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

ORDER P-561

Appeal P-910275

Stadium Corporation of Ontario Limited

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ORDER

BACKGROUND:

The Stadium Corporation of Ontario Limited (SkyDome) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to:

> ... copies of any and all reports, correspondence, memos or other documents relating to the testing performed by [a named company] prior to October, 1988, on the steel that was used in the construction of the retractable roof of SkyDome.

SkyDome located a large number of records that were responsive to the request. SkyDome also determined that the release of these documents might affect the interests of a number of third parties and, pursuant to section 28(1) of the Act, notified several companies that an access request had been received. These third parties were invited to make representations on whether the documents in question should be released. SkyDome then considered the submissions made and decided to withhold access to the records in their entirety pursuant to sections 17(1)(a), (b) and (c) of the Act. The requester appealed the decision.

During the course of the mediation process, the appellant indicated that she was not interested in (1) certain correspondence contained in the records and (2) certain inspection reports which did not involve the steel used in the retractable roof. The appeal was consequently narrowed in these respects.

Further mediation to resolve the appeal was not successful and notice that an inquiry was being conducted to review the institution's decision was sent to SkyDome, the appellant, and 17 affected persons. These affected persons included (1) the company which undertook the quality control inspection of the steel used for the roof structure, (2) architects and engineering firms involved in the project, (3) the general contractor, (4) certain sub-contractors and (5) two steel fabricators. Representations were received from the appellant, SkyDome and ten of the affected persons.

While the representations were being considered, the Commissioner's office learned that one group of records to which the appellant sought access was available for review at the City of Toronto's Buildings and Inspections Department. As a result, it was decided that SkyDome and the five affected persons with an interest in the records should be asked whether they would continue to rely on section 17(1) of the Act to deny access to these documents. Further representations were received from three of these parties. One affected person consented to the release of these records while two others did not.

Before proceeding to analyze the records at issue, I should state that the processing of this appeal was rendered particularly complex and time-consuming for a number of reasons. First, there were a large number of records to be considered. Second, these documents were extremely technical in nature. Third, the question of whether section 17(1) of the Act applied to the records

represented the first occasion that the Commissioner's office was called upon to apply the principles of intellectual property law to engineering and architectural reports.

THE RECORDS AT ISSUE:

Because of the large number of records and their nature, these documents have been divided into seven general groupings which I shall describe below:

The Group 1 records consist of a series of reports which document the inspections carried out on the steel which was to be used for the retractable roof. These inspections were undertaken at the steel fabricator's shop prior to October 1988.

The records which make up Groups 2 and 3 constitute a series of inspection reports which relate to structures such as stairs, handrails and catwalks. Having reviewed the contents of these reports, I find that they do not relate to the structural steel elements used in the retractable roof and, hence, fall outside the ambit of the access request. On this basis, these records will not be considered further for the purposes of this appeal.

The Group 4 records consist of a series of reports relating to inspections at the construction site. These documents set out the procedures to be followed in building the roof and comment on the progress made in completing the structure in the relevant period of time (i.e. between October 1987 and September 1988). Of these records, a total of 19 (which involve inspections conducted between January 10 to September 18, 1988) were found in the City of Toronto's Buildings and Inspections Department, whereas five (covering the period between October 18 and December 27, 1987) were not. For ease of reference, I shall refer to the first set of records as Group 4A and the second as Group 4B.

The Group 5 records are reports which relate to the testing of the Hollow Structural Steel Seams which were part of the SkyDome structure.

The Group 6 records consist of reports on the metallurgical testing for quality of some steel members used in the roof structure.

Finally, the Group 7 records comprise a series of documents which relate to the development of a testing process for the roof seals.

Where appropriate, I have also integrated any correspondence found in the records into the group to which these documents most clearly relate.

The records which remain at issue in this appeal are, therefore, those contained in Groups 1, 4, 5, 6 and 7.

ISSUES:

The issues to be determined in this appeal are:

A. Whether the mandatory exemptions provided by sections 17(1)(a), (b) or (c) of the Act apply to the records at issue.

B. If the answer to Issue A is yes, whether a compelling public interest in the disclosure of the records clearly outweighs the purpose of the exemption provided by section 17(1) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the mandatory exemptions provided by sections 17(1)(a), (b) or (c) of the Act apply to the records at issue.

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.

For a record to qualify for exemption under section 17(1), the institution and/or the affected persons involved in the appeal must demonstrate that each component of the following three-part test has been met:

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 a reasonable expectation that one of the harms specified in (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

The burden of proving the applicability of each element of the section 17 exemption lies both with the institution and the affected persons involved in the appeal.

For the purposes of determining whether the section 17(1) exemption applies, I will deal first with the records that fall into Groups 1, 4B, 5, 6 and 7. I will then consider the documents in Group 4A which were found in the City of Toronto's Buildings and Inspections Department.

(a) Part One of the Section 17(1) Test

In order to meet part one of the test, SkyDome and/or the affected persons must establish that the disclosure of the records would reveal information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

In their representations, several of the affected persons have argued that the information contained in the records constitute trade secrets. There were two main arguments advanced to support this contention. One affected person submitted that it had obtained ownership of the trade secrets which were developed through the day to day construction of the SkyDome roof. These trade secrets, it was argued, relate to the development of specified types of roof seals as well as to certain components of the roof design. The affected person more specifically states that:

> The SkyDome roof design itself is a special design with a special profile for the unique application. The design and profile [have] been successfully designed to combine user load, the necessary strength and lightness, the size of the span and in particular taking into consideration the constant movement of the roof sections. The nature of the joints and the total roof structure was a combined effort integrating the knowledge and technology of architects, engineers and builders. In the circumstances many aspects were developed by [a named company] as builder and those trade secrets are and should remain the property and ownership of the [the named company].

This affected person also submits that there was substantial "experience" or a "learning curve" acquired by the parties throughout the construction process which the disclosure of the records would reveal.

In Order M-29, Commissioner Tom Wright considered the various definitions of "trade secret" contained in dictionaries, legislation enacted in Canada and the United States, court cases and

various scholarly reports. Following this review, Commissioner Wright adopted the following definition proposed by the Institute of Law Research and Reform in Edmonton, Alberta and by a Federal-Provincial Working Party:

> "trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

I adopt this definition for the purposes of this appeal.

The records which fall into Groups 1, 5 and 6 contain the results of quality control testing undertaken on the components of the roof structure. In some cases, drawings and sketches also accompany these reports which describe certain repair work carried out once the testing had been completed. Collectively, these records also document a number of unique construction processes and techniques which were developed during the course of the project. The Group 7 records relate to the development of a testing process for the roof seals. This testing protocol was devised specifically for this construction project. Finally, the Group 4B records consist of inspection reports undertaken at the construction site at an early stage in the project which document the completion of certain elements of this structure.

In my view, the disclosure of the information contained in the five record groupings would reveal a series of novel construction and testing techniques developed during the construction of the SkyDome structure.

A number of court decisions have held that, where Party X has used his or her skill and knowledge base to produce a result which another party could only obtain independently through the investment of comparable time and effort, the courts will protect the proprietary interests of Party X in the information relating to the development of the product. That result will be achieved through the application of principles of fairness to prevent other parties from making use of the information to the detriment of Party X. (See in this regard Lac Minerals v. International Corona Resources Ltd. (1989), 61 D.L.R. (4th) 14 (S.C.C.); Pharand Ski Corp. v. The Queen in right of Alberta (1991), 80 Alta. R.L. (2d) 216 (Q.B.).

I have carefully reviewed the information contained in Groups 1, 4B, 5, 6 and 7. I find that this information represents an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the SkyDome structure. I further find that this knowledge base, which may be described as a learning curve, confers proprietary rights on its owners.

It will now be necessary for me to determine whether this learning curve constitutes a trade secret according to the definition which appears on page 5 of this order. In my view, this learning curve embodies elements of a method, compilation or process which are contained in a device, product or mechanism. On this basis, I find that the first aspect of the definition of a trade secret has been met. I further conclude that the information which collectively makes up this learning curve may be used in the architectural, engineering or construction trades and is not generally known in these trades. On this basis, the next two components of the test have been established.

For information to be categorized as a trade secret, it must also have economic value from not being generally known. In my view, the information contained in the five record groupings would, if disclosed, provide competitors with a knowledge base which the builders of SkyDome took many years to develop. I further conclude that this information could be used by such competitors to the detriment of the original construction group. For this reason, I find that the information contained in the five record groupings has economic value from not being generally known.

Finally, in order to qualify as a trade secret, the information in question must be subject to efforts which are reasonable in the circumstances to maintain its secrecy. This is the fifth and last component of the definition. Based on my review of the records, it appears that the relevant reports were circulated amongst a construction management group which consisted of the architects, the engineers, the general contractor, the sub-contractors, the fabricators and the quality control inspectors. I would also point out that only one report, which is a Group 6 record, contains an express provision which states that the terms of the document are to be kept confidential.

The courts have held that, in the absence of express provisions relating to confidentiality, an implicit expectation of confidentiality may nonetheless be implied from the relationship between the parties. In addition, the law may impose a duty of confidence based on the reasonable expectations of the parties in a particular business relationship. In this respect, the Supreme Court of Canada decision of Lac Minerals v. International Corona Resources Ltd., to which I have referred earlier, has approved the principle enunciated in the case of Coco v. A.N. Clark (Engineers) Ltd., [1969], R.P.C. 41 that an obligation of confidence will be placed on the recipient of information:

> ... where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other.

As indicated previously, the information at issue was circulated to a number of members of the construction group. The question is whether this distribution of the reports suggests that the efforts taken to maintain the secrecy of the proprietary information were sufficient. In order to address this issue, it is important to recognize that the construction of a structure as complex as SkyDome requires the interplay of many construction professions and trades. In this respect, it is unrealistic to assume that a single firm, which has acquired or otherwise developed specific proprietary information, could complete a major construction project without sharing this information with other participants.

In my view, the fact that information of this nature comes into the possession of a number of firms involved in a construction project does not affect its confidential character, provided that the information was (1) imparted to the other participants in confidence and (2) has not become the subject of general knowledge in the trade. In addition, in the circumstances of this case, and based on an analogy to patent law, I find that the proprietary information in question can be owned jointly be a number of parties.

In addressing the subject of confidentiality, the appellant points out that, pursuant to an arrangement with the previous head of SkyDome, she met with the President of one of the companies involved in this appeal to discuss the results of tests undertaken on the roof structure. The appellant indicates that she filed her current access request shortly after this meeting took place. In my view, the fact that such a meeting took place does not, in and of itself, demonstrate that the parties have waived any inherent confidentiality rights which they retain in the records.

In their representations, a number of the affected persons have maintained that, in the construction trade, information such as that contained in the records is inherently confidential. One party states, in this respect, that:

> The information supplied was implicitly in confidence. It is implicit in the construction of a major evolutionary construction project that construction aspects including inspection and testing [of the] parts of the roof would be held in confidence by all relevant parties involved.

SkyDome, for its part, states that all of the records "... were supplied to the institution in the utmost confidence and were never intended to be made public".

Based on the evidence before me, I am satisfied that both SkyDome and the affected persons took efforts which were reasonable in the circumstances to maintain the secrecy of the information contained in Records 1, 4B, 5, 6 and 7.

On this basis, I find that each element of the five part test to define a trade secret has been made out and, therefore, that the first element of the section 17(1) test has been established.

(b) Part Two of the Section 17(1) Test

In order to meet part two of the test, SkyDome and/or the affected persons must establish that the information was **supplied** to SkyDome **in confidence** either explicitly or implicitly.

In the last section of this order, I indicated that, for information to be categorized as a trade secret, that information must be the subject of efforts that are reasonable in the circumstances to maintain its secrecy. I also found that the information contained in Groups 1, 4B, 5, 6 and 7 constitutes a trade secret. Based on the same factual background, I also conclude that this information was supplied to SkyDome, as the owner of the stadium complex, in confidence. With the exception of one record in Group 6, which was provided to SkyDome explicitly in confidence, I further find that the expectation of confidentiality with respect to the remaining documents was implicit.

(c) Part Three of the Section 17(1) Test

In order to satisfy part three of the test, SkyDome and/or the affected persons must demonstrate that the disclosure of the information at issue could reasonably be expected to result in the types of harm specified in sections 17(1)(a), (b), or (c) of the Act. Furthermore, the evidence required to support a finding of harm under one of these provisions must be detailed and convincing (Order P-246).

In its representations, one of the affected persons addresses this issue in the following manner:

> The disclosure of the record could reasonably be expected to prejudice the competitive position of [a named company], among others, in that the experience curve which they obtained as a result of being involved in this construction project on a trial and error basis would be available to competitors who could compete in the construction of other like or similar undertakings. In evolutionary construction there is a certain amount of "trial and error" in fabricating aspects. The competitive position of [the named company] would be disadvantaged to the extent that its competitors could be put on more of an "equal footing" as a result of having access to this information.
>
> If major facilities of a similar nature were to be built in other parts of the world having access to this kind of information by the competitors of [the named company] would give such competitors a greater degree of confidence and knowledge and an experience curve to compete more equally with [the named company] who has already expended the time, energy and resources to learn the lessons of this kind of construction.

Representations expressing these themes were also provided by other parties to the appeal.

I have previously determined that the records which fall into Groups 1, 4B, 5, 6 and 7 contain trade secrets for the purpose of the Act. On this basis, it follows that this information possesses an inherent value for its owner(s). I have carefully reviewed the nature of the records at issue along with the representations provided to me. I have concluded that the disclosure of the

information contained in these records would both prejudice significantly the competitive position of the affected persons under section 17(1)(a) and result in undue loss to these companies under section 17(1)(c) of the Act. On this basis, I find that the third part of the section 17 test has been satisfied and that the records contained in Groups 1, 4B, 5, 6 and 7 are fully exempt from disclosure under section 17(1) of the Act.

(d) Whether Section 17(1) of the Act Applies to the Records Contained in Group 4A.

The documents which constitute the Group 4A records consist of a series of reports relating to inspections at the construction site. These documents comment on the progress made in completing the structure from January 10 to September 18, 1988.

During the course of processing this appeal, an employee of the Commissioner's office visited the City of Toronto's Buildings and Inspections Department and learned that reports which constitute the Group 4A records, as well as some related structural drawings, are accessible to the general public at that location. The employee then viewed the actual documents in question. Based on the investigations undertaken, it would appear that the records contained in the other groups are not similarly available from this public source.

In determining whether the records which make up Group 4A are also exempt from disclosure under section 17(1) of the Act, I must first determine whether the information contained in these documents constitutes a trade secret for the purposes of the legislation. Based on the test enunciated in Order M-29, for information to be considered a trade secret, that information must be "the subject of efforts that are reasonable in the circumstances to maintain its secrecy". In my view, the fact that the documentation is available from a public source implies that the efforts taken to preserve its secrecy are insufficient to constitute this information as a trade secret.

I must now determine whether the information contained in the Group 4A records qualifies as "technical information" for the purposes of section 17(1) of the Act.

In Order P-463, I provided the following definition for the term technical information:

> ... [T]echnical information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. Finally, technical information must be given a meaning separate from scientific information which also appears in section 17(1)(a) of the Act.

Following a review of the records in this appeal, it is my conclusion that they contain technical information for the purposes of section 17(1) of the Act. Thus, the first part of the section 17(1) test has been satisfied.

I must next determine whether the information in question was supplied in confidence to the institution either explicitly or implicitly. In its representations, one of the affected persons submits that the Group 4A records which are available to the public are not identical to those in the custody of SkyDome. The party also asserts that the SkyDome documents bear unique markings and notes which are significant. I have carefully reviewed the records which SkyDome has provided to the Commissioner's office and find that they do not contain any unique notations. On this basis, I am unable to accept the arguments which have been put forward.

In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, whose wording is similar to that found in section 17(1) of the Act:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt these comments for the purposes of this appeal.

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case including whether the information was:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

In reviewing these considerations, I would note that the Group 4A records, which have been filed in the City of Toronto's Buildings and Inspections Department, are available for review from a public source. In addition, the first page of each of the reports indicates that a copy was provided to the City of Toronto. On this basis, I am unable to conclude that these records were supplied to the institution **in confidence** either explicitly or implicitly. This means that SkyDome cannot rely on section 17(1) of the Act to exempt these records from disclosure.

It is also my view that, where records are already in the public domain, it is very difficult to assert that the harms contemplated in the third part of the section 17(1) test will arise through any subsequent disclosure of the documents.

ISSUE B: If the answer to Issue A is yes, whether a compelling public interest in the disclosure of the records clearly outweighs the purpose of the exemption provided by section 17(1) of the Act.

I have found under Issue A that the records contained in Groups 1, 4B, 5, 6 and 7 are exempt from disclosure under section 17(1) of the Act. That being the case, I must now go on to consider the argument made by the appellant that, despite the findings which I have made, this information should be disclosed pursuant to the public interest override found in section 23 of the Act. This provision states as follows:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20 and 21 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (emphasis added)

In her representations, the appellant submits that access to this information is warranted under section 23 of the Act due to the public nature of the project, and because the public "... should have the right to know the results of tests that are conducted in part to ensure public safety".

In order for section 23 of the Act to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the record. Second, this interest must clearly outweigh the purpose of the exemption. Based on the facts of this appeal, I must, therefore, determine whether there is a compelling public interest in the disclosure of the remaining third party information which clearly outweighs the purpose of the section 17 exemption.

In undertaking this analysis, I am mindful of the fact that section 17 is a mandatory exemption whose purpose is to ensure that information supplied by third parties to institutions under certain defined circumstances should remain confidential.

In the context of the present appeal, the records indicate that both the components used in the roof structure and the construction project were inspected frequently and on a number of levels. The records further reveal a pattern of reporting and evaluative testing where any quality control concerns that arose were addressed and dealt with promptly. Further, based on my review of the

documentation, there does not appear to exist any evidence to suggest that the manner in which the roof was constructed, or the constituent elements of the structure, pose a safety concern.

Based on these considerations, I find that there does not exist a compelling public interest in the disclosure of the remaining third party information that clearly outweighs the purpose of the section 17 exemption. On this basis, my decision is that section 23 does not apply in the circumstances of this appeal.

ORDER:

1. I uphold SkyDome's decision not to disclose to the appellant the records which fall under Groups 1, 4B, 5, 6 and 7.

2. I order SkyDome to disclose the records which make up Group 4A to the appellant within 35 days of the date of this order and not earlier than the thirtieth (30th) day following the date of this order. For greater certainty, these Group 4 records are those which are numbered 6 through 24.

3. In order to verify compliance with Provision 2 of this order, I order SkyDome to provide me with a copy of the record which is disclosed to the appellant, **only** upon request.

Original signed by: October 22, 1993
Irwin Glasberg
Assistant Commissioner