Office of the Information & Privacy Commissioner for British Columbia

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Order F14-49

BC PAVILION CORPORATION

Caitlin Lemiski
Adjudicator

December 16, 2014

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Summary: An applicant requested contracts related to soccer events held at BC Place Stadium. The BC Pavilion Corporation located a contract with the Canadian Soccer Association for the CONCACAF Women's Olympic Qualifying event. It withheld the amount of insurance coverage the Association agreed to obtain, the number of complimentary tickets that PavCo and the Association could use, and the daily rental fee the Association agreed to pay for the use of BC Place. The adjudicator determined that disclosure of the withheld information would not be harmful to the financial or economic interests of PavCo or to the government of British Columbia under s. 17(1) and 17(1)(f) of FIPPA. The adjudicator ordered PavCo to disclose the information.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1) and 17(1)(f), 25.

Authorities Considered: B.C.: Order F10-24, 2010 BCIPC 35 (CanLII); Order F11-14, 2011 BCIPC 19 (CanLII); Order F11-25, 2011 BCIPC 31 (CanLII).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII).

INTRODUCTION

[1] An applicant requested agreements from the BC Pavilion Corporation ("PavCo") between PavCo and the Canadian Soccer Association ("the Association"), CONCACAF[1] and FIFA[2] for use of BC Place Stadium ("BC Place") for "games, practices and other events"[3] between January 1, 2011 and January 15, 2013. In response, PavCo identified a licence agreement between PavCo and the Canadian Soccer Association for the CONCACAF Women's Olympic Qualifying event held at BC Place in January 2012 (the "Contract"). PavCo severed the amount of insurance coverage the Association agreed to obtain, the number of complimentary tickets that PavCo and the Association could use, and the daily rental fee the Association agreed to pay under s. 17 of the *Freedom of Information and Protection of Privacy Act* (FIPPA). Section 17 authorizes a public body to withhold information if disclosure would be harmful to the financial or economic interests of a public body.

[2] The applicant was not satisfied and requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). Mediation was unsuccessful and an inquiry was held. The applicant and PavCo each made initial and reply submissions. No third parties were invited to make submissions.

ISSUE

[3] Is PavCo authorized by s. 17 of FIPPA to refuse to disclose information in the Contract?

[4] PavCo accepts that under FIPPA, it has the burden of proof.[4]

DISCUSSION

[5] **Record in dispute—**The Contract is four pages. PavCo withheld the amount of insurance coverage the Association agreed to obtain, the number of complimentary tickets that PavCo and the Association could use, and the daily rental fee the Association agreed to pay for the use of BC Place.

Preliminary Matter

[6] **Disclosure in the public interest**—The applicant submits that s. 25 applies to the Contract.[5] Section 25 requires public bodies to disclose information when it is in the public interest and when there is an urgent and

[1] CONCACAF: The Confederation of North, Central America and Caribbean Association Football.
[2] FIFA: The Fédération Internationale de Football Association.
[3] Applicant's written request to the public body.
[4] Public body's initial submission at para. 23.
[5] Applicant's initial submission at para. 3.

compelling need to do so. The applicant did not raise s. 25 in his request for a review of PavCo's decision and it is not listed as an issue in the OIPC Fact Report that was issued to the parties at the start of this inquiry. Further, based on my review of the Contract, I am not persuaded that any of the information reveals any urgent and compelling need to disclose information in the public interest under s. 25.[6] Therefore, I am not going to consider the applicant's submission with respect to s. 25 any further.

[7] **Disclosure harmful to the financial or economic interest of the public body (s. 17)—** Section 17 of FIPPA authorizes a public body to withhold information if disclosing it could reasonably be expected to harm the financial interests of a public body. The parts of s. 17 relevant to this inquiry are as follows:

> 17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
>
> …
>
> (f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

[8] Previous orders have determined that "[i]nformation that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1)"[7] and that s. 17(1)(f) is "simply a further example to be interpreted in relation to the opening words of s. 17(1)."[8] I have applied this interpretation of s. 17 in this case.

[9] **Reasonable expectation of probable harm**— Section 17 is a harms-based exception. In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[9] the Supreme Court of Canada set the standard for harms-based exceptions such as s. 17 as follows:

> This Court in Merck Frosst[10] adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information

[6] My reasoning and conclusions are consistent with those of Commissioner Denham in Order F11-25 at paras. 26-28. (I note that in that Order, the public body objected to the applicant's late raising of s. 25.)
[7] Order F11-14 at para. 47.
[8] Order F11-14 at para. 47.
[9] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* 2014 SCC 31 (CanLII).
[10] *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII).

> statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground…[11]

[10] Previous orders have held that to meet the evidentiary threshold for s. 17, a public body must establish "a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information."[12]

[11] **Applying s. 17 to the license agreement terms**— The applicant submits that because the CONCACAF Women's Olympic Qualifying event at BC Place has finished, "[t]here can be no harm in disclosing the full and complete record."[13] He submits that the public has a right to know the complete terms of the Contract. PavCo submits that disclosing the information could harm its ability to attract live entertainment events to BC Place.[14] This, PavCo contends, could result in harm to both its own financial interests and the interests of PavCo's shareholder, the government of British Columbia."[15]

[12] PavCo advances three arguments in support of its contention that disclosing the information in dispute could reasonably be expected to harm its financial interests as well as the interests of the government of British Columbia as set out in s. 17. PavCo argues that if other current or prospective lessees learn the terms under which it contracted in this case, they might demand the same or better terms for themselves (the negotiation argument). PavCo also argues that if it discloses the disputed information, other lessees might not rent BC Place out of a concern that details of their agreements will be made publicly available (the chilling effect argument). PavCo further submits that "competitors would be able to undercut any bid that PavCo may make"[16] for future projects (the undercutting argument).

[13] In advancing these arguments, PavCo asserts that the potential harm to its business is real: "[t]he contemplated harm is not speculative. PavCo competes internationally for events. There is cause to expect [that] release of the key elements or terms of its license agreements will adversely impact its

[11] 2014 SCC 31 (CanLII) at para. 50.
[12] Order 02-50 at para. 137.
[13] Applicant's initial submission at para. 8.
[14] Public body's initial submission at para. 23.
[15] Public body's initial submission at para. 22.
[16] Public body's initial submission at para. 18.

ability to secure future business, resulting in economic or financial harm."[17] I will now address each of PavCo's arguments in turn.

The negotiation argument

[14] In support of the negotiation argument, PavCo's Interim President and Chief Executive Officer deposed that, during negotiations with prospective licensees, "[e]ach client seeks to minimize costs while PavCo seeks to maximize its revenue."[18] PavCo argues that its "ability to freely negotiate the best or different license agreement terms is necessarily compromised when its negotiations with a variety of third parties in respect of varying events for the same venue are virtually transparent."[19]

[15] PavCo's evidence does not support its assertion that its freedom to negotiate the most favorable terms would be compromised. In addition, by PavCo's own submission, it leases BC Place "to different clients for different events under licence agreements which typically contain differing key elements or terms, including differing or unique facility fees relating to such things as rent, ticket sales, complimentary ticket and suite allocation and insurance requirements."[20] This suggests that disclosing the terms negotiated for one event would not compromise negotiations for another.

[16] In Order F10-24, Senior Adjudicator Francis considered a similar negotiation argument and rejected it. She stated that "[t]he fact that government *might* have to "push back" if a future contractor were to seek to rely on a "precedent" from a previous contract does not in my view satisfy the test in s. 17(1) [emphasis in original]."[21] In this case, PavCo has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harms. For example, PavCo has not provided evidence that third parties have asked to match insurance coverage amounts, complimentary ticket amounts, daily rental fees, or other contract terms as a result of learning what PavCo had agreed to with another lessee. Even if I had evidence before me that third parties have asked PavCo to match terms, I have no evidence that PavCo was compelled to accept such requests.

The chilling effect argument

[17] PavCo also submits that if it discloses the disputed information, other lessees will not rent BC Place out of a concern that details of their agreements will be made available to the public. In support of this argument, PavCo submits

[17] Public body's initial submission at para. 36.
[18] Affidavit of PavCo's Interim President and Chief Executive Officer at para. 16.
[19] Public body's initial submission at para. 32.
[20] Public body's initial submission at para. 31.
[21] Order F10-24 at para. 49.

that "many of PavCo's clients have indicated a reluctance to consider future bookings at PavCo's venues if their license agreements are subject to public release."[22] PavCo submits that it's two "anchor tenants" oppose disclosure of their agreements, as does Live Nation, a company PavCo submits is a major client.[23]

[18] PavCo did not provide evidence to support these assertions, and I do not find PavCo's arguments to be persuasive. In Order F11-14, Senior Adjudicator McEvoy rejected a similar argument:

> As I note above, one of the Ministry's main concerns is that disclosure of the information at issue would discourage some proponents to bid on future projects. I received *in camera* the evidence from the Ministry in support of its premise. I am therefore not at liberty to reveal it, but I can say that I find it to be speculative, imprecise and, in large measure, uncorroborated hearsay. In short, it is unconvincing. I also note that HPAS itself makes no claim that it would not bid on future projects, only that disclosure of the withheld records would be "a matter of concern" to it in future negotiations with the Ministry. As noted, Order F10-24 also rejected this kind of argument, as did Commissioner Loukidelis in Order F08-22.[24]

[19] Here, PavCo has submitted that some of its major lessees have told PavCo they will not do business with PavCo if they release *their* information.[25] For example, PavCo's interim CEO deposed that "[o]ne of PavCo's largest repeat clients - Live Nation - has stated in unequivocal terms that it will take its business elsewhere if these key elements or terms in its license agreements with PavCo are made public."[26] PavCo provided no additional detail or evidence in regards to Live Nation or any other of its current or former lessees to support this contention. It is also highly relevant to note that Live Nation's information is not at issue in this inquiry. In addition, PavCo has not made any assertions or presented any evidence that Live Nation or any other lessees have suggested to PavCo that they will not do business with PavCo if PavCo discloses other lessees' licence agreements, such as the details of the license agreement that is at issue here. I find that PavCo has not demonstrated a clear and direct connection between disclosing the disputed information and the harm it is alleging.

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[22] Public body's initial submissions at para. 34.
[23] Public body's initial submissions at para. 34.
[24] F11-14 at para. 51.
[25] Affidavit of PavCo's Interim President and Chief Executive Officer at para. 24.
[26] Affidavit of PavCo's Interim President and Chief Executive Officer at para. 24.

The undercutting argument

[20] A third argument that PavCo makes is as follows:

> If PavCo's competitors know the details of PavCo's license agreements terms, those competitors would be able to undercut any bid that PavCo may make. All things being equal, PavCo could lose clients to the underbidding competitor and thus experience revenue loss.[27]

[21] I understand PavCo's argument to be that, for example, if the daily rental fee the Association agreed to pay for the use of BC Place were known, PavCo could reasonably be expected to lose out on future business because competing venues would offer lower rates to prospective clients for the purpose of enticing them to hold their event at their venue instead of at BC Place.

[22] PavCo stated that "BC Place operates in an extremely competitive industry, competing against a variety of venues in Canada and across North America."[28] It identified Vancouver's Roger's arena, located a short distance from BC Place, as well as Century Link Field and Safeco Field in Seattle, which PavCo submits both have similar seating capacities as BC Place, as competitors.[29] PavCo did not expressly state how it competes with these and other venues, but in its submissions it details how BC Place hosts live music events and that other competing venues also host live music events. The applicant, by contrast, submits that BC Place has a "regional monopoly" because of its size.[30]

[23] I have considered PavCo's argument that competitors could undercut them if the disputed information is disclosed and I do not agree with it for the following reasons. A premise of PavCo's argument is that it bids for events, and that disclosing the disputed information would allow competitors to "undercut any bid that PavCo might make."[31] However, PavCo provided no other information or evidence that it bids on events, including how frequently it bids on events or to what extent it bids on events. PavCo also provided no evidence or examples in support of this argument, such as instances where it has experienced underbidding or the threat of underbidding as a result of disclosing terms of a license agreement.

[24] In addition, I do not accept PavCo's statement that "all things being equal"[32] prospective licensees may choose to hold their events elsewhere if agreements to lease BC Place were disclosed. This argument is highly

[27] Public body's initial submission at para. 18.
[28] Public body's initial submission at para. 12.
[29] Public body's initial submission at paras. 10 and 15-16.
[30] Applicant's initial submission at para. 2.
[31] Public body's initial submission at para. 18.
[32] Public body's initial submission at para. 18.

speculative and is unsupported by evidence. For example, PavCo has not provided any examples of where a prospective lessee decided not to lease with PavCo as a result of concerns that its license agreement may be disclosed. Venues each have different qualities (such as capacity, location, concession, parking, etc.) that would form part of a determination of what acceptable lease terms would be for a particular event. In addition, economic fluctuations could influence rates and other terms. In these ways, all things are not equal. My conclusion is consistent with the conclusion Senior Adjudicator Francis reached in Order F10-24: "The reality is that each set of contract negotiations takes place in its own environment and has unique factors that influence the terms of the contract and what the parties will agree to. Contract negotiations inevitably involve give and take on the part of the parties."[33]

CONCLUSION

[25] In conclusion, PavCo has not demonstrated that there is a reasonable expectation of probable harm that disclosing the withheld information could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia. PavCo may not refuse to disclose this information under s. 17, so it must disclose it.

[26] For the above reasons, I make the following order under s. 58 of FIPPA:

1. I require PavCo to give the applicant access to this information by January 30, 2015. PavCo must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

December 16, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

OIPC File No.: F13-53152

[33] F10-24 at para. 52.