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

ORDER P-219

Appeal 890366

Stadium Corporation of Ontario Limited

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O R D E R

This appeal was received pursuant to subsection 50(1) of the Freedom of Information and Protection of Privacy Act, 1987, (the "Act") which gives a person who has made a request for access to information under subsection 24(1) a right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

On January 5, 1990, the undersigned was appointed Assistant Commissioner and received a delegation of the power to conduct inquiries and make Orders under the Act.

The facts of this case and the procedures employed in making this Order are as follows:

1. On October 15, 1989, the requester wrote to the Stadium Corporation of Ontario Limited (the "institution") and requested the following information:

> Documents on all arrangements between consortium members where agreement has been reached whereby one consortium member is granted exclusive rights to specific products/promotions that another consortium member produces/sells.

2. On November 21, 1989, the institution responded to the requester as follows:

> The Preferred Supplier Rights Agreements... set out the specific product rights held by each Consortium member. We do not have any

> records on arrangements between Consortium members whereby one Consortium member is granted exclusive rights to specific products that another Consortium member produces or sells.

3. On November 29, 1989, the requester appealed the head's decision to this office, and stated:

> Letters previously provided to consortium members do lay out specific product exclusivity, and waive other members right to this area where they have a product. (eg Bell-CNR, or fruit drinks under Coke - also Weston has fruit drinks). I want the data not between members but from SkyDome to members on product exclusivity.

4. Upon assignment of the file, the Appeals Officer contacted the appellant to determine whether clarification of the subject matter of the appeal would be helpful. The appellant explained that the records which he had requested are letters of agreement between members of the Consortium and the Stadium Corporation, and not between the members themselves. These letters of agreement complement but are not the same as the Preferred Supplier Rights Agreements. The letters are sometimes covering letters to the Preferred Supplier Rights Agreements, and they sometimes amend the Agreements, or clarify the terms. Some of the letters resolve later arising conflicts. They have been issued from 1986 to the present. The appellant stated that he already has copies of the letters from 1986 to 1988. He would like copies of the letters from 1988 to the present

and also any letters amending the terms of the 1986 to 1988 letters.

5. The Appeals Officer conveyed this information as to the scope of the request to the institution. The institution issued a reformulated response to the request on February 19, 1990, as follows:

> ...your request for access was for letters of agreement between Stadium Corporation of Ontario Limited and Consortium members that amend or clarify Preferred Supplier Rights Agreements.
>
> The documents will not be disclosed as:
>
> Subsection 17(1) - the record reveals trade secrets or scientific, technical, commercial, financial, or labour relations information, supplied in confidence implicitly or explicitly, where disclosure could reasonably be expected to,
>
> i) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> ii) result in similar information no longer being supplied to the Corporation where it is in the public interest that similar information continues to be so supplied; or
>
> iii) result in undue loss or gain to any person,

> group, committee or financial institution or agency.
>
> Subsection 18(1)(a) - It contains trade secrets or financial commercial, scientific or technical information that belongs to StadCo and has monetary value or potential monetary value.
>
> Subsection 18(1)(c) - The record contains information where disclosure could reasonably be expected to prejudice the economic interests of StadCo or the competitive position of StadCo.
>
> Subsection 18(1)(d) - The record contains information where the disclosure could reasonably be expected to be injurious to the financial interest of StadCo.
>
> Subsection 18(1)(e) - The record contains positions, plans, procedures, criteria or instructions to be applied to negotiations carried on or to be carried on by or on behalf of StadCo or the Government of Ontario.

6. The appellant confirmed with the Appeals Officer that he wished to appeal this reformulated decision.

7. The following records which are the subject of this appeal were forwarded by the institution to the Appeals Officer - "copies of Supplier Rights letters since 1988 and copies of letters amending the Supplier Rights terms of the 1986 to 1988 letters."

8. By letter dated April 22, 1990, the institution wrote to this office and stated that it was concerned that some of the records at issue in this appeal might also be the

subject of another appeal. The matter was clarified and as a result, the institution indicated that it wished to deal with one other record in the context of this appeal. The additional record is a Supplier Rights letter to Bitove Corporation, dated June 1988. The appellant was notified and acquiesced in the decision to include the record in this appeal.

9. Settlement was not achieved in this appeal and the matter proceeded to inquiry. By letters dated July 24, 1990, the institution, the appellant and the nine corporations (the affected parties) whose interests might be affected by the outcome of the appeal were notified that an inquiry was being conducted to review the decision of the institution. The Notice of Inquiry was accompanied by a report prepared by the

Appeals Officer. This report is intended to assist the parties in making their representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal and sets out questions which paraphrase those sections of the Act which appear to the Appeals Officer, or any of the parties, to be relevant to the appeal. This report indicates that the parties, in making representations, need not limit themselves to the questions set out in the report.

10. Written representations were received from the appellant, the institution and five of the affected parties. I did not receive representations from the four other affected parties who had been notified of the inquiry. I have considered all representations in making this Order.

The issues arising in this appeal are as follows:

A. Whether the head properly applied the mandatory exemption provided by section 17 of the Act.

B. Whether the head properly applied the discretionary exemption provided by section 18 of the Act.

C. If the answer to either of Issues A or B is in the affirmative, whether any part of any of the records could reasonably be severed under subsection 10(2) of the Act, without disclosing information that falls under an exemption.

Section 53 of the Act provides that the burden of proof that a record or part thereof falls within one of the specified exemptions in this Act lies with the head of the institution. It is the head's obligation to establish the proper application of the exemptions provided by section 18. With respect to the section 17 exemption, the affected parties resisting disclosure share with the institution the onus of proving that this exemption applies to the relevant records.

The records at issue in this appeal are as follows:

1. Letter from SkyDome to Bitove Corporation, June 14, 1988
2. Letter from SkyDome to Wardair Canada Inc., May 10, 1989
3. Letter from SkyDome to Nestle Enterprises Limited, February 15, 1989
4. Letter from SkyDome to the Toronto Sun, February 15, 1989
5. Letter from SkyDome to The Sports Network, February 15, 1989
6. Letter from SkyDome to BCE Inc., February 15, 1989
7. Letter from SkyDome to Controlled Media Communications Inc., July 10, 1989

8. Letter to SkyDome from Controlled Media Communications Inc. and Sun Controlled Ventures, May 19, 1989
9. Letter from Ainsworth Electric Co. Ltd. and Ainsworth Investments, Inc. to SkyDome, December 11, 1989
10. Consent signed by "Members Liaison Person", August 15, 1989 (re: Ainsworth Electric Co. Ltd., Ainsworth Investments Inc. and SkyDome).

"Schedule "A" is an attachment to a number of the records (Records 1 - 6) and consists of the institution's preferred supplier status rules of procedure.

ISSUE A: Whether the head properly applied the mandatory exemption provided by section 17 of the Act.

The head has claimed that subsections 17(1)(a),(b), and (c) apply to all of the records.

Subsections 17(1)(a),(b), and (c) of the Act provide 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;

At page 4 of Order 36 (Appeal Number 880030), dated December 28, 1988, former Commissioner Sidney B. Linden set out the three part test which must be satisfied in order to meet the requirements of subsection 17(1):

> 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 must give rise to a reasonable expectation that one of the types of injuries 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) claim invalid.

As stated earlier in this Order, the institution and the affected parties resisting disclosure share the burden of proof in any claims for exemption under section 17.

After examining the records in detail and considering the representations of all parties, I have determined that the records can be divided into two basic categories - those letters which constitute agreements between the institution and an affected party (Records 1 - 7, and Schedule "A"), and those

letters from affected parties addressed to the institution regarding arrangements made by the affected parties (Records 8 - 10).

Leaving aside the first part of the test for exemption under subsection 17(1), I have concluded that Records 1 - 7 and Schedule "A" do not meet the second part of the three part test for exemption under subsection 17(1) - that is, they do not contain information which was supplied to the institution. The information contained in these records was not, in my view, "supplied" by the affected parties to the institution within the meaning of subsection 17(1). In each of the above-noted records the information was included in the record as a result of negotiations between the institution and the affected parties, and does not include information which was supplied by the affected parties.

Further, as I have previously stated, I will find that information contained in a record would "reveal" information "supplied" by an affected party, within the meaning of subsection 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution [see Order 203 (Appeal 890131), dated November 5, 1990 at p.13]. In the circumstances of this appeal, I am not satisfied that disclosure of the records would reveal information that had been supplied to the institution by the affected parties during the course of the negotiations. Therefore, I find that Records 1 - 7 and Schedule "A" do not satisfy the test for exemption pursuant to subsection 17(1).

I will now consider the remaining records for which the subsection 17(1) exemption has been claimed.

Record 8 is a letter addressed to the institution from two affected parties, requesting the institution's consent to an arrangement between the two affected parties. The letter has been signed by both affected parties, and the institution has also signed it, indicating its consent to the arrangement. Applying the tests for exemption under section 17, I find that the information contained in this record qualifies as commercial information. It is clear that the letter, and the information contained therein, was supplied to the institution by the two affected parties. One of the affected parties, in its representations submits that "[a]t all times, [the affected party] expected that such information and these documents would be treated confidentially as they would be in any similar commercial dealings." The institution also addressed this expectation when it stated:

> It was not intended by any party that this information, particularly in the form of the terms of agreements between the parties, would be disclosed to any third party whatsoever.
>
> Negotiations leading up to the consummation of the agreements which are the records in this appeal and the supply of information in connection therewith and contained therein were implicitly made in confidence between the parties to each record and their respective counsel. Such negotiations, supply of information and the resulting agreement are maintained in confidence as a matter of customary commercial practice to protect each party's business affairs and safeguard information and terms from the view of competitors.
>
> ...

> Further, in the case of Records 8 and 9, the information contained in these records was supplied in confidence to StadCo solely for the purpose of obtaining Stadco's consent to the commercial arrangements made between two private entities...

In view of the foregoing, I am satisfied that the information contained in Record 8 was supplied in confidence to the institution, and the record therefore meets the second part of the test for exemption.

With respect to the third part of the test, which addresses the harms which could be reasonably expected to result from the disclosure, the institution and the affected parties claim that prejudice could be expected to result from disclosure under the three enumerated types of harm in subsections 17(1)(a), (b) and (c). The institution submits that harm to its own competitive position would result from disclosure. However, in my view, the scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed by a claim for exemption pursuant to section 18 of the Act, and not pursuant to section 17. Accordingly, I will consider the institution's representations relating to harm to its competitive or financial position under section 18 - Issue B.

The institution goes on to argue as follows:

> ...competitive position and contractual negotiations of the other parties named in the records ... can reasonably be expected to be prejudiced significantly. These parties are major Canadian private business enterprises who have made significant investment in their arrangements with Stadco. Their competitive ability to negotiate with third parties including prospective purchasers of goods and services provided

> by them in the ordinary course of their businesses would be prejudiced and jeopardized by the disclosure of the commercial and financial terms of their arrangements with Stadco.

One of the affected parties argued that disclosure of Record 8 would result in the harm set out in subsection 17(1)(a) in that its

competitive position in negotiating with parties desiring to acquire certain rights held by it would be jeopardized by disclosure. The affected party went on to say:

> Disclosure would also prejudice [the affected party]'s competitive ability to negotiate with third parties, including prospective purchasers of the various services commonly provided by [the affected party] and prospective vendors of the various rights commonly acquired by [the affected party], by revealing financial information that can be used to calculate revenues accruing to [the affected party] and accordingly the ability of [the affected party] to pay such third parties or agree to certain contractual terms with such third parties; ...
>
> ...
>
> By revealing the Disclosures, competitors of [the affected party] will be able to deductively calculate [the affected party]'s operating margins and will enjoy a distinct advantage in any subsequent attempt to enter into contractual relations with prospective third-party purchasers of products ordinarily provided by [the affected party] or prospective third party vendors of rights ordinarily acquired by [the affected party].

The affected party submitted that the harm contemplated by subsection 17(1)(c) would also ensue as:

> ... significant prejudice to the competitive position and interference with the contractual or other negotiations of any or all of [the institution and the affected parties] is likely to result in undue loss of a financial nature to any or all of them to the extent of such prejudice. Such loss would be as a direct result of disclosure of the Document in the event that the information comes into the possession of competitors and is used in the course of negotiations, ... with a potential sponsor or advertiser.

The information contained in Record 8 relates to the arrangements between two parties for a transfer of rights and liabilities. The record sets out various arrangements and obligations in some detail. In my view, it is reasonable to expect that prejudice to the contractual negotiations of the affected parties could result from disclosure of the record. Accordingly, I find that the affected party has satisfied all three parts of the test for exemption under subsection 17(1)(a) for Record 8, and I uphold the decision of the head not to release it.

Records 9 and 10 also relate to the arrangements between two affected parties. I find that the information contained in these records is commercial information, and was supplied to the institution in confidence. I have not received any representations from the affected party (a corporation and its holding company), although the affected party was notified of the appeal and afforded the opportunity to make representations. Thus, I must rely on the representations of the institution

respecting the prejudice to be expected from disclosure of the records.

The representations offered by the institution have been set out above in my discussion of Record 8.

At page 7 of Order 36 (Appeal Number 880030), Commissioner Linden discussed the kind of evidence which must be presented in order to meet the third part of the section 17 test:

> ... in order to satisfy the Part 3 test, the institution and/or third party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harm described in subsections 17(1)(a)-(c) would occur if the information was disclosed. [emphasis added]

With respect to the application of subsections 17(1)(a) and (c) to these particular records, I find that the evidence presented by the institution on behalf of the affected party is neither detailed nor convincing. The records contain very little information as to the terms and conditions of the relationship between the affected party and the institution. I have reviewed the records and find it difficult to see, without more evidence, how any potential negotiator could benefit from the meagre facts contained in Records 9 and 10. Therefore, in my view, the institution has not satisfied the third part of the test for exemption under subsections 17(1)(a) and (c).

With respect to the argument regarding subsection 17(1)(b) - that similar information would no longer be supplied to the institution - it would appear from the records that the

information was supplied to the institution pursuant to a contractual obligation. I have not been provided with any evidence to show that a breach of this contractual obligation to inform the institution of new arrangements is contemplated or reasonably expected. I find, therefore, that the institution has not satisfied the third part of the test for exemption under subsection 17(1)(b).

In summary, I find that only Record 8 satisfies the test for exemption under section 17 of the Act, and I uphold the decision of the head not to disclose it.

ISSUE B: Whether the head properly applied the discretionary exemption provided by section 18 of the Act.

The head has claimed that subsections 18(1)(a), (c), (d) and (e) apply to all of the records at issue in this appeal. Since I have found that Record 8 is exempt from disclosure under section 17, I will confine my discussion to the remaining records.

Subsections 18(1)(a), (c), (d) and (e) provide as follows:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Ontario or an institution and has monetary value or potential monetary value;
>
> (c) information where the disclosure could reasonably be expected to prejudice the economic interests

> of an institution or the competitive position of an institution;
>
> (d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario;

I will deal with each of the subsections of section 18 claimed by the head in turn.

Subsection 18(1)(a)

At page 21 of Order 87 (Appeal Number 880082), dated August 24, 1989, Commissioner Linden set out the test which must be met in order to meet the requirements of subsection 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 or an institution; and
>
> 3. has monetary value or potential monetary value.

I find that each of the records contains commercial information, and therefore satisfies the first part of the test. I find that the information belongs to the institution, as well as to the affected parties. With respect to the third part of the test, whether the information has monetary value or potential monetary value, the institution submits:

> The information has monetary value or potential monetary value in that it can be sold to competitors of these parties and Stadco for their use in negotiations with Stadco and these parties... The information also has monetary value or potential monetary value to the competitors because... the information can be used to extract more beneficial financial and commercial terms to the competitor.

In my view, this argument centres on the economic interests of the institution and the effect that disclosure would have on the institution's ability to competitively negotiate with other parties. Accordingly, I will address this argument in my consideration of subsection 18(1)(c).

The institution goes on to argue as follows:

> In addition, as a result of the high profile of the SkyDome and its business affairs in the community, and the historical interest of the media in publishing information regarding Stadco's commercial affairs, 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 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 information itself has monetary value. As well, the institution has no intention of publishing or disseminating the requested information in a way that would result in some form of monetary payment to the institution. Accordingly, subsection 18(1)(a) does not apply.

Subsections 18(1)(c) and (d)

In order to qualify for exemption under subsection 18(1)(c), the institution must show that disclosure could reasonably be expected to prejudice the economic interests or competitive position of an institution. Under subsection 18(1)(d), it must be reasonably expected that disclosure could be injurious to the financial interests of the Government of Ontario or to the ability of the Government of Ontario to manage the economy.

The institution has raised the same argument under both of these subsections - that disclosure would interfere with future negotiations by the institution. The institution's position is that disclosure of the records would prejudice its negotiations with other corporations who would use the terms and conditions disclosed in the records to press for better conditions for themselves. The institution submits that it has already suffered prejudice because of an earlier disclosure of a contract with a major partner. Subsequent negotiations with other entities were interfered with because the entities conducting the later negotiations pressed the institution for

terms and conditions similar to those contained in the contract which was disclosed.

I have examined the records at issue, and find that only Record 7 contains sufficient detail respecting the terms and conditions of the affected party's relationship with the institution to be of any value to a subsequent negotiator with the institution. Records 1 - 6 are letters to affected parties confirming agreements with the institution. The letters set out the basic services or products to be provided by the affected parties to the institution, but they do not contain information as to the terms and conditions under which the products or services will be supplied. Schedule "A" is attached to Records 1 - 6 and identifies the parties to the agreement, defines terms contained in the agreement, lists the rights of the members, and sets out the procedure for the exercise of the first refusal right. In my view, these records are sufficiently general in nature as to generate little interference with the conduct of future negotiations. Similarly, Records 9 and 10 contain very little detail as to terms and conditions. I note that the affected party respecting Record 2 wrote to this office and stated that it had no objection to the release of the record pertaining to it, and the affected parties with respect to Records 2, 3, 4, 5, 6, 9 and 10 did not respond to the Notice of Inquiry by submitting representations as to whether or not the records should be disclosed.

Record 7 differs in that it contains considerably more detail regarding the terms and conditions of the "parent" agreements with the institution. Accordingly, I find that the disclosure of this record could interfere with the institution's ability to

negotiate with other parties, and uphold the institution's decision not to disclose it.

Subsection 18(1)(e)

In order to qualify for exemption under subsection 18(1)(e), the institution must establish the following:

1. the record must contain positions, plans, procedures, criteria or instructions; and
2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and
3. the negotiations must be carried on currently, or will be carried on in the future; and
4. the negotiations must be conducted by or on behalf of the Government of Ontario or an institution.

The institution submits that it is either now in the process of renegotiating with some of the affected parties, or that future renegotiations are contemplated:

> Records 1 through 7 disclose the positions and criteria of terms applicable to present arrangements that are to be applied to continuing negotiations for more complete terms and the criteria regarding the transfer of the arrangement in the event that ownership of the stadium is transferred, ...
>
> The other positions and criteria contained in the records are in fact being applied to negotiations by Stadco that are presently under way and which will be continuing with those parties... regarding more particular terms of their arrangements, namely Records 1, 4, 5, 9, 10 and 8.

I have examined those remaining records which I have not found to be subject to any other claimed exemption, that is Records 1, 2, 3, 4, 5, 6, 9, 10, and Schedule "A", and I do not find therein any information which has been demonstrated to be "positions, plans, procedures, criteria or instructions" to be applied to negotiations. If some of the very general terms set out in the records are to be continued in any future contracts, the institution has failed to indicate which information could be considered to be "criteria", or "positions" to be applied to the negotiations, and why these terms should be considered to be "criteria".

I find therefore, that the institution has not satisfied the first part of the test for exemption under subsection 18(1)(e) for the remaining records, and I order their disclosure to the appellant.

Section 18 is one among several discretionary exemptions contained in the Act. After deciding that certain records fall within the scope of an exemption, the head is obliged to consider whether it would be appropriate to release the records, regardless of the fact that they, in the head's opinion, qualify for exemption. The institution has provided me with representations regarding the factors considered in exercising discretion not to disclose Record 7. Upon review of these representations, I find nothing improper in the exercise of the head's discretion, and I would not disturb it on appeal.

ISSUE C: If the answer to either of Issues A or B is in the affirmative, whether any part of any of the records could reasonably be severed under subsection 10(2) of the Act, without disclosing information that falls under an exemption.

Subsection 10(2) provides as follows:

> Where an institution receives a request for access to a record that contains information that falls within one of the exemptions under sections 12 to 22, the head shall disclose as much of the record as can reasonably be severed without disclosing the information that falls under one of the exemptions.

I have found that Record 8 qualifies for exemption under section 17, and that Record 7 qualifies for exemption under section 18. I have reviewed those records which I have found to be legitimately withheld from disclosure, and I find that it is not possible to sever any part of the records without disclosing the exempt information. Accordingly, I uphold the decision of the head to withhold Records 7 and 8 in their entirety.

ORDER:

1. I uphold the head's decision not to disclose Record 8 pursuant to section 17 of the Act.

2. I uphold the head's decision not to disclose Record 7 pursuant to section 18 of the Act.

3. I find that Records 1, 2, 3, 4, 5, 6, 9, 10 and Schedule "A" do not qualify for exemption under section 17 or section 18, and I order their disclosure to the appellant.

4. I order the head not to disclose Records 1, 2, 3, 4, 5, 6, 9, 10, and Schedule "A" 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.

5. 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:
Tom A. Wright
Assistant Commissioner

January 31, 1991
Date