



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

ORDER P-632

Appeals P-9300201 and P-9300202

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ORDER

BACKGROUND:

The Stadium Corporation of Ontario Limited (SkyDome) received two requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

- (1) Briefings prepared by Stadco for the Ontario Government and the new Treasurer since October 1990, and any correspondence sent/received from the government relating to government policy or positions on the status of present financing or proposed refinancing arrangements relating to SkyDome. [The requester subsequently clarified that these materials related "... to the intended sale and privatization of Stadco and the financing related to that intended sale and privatization".]
- (2) Current capital budget, status of loans and any refinancing efforts underway.

SkyDome identified one record as being responsive to each request and denied access to each in its entirety, claiming the exemptions in sections 13(1), 17(1), 18(1)(a), (c), (d), (e), (f) and (g) and 19 of the Act. The requester appealed both decisions to deny access and claimed that more records responsive to these requests should exist. The Commissioner's office opened Appeal Number P-9300201 to address the first appeal and Appeal Number P-9300202 to deal with the second.

As mediation of these appeals was not possible, notices that inquiries were being conducted to review SkyDome's decisions were sent to SkyDome, the appellant and a company whose interests might be affected by disclosure of the information contained in the record responsive to the first request (the affected party). Representations were received from SkyDome only. The affected party confirmed that it would not be submitting any representations.

In its representations, SkyDome made no representations with respect to the application of sections 18(1)(e), (f), (g) and 19 of the Act. As these are discretionary exemptions, I will not consider them in this order.

THE RECORDS:

The record identified by Skydome as being responsive to the first request is a 30-page briefing report which appears to have been prepared for the Ministry of Treasury and Economics. This document will be referred to as Record 1.

The record responsive to the second request is a four-page document entitled "Fiscal 1991 Capital Plans" (Record 2). This record consists of four parts: Summary (page 1), Category A

"Profit Generating/Cost Reduction" (page 2), Category B "Long Term/Quality & Safety of Facility" (page 3) and Category C "Improving Guest Satisfaction" (page 4).

ISSUES:

The issues to be addressed in these appeals are:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.
- B. Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.
- C. Whether the discretionary exemptions provided by sections 18(1)(a), (c) and/or (d) of the Act apply to the records.
- D: Whether SkyDome conducted a reasonable search for the records in the circumstances of these appeals.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies to the records.

Section 13 of the Act provides that:

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.

Accordingly, in order to qualify for exemption under section 13(1) of the Act, two requirements must be met:

- (1) the records or parts of records to be exempted must contain advice or recommendations, **and**
- (2) the advice or recommendations must have been given by a public servant, any other person employed in the service of an institution or a consultant retained by the institution.

[Order P-628]

SkyDome's representations with respect to the application of section 13(1) of the Act to both records merely state:

The information contained in the Record was compiled with the advice and recommendations of various persons employed by or a consultant retained by the Institution. The Record does not fall within any of the exceptions contained in sub-section 13(2) and consequently the Record should not be disclosed pursuant to the provisions of sub-section 13(1).

No further evidence of any kind to substantiate this position was provided.

As far as the first requirement of the section 13(1) exemption is concerned, the "advice" must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process (Order 118). "Recommendations" must be viewed in the same vein. A record that identifies an option is not exempt under this section where there is no indication whether or not the option is recommended (Order P-398).

While Record 1 concludes with five options, there is no indication which option is or is not recommended, and what the suggested course of action, if any, might be. The four-page summary of certain financial plans which comprises Record 2 does not contain any advice or recommendations at all.

With respect to the second requirement of the section 13(1) exemption, apart from the statement of Skydome's representations reproduced above, I have been provided with no evidence concerning the identity(ies), positions or any other information about the individual or group who created these records.

Accordingly, having reviewed the records, and in the absence of further evidence, I am not satisfied that section 13(1) applies to either Record 1 or 2.

ISSUE B: Whether the mandatory exemption provided by section 17(1) of the Act applies to the records.

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;

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- (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;

For a record to qualify for exemption under sections 17(1)(a), (b) or (c), SkyDome and/or the affected party must satisfy each part of the following three-part test:

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 harms specified in sections 17(1)(a), (b) or (c) will occur.

[Order 36]

If any part of the test is not satisfied, the exemption under section 17(1) will not apply to the record (Order 36).

Part 1

I am of the view that the information contained in the records is financial information and thus satisfies the first part of the test.

Parts 2 and 3

With respect to the second part of the test, SkyDome does not explain what information in each record was supplied to it in confidence or by whom.

As far as part three of the test is concerned, SkyDome maintains that disclosure of the records would result in harm to its competitive position and its own ability to negotiate with third parties (section 17(1)(a)). As has been stated in previous orders, the potential harm to an institution's own economic and/or competitive interests is properly addressed in the context of section 18 of the Act (Order P-487).

SkyDome also submits that section 17(1)(b) is applicable to the records. As far as section 17(1)(c) is concerned, SkyDome claims that "Disclosure of the Record can also reasonably be

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expected to result in undue loss". However, SkyDome has not provided any evidence explaining how disclosure of the information contained in the records at issue in these appeals could reasonably be expected to result in either of these alleged harms.

Having reviewed the records, and in the absence of any detailed and convincing evidence, it is my view that neither the second nor third parts of the above-noted test have been satisfied. Consequently, section 17(1) of the Act does not apply to the records at issue.

ISSUE C: Whether the discretionary exemptions provided by sections 18(1)(a), (c) and/or (d) of the Act apply to the records.

Sections 18(1)(a), (c) and (d) of the Act read:

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;

Broadly speaking, section 18 is designed to protect certain economic interests of the Government of Ontario and/or other institutions covered by the Act. Sections 18(1)(c) and (d) take into consideration the consequences which would result to an institution if a record is released. Section 18(1)(a) is concerned with the type of the record, rather than the consequences of disclosure (Order 141).

Section 18(1)(a)

In order to qualify for exemption under section 18(1)(a), SkyDome 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 or an institution; **and**
3. has monetary value or potential monetary value.

[Order 87]

Turning to the third part of the test, SkyDome submits that the information contained in the records has monetary value or potential monetary value, because "... it is likely that the information can be sold to the media for publication and thereby has potential monetary value".

In my view, the use of the term "monetary value" in section 18(1)(a) means that the information contained in the record must have an intrinsic value. As stated in Order 219, section 18(1)(a) enables an institution to refuse to disclose a record which contains information where the circumstances are such that disclosure would deprive the institution of the monetary value of the information.

Without further evidence, I do not accept that a potential sale of information to the media constitutes intrinsic monetary value for the purpose of this section. Furthermore, I cannot base the application of this exemption on information from an institution as to what the appellant will "likely" do with the information once it is received.

Accordingly, based on my review of the records and the representations which SkyDome has provided, I am not satisfied that the information contained in the records has either monetary or potential monetary value. I, therefore, find that these records do not qualify for exemption under section 18(1)(a) of the Act.

Section 18(1)(c)

SkyDome submits:

As described above, disclosure of the information contained in the Record can reasonably be expected to prejudice the economic interests and competitive position of the Institution in the manner described above including:

1. its economic interests in efficiently and inexpensively administering its present business affairs;
2. its economic interests and competitive position with regards to presently ongoing negotiations to complete more specific terms of the arrangements revealed by the Record;
3. its economic interests and competitive position in obtaining similar information for use in the course [of] present and future negotiations with the same or other parties in the same or other business arrangements; and

4. its economic interests and competitive position with regard to negotiating favourable financial terms in present and future negotiations.

In order to qualify for exemption under section 18(1)(c), an institution must provide detailed and convincing evidence that disclosure of the information contained in the record could reasonably be expected to prejudice the economic interests or competitive position of that institution. Furthermore, for both sections 18(1)(c) and (d), SkyDome must establish a clear and direct linkage between disclosure of the information and the harm alleged (Orders P-581 and P-590).

As is apparent from SkyDome's submissions, specific reference is lacking to the records at issue in these appeals. In addition, the submissions are silent on any possible linkages between the information contained in the records and the alleged harms.

Furthermore, neither record reveals the substance of any negotiations or agreements or refers to the completion of "arrangements" mentioned in SkyDome's representations.

SkyDome has failed to provide any detailed and convincing evidence to demonstrate how the disclosure contained in the records could reasonably be expected to prejudice its economic interests or competitive position. As a result, I am unable to find that the exemption provided by section 18(1)(c) of the Act applies to the records.

Section 18(1)(d)

Section 18(1)(d) deals with 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 provincial economy.

SkyDome submits that the Government of Ontario, through the Ministry of Treasury, is the sole shareholder of SkyDome, and that "... anything injurious to the financial interests of the Institution is in turn injurious to the financial interests of the Government of Ontario". According to SkyDome, disclosure of the information contained in the records can reasonably be expected to be injurious to the financial interests of SkyDome with respect to its administrative affairs and contractual and other negotiations. No further details are provided to support this claim.

After considering this submission, I find that I have not been provided with the necessary "detailed and convincing" evidence to establish a clear and direct linkage between the disclosure of the information contained in the records and the alleged harms. Therefore, I find that the records do not qualify for exemption under section 18(1)(d) of the Act.

ISSUE D: Whether SkyDome conducted a reasonable search for the records in the circumstances of these appeals.

With respect to Appeal Number P-9300201, the appellant states that more records should exist, particularly for the latter part of 1991.

In Appeal Number P-9300202, the appellant states that, in response to other requests to SkyDome made under the Act, he has been provided with documents which would appear to indicate the existence of more records in response to this request. He, therefore, maintains that additional records containing financial information prepared for or approved by SkyDome's Board of Directors current at the time of his request, should exist.

I would also note that the second request enumerates three classes of records: (i) current capital budget, (ii) status of loans and (iii) refinancing efforts. As stated, the only record SkyDome located responsive to this request in the four-page "Fiscal 1991 Capital Plans" document which, in my view, contains no information regarding the types of records in classes (ii) and (iii).

In the Notices of Inquiry, SkyDome was asked to provide details of any searches carried out to locate responsive records. It was asked to indicate who conducted the searches, what places were searched, who was contacted in the course of the search, what types of files were searched and what the results of the searches were. SkyDome was also asked to address whether it was possible that such records existed but no longer exist. If so, it was asked to provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

SkyDome provided no submissions in response to these questions as outlined in the Notices of Inquiry. In its submissions for each appeal, SkyDome merely indicates that "There are no other documents that respond to this request".

Therefore, I conclude that the searches conducted by SkyDome were not reasonable in the circumstances of these appeals.

ORDER:

1. I order SkyDome to disclose to the appellant Records 1 and 2 within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order.
2. In order to verify compliance with this order, I order SkyDome to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, **only** upon request.
3. I order SkyDome to conduct a further search for responsive records and to notify the appellant in writing as to the results of that search, within thirty (30) days of the date of this order.
4. If, as a result of the further search, SkyDome identifies any records responsive to the requests, I order SkyDome to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, considering the date of this order as the date of the request and without recourse to a time extension.

5. I order SkyDome to provide me with a copy of the letter referred to in Provision 4 of this order within thirty-five (35) days of the date of this order. 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: _____
Anita Fineberg
Inquiry Officer

_____ February 22, 1994