



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

ORDER P-288

Appeal 900283

Stadium Corporation of Ontario Limited



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O R D E R

BACKGROUND:

The Stadium Corporation of Ontario Ltd. (the "institution") received a request for access to the Board of Directors meeting minutes for the period of October 15, 1989 through May 2, 1990.

The institution provided partial access to the records, subject to severances pursuant to sections 17(1)(a), 18(1)(a), (c), (d), (e), (f), and (g), 19, and 22(a) and (b) of the Act.

The requester appealed the institution's decision and notice of the appeal was sent to the institution and the appellant.

In accordance with our normal practice, the Appeals Officer assigned to the case obtained a copy of the records, which are described as follows:

1. Minutes of a meeting of the Directors of Stadium Corporation of Ontario Limited, December 14, 1989 (Record 1);
2. Minutes of a meeting of the Directors of Stadium Corporation of Ontario Limited, January 18, 1990 (Record 2).

During the course of mediation, the Appeals Officer determined that the December meeting was a "quarterly" meeting and the January meeting was a "special" meeting. The Appeals Officer also determined that a quarterly meeting had been held in the spring of 1990, but that formal minutes for that meeting were not prepared until after the request was submitted. The

appellant was advised of this fact and has made a separate access request for these minutes.

Because mediation was not possible, the matter proceeded to inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution.

Enclosed with the Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making representations concerning the subject matter of the appeal. The Appeals Officer's Report outlines the facts of the appeal, and offers the parties an opportunity to provide written representations. Representations were received from the institution, but not the appellant. In its representations, the institution withdrew exemptions claimed under sections 18(1)(f), 19, 22(a) and (b), and raised section 13(1) as a new exemption.

During the course of this appeal, the institution released certain severances in Records 1 and 2. The severances which remain at issue in this appeal are:

Record 1: 6th paragraph on page 2; 5 sentences on page 3; and first full paragraph on page 5.

Record 2: 5 paragraphs on page 4; four words on page 4; last five paragraphs on page 5; pages 6 and 7 in their entirety; and first paragraph on page 8.

The institution has relied on all exemptions for each severance.

PRELIMINARY ISSUE:

In its representations, the institution refers to the possible application to section 17(1)(a) of the Act. Specifically, it states:

...[M]atters such as the [information contained in the severance] are to be kept confidential in order to enable the Institution to conduct its business affairs and negotiate potential settlements with such third parties without the threat that the information may later be revealed and used by such third parties to everyone's detriment.

I have reviewed the contents of the severances, together with the representations provided by the institution, and, in my view, section 17(1)(a) is not applicable. The institution maintains that disclosure of the record would result in harm to its own ability to negotiate with third parties and thereby affect its capability to "conduct its business affairs". Potential harm to the institution's own economic or competitive interests is properly addressed in the context of section 18 of the Act, which will be considered in my discussion of Issue B.

Therefore, the exemptions at issue in this appeal are sections 13(1) and 18(1)(a), (c), (d), (e) and (g).

ISSUES:

- A. Whether the discretionary exemption provided by section 13(1) applies to any severed parts of the records.
- B. Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d), (e) or (g) apply to any severed parts of the records.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the discretionary exemption provided by section 13(1) applies to any severed parts of 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.

"Advice", for the purposes of subsection 13(1) of the Act, 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]

I have examined all severances and, in my view, they contain information that is properly characterized as factual information, rather than advice. The severances describe decisions taken by the Board, not suggested courses of action.

Accordingly, I find that the severances do not qualify for exemption under section 13(1) of the Act.

ISSUE B: Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d), (e) or (g) apply to any severed parts of the records.

The relevant provisions of section 18 read 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;

...

(g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue

financial benefit or loss to a
person;

...

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

I will discuss each section separately:

Section 18(1)(a)

As stated above, section 18(1)(a) exempts classes or types of records based on their content.

Order 87 outlines a three-part test which must be met in order to qualify for exemption under section 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.

Turning first to the third part of the test, the institution submits that the information contained in the severances has monetary value or potential monetary value, because "... it can be sold to or used by competitors to attempt to enter into negotiations regarding the subject matter referred to". It also submits that the information could "... be sold to the media for publication and thereby has potential monetary value". Based on my review of the severances and consideration of the institution's representations, I am not satisfied that the information contained in the severances has either monetary or potential monetary value, and I find that these severances do not qualify for exemption under section 18(1) (a) of the Act.

Section 18(1) (c)

To qualify for exemption under section 18(1) (c), the institution must successfully demonstrate a reasonable expectation of prejudice to the economic interest or the competitive position of an institution arising from disclosure of the severances.

[Order 87]

In its representations, the institution makes submissions of a general nature, stating that the consequences of disclosure of the severances would detrimentally affect the institution's ability to arrange future financing, and would prejudice its ability to

negotiate and resolve claims. No details are provided to support the institution's position.

In order to qualify for exemption under section 18(1) (c), the institution must provide detailed and convincing evidence that

disclosure of the information contained in the severances could reasonably be expected to prejudice the economic interests or competitive position of an institution. Commissioner Tom Wright considered the meaning of the words "could reasonably be expected to" in the context of section 14(1) of the Act, and found that the expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason. [Order 188] In my view, section 18(1)(c) imposes a similar requirement with respect to the expectation of prejudice to the economic interests or competitive position of an institution.

Based on the representations provided by the institution and my independent review of the severances, I am not convinced that the severances contain information, the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of the institution. Therefore, I find that the severances do not qualify for exemption under section 18(1)(c).

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.

The institution submits that disclosure of the severances could have a negative impact on sale negotiations for the institution, and thereby result in financial hardship to the Government of Ontario. Again, no further details are provided to support this claim.

I have not been provided with the necessary "detailed and convincing" evidence to establish that the harm contemplated by section 18(1)(d) could reasonably be expected to occur should the information in the severances be disclosed. The institution bears the onus of proving that the harms envisaged by this subsection are present or reasonably foreseeable, and, in my view, they have not done so. Therefore, I find that the severed portions of the records do not qualify for exemption under section 18(1)(d) of the Act.

Section 18(1)(e)

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

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.

[Order 219]

The only submission made by the institution with respect to section 18(1)(e) is as follows:

"The severances reveal plans, positions and criteria to be applied to negotiations carried out on behalf of the institution".

This statement is not sufficient to establish the requirements of the section 18(1)(e) test, and I find that the severances do not qualify for exemption under this section.

Section 18(1)(g)

In order for a record to qualify for exemption under section 18(1)(g), the institution must establish that a record:

1. contains information including proposed plans, policies or projects; and
2. that disclosure of the information could reasonably be expected to result in:
 - i) premature disclosure of a pending policy decision, or
 - ii) undue financial benefit or loss to a person.

[Order 229]

The institution's representations point out that, in future, the institution may want to re-examine the long term financing proposal set out in the severances, and "... should this information be disclosed at this time, this could reasonably be expected to result in premature disclosure of such a decision". In my view, this situation is speculative, at best, and the

evidence provided by the institution is not sufficient to satisfy the requirements for exemption under section 18(1)(g).

In summary, I find that the exemptions provided by sections 18(1)(a), (c), (d), (e) and (g) of the Act to not apply to the severed records at issue in this appeal.

ORDER:

1. I order the head to disclose the severed portions of the records to the appellant.
2. 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.
3. In order to verify compliance with the provisions of this Order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to provision 1, upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ April 10, 1992