution by tailoring their offers to undercut or outbid the Institution, especially in the food services area. All of these facts would result in economic loss to the Institution and lessening of its competitive position.

Record 2:

Suppliers having knowledge of this information and contracting with the Institution in the future would have a substantial advantage in negotiations. The type of information contained in this record outlines one of the most substantial areas of revenue for the Institution. Knowledge of this information would give such suppliers and competitors the means to more competitively bid for contracts or bid away business, respectively. It would be impossible for the Institution to engage in meaningful negotiations for the supply of license products if the suppliers know exactly what the Institution's expected revenues are.

Record 3:

In negotiations which are constantly ongoing, the Institution is attempting to contract with potential promoters of SkyDome events and advertisers. Such negotiations would be undermined if such potential promoters of SkyDome events and advertisers have access to the figures contained in this report. It would become more difficult for the Institution to negotiate the best deal possible. Potential promoters of SkyDome events and advisers would be able to calculate exactly how much of the Institution's total advertising revenue they are supplying and would therefore be able to demand a proportionate share of advertising space and time. This would not, in all instances, be in the Institution's best interest. In addition, present and future participants in the scoreboard operation would have their bargaining positions strengthened in negotiations for revenue sharing. This record discloses total estimated revenue, total cost of the scoreboard and implicitly the total date and repayments scheduled for the financing of the scoreboard. This information would be of great assistance, to the detriment of the Institution, to potential participants in the scoreboard operation. The Institution would have lost all bargaining strengths as such parties would have access to all details relevant to negotiating.

Record 4:

Third parties having knowledge of this information and contracting with the Institution in the future, with respect to the SkyDome tours specifically or with respect to other matters, with other substantial advantage in negotiations. Knowledge of this information would give suppliers, advertisers, promoters and competitors the means to more competitively bid for contracts or bid away business, respectively.

Record 5:

It is the Institution's position that it would be detrimental to its interest to release such specific income forecast. This is especially true when the

> record contains not only income forecasts, but the method whereby the forecast was arrived at. Promoters, suppliers, advertisers and tenants of the Institution
>
> could use the type of information included in this record against the Institution in negotiations. Knowledge of precisely how the Institution will compute its income from one of its major revenue sources would be an important weapon to be used by third parties in negotiations with the Institution.
>
> In addition, competitors of the Institution could use the type of information contained in this record bid for contracts or bid away business from the Institution. In a similar manner, different tenants of the SkyDome would have access to details of another tenant's rental terms if these records were to be released. This would make future negotiations difficult in that all tenants, upon negotiation of their present leases, would demand any advantages granted to others that they do not have the benefit of. The difference in the rights and privileges granted to different tenants would cause the Institution unnecessary difficulties in future negotiations. For these reasons, this record should not be released.

In his representation the appellant states:

> I refute the arguments put forth by the corporation for three main reasons:
>
> First, part of the details I think have already been released without competitive damage to MacDonalds and the Skydome. [It should be noted here that the appellant has obtained through other means, a copy of a document containing information about MacDonalds similar to the type of information contained in these records.]
>
> Second, the public has a large stake in The Corporation and deserves answers.
>
> Third, The Corporation is a closed shop with competitors being shut out. I fail to see how

> competitive advantage could be lost. The SkyDome is built as "like no other in the World", so how can officials lean on this competitive crutch as a reason for secrecy?

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. [emphasis added] 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] 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.

While it may be true that the disclosure of a similar record did not result in economic harm to the institution, as previously mentioned, the test under subsection 18(1)(c) is one of reasonable expectation of prejudice to economic or competitive interests. It is not necessary to prove that actual harm will result from the disclosure but that the expectation of harm is based on reason and not fanciful, imaginary or contrived.

It is my view that all of the records at issue in this appeal contain information the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of the institution and therefore qualify for exemption under subsection 18(1)(c) of the Act.

As I have found that all the records at issue in this appeal qualify for exemption under the discretionary exemption contained in subsection 18(1)(c) of the Act it is also my responsibility to ensure that the head has properly exercised his discretion. Despite a request to do so, the institution has not provided any representations outlining whether the head has actually exercised his discretion under subsection 18(1) and if so, what factors were considered by the head when exercising his discretion.

Therefore, the final determination of Issue B will be deferred until representations have been received from the head regarding the exercise of his discretion. In this connection, I wish to note that under Issue A I have found that section 17 does not apply to Records 1, 2, 4 and 5.

Following my review of the head's exercise of discretion under subsection 18(1) of the Act, I will consider the application of the public interest override.

ORDER:

I order the head to exercise his discretion pursuant to subsection 18(1) of the Act with respect to the records at issue in this appeal. I further order the head to provide me with additional representations as to the factors considered in doing so within 20 days from the date of this Interim Order. The representations should be forwarded to my attention j Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by:
Tom A. Wright
Assistant Commissioner

November 5, 1990
Date