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

ORDER P-346

Appeals 900284 and P-910040

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ORDER

BACKGROUND:

Stadium Corporation of Ontario Limited (the institution) received two separate requests for access to records under the Freedom of Information and Protection of Privacy Act (the Act). The first request was for:

> Documentation on remaining work/projects before Partnership agreement is entered into between consortium and Skydome, and any written documents on this type of agreement, including implications of delaying having such an agreement after stadium opening date, both economic and legal.

The institution identified one record, a draft partnership agreement between the institution and Dome Consortium Investment Inc., as the only responsive record, and denied access pursuant to sections 13(1), 17(1) and 18(1) of the Act.

The second request was for:

> Status and records on developing a partnership agreement between Skydome and consortium members.

The institution identified three responsive records, including the same draft partnership agreement. After consulting with two organizations whose interests could be affected by disclosure of these records (the affected persons), the institution denied access to all three records pursuant to sections 13(1), 17(1)(a), (b) and (c), and 18(1)(a), (c), (d), (e), (f) and (g) of the Act, and provided a fee estimate to the requester.

The requester appealed all exemption claims in both decisions, but did not appeal the fee estimate. Because the record in the first appeal was also at issue in the second appeal, both were combined for the purposes of this order.

The three records can be described as follows:

1. six-page draft partnership proposal and 1-page covering letter dated January 16, 1986 from one affected person to the institution

2. eight-page memo-to-file dated January 22, 1986 headed "Joint Venture Arrangements - Stadium Corporation/Consortium"

3. undated 36-page draft partnership agreement described as Appendix "I" to Fifth Amending Agreement, Schedule "C"

Mediation of the appeals was not successful and the matters proceeded to inquiry. Notice that an inquiry was being conducted to review the decisions of the head was sent to the appellant, the institution and the two affected persons. Enclosed with each Notice of Inquiry was a report prepared by the Appeals Officer, intended to assist the parties in making their representations concerning the subject matter of the appeal. Written representations were received from the appellant, the institution and counsel representing the two affected persons.

During the course of the inquiry the Appeals Officer determined that Records 1 and 3 were publicly available, together with numerous other related records, in the court file for the case of Stadium Corporation of Ontario Limited v. Wagon-Wheel Concessions Ltd., Environmental Innovations Limited and Gary Gladman. This fact was drawn to the attention of the institution, to determine whether it had any effect on the exemption claims. The institution's position remained unchanged and the appeals proceeded.

ISSUES:

The issues arising in this appeal are as follows:

A. Whether the discretionary exemption provided by section 13(1) of the Act applies to any of the records.

B. Whether the mandatory exemption provided by sections 17(1)(a), (b) and/or (c) of the Act apply to any of the records.

C. Whether the discretionary exemption provided by sections 18(1)(a), (c), (d), (e), (f) and/or (g) of the Act apply to any of the records.

SUBMISSIONS/CONCLUSIONS:

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

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

> 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 institution submits that:

> Records 1 and 2 should be considered advice and recommendations as their contents influenced various decisions and courses of action undertaken by the institution resulting in the current draft of the partnership agreement (Record 3), such as strategic and financial planning.

It has been established in a number of orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations" the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. [Order 118]

Having reviewed the three records, in my view, none of them contain information which could be properly characterized as "advice" or "recommendations" as those terms are used in section 13(1) of the Act.

ISSUE B: Whether the mandatory exemption provided by sections 17(1)(a), (b) and/or (c) of the Act apply to any of the records.

Sections 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 order to qualify for exemption under sections 17(1)(a), (b) and/or (c), the institution and/or affected person must satisfy the requirements of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure 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 section 17(1) claim invalid. [Order 36]

As stated earlier, Records 1 and 3 are among several exhibits contained in a publicly available court file. Without considering whether or not these records satisfy the requirements of the first and second part of the section 17(1) exemption test, I find that the institution and/or counsel for the affected persons have failed to establish that the prospect of disclosure of these already publicly available records would "give rise to a reasonable expectation that one of the types of injuries specified in (a), (b) or (c) of section 17(1) will occur", and I find that the third part of the test has not been satisfied. Therefore, Records 1 and 3 do not qualify for exemption under section 17(1) of the Act.

As far as Record 2 is concerned, it is an internal memo-to-file from the President of the institution. Having reviewed this record, I find that it contains financial and/or commercial information. I also find that, although the record is an internal memorandum, disclosure of the information contained in this record would permit the drawing of accurate inferences with respect to the information actually supplied to the institution by the affected persons implicitly in confidence. Therefore, I find that the first two parts of the section 17(1) exemption test have been satisfied with respect to Record 2.

Turning to the third part of the test, counsel for the affected persons submits:

> Disclosure of the information contained in the Stadco Memorandum [Record 2] can reasonably be expected to prejudice [the affected person's] competitive position and cause it undue loss, because any public disclosure of information
>
> relating to the respective financial contributions and rights of those involved may be used by competitors to the detriment of [the affected person] and its shareholders, prejudicing their respective competitive positions and causing them undue harm".

No further evidence was provided by the counsel for the affected persons in support of this position.

The institution's representations include similar generalized references to harm to the competitive position of the affected persons, and also deal with possible harm to the competitive position of the institution. This latter harm is properly considered in the context of section 18 of the Act, and I will address this in my discussion of Issue C.

In my view, the institution and/or counsel for the affected persons have failed to provide sufficient detailed and convincing evidence to support the claim that disclosure of the information contained in Record 2 would result in one or more of the harms specified in sections 17(1)(a), (b) or (c). As such, the third part of the test for exemption has not been satisfied, and I find that Record 2 does not qualify for exemption under section 17(1) of the Act.

ISSUE C: Whether the discretionary exemption provided by sections 18(1)(a), (c), (d), (e), (f) and/or (g) of the Act apply to any of the records.

Sections 18(1)(a), (c), (d), (e), (f) and (g) state:

> 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;

(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. Sections 18(1) (c), (d) and (g) all take into consideration the consequences which would result to an institution if a record were released. Sections 18(1)(a), (e) and (f) are all concerned with the form of the record, rather than the consequences of disclosure. Detailed and convincing evidence is required to support a claim under sections 18(1)(c), (d) and (g) that one of the consequences identified in these sections could reasonably be expected to occur if the records were disclosed. [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.

In order to qualify for exemption under section 18(1)(a), the institution 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. [Order 87]

Turning first to the third part of the test, the institution submits that the information contained in the records has monetary value or potential monetary value, because "... it can be sold to third parties for their use in negotiations with the Institution". It also submits that the information could "... be sold to the media for publication and thereby has potential monetary value". Having reviewed the records, I am not satisfied that the information itself has intrinsic monetary value.

The institution has expressed no intention of publishing or disseminating this information in a way that would result in some form of monetary payment to the institution, and I find that section 18(1)(a) does not apply.

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 interests or the competitive position of an institution arising from disclosure of the records. [Order 87]

In its representations, the institution claims:

> The disclosure of the information contained in the record can reasonably be expected to prejudice the economic interests and competitive position of the institution...:
>
> 1. its economic interests in efficiently and inexpensively administering its present business affairs;
>
> 2. its economic interests in and competitive position with regards to presently ongoing negotiations...
>
> 3. its economic and competitive position in obtaining similar information for use in the course present and future negotiations or commercial situation; and
>
> 4. its economic interests and competitive position with regard to negotiating favourable financial terms in present and future negotiations.

No additional 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 record could reasonably be expected to prejudice the economic interests or competitive position of an institution. The expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason. [Order 188]

Based on the representations provided by the institution and my independent review of the records, I am not convinced that they contain information, the disclosure of which could reasonably be expected to prejudice the economic interests or the competitive position of the institution. Therefore, the institution has failed to discharge its burden of proof, and I find that the records 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.

In its representations, the institution states:

> ...Anything injurious to the financial interests of the Institution is in turn injurious to the financial interest of the Government of Ontario [the sole shareholder of the institution], since a shareholder of any corporation has a financial interest in that corporation.
>
> ...[D]isclosure of the information...can reasonably be expected to be injurious to the financial interests of the Institution and result in distinct financial detriment to the Institution both in connection with its administrative affairs and contractual and other negotiations.

Again, no further details are provided to support this claim.

In my view, the institution has not provided the necessary "detailed and convincing" evidence to establish that the harm contemplated by section 18(1)(d) could reasonably be expected to occur if the information in the records is disclosed, and I find that the records do not qualify for exemption under this section.

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 representation made by the institution with respect to section 18(1)(e) is: 'The records disclose the positions and criteria of terms applicable to present arrangements that are to be applied to continuing negotiations for complete terms".

In my view, this statement alone is not sufficient to establish the requirements of the section 18(1)(e) test, and I find that the record does not qualify for exemption under this section.

Section 18(1)(f)

Section 18(1)(f) exempts a specific class or type of record based on its content, namely plans. The plans must relate to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

In order to qualify for exemption under section 18(1)(f) of the Act, the institution must establish that a record satisfies each element of a three part test:

1. the record must contain a plan or plans, **and**

2. the plan or plans must relate to:

    i) the management of personnel or

    ii) the administration of an institution, **and**

3. the plan or plans must not yet have been put into operation **or** made public.

[Order P-229]

The institution's only representation with regard to section 18(1)(f) is: 'The records disclose the partnership agreement and this information has not been put into operation or made public". Although I have not been provided with evidence to establish the current status of the partnership agreement between the institution and the affected person, it is clear that some form of arrangement has been reached in order to put the SkyDome complex into operation. Even if I were to find that the records contain a "plan", which is not established by the representations provided by the institution, I do not accept the institution's position that this "plan" has not yet been put into operation, and I find that the records do not qualify for exemption under section 18(1)(f).

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 P-229]

In its representations, the institution submits:

> Various policy decisions of the Institutions are based or will be based upon the information contained in the Record[s], and consequently disclosure of the Record[s] could reasonably be expected to result in premature disclosure of such pending decisions.

Again, in my view, the evidence provided by the institution is not sufficient to establish the harm specified in section 18(1)(g), and I find that the records do not qualify for exemption under this section.

In summary, I find that Records 1, 2 and 3 do not qualify for exemption under sections 18(1)(a), (c), (d), (e), (f) and/or (g) of the Act.

ORDER:

1. I order the institution to disclose Records 1, 2 and 3 to the appellant in their entirety, within 35 days following the date of this order and **not** earlier than the thirtieth day following the date of this order.

2. The institution is further ordered to advise me in writing within five 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 provision 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, only upon my request.

Original signed by: August 27, 1992
Tom Mitchinson
Assistant Commissioner