



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

ORDER P-228

Appeal 900038

Stadium Corporation of Ontario



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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 141.

INTRODUCTION:

On June 9, 1989, the requester wrote to Stadium Corporation of Ontario (the "institution") requesting access to "Board minutes from Stadium Corporation of Ontario meetings, June 1988 to present".

The institution's Freedom of Information and Privacy Co-ordinator (the "Co-ordinator") responded to the request by providing partial access to the requested records. Access to parts of the records was denied pursuant to sections 13, 17, 18 and 19 of the Act. The requester appealed the head's decision to sever and withhold parts of the requested records.

The records consist of the minutes of four meetings of the institution's Board of Directors dated June 15, 1988; August 11, 1988; August 13, 1988; and November 3, 1988. A total of 43 severances were made to the records and withheld from disclosure.

Because of the number and nature of the exemptions claimed by the institution to deny access to the requested records, the

appellant and the institution requested that the matter proceed to inquiry.

On January 23, 1990, former Information and Privacy Commissioner Sidney B. Linden issued Interim Order 141. At that time he ordered the institution to take the following action:

1. Release to the appellant the severances listed in Appendix "B" which severances the institution has indicated may now be released, within twenty (20) days of the date of this Interim Order and advise me in writing within five (5) days of the date of disclosure of the severances, of the date on which disclosure was made.
2. Release severances A, F, G, I and K (identified in Appendix "A") for which I have found no exemptions to be applicable within twenty (20) days of the date of this Interim Order and advise me in writing within five (5) days of the date of disclosure of the severances, of the date on which disclosure was made.
3. Provide me with representations as to the discretion exercised under subsections 13(1) and 18(1) in respect of the exempt portion of severance "H" and all of severance "L" respectively within twenty (20) days of the date of this Interim Order.
4. Notify the third parties affected by this appeal of the severances made pursuant to section 17 of the Act (severances B, C, D, E, H, J, M, N and O), providing them with a copy of the severance in question within twenty (20) days of the date of this Interim Order. Copies of these notices are to be sent to me within five (5) days of the date on which they are provided to the third parties. I will contact these third parties directly to elicit representations from them as to the application of section 17 of the Act.

For ease of reference, I will use the same letters used in Interim Order 141 to identify each severance which remains at issue. Appendix "A" to this Order is a list of severances for which section 17 was claimed by the head and for which the head sent out notices pursuant to provision 4 of the Interim Order. Appendix "B" to this Order lists the severances for which the institution was ordered to make representations as to its exercise of discretion pursuant to provision 3 of the Interim Order.

BACKGROUND TO THIS ORDER:

Subsequent to the issuance of the Interim Order and prior to the release of any of the records to the appellant, counsel for the institution wrote to Commissioner Linden claiming that section 17 was applicable to severances F and K, and that the applicability of this section had not been considered by the former Commissioner in his Interim Order. In Commissioner Linden's view it was far from clear from the representations made by the institution that this section of the Act had been claimed as a possible ground for exemption of severances F and K. However, because of his concern for the rights of the third parties who had not been notified of the appeal, the former Commissioner was prepared to consider the application of section 17 to severances F and K and, accordingly, asked the institution to follow the requirements of provision 4 of the Interim Order in regard to these two severances.

On February 9, 1990, the institution provided the appellant with access to the severances listed in provision 1 of Interim Order 141. It also released severances A, G, I and J (identified in provision 2 of Interim Order 141) at that time. For the reasons

previously noted, the institution did not release the information contained in severances F and K.

In response to provision 3 of the Interim Order, counsel for the institution provided written representations concerning the head's exercise of discretion under subsections 13(1) and 18(1) in respect of the exempt portion of severance H and all of severance L respectively.

Because of the resignation of Commissioner Linden and the fact that I would be deciding the remaining issues in this appeal, I granted both the institution and the appellant the opportunity to submit

further representations on the applicability of subsections 13(1) and 18(1) to the relevant records including the reasons for the exercise of discretion. No further representations were received from either party.

On February 7, 8 and 9, 1990, the institution notified nine third parties whose interests might be affected by this appeal (the "affected parties") of the severances made pursuant to section 17 of the Act. By letter dated February 22, 1990, this office invited the affected parties to make representations as to the application of section 17 of the Act.

Seven of the affected parties submitted written representations. Of these seven, five requested that the Commissioner uphold the head's decision to deny access to severances C, D, E, F, H, K and O. The other two had no objection to the disclosure of severances B, M and N. The two remaining affected parties were

contacted directly by this office by telephone. Neither objected to the disclosure of the severances affecting their interests, severances M and N.

PRELIMINARY ISSUE:

In his representations, the solicitor for one of the affected parties asserts that as the information contained in severance D relates to a federal Crown corporation, it is "not affected by" the Act. Having reviewed the information I do not agree with this assertion.

Severance D consists of an entry in the minutes of a meeting of the institution's Board of Directors. The entry indicates that board members were advised that an analysis of a particular project had been terminated based on statements made by the affected party at a previous board meeting. As I see it, while the information in

issue makes reference to the affected party, it is not the information of that party. I am also satisfied that the information was not given by nor acquired from the affected party. The information is that of the institution, which information is properly subject to the Act.

In conclusion, as I am of the view that the information contained in this severance is that of the institution, in my opinion a claim for exemption under section 17 is not appropriate.

BURDEN OF PROOF:

Section 53 of the Act provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions of the Act lies with the head of the institution. Affected parties who rely on the exemption provided by section 17 of the Act to resist disclosure of certain parts of the record share with the institution the onus of proving that this exemption applies to the record or parts of it.

ISSUES/DISCUSSION:

The issues that remain to be decided are as follows:

- A. Whether the head properly applied the discretionary exemptions provided by subsections 13(1) and 18(1) in withholding the exempt portion of severance H and all of severance L.
- B. Whether severances B, C, E, F, H, K, M, N and O contain information which falls within the mandatory exemptions provided by subsections 17(1) (a), (b) and (c) of the Act.

ISSUE A: Whether the head properly applied the discretionary exemptions provided by subsections 13(1) and 18(1) in withholding the exempt portion of severance H and all of severance L.

I have reviewed the institution's original submissions concerning the application of subsections 13(1) and 18(1) to the relevant records. I have also examined its representations as to the basis on which the head exercised his discretion not to disclose them to the appellant.

I agree with the findings of former Commissioner Linden with regard to the applicability of subsections 13(1) and 18(1) to the paragraph found on page 10 of the minutes of the August 11, 1988 meeting (part of severance H) and severance L.

It is my view that where the head of an institution has exercised his or her discretion in accordance with established legal principles, the exercise of discretion should not be disturbed on appeal. In this case, I am satisfied that the head has properly exercised his discretion. Accordingly, I uphold the head's decision to exempt part of severance H and all of severance L under subsections 13(1) and 18(1) respectively.

ISSUE B: Whether severances B, C, E, F, H, K, M, N and O contain information which falls within the mandatory exemptions provided by subsections 17(1) (a), (b) and (c) of the Act.

Subsections 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;

In previous Orders, former Commissioner Linden outlined the three part test which must be satisfied in order for a record to be exempt under subsections 17(1) (a), (b), or (c). In Order 36 (Appeal Number 880030), dated December 28, 1988, he stated the test 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) claim invalid.

In addition, Commissioner Linden has described the type of evidence that must be presented to satisfy Part 3 of the test. It must be "detailed and convincing, and 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" (See Order 36 supra at p.7).

I will examine the information contained in each severance in the context of each part of the section 17 test.

Part One

Severance B is a report on the status of negotiations being conducted between the affected party and the institution dealing with the affected party's supply of a product to the institution.

The first paragraph of severance C outlines a business arrangement between the third party and the institution. The nature of the revenue sharing agreement between the party and the institution is also described.

Paragraph two of severance C and severances E, F and K describe two proposals which the Board of Directors of the institution was considering to create and operate various facilities ancillary to the institution.

Severance H consists of several paragraphs. I have upheld the head's decision to exempt the paragraph found on page 10 of the minutes of the August 11, 1988 meeting pursuant to section 13 of the Act. As far as the remainder of this severance is concerned, the status of negotiations between the institution and the affected party are outlined, and three alternative settlements are described.

Severance M describes the status of negotiations being carried on between two of the affected parties, the outcome of which would affect the development work being conducted by the institution.

Severance N describes proposed construction projects ancillary to the stadium development.

Severance O describes a business arrangement between the institution and the affected party, and includes information regarding commissions and revenue.

Based on my review of the records and the submissions of the affected parties, I am satisfied that the information contained in the above severances consists of commercial information and therefore satisfies the first part of the three part test for exemption under section 17.

Part Two

The second part of the section 17 test raises the issue of whether the information was "supplied in confidence implicitly or explicitly".

Counsel for one of the affected parties submits that the information contained in the first paragraph of severance C was implicitly supplied in confidence for two reasons:

- i) It was supplied during and in the course of and as part of negotiations between the Institution and the [affected party] of an agreement to govern the [affected party's] proposed use of the SkyDome facility, which negotiations were carried out in confidentiality amongst representatives of

the Institution, the [affected party], and their respective legal counsel; and

- ii) The information is of a commercially sensitive nature to the [affected party] as it reveals a source of revenue of the [affected party] and what the [affected party] were prepared to give up in exchange therefor, and would not ordinarily be supplied by any of them to any member of the public

Counsel for two of the affected parties submits that the parties had to reveal the information contained in paragraph two of severance C and severances E, F, and K in order to negotiate the terms of the financing arrangements. As well, counsel submitted that the severances contain information regarding the progress of the negotiations between the two parties and the institution and thus reveal information about the viability of the proposal and the concerns which the parties had to address. Counsel further submitted that:

Business ethics demand that information obtained during negotiations of this type be kept confidential, to preserve the integrity of the negotiation and to protect the Proposal from being used by competitors of [one of the affected parties] or [the other affected party].

In regard to the information contained in severance H, counsel for the affected party submitted the following:

...We further wish to emphasize that all of such commercial and financial information was supplied and discussed by [the affected party] and Stadco in confidence ...

In his representations on the information contained in severance O, the affected party does not address the second part of the section

17 test. He merely paraphrases the Act and refers to "commercial and financial information supplied in confidence ..." without indicating the basis for this conclusion.

Consent to disclose the information contained in severances B, M and N was received from the affected parties.

In its representations, the institution merely asserts that the information in each of the severances was supplied to the institution in confidence either implicitly or explicitly without providing any supporting evidence.

The severances at issue in this appeal were made to the minutes of meetings of the institution's Board of Directors. In each case, the information reflects the status of negotiations between the institution and the affected parties. In Order 87 (Appeal Number 880082), dated August 24, 1989, Commissioner Linden addressed the issue of whether information which appears in a record as a result of negotiations between the parties falls within the meaning of the word "supplied" in the second part of the three-part test. On page 8 of that Order he stated:

The information contained in these severances was included in the contract as a result of negotiations between the institution and the affected party, and was not "supplied" by the affected party as envisioned by section 17. Although the negotiations were presumably based in part on information "supplied" by the affected party, this is not the same information which has been severed in this appeal, and, in my view, the requirements of the second part of the test have not been satisfied.

I agree with this analysis. After examining the records and considering the representations of all parties, I have concluded that the records at issue in this appeal do not, in my view, contain information which was "supplied" by the affected parties to the institution within the meaning of subsection 17(1). The information was included in the records 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, I have previously stated that 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 information contained in the severances would reveal information that had been supplied to the institution by the affected parties during the course of the negotiations. Accordingly, I find that the information at issue in this appeal does not satisfy the second part of the test for exemption under section 17 and I do not uphold the institution's decision to exempt the information contained in severances B, C, E, F, H, K, M, N and O.

As the affected parties and the institution have failed to satisfy the second part of the test, it is not necessary to consider the third part of the test.

ORDER:

1. I uphold the institution's decision not to disclose the paragraph found on page 10 of the minutes of the August 11, 1988 meeting and severance L.
2. I order the institution to disclose to the appellant severances B, C, D, E, F, H, K, M, N, and O.
3. I further order the institution not to disclose the severances 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 the affected parties 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 institution or my office within this thirty (30) day period, I order that the information contained in the severances listed in provision 2 of this Order be disclosed within thirty-five (35) days of the date of this Order. The institution is further ordered to advise me in writing within five (5) days of the date of disclosure of the date on which disclosure was made.

Original signed by: _____
Tom A. Wright
Assistant Commissioner

_____ April 17, 1990
Date

APPENDIX A

ORDER P-228

The following is a list of severances for which section 17 was claimed by the head and for which the head sent out third party notices

Board of Directors Minutes, June 15, 1988

- (B) Page 7, paragraph 5, second sentence
- (C) Page 8, paragraphs 7 and 8 and continuing to the top of page 9
- (D) Page 9, paragraph 3
- (E) Page 10, paragraph 3

Board of Directors Minutes, August 11, 1988

- (F) Page 8, paragraph 4
- (H) Page 9, paragraph 7, second sentence and continuing to end of page 10

Board of Directors Minutes, October 13, 1988

- (J) Page 9, paragraph 2
- (K) Page 9, paragraph 5 and continuing to page 10, paragraph 2 as well as page 14, paragraphs 4 and 5

Board of Directors Minutes, November 3, 1988

- (M) Page 3, paragraph 4
- (N) Page 4, paragraphs 2 and 6
- (O) Page 4, paragraph 4 first sentence only

APPENDIX B

ORDER P-228

The following is a list of severances for which the institution was ordered to make representations as to the exercise of discretion under subsections 13(1) and 18(1) of the Act

Board of Directors Minutes , August 11, 1988

(H) Page 9, paragraph 7, second sentence and continuing to end of
page 10 [exempt portion only]

Board of Directors Minutes, November 3, 1988

(L) Page 2, paragraph 6, as well as pages 5 and 6 and
continuing to page 7, paragraph 3