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

ORDER P-581

Appeal P-9300152

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:

> the actual agreement, all sub-agreements, the letter of intent and all background documents that (i) were announced Nov. 14/91, or (ii) are related to [the proposed sale of SkyDome] (including new [consortium] agreements).

SkyDome did not make a substantive decision on the access request but instead provided the requester with a fee estimate of $360. The requester appealed SkyDome's decision regarding the amount claimed for record search and preparation time and also requested a fee waiver.

This fee appeal was processed by the Commissioner's office and resulted in the issuance of Order P-409. In that order, former Assistant Commissioner Tom Mitchinson held that the fee estimate did not comply with the requirements of section 57(1)(a) of the Act and, therefore, that SkyDome was precluded from charging any fee for processing the appellant's request. SkyDome was then ordered to issue a proper decision letter in response to the original request.

SkyDome subsequently identified one record that was responsive to the request. This record consists of a five page document entitled "Letter of Intent", dated November 12, 1991, to which are attached Schedules A and B, comprising three pages and one page, respectively.

SkyDome also determined that the release of the document might affect the interests of a number of third parties and, pursuant to section 28(1) of the Act, notified several organizations 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), 18(1)(a), (c), (d), (e), (f) and (g) and 21 of the Act. The requester appealed SkyDome's decision.

Efforts to mediate this appeal were not successful and notice that an inquiry was being conducted to review SkyDome's decision was sent to SkyDome, the appellant and to nine affected persons. Representations were received from SkyDome, from counsel representing seven of the affected persons, as a group, and from one other affected person individually.

The representations received from the group of seven affected persons (the SAI group), refer to the presence of "labour relations information" in the record. That reference, in turn, raises the potential applicability of section 17(1)(d) of the Act to the Letter of Intent. The group's

representations do not, however, pursue this issue in any detail nor is it addressed by any of the other parties. For these reasons and based on my independent review of the record, I find that this provision does not apply to the information contained in the Letter of Intent.

In the Notice of Inquiry, the parties were also invited to make representations on the applicability of section 21 of the Act to the Letter of Intent but no submissions were received. Since section 21 is a mandatory exemption, I have reviewed the record to determine whether it contains any personal information and, if so, whether the disclosure of that information would constitute an unjustified invasion of the personal privacy of an individual. My conclusion is that the Letter of Intent does not contain any personal information and, on this basis, it is not necessary for me to pursue this issue further.

ISSUES:

The issues to be addressed in this appeal are:

A. Whether the mandatory exemptions provided by sections 17(1)(a), (b) and (c) of the Act apply to the record.

B. Whether the discretionary exemptions provided by sections 18(1)(a), (c), (d), (e), (f) and (g) of the Act apply to the record.

SUBMISSIONS/CONCLUSIONS:

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

Section 17(1) of the Act states that:

> 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 sections 17(1)(a), (b) or (c), 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 sections 17(1)(a), (b) or (c) will occur.

[Order 36]

If any part of the test is not satisfied, the exemption under section 17(1) will not apply to the record (Order 36).

I will first consider part two of the test, which requires that SkyDome and/or the affected persons must establish that the information contained in the record was **supplied** to SkyDome and secondly that such information was supplied **in confidence** either implicitly or explicitly.

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and an affected person was supplied by the affected person. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the affected person. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act (Orders 36, 87, 203, P-219, P-228, P_251, P-263).

Finally, other orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by an affected person, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, P_451, P-472).

As indicated previously, the record at issue in the present appeal is a "Letter of Intent" in the form of correspondence to SkyDome. While the letter format of the record and its "preliminary" nature might be said to distinguish this document from a finalized contract, the Letter of Intent clearly indicates that once it has been accepted by the purchasers, the parties will proceed to negotiate an agreement of purchase and sale which will embody the terms and conditions of the Letter of Intent. In my view, the Letter of Intent bears the necessary indicia of a binding agreement.

I also find, based on the representations of the SAI group, that the terms and conditions contained in the Letter of Intent were negotiated between SkyDome and the prospective purchasers.

On the basis that the record is essentially a contract which contains information negotiated between SkyDome and the affected persons, I am satisfied that the reasoning applied in the line of orders referred to previously also applies to the Letter of Intent in the present appeal. I find, therefore, that the information contained in the Letter of Intent was not "supplied" to SkyDome for the purposes of section 17(1) of the Act.

I have also considered whether the disclosure of the record would permit the drawing of accurate inferences about the information that the affected persons actually supplied to SkyDome. From my examination of the Letter of Intent, I cannot conclude that any such inferences could reasonably be drawn.

For these reasons, I find that the second part of the test for the application of section 17(1) of the Act has not been met.

As stated previously, the failure to satisfy any component of the three part test means that the section 17(1) exemption will not apply. As I have found that the information contained in the Letter of Intent was not supplied to SkyDome within the meaning of section 17(1), it is not necessary for me to consider the first or third parts of the test.

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

Section 18(1) of the Act reads, in part, that:

> 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 or 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 (Order 141).

In all cases where a claim for exemption is made under section 18 of the Act, the onus rests with the institution to demonstrate that the harms envisioned by this section are present or reasonably foreseeable. The evidence submitted by the institution must be detailed and convincing. In the absence of sufficient evidence to support a claim under section 18, the records should be released to the appellant (Orders P-441 and P-454)

I will now consider each component of the section 18(1) exemption which the institution has claimed.

Section 18(1)(a)

In order to qualify for exemption under section 18(1)(a) of the Act, SkyDome must establish that the information contained in the record:

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]

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 P-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 that information.

SkyDome submits that the information contained in the Letter of Intent could be sold to third parties for their use in negotiations with SkyDome or could be employed by these parties to extract some more beneficial financial or commercial terms from the institution. SkyDome states, in particular, that based on the media's historical interest in publishing information about SkyDome, it is likely that the information could be sold to the media for publication and, therefore, that it has a monetary value.

Based on my review of the record and SkyDome's representations, I am not satisfied that the actual information contained in the record either has monetary value or potential monetary value. I find, therefore, that this record does 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, the record in question must contain information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of an institution.

The phrase "could reasonably be expected to" has been considered in a number of previous orders dealing with various sections of the Act which use the same terminology. This phrase has been interpreted as requiring that there exist a reasonable expectation of probable harm. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm alleged (Orders M-202 and P-555). I adopt this approach for the purpose of interpreting section 18(1)(c) of the Act.

In its representations, SkyDome submits that:

> Unlike virtually every other institution to which the Act applies, this Institution must compete in the private marketplace. This Institution has direct competitors

> in the marketplace ... in Toronto, as well as facilities across Canada and North America, which are not subject to the Act or similar legislation.
> ...
>
> As being just one such alternative, SkyDome cannot afford to have its competition gain an upper hand in the marketplace. Release of certain business information results in competitors, suppliers, producers, advertisers, etc., gaining access to trade secrets and competitive strategies that are ordinarily a matter of internal operation of a competitive venture, and can only have a negative impact on the Institution.
> ...
>
> It is reasonable to expect that release directly or indirectly through the Record of any contractual terms or financial information will both prejudice our competitive position and interfere significantly with current and future contractual negotiations.

Following a careful review of the Letter of Intent and the representations provided by the parties, I am satisfied that the disclosure of certain portions of the record could reasonably be expected to prejudice SkyDome's competitive position and/or its economic interests. These parts of the Letter of Intent contain information on the monetary terms of the proposed sale, the financing details, the structuring of the purchasing group and related details of the transaction.

More particularly, I find that the information, which is contained in paragraph 1, subparagraphs 2(a) and (b) (except the introductory sentence of paragraph 2), 3(a), 3(d), 3(e), 3(f), 3(g), 5(b), 5(c) and the final unnumbered portion of paragraph of 5, the last part of paragraph 6, paragraphs 7, 8 and 9, Schedule A in its entirety, and paragraphs 4, 6, 9, the last sentence in item 2 and the last four words in item 7 in Schedule B, falls within the ambit of section 18(1)(c) of the Act and is, therefore, exempt from disclosure.

The remaining information found in Schedule B of the Letter of Intent provides a list of the court cases in which SkyDome is presently involved. Since these cases are already a matter of public record, I am not persuaded that the release of this information could reasonably be expected to prejudice Skydome's economic position or economic interests. I find, therefore, that section 18(1)(c) does not apply to this subset of information.

I have also determined that the disclosure of the remaining portions of the Letter of Intent which are introductory only, which serve to identify the parties to the Letter of Intent, and which would reveal "standard" or non-monetary terms concerning the purchase proposal, cannot reasonably be expected to lead to the harms enumerated in section 18(1)(c). Consequently, these portions of the record do not qualify for exemption under section 18(1)(c) of the Act.

Section 18(1)(d)

Section 18(1)(d) of the Act allows an institution to withhold information where its disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or to the ability of the Government of Ontario to manage the economy (Order P-219).

SkyDome submits that, since the Government of Ontario is the sole shareholder of SkyDome, any actions taken which would be injurious to the financial interests of SkyDome would also necessarily be injurious to the financial interests of the Government of Ontario. No further details are provided to support this claim.

I have considered this submission and I find that it does not provide the necessary "clear and direct" linkage between the disclosure of the Letter of Intent and the harms contemplated under section 18(1)(d) of the Act. On this basis, I find that SkyDome has not satisfactorily established that this exemption applies to the Letter of Intent.

Furthermore, if the harm to the Government is predicated upon the disclosure of information injurious to SkyDome, then the finding I have made that certain portions of the record are exempt from disclosure under section 18(1)(c), would also serve to protect the interests of the Government of Ontario.

Section 18(1)(e)

For a record to qualify for exemption under section 18(1)(e) of the Act, the institution must establish that:

1. the record contains positions, plans, procedures, criteria or instructions; **and**

2. the record is intended to be applied to negotiations; **and**

3. the negotiations are being carried on currently or will be carried on in the future; **and**

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

[Order 87]

SkyDome has provided the following general submission to support its reliance on section 18(1)(e):

> The [Record] discloses the positions and criteria of terms applicable to present arrangements that are to be applied to continuing negotiations for more complete terms.

While it is true that the Letter of Intent contains a series of contractual terms and conditions, I find that these have already been finalized through negotiations entered into between SkyDome

and the prospective purchasers. For this reason, the record does not contain positions, plans, criteria or instructions which Skydome will apply to current or future negotiations. I am supported in this conclusion by the representations of the SAI group which indicate that the "definitive agreement of purchase and sale", for which the Letter of Intent contained the basic terms and conditions, has now been finalized and signed by the parties.

In these circumstances, I find that SkyDome has not satisfied the test for the application of the section 18(1)(e) exemption.

Section 18(1)(f)

In order to qualify for exemption under section 18(1)(f) of the Act, SkyDome must establish that the Letter of Intent satisfies each element of the following 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 Eighth Edition of the Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme".

In its representations, SkyDome states simply that "plans relating to the management of personnel that have not been put into operation or made public are set out in the Record". No further details to support the application of section 18(1)(f) have been provided, nor did SkyDome identify the parts of the Letter of Intent which contained such plans.

Based on my review of the record, only subparagraph 3(b) of the Letter of Intent, which refers generally to "employees", could potentially fall within the ambit of section 18(1)(f). This subparagraph contains one sentence which makes a general statement. In my view, however, this wording does not circumscribe a detailed method for accomplishing a particular objective or thing. For this reason, I find that subparagraph 3(b) does not constitute a "plan" for the purposes of part one of the section 18(1)(f) exemption and, hence, that SkyDome cannot rely on this provision to withhold the subparagraph in question from disclosure.

Section 18(1)(g)

In order to qualify for exemption under section 18(1)(g) of the Act, an 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.

Each element of this two part test must be satisfied for the exemption to apply.

In its representations, SkyDome states that:

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

No further details are provided to support this exemption.

In the absence of any evidence about the type of policy decisions which could be affected by disclosure of the record and with no "clear and direct" linkage to the specific harms set out, I find that section 18(1)(g) does not apply to the information contained in the Letter of Intent.

Section 18 of the Act is a discretionary exemption. On this basis, I have considered SkyDome's representations respecting its decision to exercise its discretion to rely on this provision and I find nothing improper in the determination which has been made.

ORDER:

1. I uphold SkyDome's decision to withhold the following portions of the record: paragraph 1, subparagraphs 2(a) and (b) (except the introductory sentence of paragraph 2), 3(a), 3(d), 3(e), 3(f), 3(g), 5(b), 5(c) and the final unnumbered portion of paragraph 5, the last part of paragraph 6, all of paragraphs 7, 8 and 9, all of Schedule A and all of items 4, 6 and 9, the last sentence in item 2 and the last four words in item 7 of Schedule B.

2. I order Skydome to disclose to the appellant the remaining portions of the record, as indicated in the highlighted copy of the record which will accompany SkyDome's copy of this order. The highlighted portions of the record are those which **should** be disclosed.

3. I order SkyDome to disclose the portions of the record identified in provision 2 within 35 days after the date of this order but not earlier than the thirtieth (30th) day after the date of this order.

4. In order to verify compliance with this order, I order SkyDome to provide me with a copy of the record as disclosed to the appellant, **only** upon request.

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