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

ORDER P-248

Appeal 900300

Stadium Corporation of Ontario Limited

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

O R D E R

On July 8, 1991, the undersigned was appointed Assistant Commissioner and received a delegation of the power and duty to conduct inquiries and make orders under the Freedom of Information and Protection of Privacy Act, 1987 the ("Act").

INTRODUCTION:

On May 23, 1990, the requester wrote to the Stadium Corporation of Ontario Limited (the "institution") requesting access to documents on the issue of who would own the enhancements made to the SkyDome stadium. The requester indicated that this issue was discussed at the May 22, 1987 meeting of the Board of Directors of the institution.

The requester also asked for a fee waiver and stated that he wished to view the records in Ottawa.

The institution identified one record which responded to the request and wrote to the requester on June 25, 1990, denying him access to the entire record pursuant to sections 13(1), 17(1)(a), (b) and (c) and 18(1)(a), (c), (d), (e), (f) and (g) of the Act. In addition, the institution issued the following decision regarding fees:

> Please be advised that in the event that it is determined on any appeal or otherwise that the records are to be disclosed, a fee will be payable pursuant to section 57 of the Act and the regulations prior to disclosure. We estimate costs at this time to be as follows (total cost $43.77):

(a) processing of request $35.00;

(b) copying cost of $7.60 being $0.20 per page for 38 pages; and

(c) shipping costs $1.17.

On June 28, 1990, the requester appealed the institution's decision to deny access to the record. He also appealed the institution's refusal to waive the fees on the grounds of financial hardship and asked the Commissioner to review the amount of the fee estimated for "processing of request". The appellant withdrew his request to view the record in Ottawa.

The record was received and reviewed by the Appeals Officer. The institution advised the Appeals Officer that it had notified five parties whose interests might be affected by the disclosure of the record. The two parties that responded to this notification declined to give their consent to disclosure of the record.

The Appeals Officer was unsuccessful in her attempts to mediate a settlement of this matter. Accordingly, the matter proceeded to an inquiry. Notice that an inquiry was being conducted to review the institution's decision was sent to the appellant, the institution, and the affected parties. An Appeals Officer's Report, which is intended to assist the parties in making any representations to the Commissioner concerning the subject matter of the appeal, accompanied the Notice of Inquiry.

Written representations were received from the institution and four of the affected parties, all of whom objected to the

disclosure of that portion of the record that might affect their interests. The appellant did not provide any representations.

The record at issue is a 38-page document dated May 15, 1987 entitled "Complete Enhancements", prepared for the May 22, 1987 meeting of the Board of Directors of the institution.

The record consists of two parts. The first (the "memo" section) is a 2-page introductory memorandum in which the author outlines two possible scenarios regarding the ownership of the enhancements. The second part (the "financial" section) consists of ten-year operating forecasts and financial projections for each of the two scenarios referred to in the memo section.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d), (e), (f) and (g) apply to the record.

B. Whether the mandatory exemption provided by sections 17(1)(a), (b) and (c) applies to the record.

C. Whether the discretionary exemption provided by section 13(1) applies to the record.

D. Whether the amount of the estimated fee was calculated in accordance with the terms of the Act.

E. Whether the head's decision not to waive fees under section 57(3) of the Act was in accordance with the terms of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d), (e), (f) and (g) apply to the record.

Sections 18(1)(a), (c), (d), (e), (f) and (g) state:

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;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(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.

Before dealing with the specific exemptions provided by the various subsections of section 18, I thought it would be useful to make some comments about the general nature of section 18, and the type of evidence required to support an exemption claimed under sections 18(1)(c), (d) and (g).

At page 5 of Order 141, dated January 23, 1990, former Commissioner Sidney B. Linden stated:

> Broadly speaking, section 18 is designed to protect certain interests, economic and otherwise, of the Government of Ontario and/or institutions. Subsections 18(1) ... (c), (d) and (g) all take into consideration the consequences which would result to an institution if a record were released. Subsections 18(1)(a),(e) and (f) are all concerned with the form of the record, rather than the consequences of disclosure.

At page 7 of the same Order, Commissioner Linden made the following comments on the nature of the evidence required to support a claim under sections 18(1)(c), (d) and (g):

> ... the evidence of consequences required to support a claim under section 17 of the Act must be "detailed and convincing". The standard is no less stringent under section 18 ... subsections 18(1)(c), (d) and (g) are all concerned with the consequences of the disclosure of records.

In Order 188, dated July 19, 1990, then-Assistant Commissioner

Tom Wright discussed the meaning of the term "could reasonably be expected to" in the context of subsection 14(1) of the Act. The term "could reasonably be expected to" also appears in sections
18(1)(c), (d) and (g) of the Act. At page 11 of the Order, Commissioner Wright states:

> It is my view that [the] section requires that the expectation of one of the enumerated harms coming to pass, should a record be disclosed, not be fanciful, imaginary or contrived, but rather one that is based on reason. An institution relying on the ... exemption, bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 53 of the Act.

I concur with and adopt the reasoning of these previous orders for the purposes of this appeal.

I will first consider the application of subsection 18(1)(c).

Section 18(1)(c)

Section 18(1)(c) speaks of disclosure of information which could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

The argument raised by the institution to address the application of subsection 18(1)(c) is that disclosure of the record could result in financial detriment to the institution, both in connection with its administrative affairs as well as

its contractual and other negotiations. It claims that these negative consequences will occur to both its present and future activities.

I have examined the "financial" section of the record and the representations of the institution. The institution has provided "detailed and convincing" evidence that the harm contemplated by

subsection 18(1)(c) could reasonably be expected to occur should the information in this section of the record be disclosed. In my view, the disclosure of the information contained in this section of the record could reasonably be expected to prejudice the economic interests of the institution.

I have also examined the "memo" section of the record and the representations of the institution and I find that only the last phrase of paragraph 1, the whole of paragraph 2, the first phrase and a part of the second phrase of paragraph three, and the entire paragraph 4 on page 2, meet the requirements for exemption pursuant to subsection 18(1)(c) of the Act. These parts of the "memo" section are in essence a "prose" description of certain of the numerical financial data contained in the "financial" section of the record. In my view, the disclosure of this information could reasonably be expected to prejudice the economic interests of the institution in the same manner as if the actual financial forecasts were disclosed. I have been provided with "detailed and convincing" evidence from the institution that the harm contemplated by subsection 18(1)(c) could reasonably be expected to occur should this information be disclosed.

Because the section 18 exemption is discretionary, it is my responsibility to ensure that the head of an institution has properly exercised his or her discretion when deciding not to grant access to a record. In the circumstances of this appeal, I have found nothing to indicate that the head's exercise of discretion was improper.

Therefore, I uphold the application of the subsection 18(1)(c) exemption to the entire "financial" section of the record, and to the last phrase of paragraph 1, the whole of paragraph 2, the first phrase and a part of the second phrase of paragraph three, and the entire paragraph 4 on page 2 of the "memo" section of the record.

I will now deal with each of the other subsections of section 18 claimed by the head as they relate to the remaining parts of the "memo" section of the record which did not meet the requirements of the section 18(1)(c) exemption.

Section 18(1)(a)

At page 21 of Order 87, dated August 24, 1989, Commissioner Linden set out the test which must be met in order to satisfy the requirements of section 18(1)(a):

> ...the head must establish that the information:
>
> 1. is a trade secret, or financial, commercial, scientific or technical information; and
>
> 2. belongs to the Government of Ontario; and
>
> 3. has monetary value or potential monetary value.

I have reviewed the record and the representations of the institution and I find that the institution has not satisfied the third element of the test.

In arguing that this information has monetary or potential value, the institution maintains that the information can be sold to third parties for their use in negotiations with the institution or can be used by these parties to extract more beneficial financial and commercial terms. The institution argues that because of the media attention previously focused on the institution, it is likely that the information can be sold to the media for publication and therefore, it can be said to have potential monetary value.

At page 15, of Order 219, dated January 31, 1991, Commissioner Wright addressed this argument when raised by the same institution in a different appeal. He stated:

> In my view, the use of the term "monetary value" in subsection 18(1)(a) requires that the information itself have an intrinsic value. As I see it the purpose of subsection 18(1)(a) is to permit an institution to refuse to disclose a record which contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information.

In this case, I am not satisfied that the "memo" section of the record has intrinsic monetary value. Accordingly, I find that section 18(1)(a) does not apply to the remainder of the "memo" section of the record.

Section 18(1)(d)

Section 18(1)(d) speaks of information which, if disclosed, could reasonably be expected to be injurious to the financial interests of the Government of Ontario or its ability to manage the economy of Ontario.

The institution has made the same argument to support the application of section 18(1)(d) as it did in the context of section 18(1)(c); that disclosure of the information contained in the record can reasonably be expected to be injurious to the financial interests of the institution and would result in financial detriment to the institution in both its administrative affairs and contractual and other negotiations. It further argued that because the government of Ontario is the sole shareholder of the institution, anything injurious to the financial interests of the institution would therefore be detrimental to the financial interests of the government.

I have not been provided with "detailed and convincing" evidence from the institution that the harm contemplated by section 18(1)(d) could reasonably be expected to occur should the information in the remainder of the memo section be disclosed. The institution bears
the onus of proving that the harms envisaged by this subsection are present or reasonably foreseeable, and, in my view, this onus has not been satisfactorily discharged.

Section 18(1)(e)

At page 21 of Order 87, dated August 24, 1989, Commissioner Linden established the following test for exemption under section 18(1)(e):

1. The record contains positions, plans, procedures, criteria or instructions; and

2. This record is intended to be applied to negotiations; and

3. These negotiations are being carried on or will be carried on in the future; and

4. These negotiations are being conducted by or on behalf of an institution or the government of Ontario.

The institution submits that:

> The record discloses the positions and criteria of terms applicable to present arrangements that are to be applied to continuing negotiations for more complete terms.

In my examination of the remainder of the "memo" section of the record, I have not found any information that could be considered to be "positions, plans, procedures, criteria or instructions". The institution has not identified what information contained in the record could be labelled as such, and, accordingly, I find that the institution has not satisfied the first part of the test for exemption under section 18(1)(e).

Section 18(1)(f)

Section 18(1)(f) exempts a specific class or type of record based on its content, namely plans. The plans must relate to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

At page 8 of Order 229, dated May 6, 1991, Commissioner Wright stated that in order to qualify for exemption under section 18(1)(f) of the Act, the institution must establish that a record satisfies each element of a three part test:

1. the record must contain a plan or plans, and
2. the plan or plans must relate to:
    i) the management of personnel or
    ii) the administration of an institution, and
3. the plan or plans must not yet have been put into operation or made public.

Commissioner Wright adopted the definition of plan found in The Eighth Edition of the Concise Oxford Dictionary. A "plan" is "a formulated and especially detailed method by which a thing is to be done; a design or scheme."

I have reviewed the record and the representations of the institution and I find that the institution has failed to establish the first element of the test. The institution submits that the record contains forecasts and financial projections for a ten year period which have not yet been put into operation nor

made public. While this may be an accurate characterization of the "financial" section of the record, the same cannot be said of the "memo" section of the record. In my opinion, there is no information in the portion of the record still at issue that could be considered to be a "plan".

Accordingly, I find that the institution has not satisfied the first part of the test for exemption under section 18(1)(f).

Section 18(1)(g)

This section exempts classes or types of information "including the proposed plans, policies or projects of an institution". It combines an exemption for types or classes of records with a requirement that certain consequences could reasonably be expected to result from the disclosure of the record.

At pages 11-12 of Order 229, supra, Commissioner Wright stated that in order to qualify for exemption under subsection 18(1)(g) of the Act, an institution must establish that a record:

1. contains information including proposed plans, policies or projects; and

2. that disclosure of the information could reasonably be expected to result in:

    i) premature disclosure of a pending policy decision, or

    ii) undue financial benefit or loss to a person.

The institution's position is that:

> Various policy decisions of the Institution are based upon the information contained in the Record, and consequently disclosure of the Record could reasonably be expected to result in premature disclosure of such pending decisions.

I have examined the record at issue and I am unable to determine from the contents of the record whether the information contained in the remainder of the "memo" section of the record is a proposed plan, policy or project of the institution. Nor do the representations of the institution provide me with sufficient
evidence to make this determination. Accordingly, I find that the institution has not satisfied the first part of the test for exemption under section 18(1)(g).

In summary, I have upheld the application of the subsection 18(1)(c) exemption to the entire "financial" section of the record, and to the last phrase of paragraph 1, the whole of paragraph 2, the first phrase and a part of the second phrase of paragraph three, and the entire paragraph 4 on page 2 of the "memo" section of the record pursuant to section 18(1)(c). I have not upheld the institution's claim for exemption under sections 18(1)(a), (d), (e), (f) and (g) as they relate to the remainder of the "memo" section of the record.

I shall now consider the application of section 17 to the remainder of the record at issue.

ISSUE B: Whether the mandatory exemption provided by sections 17(1)(a), (b) and (c) applies to the record.

Sections 17(1)(a), (b) and (c) of the Act state:

> 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;

At page 4 of Order 36, dated January 16, 1989, Commissioner Linden established the following test which is to be applied to a record which has been exempted under section 17 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

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.

The institution and the affected party share the burden of proving that the exemption provided by section 17 applies to the record.

The third party whose interests might be affected by the disclosure of the "memo" section of the record did not submit any representations.

I will first consider the second part of the test: was the information contained in the remaining portions of the "memo" section of the record supplied to the institution, in confidence, either explicitly or implicitly.

In its representations the institution maintained that certain information contained in the record was supplied to the institution "in the utmost confidence by third parties, either directly or indirectly through their contractual arrangements with the Institution".

In my view, the information at issue was not directly "supplied" to the institution by the affected party.

The information that may have been "supplied" by the affected party is not one and the same as that contained in the record itself, nor would its disclosure permit the drawing of accurate inferences with respect to the information which may have been actually supplied to the institution.

Accordingly, I find that the institution has not discharged the burden of proof that the remainder of the "memo" section of the record falls within this exemption.

I shall now consider section 13 as it relates to the remaining portions of the record.

ISSUE C: Whether the discretionary exemption provided by section 13(1) applies to the record.

Section 13(1) of the Act states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

In Order 94, dated September 22, 1989, Commissioner Linden discussed the general purpose of the section 13 exemption. At page 5 of that Order he stated:

> ...in my view, section 13 was not intended to exempt all communications between public servants despite the fact that many can be viewed, broadly speaking, as advice or recommendations. As noted above, section 1 of the Act stipulates that exemptions from the right of access should be limited and specific. Accordingly, I have taken a purposive approach to the interpretation of subsection 13(1) of the Act. In my opinion, this

> exemption purports to protect the free flow of advice and recommendations within the deliberative process of government decision-making and policy-making.

Commissioner Linden addressed the term "advice" in Order 118, dated November 15, 1989. At page 4 of that Order he stated:

> In my view, "advice" pursuant to subsection 13(1) of the Act, must contain more than mere information. Generally speaking, advice pertaining to the submission of a suggested course of action which will ultimately be accepted or rejected by its recipient during the deliberative process.

In its representations the institution submitted that:

> The financial projections contained in the Record were compiled with the advice and recommendations of various persons employed by the institution. The record itself should be considered a recommendation as its contents will influence various decisions and courses of action undertaken by the Institution, such as strategic and financial planning.
>
> The Record does not fall within any of the exceptionscontained in sub-section 13(2) and consequently the Record should not be disclosed pursuant to the provision of Sub-section 13(1).

Regarding the remainder of the "memo" section of the record, I find that the section 13(1) exemption is not applicable. These portions of the "memo" section do not contain any advice or recommendations. Rather, they introduce and provide some

explanation of the "financial" section of the record. They do not purport to suggest one course of action or another.

Accordingly, I find that the remaining portions of the "memo" section of the record do not qualify for exemption under section 13.

ISSUE D: Whether the amount of the estimated fee was calculated in accordance with the terms of the Act.

The appellant has disputed the amount of the fee estimate provided to him by the institution. In particular, he has questioned the institution's estimate of $35.00 for a "processing fee".

Section 57(1) of the Act outlines the process for establishing a fee which may be charged by an institution to a requester. The relevant parts of this section state:

> Where no provision is made for a charge or fee under any other Act, a head shall require the person who makes a request for access to a record or for correction of a record to pay,
>
> (a) a search charge for every hour of manual search required in excess of two hours to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record; and

(d) shipping costs.

The institution's position on the fee estimate is as follows:

> Our fee estimate of $43.77 was comprised as follows:
>
> (a) a processing fee in the amount of $35.00 was for time spent manually searching for the Record in addition to two hours at a rate of $7.50 for each additional fifteen minutes spent;
>
> (b) a photocopying cost of $7.60 being at 20 cents per page or 38 pages; and
>
> (c) shipping costs in the amount of $1.17.
>
> These fees represent only a portion of costs actually incurred, are properly imposed under the Act and are reasonable....

It is clear from the wording of the fee estimate provided by the institution that the "processing fee" is actually the amount estimated for the search charge allowable under subsection 57(1)(a) of the Act, rather than an estimate of any fees incurred in "processing a record" pursuant to subsection 57(1)(c) of the Act. Despite the fact that the institution has not used the technically correct language in its claim for a fee estimate for manual search time, I am prepared to accept that the intention of the institution was to charge for "search" rather than "processing" time. However, I would recommend that in future the institution use the wording of the specific

portions of section 57 in giving fee estimates. This will make it very clear to appellants on what basis such fees will be charged.

What does concern me about this portion of the estimate is the actual amount claimed. A search charge of $35.00 would mean that it took the institution approximately 3 hours and 10 minutes to locate this record. I have made this calculation on the basis that subsection 57(1)(a) provides for 2 hours of "free" search time and the regulations provide that the institution may charge $7.50 for every fifteen minutes of manual search time over and above these two hours. I have already noted that the appellant's request identified this record as addressing an issue that was discussed at the May 17, 1987 Board of Directors meeting of the institution. It is reasonable to assume that this information would assist the institution in locating the record relatively easily and quickly.

The institution has provided me with no evidence of the details of the search involved in order to account for this time.

Accordingly, I am not prepared to uphold the fee in the circumstances of this appeal, and I disallow this portion of the fee estimate.

The remaining items of the fee estimate are the $1.17 shipping charge and the $7.60 photocopying charge. As I have determined that the appellant is only entitled to have access to the first page and some portions of the second page of the "memo" section of the record, there are only two pages of the record which must be photocopied and forwarded to the appellant. While I am cognizant of the fact that the institution will now have to

sever the record in order to comply with this Order, the time involved will be minimal. Given that the total fees in this case would work out to be less than $5.00, in my view this is an appropriate case for the head to waive the fees. Accordingly, I would order the head to provide access to the portions of the record described below at no charge to the appellant.

Because of the manner in which I have dealt with Issue D, it is not necessary to consider Issue E.

ORDER:

1. I uphold the head's decision not to disclose the "financial" section of the record.

2. I uphold the head's decision not to disclose the last phrase of paragraph 1, the whole of paragraph 2, the first phrase and a part of the second phrase of paragraph three and the entire paragraph 4 on page 2 of the "memo" section of the record.

3. I order the head to disclose page 1 and page 2 of the "memo" section of the record in accordance with the severed copy of the record which has been provided to the institution with this order.
4. I order the institution to provide page 1 and the non-severed portions of page 2 of the record to the appellant at no charge.

5. I order the head not to disclose page 1 and the non-severed portions of page 2 of the "memo" section of the record

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 disclosed. 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 these records be disclosed within thirty-five (35) days of the date of this Order.

6. I order the head to notify me in writing within five (5) days of the date on which disclosure was made. This 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: November 5, 1991
Tom Mitchinson Date
Assistant Commissioner