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

ORDER P-263

Appeal P-900185

Stadium Corporation of Ontario Limited

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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 162.

INTRODUCTION:

On April 24, 1990, Sidney B. Linden, former Information and Privacy Commissioner/Ontario, issued Interim Order 162 in Appeal Number 880186. I will briefly summarize the facts of that appeal and the procedures employed in making the Interim Order in order to provide some background to the issues that will be dealt with in this Order.

On November 20, 1987, the appellant wrote to Stadium Corporation of Ontario Limited (the "institution") seeking access to the following information, "in the spirit of Bill 34 [the Freedom of Information and Protection of Privacy Act]":

a) all contracts to build, manage and control the stadium, and all sources of financing both utilized and committed to the development, including public and private sources

b) all special arrangements, privileges the private concerns in the stadium corporation will receive, and any changes in ownership composition of the corporation since inception

c) all briefing notes sent to the responsible Minister(s), or Cabinet, on the subjects of stadium financing, corporate structure, construction, activities or other matters

d) all arrangements with those originally owning the land

e) all agreements, bylaws on how the stadium and corporation is or will run

f) projected figures, studies of stadium use, and of stadium traffic patterns-flows

g) your file/record inventory list, and the 1985 to 1987 meeting minutes of the stadium board

h) any major planning changes to the stadium since planning begun, these costs; and general expenditures to date and those projected for the stadium

i) all documents on areas of expected revenues, expected expenses once the stadium is in operation - for a ten year period or as long as such projections are made.

The institution advised the appellant that it would process his request once Bill 34 had been implemented.

Subsequent to informing the appellant that it needed to extend the time limit to respond to his request to March 31, 1988, the institution sent him a copy of its 1986 financial statements and some general information on the SkyDome complex.

By letter dated April 29, 1988, the appellant advised the institution that he would be in Toronto during the week of May 16, 1988, and wanted to view the records he had requested. The appellant subsequently attended at the premises of the institution and was given the opportunity to view the records. He identified the parts of the records he was interested in by affixing yellow "post-it" notes to them. He requested that these pages be photocopied and sent to him.

After receiving 186 pages of records, the appellant, by letter dated June 9, 1988, notified this office that more records remained outstanding. On the basis of that letter, this office opened an appeal file.

By letters dated June 25, 1988, the appellant advised the institution and this office of certain records which had been requested and were still outstanding from the original request. The records were as follows:

1) 1985-1988 Board Meeting Minutes

2) April 23/87 Briefing Binder - various segments of 6 sections

3) Four Sets of Binders of Agreement - various matters

4) 10 Year Operating Forecast Sheets

5) Multi-Year Capital Plan Sheets

While mediation efforts resulted in much information being released to the appellant, total settlement was not effected and, accordingly, the matter proceeded to inquiry.

On April 24, 1990, Commissioner Linden issued Interim Order 162 and ordered the institution to take the following action:

1. the institution shall disclose to the appellant the records or parts of records listed in Appendix "A" as "Additional Records which the Institution Stated can now be Released: and the following records or parts of records listed in Appendix "B": #4, 5, 6, 18, 19, 20, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 50, 56, 57, 58, 59, 60, 61 and 62;

2. the institution shall disclose these records to the appellant within ten (10) days of the payment of the fees by the appellant and notify my office as to the date of such disclosure within five (5) days of the date on which disclosure is made;

3. the institution shall notify the third parties to whom the records or parts of records for which section 17 was claimed as an exemption relate and which are not publicly available, being the following records or parts of records listed in Appendix "B": #3, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 46, 47, 48, 49, 51, 52, 53, 54 and 55;

4. the institution shall notify the third parties to whom the records or parts of records listed in paragraph #3 above relate, providing them with copies of the records in question. The institution is to notify these parties within twenty (20) days of the date of this Interim Order and copies of the notices are to be sent to my office within five (5) days of the date on which they are provided to the third parties. The third parties will be contacted directly to elicit representations from them as to the application of section 17 of the Act; and

5. the institution shall provide my office with representations as to the exercise of discretion under subsections 13(1) and 18(1) and section 19 in respect of the following records or parts thereof listed in Appendix "B": #1, 2, 14, 21, 33, 34 and 35, within twenty (20) days of the date of this Interim Order.

In addition, at page 25 of the Interim Order, Commissioner Linden indicated that he would defer the final determination of the application of section 23 of the Freedom of Information and Protection of Privacy Act (the "Act") until the head had made representations regarding the exercise of his discretion in the application of sections 13 and 18.

Interim Order 162 is currently the subject of a judicial review application brought by the appellant.

BACKGROUND TO THIS ORDER:

On May 18, 1990, the institution provided the appellant with access to the records or parts of records listed in Appendix "C" to Interim Order 162 as "Records Ordered Released to the Appellant".

On May 14, 1990, in response to provision 5 of Interim Order 162, the institution provided this office with written representations concerning the head's exercise of discretion under sections 13, 18 and 19 in respect of the records or parts of records listed in that provision of the Interim Order.

Due to the resignation of Commissioner Linden and the fact that I would be deciding the remaining issues arising in the appeal, I granted both the institution and the appellant the opportunity to submit further representations on the applicability of sections 13, 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 head notified nine parties (the affected parties) of the existence of the appeal and provided them with copies of the records or parts of the records withheld from disclosure pursuant to section 17 of the Act.

By letter dated August 28, 1990, this office contacted the affected parties directly to invite representations from them as

to the application of section 17 of the Act to those records relating to them.

Eight of the affected parties submitted written representations. The party whose interests might be affected by the release of record 10 did not make any written representations, nor could it be contacted directly to determine its position.

Appendix "A" to this Order is a list of the records for which section 17 was claimed by the head and for which the head sent out notices to the affected parties. It corresponds to Appendix "D" of Interim Order 162. Appendix "B" to this Order lists the records for which the institution was invited to make further representations as to the applicability of sections 13, 18 and 19 of the Act, and ordered to make representations on the exercise of discretion by the head under these sections. It corresponds to the following records or parts of records listed in Appendix "B" to Interim Order 162: 1, 2, 14, 21, 33, 34 and 35.

ISSUES/DISCUSSION:

The following issues will be addressed in this Order:

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

B. Whether confidentiality provisions contained in other Acts apply to records 1, 2 and 3 listed in Appendix "A" to this Order.

C. Whether the mandatory exemption provided by section 17(2) of the Act applies to records 1, 2 and 3 listed in Appendix "A" to this Order.

D. Whether records 2 and 3 listed in Appendix "A" to this Order contain information which falls within the discretionary exemption provided by section 15(b) of the Act.

E. Whether the head properly applied the discretionary exemptions provided by sections 13, 18 and 19 of the Act in withholding the records (or parts thereof) listed in Appendix "B" to this Order.

F. 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 in sections 13 and 18 of the Act.

Issue A: Whether the records (or parts thereof) listed in Appendix "A" to this Order contain information which falls within the mandatory exemption 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; or

Three Part Section 17(1)(a), (b) and (c) Test:

In Order 36, dated December 28, 1988, Commissioner Linden outlined the three part test which the institution and/or the affected party must satisfy in order for a record to be exempt under section 17(1)(a), (b) or (c) 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 reasonable expectation that one of the types of harm specified in (a), (b) or (c) of subsection 17(1) will occur.

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

I concur with Commissioner Linden's view of the section 17(1)(a), (b) and (c) test and adopt it for the purposes of this appeal.

First Part of Section 17(1)(a), (b) and (c) Test:

In its representations, the institution claims that the records contain commercial and financial information. I am satisfied

that the information contained in the records constitutes commercial and/or financial information such that the first part of the test is satisfied.

Second Part of Section 17(1)(a), (b) and (c) Test:

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

Records 1, 2 and 3

Record 1 is a ten page letter under the signature of the solicitors for the Province of Ontario and the institution requesting an advance ruling from the Corporate Rulings Directorate of Revenue Canada, Taxation in connection with the proposed financing,

development and operation of the SkyDome. It is technically a joint submission made as well by the solicitors for Dome Consortium Investments Inc. (DCI).

Record 2 is a reply from the Director General, Speciality Rulings Directorate of Revenue Canada, Taxation responding to, among other things, the request made in record 1.

Record 3 is a response from Revenue Canada Taxation to a further communication from the solicitors for the Province of Ontario and the institution regarding the advance ruling. It describes some amendments to the arrangement as set out in records 1 and 2.

The position of the affected party, Revenue Canada, respecting the application of section 17(1) to records 1, 2 and 3 was stated as follows in its submissions dated October 3, 1990:

> When seeking an Advance Tax Ruling, taxpayers whether corporations or individuals, are required to provide significant private and confidential financial information. In this case, very specific and detailed information was supplied in order to determine the tax treatment of proposed transactions to provide for the financing, development and operation of a dome stadium facility in Toronto.
>
> Also when you examine the information submitted in support of the request for a ruling, you will conclude that it is heavily intertwined with confidential commercial information about other third parties.
>
> Under the federal Access to Information Act, 1983 the exempting provision for information of this sort is subsection 24(1) of the Access to Information Act. This is a statutory prohibition against the disclosure of information that was obtained by or on behalf of the Minister of National Revenue for the purpose of administering or enforcing the Income Tax Act. The details of the confidentiality requirements are found at section 241 of the Income Tax Act.
>
> To disclose this type of information would undermine the public's confidence in the Minister's ability to protect the information that is prepared or obtained on his behalf for the purpose of administering or enforcing the Income Tax Act. The erosion of this confidence directly affects the foundation on which the principle of self-assessment of taxation is based in Canada.

In my view, the second part of the section 17(1) test contemplates that the information must be supplied in confidence to the institution. The submissions of Revenue Canada refer to

circumstances where information has been supplied in confidence by the institution and an affected party to Revenue Canada. Such a factual context clearly would not satisfy the second part of the three part test.

Record 1 contains financial information about DCI. However, this is not information supplied to the institution in the sense contemplated by the Act. Rather, the information is information arising from and having to do with the actual or contemplated relationship between DCI and the institution. Further, this information is supplied to Revenue Canada by the institution and DCI jointly. It is clearly not information supplied to the institution by Revenue Canada, nor does it reveal information supplied to the institution by DCI. Therefore, record 1 does not meet the second part of the section 17(1) test.

Portions of records 2 and 3 consist of restatements of the information contained in record 1 and the tax ruling of Revenue Canada based on that information. Those portions that are restatements of the information contained in record 1 fail to meet the second part of the section 17(1) test as the information has not been supplied to the institution by Revenue Canada nor does it reveal information supplied to the institution by DCI.

The portions of records 2 and 3 that are Revenue Canada rulings about potential tax liability or lack thereof in a stated situation are financial information. However, it is my view that this information does not satisfy part two of the test.

In the context of its submissions on section 17(1) of the Act, DCI raised the express protection of confidentiality provided by

section 241 of the Income Tax Act, R.S.C. 1952, c.148, as amended, which provides:

> (1) Except as authorized by this section, no official or authorized person shall
>
> (a) knowingly communicate or knowingly allow to be communicated to any person any information obtained by or on behalf of the Minister for the purposes of this Act or the Petroleum and Gas Revenue Tax Act,
>
> (b) knowingly allow any person to inspect or to have access to any book, record, writing, return or other document obtained by or on behalf of the Minister for the purposes of this Act or the Petroleum and Gas Revenue Tax Act, or
>
> (c) knowingly use, other than in the course of his duties in connection with the administration or enforcement of this Act or the Petroleum and Gas Revenue Tax Act, any information obtained by or on behalf of the Minister for the purposes of this Act or the Petroleum and Gas Revenue Tax Act

"Official" and "authorized person" are terms defined in sections 241(10)(a) and (b) of the Income Tax Act. The definition of "authorized person" reads as follows:

> "authorized person" means any person engaged or employed, or formerly engaged or employed, by or on behalf of Her Majesty in right of Canada or a province to assist in carrying out the purposes and provisions of this Act or the Petroleum and Gas Revenue Tax Act;

The definition of "official" reads as follows:

> "official" means any person employed in or occupying a position of responsibility
>
> (i) in the service of Her Majesty in right of Canada or a province, or
> (ii) in the service of an authority engaged in administering a law of a province similar to the Pension Benefits Standards Act, 1985
>
> or any person formerly so employed or formerly occupying a position therein;

In the context of the disclosure of records 1, 2 and 3 and assuming that employees of the institution are provincial employees, in my view, s. 241 of the Income Tax Act would not apply to the three records unless the institution's employees came to possess the 3 records while acting on behalf of the federal Minister of National Revenue in the course of administering or enforcing the Income Tax Act.

A similar approach to the interpretation of s. 241 of the Income Tax Act was adopted by the Federal Court of Appeal in Her Majesty the Queen v. Diversified Holdings Ltd (1990) F.C.J. No. 1039 Action No. A-1088-88 (November 13, 1990). This was an appeal of a decision of the Federal Court, Trial Division, which compelled the appellant (the Crown) to produce certain documents (docket notations made by four Collection Investigation Officers of the Department of National Revenue relating to the actions taken by Revenue Canada) to Diversified Holdings Ltd. which the Crown had refused to disclose pursuant to s. 241(1) of the Income Tax Act. At page 2 of his judgment, Mr. Justice Decary stated:

> In order to succeed, the appellant [the Crown] had to demonstrate that the documents in question were of a confidential nature within the meaning of subsection

> 241(1), i.e. that they were: i) "obtained by or on behalf of the Minister". ii) "for the purposes of the Income Tax Act".
>
> Section 241 cannot be interpreted in a vacuum. The legislative intent, admittedly, is the protection of the confidentiality of information given to the Minister for the purposes of the Income Tax Act. The privilege is not established in favour of Revenue Canada but in favour of those, particularly the taxpayer, who give information to the Minister on the understanding that such information will remain confidential.

In my view the purpose of s. 241 is to prevent the disclosure of information by persons who would not, but for their positions as administrators or enforcers of the Income Tax Act, otherwise be privy to the information. The section does not bind the those who actually furnish this information. Section 241 clearly does not attempt to address the issue of who a taxpayer may or may not disclose his/her/its information to.

On the facts of this appeal, it is my view that the institution is in the role of taxpayer and therefore, section 241 of the Income Tax Act cannot apply to the records.

Record 4

This record contains two distinct parts: one dealing with the Toronto Blue Jays Baseball Club (the "Blue Jays") and the other dealing with the Toronto Argonaut Football Club (the "Argonauts").

a) Blue Jays Portion

This portion of the record is divided into three separate sections outlining various aspects of the commercial relationship between the Blue Jays and the institution: 1)

"Current Contract at CNE [the Canadian National Exhibition]", 2) "Status of Negotiations for the Dome Stadium" and 3) "Areas of Dispute".

b) Argonauts Portion

This portion of the record is a summary of the Argonauts' contract with the CNE.

The institution submits that:

> ... The descriptive material on arrangements between the CNE and the Blue Jays and the CNE and the Argonauts is third party information that the Institution received in confidence. Therefore, we submit that Section 17 is applicable. The information with regards to the Blue Jays' and Argonauts' contracts with the CNE was supplied in confidence (by the CNE or the Blue Jays or the Argonauts, as the case may be) and the record contains commercial and financial information on the nature of exact details of the Argonauts' and Blue Jays' rental agreements with the CNE. The information was supplied to the Institution to assist the Institution in negotiating a new arrangement with the two sports franchises. Disclosure of this information could reasonably be expected to result in significant prejudice to the competitive position of the CNE, the Blue Jays and/or the Toronto Argonauts.

The affected party, the Blue Jays, submits that:

This information was **explicitly** supplied in confidence for the following reason:

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. 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.

Furthermore, implicitly, this information was supplied in confidence for two reasons:

ii) The said negotiations referred to in paragraph (i) above are of a type ordinarily intended to be conducted in confidence as a matter of standard commercial practice.

iii) The information is of a commercially sensitive nature to the Blue Jays as it reveals a source of revenue of the Blue Jays and what the Blue Jays were prepared to give up in exchange therefor, and makes reference to the relationship between the Blue Jays 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 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 Jays and the Institution and monitored information supplied regarding the terms of the agreement under negotiation.

Counsel for the affected party Argonauts did not object to the disclosure of its regular lease payments to the CNE. However, counsel was concerned about the release of any information concerning the arrangements between the CNE and his client should the Canadian Football League fail to operate. In addition, counsel claimed confidentiality for his client's rights and revenues from radio, television and moving pictures as well as its use of public address systems at the CNE.

Counsel for the affected party CNE has taken no position on the release of this record.

It is my opinion that only the information contained in the section entitled "1. Current Contract at CNE" in the Blue Jays' portion of this record, and the section entitled "Current Arrangements at CNE" in the Argonauts' portion of the record was supplied in confidence to the institution implicitly by the Blue Jays and the Argonauts respectively. Accordingly, only this information satisfies the second part of the section 17(1) test.

Records 5, 6 and 7:

Record 5 is dated April 24, 1986 and, as a whole, is entitled "Briefing Materials". It is comprised of two distinct portions - one describing some of the terms of the lease between the Blue

Jays and the institution; the other is entitled "Toronto Argonaut Football Club and the Stadium Corporation - Essential Lease Terms".

Records 6 and 7 are letters that contain the details of an agreement between the institution, Carling O'Keefe Limited and John Labatt Limited.

The submissions of the institution, Blue Jays and Argonauts in support of the application of the section 17 exemption to record 5 are the same as those noted above in relation to record 4.

The institution submits that the information contained in records 6 and 7 should not be released, because:

> The disclosure of the information contained in these letters, supplied implicitly in confidence in the course of negotiations, could prejudice the competitive positions of the breweries and could result in undue loss or gain (Section 17 of the Act).

The affected party, Carling O'Keefe Limited submits that:

> We believe that the contents of the letter dated 8 April 1987 addressed to Mr. Twiner from the Stadium Corporation of Ontario Limited include commercially confidential information and therefore access to this letter should be declined.

In written representations, counsel for the affected party, John Labatt Limited states:

> ... As the terms of the Arrangement, and the Letter of which it forms a part, refer to the commercial and

> financial relationship of Labatt's and the Institution, they are matters that always were intended to be and remain confidential between the parties and it is understood, implicitly by both parties that these terms are not to be disclosed to third parties.

Counsel goes on to describe in detail some of the adverse effects disclosure of the information contained in record 7 would have on her client.

I adopt the analysis developed in previous orders with respect to information arrived at through negotiations between an institution and an affected party with respect to the information contained in records 5, 6 and 7 (see Orders 87, 203, P-218 and P-251). In my opinion, the information contained in these records was the result of negotiations between the institution and the affected parties and does not consist of information "supplied" by the affected parties to the institution. In addition, I cannot conclude that disclosure of the records would permit the drawing of accurate inferences about information actually supplied to the institution by the affected parties, and, therefore, the institution and affected parties have failed to satisfy the second part of the section 17(1) test.

Records 8, 9 and 10:

Each of these records consists of a one paragraph severance from the minutes of meetings of the Board of Directors of the institution. All three records have been identified by the institution as relating to DCI. Record 10 is identified by the

institution as also containing information pertaining to Promaction.

Record 8 contains a statement that a certain oil company wished to participate in some way in the stadium project, not necessarily as a member of the limited partnership, although it wanted similar entitlements.

While in its submissions, the institution adverts to how the public image of this company may be adversely affected by public knowledge that another oil company was chosen as a member of the consortium, it makes no submissions on how such information was "supplied in confidence" by the affected party to the institution.

DCI submits that "such negotiations are treated as confidential by the affected parties and DCI and Stadco [the institution]". DCI has not addressed the issue of the information having been supplied by them to the institution. Therefore, I am not satisfied that this information was "supplied in confidence" by the DCI to the institution.

Record 9 contains information regarding potential additional members to the consortium. While I accept DCI's statement that "... In entering into such negotiations, the third parties treat them as confidential", I am not satisfied that this information was "supplied" by DCI to the institution within the meaning of section 17(1) of the Act.

The information contained in record 10 deals with projected revenues from advertising and food concessions. It is my view that this information was not "supplied" by DCI or Promaction

within the meaning of section 17(1) of the Act. Therefore, records 8, 9 and 10 fail to satisfy the second part of the section 17(1) test.

Record 11:

The state of the negotiations between the institution and the Blue Jays is outlined in this record. It describes certain matters that were still outstanding at the time the record was created.

It is my view that the information contained in this record cannot be said to have been "supplied" by the affected party to the institution. Rather this record is more in the nature of a "status report" indicating issues still to be resolved by these parties.

Records 12, 13 and 14:

These records are a portion of an insurance policy to insure all work and property relating to the construction of SkyDome. Records 12 and 13 list the subscribing insurers and the extent of their participation. Record 14 outlines the premiums and adjustment rates for the stadium and the enhancements.

Reed Stenhouse Limited, the affected party, adopted the following position with respect to the disclosure of these records:

> Reed Stenhouse's position in this matter is that we do not object to this documentation being made available, but think the decision should be that of the Stadium

> Corporation of Ontario and not Reed Stenhouse or the Insurers since this policy was purchased (Stadium Corporation paid the premium) by Stadium Corporation and therefore, legally they own this document and all decisions associated with it should be made by them.

The institution submits that:

> ... subsection 17(1) is applicable as the information in question is commercial information (in the form of an insurance policy) supplied by Reed Stenhouse Limited. The business of insurance being what it is, such information is generally held to be confidential. The release of this record would cause undue gain to the insurers or loss to the Institution...

In the circumstances, I am unable to conclude that disclosure of these records would reveal information that was "supplied in confidence by the affected party to the institution" so as to meet the requirements of the second part of the section 17(1) test.

Records 15, 16, 17, 18, and 19:

These five records all contain information severed from the institution's agreement with the Argonaut Football Club dated October 31, 1986. All these records have been identified by the institution as relating to the Argonauts.

Record 15 deals with the rights and liabilities of the two parties in the event that either the Canadian Football League (CFL) or the Toronto Argonauts cease to operate. Both the

institution and the affected party have submitted that harms might occur should this information be disclosed. However, it is my opinion that these commercial arrangements were reached as a result of negotiations between the Argonauts and the institution and do not contain information "supplied" to the institution. In addition, I cannot conclude that disclosure of the records would reveal information actually supplied to the institution by the affected party, and, therefore, the institution and the affected party have failed to satisfy the second part of the section 17(1) test.

Record 16 describes the "blackout" conditions that apply to the broadcasts of Argonauts' games. In my view, this record consists of terms which have been negotiated between the parties rather than information "supplied in confidence" by an affected party, and disclosure of the record would not, in my opinion, reveal information actually supplied to the institution by the affected party.

Record 17 consists of information on the concession revenues to be paid by the institution to the Argonauts when the Argonauts are using the stadium. While the institution submits that "...this commercial and financial information...was supplied implicitly in confidence during negotiations...", in my view these negotiated terms are not information supplied to the institution by the affected party, neither would disclosure of the record reveal information actually supplied to the institution by the affected party.

Record 18 outlines the fees payable to the institution by the Argonauts for the use of the stadium and for other services provided by the institution. In its representations, the

institution does not specifically address the issue of how it can be determined that this information was "supplied" by the third party within the meaning of section 17(1) of the Act. In my view, this information reflects a negotiated agreement between the parties, not information supplied to the institution by the affected party, and I cannot conclude that disclosure of the record would reveal information actually supplied to the institution by the affected party.

Record 19 deals with the Argonauts' right to sell or assign its CFL franchise. The institution states that:

> We submit that Section 17 of the Act is applicable because the information contained in the record was negotiated by the parties and, therefore, at least partially, supplied by the Toronto Argonauts. Such negotiations are held in strictest confidence. The terms of the agreement with the Institution are information of a financial or commercial nature. This information, if disclosed, could prejudice the competitive position and future negotiations of the Argonauts with prospective purchasers and could result in undue loss to the Argonauts.

I do not agree with the institution's position that one must assume that, because certain terms were negotiated, at least a portion of the information in the record meets the second part of the section 17(1) test. It may be that, during the course of the negotiations, various information was "supplied" by the affected party to the institution. Conversely, some of the information that appears in the final contract may have originated from the institution. However, the final agreement

may contain information other than that which could be said to have been "supplied" by the affected party to the institution, such that the resulting contract reflects the "give and take" of the negotiating process.

I am unable to determine from my review of the record which portion of the record reveals information that was supplied to the institution by the Argonauts, which information is that of the institution and which terms reflect an amalgam of the position of both parties. I therefore find that the requirements of the second part of the section 17(1) test have not been met with regard to record 19.

In summary, I find that the second part of the section 17(1) test has not been satisfied with respect to records 1-3 and records 5-19. In addition, the second part of the section 17(1) test has not been satisfied with respect to record 4, with the exception of the

information contained in the section entitled "Current Contract at the CNE" in the Blue Jays' portion of this record, and the section entitled "Current Arrangements at CNE" in the Argonauts' portion of that record.

Third Part of Section 17(1) Test:

I will examine the information contained in record 4 that I have found satisfies the second part of the test in the context of this part of the test.

Record 4

I am not satisfied that disclosure of the information describing arrangements between the Blue Jays and Argonauts and the CNE current at the time that record 4 was created could reasonably be expected to result in any of the harms described in sections 17(1)(a), (b) or (c) of the Act. Neither the institution nor the affected parties have provided me with sufficient evidence to establish a reasonable expectation of significant prejudice to the affected parties' competitive positions, similar information no longer being supplied, or undue loss or gain to any person should this information be released. As a result, record 4 does not qualify for exemption under section 17 of the Act.

In summary, none of the records listed in Appendix "A" qualify for exemption under section 17(1) of the Act.

Issue B: Whether confidentiality provisions contained in other Acts apply to records 1, 2 and 3 listed in Appendix "A" to this Order.

I reviewed the representations made by the institution dated June 18, 1991 and by DCI dated June 7, 1991. The institution adopted and relied on the representations by DCI on the applicability of s. 17(2) of the Act and, if this provision were found not to apply, the law as it existed at the time of the request.

As indicated, DCI takes the position that records 1, 2 and 3 listed in Appendix "A" to this Order are exempt from disclosure under the law as it existed at the time of the request. Specifically, DCI states:

> Before the Act was amended to add the new section 17(2)(S.O. 1989, c. 71 (Bill 84)), section 67(3) of the Act provided that various confidentiality provisions in other provincial statutes were to take precedence over the Act. One such confidentiality provision was section 91(1) of the Corporations Tax Act ...

As at November 20, 1987 (the date of the request) section 91 of the Corporations Tax Act read as follows:

> **91.-**(1) No person employed in the service of Her Majesty shall communicate or allow to be communicated to any person not legally entitled thereto any information obtained under this Act or allow any such person to inspect or have access to any written statement furnished under this Act.
>
> (2) Every person who contravenes any provision of this section is guilty of an offence and on conviction is liable to a fine of not more than $200.
>
> (3) Notwithstanding subsection (1), the Minister may, for the purpose of aiding in an investigation for taxation purposes under this or any other Act, enter into an agreement with the government of Canada or of any province under which officers of such government will be allowed access to information obtained or any written statement furnished under this Act and officers of the Government of Ontario will be allowed access to information obtained or any written statement furnished under any Act of such government.

DCI, in its representations submits that employees of the institution "are caught by section 91(1) as being 'employed in the service of Her Majesty'". Further it states:

> The three records in question concern an application on behalf of Stadco and DCI, and the subsequent response of Revenue Canada, for an advance tax ruling. The application was made pursuant to the provisions of

> Information Circular 70-6R, which was issued by the Department of National Revenue, Taxation. While Stadco and DCI are subject to both federal and provincial taxation law, it is extremely rare to request advance rulings from both levels of government. This is because the answers provided under the federal legislation are almost exclusively determinative of any issues under the provincial taxation laws. Stadco's request, while under the authority of the federal Income Tax Act, is equally determinative of its position under the Corporations Tax Act, which incorporates much of the federal statute by reference. Therefore, the request and response may just as properly be said to have been obtained or furnished under the provincial Act as under the federal. **This brings the information within the confidentiality provision in section 91(1).** Therefore, according to the law at the time of the request for these records, they cannot be disclosed by the head of Stadco. (emphasis added)

I will assume for the purposes of the discussion below that employees of the institution are employees of the Crown.

If s. 91(1) of the Corporations Tax Act is read to mean that a person employed in the service of Her Majesty must come to possess the information while in his/her/its official capacity rather than his/her/its capacity as an individual/corporate taxpayer, then in my view, the confidentiality provision would not apply to the three records at issue. In this case the three records at issue were furnished or obtained by the institution in its capacity as a taxpayer and not in the course of administering the Corporations Tax Act.

In my view, the intent of s. 91(1) is to protect the confidentiality of information given to a person employed in the service of Her Majesty for the purposes of administering the Corporations Tax Act. The protection of the confidentiality of

such information is established not in favour of Her Majesty but in favour of those, particularly the taxpayer, who give information to Her Majesty on the understanding that such information will remain confidential. Accordingly, s. 91(1) does not bind the taxpayer who furnishes the information and in the circumstances of this appeal it is my view that the institution is in the role of taxpayer. Therefore section 91(1) of the Corporations Tax Act does not apply to records 1-3.

Issue C: Whether the mandatory exemption provided by section 17(2) of the Act applies to records 1, 2 and 3 listed in Appendix "A" to this Order.

Section 17(2) of the Freedom of Information and Protection of Privacy Act reads as follows:

> A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

On January 1, 1990, section 17(2) came into force and the old section 17(2) was repealed. Revenue Canada raised the possibility of the new section 17(2) of the Act applying to records 1, 2 and 3. Records 1, 2 and 3 are described in detail on page 8 of this Order.

As it was felt that the institution, the affected parties and the appellant should have an opportunity to address this issue, a supplementary notice of inquiry was sent to the institution, Revenue Canada, DCI and the appellant on May 7, 1991, inviting

submissions. Extensive submissions dated June 7, 1991, respecting the applicability of section 17(2) of the Act were submitted by DCI in response to the supplementary notice of inquiry. The DCI submissions were adopted by the institution in a brief letter dated June 18, 1991. No additional submissions were received from Revenue Canada or the appellant.

The position of the affected party, Revenue Canada, respecting the section 17(2) issue was stated as follows:

> Revenue Canada, Taxation consistently treats information exchanged for the purpose of obtaining an Advance Tax Ruling as financial information that is supplied in confidence by the taxpayer.
>
> The information sought consists of a record that reveals information that was gathered for the purpose of determining the tax liability in a given set of circumstances surrounding a proposed transaction. Thus, it is my opinion that the information sought is information of the sort referred to in subsection 17(2) of the Freedom of Information and Protection of Privacy Act, 1987.

The DCI submissions raise a number of issues regarding the retrospective or retroactive application of section 17(2) of the Act.

I believe it is a well-established general principle of law that unless there is some clear and unequivocal declared intention of the Legislature or unless there are circumstances rendering another view totally untenable, an act is prospective and not retrospective in application. There are some exceptions to this general rule. A recognized exception to this principle is that

relating to declaratory Acts. The DCI representations assert that the new section 17(2) is declaratory in nature and thus should be given retrospective effect.

It has been said that an Act of a declaratory nature is in principle retrospective and where it is to apply only prospectively, then there should be something on the face of the Act to show that this is the intention of the Legislature. Doe D. Earl of Mountcashel v. Grover, (1847), 4 U.C.Q.B. 23 (C.A.). A declaratory Act has been defined in the following way: "For modern purposes a declaratory Act may be defined as an Act passed to remove any doubts existing as to the common law, or the meaning or effect of any statute. Such Acts are usually held to be retrospective." Mortgage Corpn. of Nova Scotia v. Walsh, 57 N.S.R. 547, [1925] 1 D.L.R. 665 (C.A.).

Furthermore, the retrospective effect given declaratory Acts has been applied very restrictively. In this regard, I quote the words of Lord Esher, M.R., in Ex parte Todd: In re Ashcroft, 19 Q.B.D. 186 (at 195), as approved by the Supreme Court of Canada in Trans-Canada Insurance Company v. Winter, [1935] S.C.R. 184.

> In determining whether any provision of an Act was intended to be retrospective or not, I think the consequences of holding that it is not retrospective must be looked at, and to my mind it is inconceivable that the legislature, when, in a new Act which repeals a former Act, they repeat in so many words certain provisions of the repealed Act, should have intended that persons who, before the passing of the new Act, had broken the provisions of the old Act - who had been doing that which the legislature thought to be wrong - should entirely escape the consequences of their wrongdoing by reason of the repeal of the old Act. I think, therefore, that, so far as s. 47 is a repetition of s. 91, the legislature obviously intended to replace the old enactment at once by the

> new one, and that, to that extent, s.47 must apply to transactions which took place before the commencement of the new Act. But why should we carry it any further, and say that the new part of s. 47 applies to antecedent transactions? I can see no reason for doing so, and I think it is a wholesome doctrine to hold that the section is retrospective so far as it is a repetition of the former enactment, but that it is not retrospective so far as it is new.

Similarly, R. v. Crown Zellerbach Canada Ltd. (1954), 14 W.W.R. 433 (B.C.S.C.) was cited in the DCI representations in support of the proposition that:

> ... the court found that new provisions of the Combines Investigations Act were available to be used by the Crown in the course of a prosecution which had started before those provisions had been enacted, because those provisions were a simultaneous re-enactment and repeal of substantially the same procedures in the same Act.

I note that the change in the wording of the legislation in issue in the Crown Zellerbach case was from "to prevent or lessen, unduly, competition" to "to unduly prevent or lessen competition". In my view this change improved the clarity of the language of the section but otherwise used precisely the same words to convey the same meaning. The other changes discussed by the court in the Crown Zellerbach case were likewise dissimilar to the amendment to the Act embodied in section 17(2).

In my view, section 17(2) does not contain a clear and unequivocal declared intention of the Legislature that it should operate retrospectively. Further, section 17(2) appears to be

broader and less specific than the confidentiality provisions that were in effect before it. In my view, section 17(2) is not a re-enactment of a previous section(s) with substantially the same wording and the same effect. Therefore, section 17(2) does not operate retrospectively and does not apply to records 1, 2 and 3.

Issue D: Whether records 2 and 3 listed in Appendix "A" to this Order contain information which falls within the discretionary exemption provided by section 15(b) of the Act.

Section 15(b) of the Act reads as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> (b) reveal information received in confidence from another government or its agencies by an institution; or
>
> ...
>
> and shall not disclose any such record without the prior approval of the Executive Council.

The institution first raised the possibility that section 15(b) of the Act might apply to records 2 and 3 listed in Appendix "A" to this Order in its representations of June 18, 1991, in the following words:

> Upon reviewing our file on this appeal and all of the submissions that have previously been forwarded to the Commission, we have discovered that the exemption to disclosure of the two letters from Revenue Canada as set out in Section 15(b) of the Act has not been addressed. Section 15(b) states that a Head may refuse to disclose a record where disclosure could

> reasonably be expected to reveal information received in confidence from another government or its agencies by an institution and a Head shall not disclose any such record without the prior approval of the Executive Counsel. Section 15(b) is mandatory so that a record described in this Section is not permitted to be disclosed without the prior approval of the Executive Counsel which to the best of our knowledge has not been obtained. The two letters from Revenue Canada were advance tax rulings, and such rulings were provided in confidence. Consequently, it is mandatory pursuant to Section 15(b) that the two letters from Revenue Canada not be disclosed.
>
> We request that the Commissioner consider the above submissions regarding the exemptions in subsections 17(2) and 15(b) of the Act in addition to our previous submission in this appeal.

At pages 306-307 of Volume 2 of Public Government for Private People, The Report of the Commission on Freedom of Information and Protection of Privacy/1980, the Williams Commission addressed the following question:

> The government of Ontario may receive documents or acquire information from governments of other jurisdictions in circumstances in which it is expected that the material will be treated as confidential. Should there be an exemption for information received in confidence from other governments?

This question was answered in the affirmative for the general purpose of ensuring that the Government of Ontario and its agencies would be able to obtain records, which other governments might be unwilling to provide without having this protection from disclosure. In my view, section 15(b) is intended to protect the free flow of information from other

governments or their agencies to Ontario institutions who are carrying out their respective "governmental" functions.

In my opinion it cannot be said that records 2 and 3 contain "information received in confidence from another government or its agencies by an institution" in the sense contemplated by section 15(b). In the circumstances of this appeal the relationship between Revenue Canada and the institution was of tax collector and taxpayer. Accordingly, I do not accept the institution's submission that section 15(b) applies to exempt records 2 and 3 from disclosure.

Issue E: Whether the head properly applied the discretionary exemptions provided by sections 13, 18 and 19 of the Act in withholding the records (or parts thereof) listed in Appendix "B" to this Order.

I have considered the institution's original submissions concerning the application of sections 13, 18 and 19 to the records listed in Appendix "B" to this Order. I have also examined its representations as to the basis on which the head exercised his discretion not to disclose them to the appellant, which representations were submitted pursuant to Interim Order 162.

I agree with the findings of Commissioner Linden with regard to the applicability of section 13 to records 33, 34 and 35 listed in Appendix "B" to Interim Order 162 (records 5, 6 and 7 listed in Appendix "B" to this Order). I also agree with Commissioner Linden's view that record 1 of Appendix "B" to the Interim Order (record 1 of Appendix "B" to this Order) is exempt pursuant to

section 18(1)(c), record 21 (record 4 of Appendix "B" to this Order) pursuant to section 18(1)(e) and records 2 and 14 (records 2 and 3 of Appendix "B" to this Order) pursuant to section 19.

It is my view that where a head of an institution has exercised his or her discretion in accordance with established legal principles and where the discretion has been used in a manner which is in accordance with the Act, that exercise of discretion should not be disturbed on appeal.

In this case, I have been provided with sufficient information to satisfy me that the head has properly exercised his discretion and therefore uphold the decision of the head to deny access to these records.

Issue F: 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 in sections 13 and 18 of the Act.

Because I have upheld the application of section 13 to records 5, 6, and 7, section 18(1)(c) to record 1 and section 18(1)(e) to record 4 listed in Appendix "B" to this Order, these are the only records subject to consideration under section 23 of the Act.

Section 23 of the Act 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, 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 onus 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 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 the 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.

In the circumstances of this appeal, I am not satisfied that there is a compelling public interest that clearly outweighs the purpose of the exemptions.

Order:

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

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

3. I order that the institution not disclose the records listed in provision 2 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 any party to the appeal 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 Information and Privacy Commissioner/Ontario and/or the institution within this thirty (30) day period, I order that the records listed in provision 2 of this Order be disclosed within thirty-five (35) days of the date of this Order.

4. The institution is further ordered to advise 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: January 24, 1992
Tom Wright Date
Commissioner

APPENDIX "A"

ORDER NO. 263

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.

1. Letter of Fasken and Calvin to Revenue Canada dated March 13, 1986

2. Letter of Revenue Canada dated April 22, 1986

3. Letter of Revenue Canada dated May 7, 1986

4. Briefing Materials: Blue Jays and Argos

5. Briefing Materials : Blue Jays and Argonauts (April 24, 1986)

6. Letter Agreement: April 8, 1987 with Carling O'Keefe

7. Letter Agreement: July 9, 1987 with John Labatt

8. Minutes February 11, 1985 - page 2, paragraph 2

9. Minutes April 16, 1986 - page 4, paragraph 1

10. Minutes April 16, 1986 - page 4, paragraph 4

11. Minutes April 16, 1986 - page 6, paragraph 5

12. Reed Stenhouse Insurance Policy - page 11, "insurers"

13. Reed Stenhouse Insurance Policy - page 14, "insurers"

14. Reed Stenhouse Insurance Policy - page 13, "premium"

15. Agreement with Argonaut Football Club dated October 31, 1986 -pages 10,,11 and 12

16. Agreement with Argonaut Football Club dated October 31, 1986 -page 15, paragraph 14(b)

17. Agreement with Argonaut Football Club dated October 31, 1986 -pages 16 and 17, paragraph 17(a)

18. Agreement with Argonaut Football Club dated October 31, 1986 -pages 17, 18 and 19, paragraph 18(a)

19. Agreement with Argonaut Football Club dated October 31, 1986 -page 21, paragraph 26

APPENDIX "B"

ORDER NO. 263

The following is a list of records on which the institution was ordered to make representations as to the applicability of and the discretion exercised under sections 13(1) and 18(1) and section 19 of the Act.

1. Briefing materials entitled "Operating Analysis and Projections" including 10-year financial projections [ss. 18(1)(c)(e)]

2. Reporting Letter of Fasken and Calvin dated October 19, 1987 [ss. 13, 18(1)(c), 19]

3. Minutes April 10, 1985 - page 3, paragraphs 1-3 [ss. 13(1), 19]

4. Minutes February 12, 1987 - page 7, paragraph 3 [ss. 18(1)(c)(e)]

5. Minutes December 17, 1987 - page 5, paragraph 1 [ss. 13(1), 18(1)(c)]

6. Minutes December 17, 1987 - page 5, paragraph 2 [ss. 13(1), 18(1)(c)]

7. Minutes December 17, 1987 - page 5, paragraph 4 [ss. 13(1), 18(1)(c)(e)]