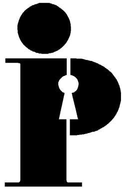

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1126

Appeal P-9500713

Ministry of Citizenship, Culture and Recreation

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

NATURE OF THE APPEAL:

As part of a recent expansion of the National Basketball Association (the NBA), the Toronto Raptors Basketball Club Inc. (the Raptors) was awarded a franchise, conditional upon the removal of NBA games from the Pro-Line Lottery operated by the Ontario Lottery Corporation (the OLC). In September 1994, the NBA, the Raptors, the OLC, the Ministry of Culture, Tourism and Recreation, and NBA Properties Inc. (NBA Properties) entered into a Memorandum of Agreement (the agreement) for the purpose of complying with this condition.

The Ministry of Citizenship, Culture and Recreation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for a copy of this agreement.

After soliciting the views of the other parties to the agreement, the Ministry provided the requester with partial access to the agreement, and denied access to the remaining parts based on the mandatory exemption provided by section 17(1) of the Act (third party information).

The requester appealed the Ministry's decision.

A Notice of Inquiry was sent to the appellant, the Ministry, and the other parties to the agreement. Representations were received from the Ministry, the OLC, the Raptors, and jointly from the NBA/NBA Properties.

DISCUSSION:

THIRD PARTY INFORMATION

The only issue in this appeal is whether the portions of the agreement withheld by the Ministry qualify for exemption under section 17(1) of the Act. Having reviewed the agreement and the representations, I find that the subject matter of section 17(1)(d) is not relevant in the circumstances of this appeal, and I will restrict my discussion to the possible application of sections 17(1)(a), (b) and (c), which 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;

The Ministry takes no position with respect to the application of section 17(1).

Therefore, the other parties to the agreement must provide evidence to 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 (a), (b) or (c) will occur.

[Order 36]

Part One

The agreement establishes a commercial relationship between the Ministry and the other parties. Some specific clauses include dollar figures and outline financial responsibilities of the Raptors, the NBA and NBA Properties. In my view, the information contained in the agreement is commercial and/or financial information, and the requirements of the part one test have been satisfied.

Part Two

Previous orders of this office have addressed the issue of whether information contained in an agreement entered into between a Ministry and a third party was "supplied" by the third party (Orders 36, 87, P-385 and P-581). These orders stand for the proposition that, generally speaking, information which is the product of a negotiation process will not qualify as having been "supplied" for the purposes of section 17(1) of the Act.

Orders have also held that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-218, P-385 and P-581).

The Raptors state that the information contained in clauses 1.1, 1.2(a), (b) and (d), 1.3, 8.1 and 9.2(a) was supplied during the negotiation process, and the NBA/NBA Properties make similar statements regarding clauses 3, 4, 8.2 and 9.2(a). However, none of the documentation provided by either of these parties contains evidence to establish that the information contained in these clauses was actually supplied to the Ministry. The Ministry takes no position on this issue, and the OLC's representations make no reference to the "supplied" aspect of part two of the test.

Having reviewed the various clauses, in my view, they consist of information which was the product of a negotiation process, as opposed to information which was supplied. The agreement is a unique document created to deal with a particular situation involving the various parties.

The content of clauses 1.1, 1.2(a), (b) and (d), 1.3, 3 and 4, which deal with the establishment of a charitable foundation and the provision of promotional support, clearly are the product of discussions among the parties and reflect demands and concessions arrived at through the negotiation process. Clauses 8.1 and 8.2 deal with an administrative matter which the NBA/NBA Properties describes as a concession made during the negotiation process, a categorization which is clearly inconsistent with having supplied the information in the first place. Clause 9.2(a) is a general clause which deals with a matter commonly included in commercial agreements and is typically the subject of negotiations among parties.

Having carefully reviewed the agreement and considered all representations, I find that none of the clauses of the agreement which are at issue in this appeal contain information which was "supplied" to the Ministry by the Raptors and/or the NBA/NBA Properties for the purposes of section 17(1) of the Act. I have also considered whether the disclosure of these clauses would permit the drawing of accurate inferences about information that these parties actually supplied to the Ministry, and I cannot conclude that any such inferences could reasonably be drawn. Therefore, I find that the requirements of part two of the test have not been satisfied.

The confidentiality aspect of part two of the exemption test only becomes relevant if the information has been "supplied". Therefore, it is not necessary for me to address the issue of confidentiality in the context of this appeal. However, because the representations of the Raptors and the NBA/NBA Properties focus on this issue in some detail, I have decided to include a discussion of the confidentiality aspect of part two of the test in this order.

The Raptors, NBA/NBA Properties and the OLC all maintain that the record was intended to be held in confidence, and refer to clause 9.9 of the agreement which reads as follows:

> Unless otherwise agreed to by all of the parties hereto, and subject to the Freedom of Information and Protection of Privacy Act (Ontario), as amended from time to time, the information in this Agreement and all information obtained in connection with, or relating to the exercise and performance by the parties hereto of their respective rights and obligations under this Agreement shall be kept confidential.

This clause demonstrates a clear intention on the part of all parties to the agreement that the content would be treated confidentially, subject to two exceptions: (1) agreement by all parties to the contrary; or (2) if the agreement or portions of the agreement must be disclosed pursuant to the Act. Clause 9.9 recognizes that either the Ministry or the OLC may be compelled to disclose the contents of the agreement pursuant to a request under the Act, and that in such a case the clause has no effect. In my view, this clause constitutes evidence of an intention to hold the agreement in confidence, but that intention does not extend to the situation where the agreement is not exempt and therefore must be disclosed under the Act. Because I have found that the information contained in the agreement was not "supplied" by the Raptors and/or the NBA/NBA Properties, as required by section 17(1), the evidence of confidentiality is not sufficient to satisfy the requirements of part two of the test, and therefore the exemption does not apply.

Part Three

Because all three parts of the section 17(1) exemption test must be established in order for a record to qualify for exemption, and I have found that the requirements of part two of the test have not been established, it is not necessary for me to deal with part three. Again, however, the representations provided by the Raptors and the NBA/NBA Properties include a discussion of the harms enumerated in part three, so I have decided to address this part of the test as well.

To satisfy part three of the test, the Raptors and/or the NBA/NBA Properties must establish that one or more of the harms described in sections 17(1)(a), (b) or (c) could reasonably be expected to occur if the information is disclosed.

The Raptors and the NBA/NBA Properties both submit that disclosure of the information contained in clauses 1.1, 1.2(a), (b) and (d), 1.3, 3 and 4 could interfere with future negotiations involving other NBA franchisees, potential sponsors, broadcasters, licensees, and other donors. Both of these parties feel that this would result in undue loss to them and undue gain to organizations they may have to negotiate with in the future. As far as the administrative clause 8.2 is concerned, as stated above, the NBA/NBA Properties states that it was a concession, knowledge of which would adversely affect further negotiations. The Raptors make similar submissions regarding clause 8.1 with respect to the negotiation of licencing agreements. Both parties argue that release of the information contained in clause 9.2(a) would prejudice future negotiations among the parties to the agreement in the event that this clause is invoked at some future date.

The appellant submits that, because the Raptors are the only professional basketball team in Ontario, it is difficult to imagine how release of information about the charitable foundation established by the agreement could harm the competitive position of the Raptors. He also points out that the foundation is not merely a private institution, having one-third of its directors appointed by the Provincial Government.

The appellant also attached copies of two press releases to his letter of appeal, one dated February 10, 1994 and the other dated September 28, 1995, which contain details of various aspects of the agreement. The appellant points to these press releases as evidence of the fact that the foundation created by the agreement has a public component, and that the public has a real interest in the foundation, including its funding and operation.

The OLC states that disclosure of the remaining clauses of the agreement would not result in harm to the OLC.

Having reviewed all of the representations, together with the copies of the press releases provided by the appellant, I am not satisfied the Raptors and/or the NBA/NBA Properties have provided sufficient evidence to demonstrate that disclosure of the remaining portions of the agreement could reasonably be expected to cause the harms described in sections 17(1)(a), (b) or (c).

As far as clauses 1.1, 1.2(a), (b) and (d), 1.3, 3 and 4 are concerned, the February 10, 1994 press release issued by the Office of the Premier refers to the main points included in these clauses and the September 28, 1995 press release from the Raptors confirms one aspect of one of those clauses. I acknowledge that the February 10, 1994 press release was issued several months

before the agreement was executed, and that certain details contained in the clauses were not specifically referred to in either press release. However, the substance of these clauses has already been made public through the issuance of the press releases and, in my view, the additional information which would be disclosed through release of the actual text of the clauses could not reasonably be expected to cause the harms described in sections 17(1)(a), (b) or (c) of the Act.

Turning to clauses 8 and 9.2(a), these are administrative and general clauses typically found in commercial agreements. Although the specific provisions are unique to the circumstances of this agreement, in my view, they do not deal with matters which could reasonably be expected to give rise to the harms identified in sections 17(1)(a), (b) or (c).

In summary, I find that both part two and part three of the exemption test under section 17(1) of the Act have not been satisfied, and the remaining clauses of the agreement do not qualify for exemption and should be disclosed to the appellant.

ORDER:

1. I order the Ministry to disclose clauses 1.1, 1.2(a), (b) and (d), 1.3, 3, 4, 8 and 9.2(a) of the agreement to the appellant by **March 20, 1996** and not earlier than **March 15, 1996**.

2. In order to verify compliance with the provisions of this order, I reserve the right to require that the Ministry provide me with a copy of the clauses of the agreement which are disclosed to the appellant pursuant to Provision 1.

Original signed by: February 14, 1996
Tom Mitchinson
Assistant Commissioner