



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

ORDER P-487

**Appeals P-9200298, P-9200395 and
P-9200769**

Stadium Corporation of Ontario Limited



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Stadium Corporation of Ontario Limited (SkyDome) received, from the same individual, three requests under the Freedom of Information and Protection of Privacy Act (the Act) for access to the minutes of specific meetings of SkyDome's Board of Directors.

SkyDome denied access in full to the records pursuant to sections 17(1)(a), (b) and (c), and 18(1)(a), (c), (d), (e), (f), and (g) of the Act for all three requests. In addition, SkyDome also claimed sections 19 and 22(a) and (b) of the Act with respect to Appeals P-9200298 and P-9200395.

The requester appealed SkyDome's decisions and three separate appeal files were opened for the following sets of Minutes:

- P-9200298 - Minutes of the Board of Director's meetings held on November 22 and December 12, 1990 and on February 21, May 29, August 29 and November 14, 1991.
- P-9200395 - Minutes of the Board of Director's meetings held on May 17 and August 9, 1990 and on November 14 and 28, 1991. (The Minutes for the November 14 session were also requested in Appeal P-9200298).
- P-9200769 - Minutes of the Board of Director's meetings held on March 3 and May 28, 1992.

I will deal with each of these appeals in this order.

During the course of mediation, the respective Appeals Officers assigned to these files clarified the records at issue with SkyDome. This process eliminated any duplicate records from the scope of the appeal. Further mediation was not successful and notices that inquiries were being conducted to review SkyDome's decisions were sent to the appellant and to SkyDome. Written representations were received from SkyDome only.

SkyDome has not made any representations with respect to the application of sections 18(1)(f), 19, 22(a) and (b) of the Act to the records at issue. Therefore, I will treat these exemptions as being abandoned for the purposes of these appeals. In addition, SkyDome raised section 13(1) as a new exemption at this late date in the appeal.

PRELIMINARY ISSUES:

Section 17

In its representations, SkyDome appears to refer to the possible application of section 17(1) of the Act to the Minutes by making the following statement:

Disclosure of the records can reasonably be expected to both:

- (1) prejudice significantly the competitive position of the institution; and
- (2) interfere significantly with the negotiations of the institution and such parties.

SkyDome, thus, maintains that disclosure of the Minutes would result in harm to **its** competitive position and its own ability to negotiate with third parties. The potential harm to an institution's own economic and/or competitive interests is properly addressed in the context of section 18 of the Act. On this basis, and following my independent review of the records, I find that section 17(1) of the Act does not apply to the records at issue in these appeals.

Personal Information

One of the excerpts found in the Minutes contains a short statement about the personal plans of a SkyDome employee. The appellant has confirmed that he is not interested in this personal information which is not connected to any business-related matter. Therefore, I find that this information falls outside the scope of these appeals. I have highlighted this information on a copy of the Minutes to be provided to SkyDome with this order.

ISSUES:

The remaining issues in these appeals may be set out as follows:

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

SUBMISSIONS/CONCLUSIONS:

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

SkyDome's representations on the application of section 13 are very general in nature. They state:

All of the records reveal advice or recommendations of the president, chairman and officers of the Institution, being persons employed in the services of the Institution. The records also deal with advice and/or recommendations to the Board with respect to the proposed method of long term financing and the particulars of such proposed long term financing. It is submitted that all of the records should not be disclosed as they fall within the exemptions contained in subsection 13(1).

In these representations, SkyDome has not indicated to which specific parts of the Minutes the section 13(1) exemption applies. In the absence of more detailed representations, I find that only six references in the Minutes contain information which would qualify for exemption under section 13(1). These passages are found in the Minutes of the November 22, 1990, December 12, 1990, February 21, 1991 and May 29, 1991 meetings.

I have reviewed the list of mandatory exceptions contained in section 13(2) of the Act and find that none of these apply in the circumstances of these appeals.

Because section 13(1) is a discretionary exemption, I have reviewed SkyDome's representations regarding its exercise of discretion in favour of claiming this exemption. While section 13(1) was applied in a very general fashion, I am not, in the circumstances of these appeals, prepared to say that the SkyDome's exercise of discretion was inappropriate.

Along with this Order, I have provided SkyDome with a highlighted copy of the relevant Minutes to indicate which portions of these documents are properly exempt under this section.

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

The relevant parts of section 18(1) of the Act read, in part, 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 economic interests 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 type 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 the contents of these documents. In order to qualify for exemption under section 18(1)(a), an 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, SkyDome submits that the information contained in the records 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".

In my view, the use of the term "monetary value" in section 18(1)(a) means that the information contained in the record must have an intrinsic value. As stated in Order 219, section 18(1)(a) enables an institution to refuse to disclose a record which contains information where the circumstances are such that disclosure would deprive the institution of the monetary value of the information.

Based on my review of the Minutes and the representations which SkyDome has provided, I am not satisfied that the information contained in the records has either monetary or potential monetary value. I, therefore, find that these records 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) of the Act, an institution must prove that the disclosure of information could reasonably be expected to prejudice the economic interest or the competitive position of an institution (Order 87).

In its representations, SkyDome states that the release of the Minutes would detrimentally affect its ability to arrange future financing and to negotiate and resolve claims. No details are, however, provided to support this assertion.

In order to qualify for exemption under section 18(1)(c), an 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 that institution. Furthermore, such an expectation must not be fanciful, imaginary or contrived, but rather one that is based on reason (Order P-346).

A number of the passages contained in the Minutes at issue in Appeals P-9200298 and P-9200395 describe contractual negotiations being undertaken between SkyDome and certain third

parties. Having reviewed these records, I believe that the release of these passages could reasonably be expected to prejudice the economic interests of SkyDome. Accordingly, I find that eight references contained in the Minutes of the meetings held on August 9 and December 12, 1990 and February 21, May 29, August 29 and November 14, 1991 qualify for exemption under section 18(1)(c) of the Act. I have provided SkyDome with a highlighted copy of the relevant Minutes to indicate the parts of these documents which are properly exempt under section 18(1)(c).

Based on the very general representations provided by SkyDome and my independent review of the records, I am not convinced that the remaining portions of the Minutes contain information, whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of SkyDome. Therefore, I find that, with the exception of the portions of the minutes referred to above, 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.

SkyDome submits that disclosure of the records could have a negative impact on its negotiations to sell the facility and, thereby, result in financial hardship to the Government of Ontario. Again, no further details are provided to support this claim.

After considering this submission, I find that 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 Minutes be disclosed. SkyDome bears the onus of proving that the harms envisaged by this section are present or reasonably foreseeable, and, in my view, it has not done so. Therefore, I find that 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) of the Act, the following criteria must be met:

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 SkyDome with respect to section 18(1)(e) is as follows:

The severances reveal plans, positions and criteria to be applied to negotiations carried on or to be carried on behalf of the Institution.

This statement, which simply reiterates the wording of the statute, is not sufficient to meet the requirements of the section 18(1)(e) test. Accordingly, I find that the Minutes 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]

Once again, the expectation of the harm contemplated by this section must not be fanciful, imaginary or contrived, but rather one that is based on reason (Order P-346).

SkyDome's representations indicate that, in future, it may want to re-examine the long term financing proposal as set out in the Minutes, and "... should this information be disclosed at this time, this could reasonably be expected to result in premature disclosure of such decision". While the scenario which SkyDome has sketched could occur, it is by no means definite or even probable that it will. For this reason, I do not accept that the information in question relates to a proposed plan, policy or project and that the disclosure of the information could reasonably

produce the harms contemplated under the section. Thus, SkyDome cannot rely on section 18(1)(g) of the Act to withhold the Minutes in question.

In summary, I find that the section 18(1)(c) exemption applies to the passages of the Minutes which I have highlighted. The exemptions provided by sections 18(1)(a), (d), (e) and (g) of the Act do not apply to the balance of the Minutes at issue.

Section 18(1)(c) is a discretionary exemption. I find nothing improper in the manner in which SkyDome has exercised its discretion with respect to the records at issue in these appeals.

ORDER:

1. I uphold SkyDome's decision to deny access to those portions of the Minutes of August 9, 1990, November 22, 1990, December 12, 1990, February 21, 1991, May 29, 1991, August 29, 1991, November 14, 1991 and May 28, 1992 which have been highlighted in the copy of the Minutes forwarded to SkyDome with this Order.
2. I order SkyDome to disclose the Board of Director's Minutes of May 17, 1990, November 28, 1991 and March 3, 1992 in their entirety and the non-highlighted portions of the Board of Director's Minutes of August 9, 1990, November 22, 1990, December 12, 1990, February 21, 1991, May 29, 1991, August 29, 1991, November 14, 1991 and May 28, 1992 within 15 days following the date of this Order.
3. I order SkyDome to notify me in writing within five (5) days of the date on which disclosure is 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: _____
Irwin Glasberg
Assistant Commissioner

June 25, 1993