



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

ORDER 141

Appeal 890214

Stadium Corporation of Ontario



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I N T E R I M 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 a record under subsection 24(1) the right to appeal any decision of a head under the Act to the Information and Privacy Commissioner.

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

1. On June 9, 1989, the requester wrote to the Stadium Corporation of Ontario (the "institution") to request access to "Board minutes from Stadium Corporation of Ontario meetings, June 1988 to present."
2. On July 12, 1989, 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 for a fee in the amount of \$9.94. The institution had waived the costs of preparing the records for disclosure and charged for copying and shipping costs only. Access to parts of the records was denied pursuant to sections 13, 17, 18 and 19 of the Act.
3. On July 17, 1989, the requester wrote to me to appeal the head's decision to sever and withhold parts of the

requested records. The requester did not appeal the head's decision to charge a fee. I gave notice of the appeal to the institution and appellant on July 21, 1989.

4. Upon receipt of the appeal, the Appeals Officer assigned to this case obtained and reviewed a copy 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 and withheld from disclosure. Each of the 43 severances was made pursuant to subsection 18(1) of the Act. In addition, 11 of the severances were made pursuant to subsection 17(1) of the Act; four severances were made pursuant to subsection 13(1); and three severances were made pursuant to section 19 of the Act.

5. Given the number and nature of the exemptions claimed by the institution to deny access to the requested records, the Appeals Officer determined that a mediated settlement was unlikely. Both the appellant and the Co_ordinator were in agreement with this assessment and requested that the matter proceed to an inquiry.
6. By letters dated September 25, 1989, I gave notice to the institution and the appellant that I was conducting an inquiry to review the decision of the head. In accordance with my usual practice, 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 other parties, to be relevant to the appeal. Those sections of the Act paraphrased in the report include the exemption sections cited by the head in refusing access to a record or a part thereof. The report indicates that the parties, in making their representations to the Commissioner, need not limit themselves to the questions set out in the report.

7. Representations have been received from the institution and have been considered in making this Interim Order.

The issues arising in this appeal are as follows:

- A. Whether any information severed from the records and withheld from disclosure falls within the discretionary exemptions provided by subsections 18(1)(a), (c), (d), (e), (f) and (g) of the Act.
- B. Whether any information severed from the records and withheld from disclosure falls within the discretionary exemption provided by subsection 13(1) of the Act.
- C. Whether any information severed from the record and withheld from disclosure falls within the discretionary exemption provided by section 19 of the Act.
- D. Whether any information severed from the records and withheld from disclosure falls within the mandatory exemptions provided by subsections 17(1)(a), (b) and (c) of the Act.
- E. If the answer to either issue A, C or D is answered in the affirmative, whether the head properly exercised his discretion when denying access to the exempted information.

It is important to note at the outset that the purposes of the Act as outlined in subsections 1(a) and (b) are as follows:

1. The purposes of this Act are,
 - (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
 - (i) information should be available to the public,
 - (ii) necessary exemptions from the right of access should be limited and specific, and
 - (iii) decisions on the disclosure of government information should be reviewed independently of government; and
 - (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

Further, 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 in the Act lies with the head of the institution.

In its representations, the institution advised that certain severances could now be released, thereby reducing the number of severances at issue in this appeal. Attached to this Interim Order are two Appendices. Appendix "A" identifies each of the severances still at issue by a letter of the alphabet and its corresponding page and paragraph number from the records. Appendix "B" lists the severances by page and paragraph which the institution says can now be released.

Given that the severances which remain at issue in this appeal were all made pursuant to at least one of the subparagraphs of subsection 18(1) of the Act, I will deal with this exemption first.

ISSUE A: Whether any information severed from the records and withheld from disclosure falls within the discretionary exemptions provided by subsections 18(1) (a), (c), (d), (e), (f) and (g) of the Act.

Subsection 18(1) of the Act, reads as follows:

18.__(1) 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;
- (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;
- (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;

- (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
- (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 institutions. Subsections 18(1)(b), (c), (d) and (g) all take into consideration the consequences which would result to an institution if a record was released. Subsections 18(1)(a), (e) and (f) are all concerned with the form of the record, rather than the consequences of disclosure.

In its representations, the institution submitted a theoretical framework and argument in support of its position to deny access. The institution submitted that it,

...must compete openly and directly in the private marketplace. The fact that this Institution does not operate in a monopoly environment should be considered by the Commission in the application of the Act to this Institution. This Institution has direct competitors in the marketplace. Any particular party, group organization or franchise will only deal with this Institution if it can offer the most attractive and competitive facility of its kind. It is qualitatively different from other government agencies which operate in a private sector.

Given its unique situation, the institution then went on to identify three principles by which it determined that the

information severed from the records at issue in this appeal should not be disclosed to the appellant.

Firstly, we submit the Institution should not release specific details of financial, commercial or business arrangements with other parties. Disclosure of this type of information would give competitors of the Institution an unfair bargaining advantage in the competition for business.

Secondly, we submit the Institution should not release records which disclose long term operating, capital or income forecasts. Knowledge of such information would give third parties dealing, or competing, with the Institution an unfair advantage in the marketplace.

Thirdly, we submit the Institution should not disclose the names of companies or groups that have failed to successfully negotiate an arrangement with the Institution. Further, the details of such negotiations should not be released. The companies justifiably fear negative public relations and the release of such information would prevent full and open negotiations in the future.

The institution also provided me with two schedules by which it documented its current financial projections and future financial projections should a minimal drop_off in revenue of 10% occur due to a deterioration in the institution's competitive position as a result of the release of the records at issue in this appeal.

Apart from these general principles and theoretical argument in support of its position, the institution also made specific reference to each severance in its representations.

The difficulty with the institution's general argument alone, is that even if I were to find that the severances in question

contained the types of information noted in the principles cited by the institution (i.e., "specific details of financial, commercial or business arrangements", "long term operating, capital or income forecasts", or details of failed negotiations), there must still be evidence that disclosure of this kind of information could reasonably be expected to result in the harms contemplated by subsections 18(1)(c), (d) and (g) of the Act. Whereas I have been provided with schedules which forecast the institution's competitive position over a period of time if it suffered a 10% drop_off in revenue, I have not been provided with evidence to suggest that such a 10% drop_off "could reasonably be expected" to result if the information in question were released. The representations in support of the specific severances did not bridge the evidentiary gap in its general or theoretical argument.

I have stated in Orders 36 and 70 (Appeal Numbers 880030 and 880264) dated December 28, 1988 and June 29, 1989 respectively, that the evidence of consequences required to support a claim under section 17 of the Act must be "detailed and convincing". The standard is no less stringent under section 18. As stated above, subsections 18(1)(c), (d) and (g) are all concerned with the consequences of disclosure of records. Having reviewed the severances in question and the representations of the institution, I find that the onus of proof has not been discharged as it relates to the application of subsections 18(1)(c), (d) and (g) of the Act.

I turn now to consider the application of subsections 18(1)(a), (e) and (f) of the Act to the records. As noted above, these subsections exempt classes or types of records based on their

content, as opposed to the adverse consequences resulting to the institution if the records were released.

Subsection 18(1)(a) was cited by the institution to exempt from disclosure severance "I" only. This severance contains information concerning the then status of litigation regarding the "SkyDome" name. In support of its claim, the institution's

representations quoted the language of the subsection. No evidence respecting the "monetary value or potential monetary value" of the information contained in the severance was provided.

Having reviewed severance "I", I have concluded that the information contained therein could be discerned easily from publicly available court records. The litigation which is the subject of this severance has now been completed. Accordingly, I do not find that the onus of proof respecting the application of subsection 18(1)(a) has been discharged in this case.

As I stated in Order 87 (Appeal Number 880082), dated August 24, 1989, the test for exemption under subsection 18(1)(e) is as follows:

1. the record contains positions, plans, procedures, criteria or instructions; and
2. this record is intended to be applied to negotiations; and
3. these negotiations are being carried on or will be carried on in the future; and

4. these negotiations are being conducted by or on behalf of an institution or the Government of Ontario.

In my view, timing is key to the application of subsection 18(1)(f) as well. This provision applies where the record contains "plans relating to the management of personnel or the administration of an institution **that have not yet been put into operation or made public**" (subsection 18(1)(f), emphasis added).

Because subsections 18(1)(e) and (f) contemplate on-going or future events, a severance containing information about a past event such as a "failed negotiation" could not possibly qualify for exemption under either of these provisions.

I have reviewed the severances and the representations of the institution and in only one instance does the severance contain the type of information referred to in subsections 18(1)(e) or (f) and which is also in respect of an ongoing or anticipated proposal, plan or negotiation. In my view, the information contained in severance "L" relates to a proposal or plan intended to be applied to negotiations which are being carried on at present. Accordingly, severance "L" may be exempted from disclosure pursuant to subsection 18(1)(e) of the Act. (See Appendix "A" for its location in the record.) In all other instances, the severance either does not contain the type of information referred to in subsections 18(1)(e) or (f), or the information is in relation to completed negotiations, plans or projects, etc.

In conclusion, I uphold the head's decision under subsection 18(1)(e) to exempt only severance "L" from the records.

ISSUE B: Whether any information severed from the records and withheld from disclosure falls within the discretionary exemption provided by subsection 13(1) of the Act.

Subsection 13(1) of the Act reads as follows:

13.__(1) 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.

The severances which were exempted pursuant to this provision are those listed in Appendix A as letters H, I, K and L. As severance "L" was addressed above and was found by me to be exempt pursuant to subsection 18(1) of the Act, I need not consider it in the context of this issue.

In Order 94 (Appeal Number 890137), dated September 22, 1989, I noted that the general purpose of the exemption contained in subsection 13(1) of the Act was "to protect the free flow of advice and recommendations within the deliberative process of government decision_making and policy_making." In Order 118 (Appeal Number 890172), dated November 15, 1989, I also noted that "advice" must contain more than mere information. In that Order I stated "advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during a deliberative process."

In its representations in respect of severance "H", the institution indicated that the severance reveals advice or

recommendations of the "management of the Institution to the Finance Committee and to the Board of Directors." Upon review of the severance in question, I note that it identifies various alternatives or options regarding the institution's "Accelerated Construction Program" and also indicates a preference or recommendation of the institution's management. In my view, only the paragraph indicating management's recommendation contains the type of information which falls within the scope of subsection 13(1) of the Act. The balance of the severed information is factual and cannot be said to be advice or recommendations. Accordingly, I uphold the head's decision to exempt only with respect to the sixth paragraph on page 10 of the minutes of the August 11, 1988 meeting (being part of severance "H") under subsection 13(1) of the Act.

With respect to severance "I", the institution's representations indicated that the President of the institution was advising the Board of Directors on the status of litigation. In its representations in support of severance "K", the institution indicated that the President was advising the Board of Directors as to how a particular organization dealing with the institution would operate and what the best financing arrangements would be. In my view, these severances contain information only;

neither severance "I" nor "K" contain specific advice or recommendations relating to the deliberative process of the institution.

In conclusion, I uphold the head's decision to exempt a portion of severance "H" only (i.e. the sixth paragraph of page 10 of the August 11, 1988 minutes). I do not uphold the head's

decisions to exempt the balance of severance "H" and severances "I" and "K".

ISSUE C: Whether any information severed from the record and withheld from disclosure falls within the discretionary exemption provided by section 19 of the Act.

Section 19 of the Act reads as follows:

A head may refuse to disclose a record that is subject to solicitor_client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Only severance "I" has been exempted from disclosure pursuant to this provision.

Clearly, the second part of the exemption provided by section 19 is not applicable in this case. The minutes of the Board of Directors' meeting on August 11, 1988, which is the record containing the severance in question, was not prepared by or for Crown counsel, let alone for use in giving legal advice or in contemplation of litigation. Therefore, I must determine whether the common law solicitor_client privilege applies to this record.

As stated in Order 49 (Appeal Numbers 880017 and 880048), dated April 10, 1989, at page 13, there are two branches to the common law solicitor_client privilege and they are:

1. all communications, verbal or written, of a confidential character, between a client and a legal advisor directly related to the seeking,

formulating or giving of legal advice or legal assistance (including the legal adviser's working papers directly related thereto) are privileged; and

2. papers and materials created or obtained especially for the lawyer's brief for litigation, whether existing or contemplated are privileged. ("litigation privilege".)

This record and the severance contained therein does not satisfy the second branch of the common law solicitor_client privilege. The record was not created for a lawyer's brief for litigation nor does it reveal information obtained for that purpose.

To be exempt under the first branch of the common law solicitor_client privilege, a record must satisfy the following four_part test:

1. There must be a written or oral communication;
2. The communication must be of a confidential nature;
3. The communication must be between a client (or his agent) and a legal advisor;
4. The communication must be directly related to seeking, formulating or giving legal advice.

In its representations, the institution stated that the record contains information prepared or supplied by the institution's legal counsel with respect to legal advice concerning on_going litigation. As noted above, in my discussion under Issue A, it is my view that the information contained in severance "I" can

easily be discerned from publicly available court records. Accordingly, severance "I" does not reveal confidential communications between a client and a solicitor.

In conclusion, I do not uphold the head's decision to exempt severance "I" pursuant to section 19 of the Act.

ISSUE D: Whether any information severed from the records and withheld from disclosure falls within the mandatory exemptions provided by subsections 17(1)(a), (b) and (c) of the Act.

Subsection 17(1) of the Act reads as follows:

17.___(1) 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; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

The following severances have been made by the institution pursuant to this provision: Severances B, C, D, E, H, J, M, N and O.

Severance "H" was not originally exempted under section 17 by the institution. However, in its written representations, the institution submitted that section 17 applied to this severance. Since I found only one paragraph of severance "H" to be exempt from disclosure pursuant to subsection 13(1), I will consider severance "H" in respect of this issue as well.

Because each of the severances made pursuant to subsection 17(1) was also made pursuant to section 18 of the Act (and in one instance, severance "H", under section 13 as well) the institution did not notify any third parties of the request and did not elicit from them their views as to disclosure of the information contained in the severance.

In the absence of representations from the third parties, I do not feel it would be appropriate for me to comment on the application of section 17 to the severances at this time. As I have already determined that section 18 does not apply to any of the severances which were also exempted under section 17 of the Act, I feel that it would be appropriate for the institution to disclose the relevant severances to the third parties so that I might have the benefit of their views as to disclosure. Accordingly, I order the institution to provide each of the third parties with a copy of the severance which the institution asserts would, if disclosed, reveal that particular third party's information, within twenty (20) days of the date of this Interim Order. In addition, the institution is required to provide me with copies of its letters to the third parties, within five (5) days of the date on which the copies of severances were provided to the third parties. I will then contact these third parties directly to elicit their views as to

the application of section 17 of the Act to the severances in question.

ISSUE E: If the answer to either issue A, C or D is answered in the affirmative, whether the head properly exercised his discretion when denying access to the exempted information.

Subject to my findings relating to the severances made pursuant to section 17 of the Act (which I will address in my final Order), I have found that only one complete severance and a portion of a second severance made by the institution (severances "L" and "H" respectively) have been upheld. Both of these severances were made pursuant to discretionary provisions; in the case of severance "L", under subsection 18(1) and in the case of severance "H", under subsection 13(1) of the Act.

Despite a request to do so, the institution has not provided me with any representations outlining the factors which were considered by the head when exercising his discretion to exempt the information under either of these provisions. As it is my responsibility as Commissioner to ensure that the head has properly exercised his discretion under the Act, I have decided to defer my final determination of Issue E until I have received representations from the head regarding the exercise of his discretion. Therefore, I order the head to exercise his discretion under subsection 18(1) of the Act with respect to severance "L" and under subsection 13(1) of the Act with respect to that portion of severance "H" which I found to be exempt from disclosure under Issue B above. I further order the head to exercise his discretion within twenty (20) days of the date of this Interim Order, and to provide my office with written notification of his decision regarding the exercise of

discretion and accompanying reasons within five (5) days of the date of that decision.

In summary, I order 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.

Original signed by: _____
Sidney B. Linden
Commissioner

_____ January 23, 1990
Date

APPENDIX A

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The following is a list of severances which are at issue in this appeal. The exemptions cited by the institution to deny access to the severed information are noted in brackets.

Board of Directors Minutes, June 15, 1988

- (A) Page 2, paragraph 5. (s.18(1)(c), (e), (g))
- (B) Page 7, paragraph 5, second sentence. (ss. 17(1)(a), (b), (c) and 18(1)(c), (e), (g))
- (C) Page 8, paragraphs 7 and 8 and continuing to the top of page 9. (ss. 17(1)(a), (b), (c) and 18(1)(c), (e), (g))
- (D) Page 9, paragraph 3. (ss. 17(1)(a), (b), (c) and 18(1)(c), (e), (g))
- (E) Page 10, paragraph 5. (ss. 17(1)(a), (b), (c) and 18(1)(c), (e), (g))

Board of Directors Minutes, August 11, 1988

- (F) Page 8, paragraph 4. (s. 18(1)(c), (d), (e), (f), (g))
- (G) Page 8, paragraph 5. (s. 18(1)(c), (d), (e), (g))
- (H) Page 9, paragraph 7, second sentence and continuing to end of page 10. (ss. 13(1), 17(1)(a), (b), (c) and 18(1)(c), (d), (e), (f), (g))
- (I) Page 13, paragraph 3. (ss. 13(1), 18(1)(a), (c), (d) and 19)

Board of Directors Minutes, October 13, 1988

- (J) Page 9, paragraph 2. (ss. 17(1)(a), (b), (c) and 18(1)(c), (d), (e), (g))

(K) Page 9, paragraph 5 and continuing to page 10, paragraph 2 as well as page 14, paragraphs 4 and 5. (ss. 13(1) and 18(1)(c), (d), (e), (f), (g))

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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. (ss. 13(1) and 18(1)(c), (d), (e), (f), (g))

(M) Page 3, paragraph 4. (ss. 17(1)(a), (b), (c) and 18(1)(c), (d), (e), (f), (g))

(N) Page 4, paragraphs 2 and 6. (ss. 17(1)(a), (b), (c) and 18(1)(c), (d), (e), (f), (g))

(O) Page 4, paragraph 4 first sentence only. (ss. 17(1)(a), (b), (c) and 18(1)(c), (d), (e), (f), (g))

APPENDIX B

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The following is a list of severances which the institution claims can now be released:

Board of Directors Minutes, June 15, 1988

(i) Page 8, paragraph 5.

Board of Directors Minutes, August 11, 1988

(i) Page 7, last paragraph.

(ii) Page 8, paragraph 1.

(iii) Page 8, paragraph 2.

(iv) Page 8, paragraph 3.

(v) Page 9, paragraph 6 and the first sentence of paragraph 7.

(vi) Page 11, paragraphs 1, 2 and 3.

(vii) Page 12, paragraphs 1 and 2.

(viii) Page 12, paragraph 4.

(ix) Page 12, paragraph 8 and page 13, paragraph 1.

(x) Page 13, paragraph 2, third, fourth and fifth sentences.

Board of Directors Minutes, October 13, 1988

(i) Page 3, paragraph 3.

(ii) Page 4, paragraph 4.

(iii) Page 6, paragraphs 6, 7 and 9.

(iv) Page 7, paragraph 1.

(v) Page 8, paragraphs 1 to 5.

(vi) Page 9, paragraph 1.

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- (vii) Page 10, paragraphs 4 and 6.
- (viii) Page 11, paragraphs 1, 3, 6 and 7.
- (ix) Page 12, paragraphs 2, 5 and 6.
- (x) Page 13, paragraphs 1 to 7.
- (xi) Page 14, paragraphs 1, 2, 3, 6 and 7.
- (xii) Page 15, paragraphs 1 to 7.

Board of Directors Minutes, November 3, 1988

- (i) Page 2, paragraph 7, second and third sentences.
- (ii) Page 3, paragraph 6, second and third, fourth and fifth sentences as well as page 4, paragraph 1.
- (iii) Page 4, paragraph 4, second sentence.