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Order F15-10

BC PAVILION CORPORATION

Vaughan Barrett
Adjudicator

March 9, 2015

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Summary: An applicant requested a copy of the agreement between PavCo and the BC Lions for the use of BC Place Stadium. The BC Lions disagreed with PavCo's decision that s. 21 of FIPPA (harm to third party business interests) did not apply to the record. The adjudicator concluded that s. 21(1) did not apply to the record as the BC Lions had not "supplied" the information in dispute within the meaning of s. 21(1)(b). The adjudicator ordered PavCo to disclose all of the Agreement to the applicant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a), (b) and (c); s. 25; s. 54(b); and s. 57(3)(b).

Authorities Considered: B.C.: Order F14-05, 2014 BCIPC 6 (CanLII); Order F14-14, 2014 BCIPC 17 (CanLII); Order 01-20, 2001 CanLII 21574 (BC IPC); Order F09-04, 2009 CanLII 14731 (BC IPC); Order F07-23, 2007 CanLII 52748 (BC IPC); Order F07-04, 2007 (CanLII 9595 (BC IPC); Order 02-38, 2002 CanLII 42472 (BC IPC); Order F14-28, 2014 BCIPC 31 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order F06-20, 2006 CanLII 37940 (BC IPC); Order F13-22, 2013 BCIPC 29 (CanLII); Order F11-14, 2011 BCIPC 19 (CanLII); Order F11-08, 2011 BCIPC 10 (CanLII).

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603.

INTRODUCTION

[1] This inquiry arises out of Order F14-14,[1] a decision to re-open Order F14-05,[2] which dealt with the British Columbia Pavilion Corporation's ("PavCo") refusal to provide the applicant with full disclosure of the BC Place Licensing Agreement ("Agreement") between PavCo and the BC Lions Football Club Inc. ("BC Lions").

[2] PavCo is the public body responsible for the operation and maintenance of British Columbia's largest venue for public events, BC Place Stadium ("BC Place"). In November, 2011 PavCo and the BC Lions signed the Agreement under which the BC Lions are afforded the right to use BC Place for each of its home games and for ancillary events.

[3] The applicant requested a copy of the Agreement. PavCo informed the BC Lions of the request and that it proposed to disclose the Agreement but sever information under ss. 15, 17 and 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The BC Lions consented to that proposed disclosure. PavCo disclosed the Agreement but withheld some information under ss. 15, 17 and 21 of FIPPA. The applicant asked the Office of the Information and Privacy Commissioner ("OIPC") to conduct a review of PavCo's decision. During that review, PavCo decided to withdraw its reliance on ss. 15 and 21 of FIPPA. PavCo informed the BC Lions of that re-evaluated decision and provided the BC Lions with a copy of the Agreement with the new proposed severing under s. 17 only. The BC Lions did not respond. PavCo disclosed a copy of the Agreement to the applicant, which contained only the s. 17 severing.[3] Therefore the copy of the Agreement that the applicant received contained some information that had originally been withheld under s. 21.[4]

[4] The applicant requested that PavCo's application of s. 17 to the Agreement proceed to inquiry under Part 5 of FIPPA. Inquiry submissions were received from the applicant and PavCo, which I considered along with the record. I found that PavCo had not proven that it was authorized to refuse to disclose the information in dispute under s. 17 of FIPPA and it must disclose all of the Agreement. My decision and reasons were set out in Order F14-05.[5]

[5] Subsequently, the OIPC received a request from the BC Lions to re-open the inquiry on the basis that, as a third party whose financial interests could be affected by disclosure of the Agreement, it was entitled to be given notice of the proceedings under s. 54(b) FIPPA and given the opportunity to file its own

[1] Order F14-14, 2014 BCIPC 17 (CanLII).
[2] Order F14-05, 2014 BCIPC 6 (CanLII).
[3] The applicant provided a copy of the Agreement he received in appendix 5 of his reply submissions.
[4] He did not get s. 21 information where s. 17 was also applied to the same information.
[5] The disclosure ordered in F14-05 has been on hold pending the outcome of this inquiry.

submissions prior to any final decision being made. The OIPC agreed to consider arguments from the BC Lions, the applicant and PavCo on whether the case should be re-opened. Having reviewed the parties' arguments on the issue, I decided that Order F14-05 should be re-opened to allow the BC Lions to file third party submissions on the applicability of s. 21 to the record. My decision and reasons were set out in Order F14-14.

[6] On August 21, 2014 a Notice of Written Inquiry was issued inviting submissions from the applicant, PavCo and the BC Lions regarding the applicability of s. 21 to the record. Both the applicant and BC Lions provided submissions but PavCo chose not to do so. The BC Lions also requested and received permission to submit *in camera* affidavit evidence.

ISSUE

[7] Is PavCo required under s. 21(1) of FIPPA to refuse disclosure of the information in dispute? Under s. 57(3)(b) of FIPPA the onus is on the BC Lions, as the third party opposed to disclosure, to prove that the applicant has "no right of access to the record or part".

DISCUSSION

[8] **Information in Dispute**—The record at issue in this inquiry is the Agreement under which PavCo allows the BC Lions the right to use BC Place. The Agreement is comprised of 53 pages, 16 of which are attached schedules. The withheld portions of the Agreement include the fees the BC Lions are expected to pay for the use of BC Place facilities including the field, balconies and private suites, and for services including utilities, security, ticket sales, food and beverage, advertising, and merchandising. Also withheld are those provisions of the Agreement that set out facilities and services provided without cost to the BC Lions as well as information regarding complimentary tickets and insurance coverage.

[9] As mentioned above the applicant received some information that was originally withheld under s. 21 after PavCo re-evaluated its decision and concluded that it would only withhold information under s. 17. I have reviewed the copy of the Agreement provided by the applicant and am satisfied that the only information remaining in dispute is information withheld under the following seven subject headings: Rent; Hospitality Areas; Tickets; Media system and Advertising; Television and Radio Broadcasts; and Insurance.

Preliminary Issue – does s. 25 apply

[10] Although not referred to in the Notice of Inquiry or the Fact Report as an issue requiring determination, the applicant and the BC Lions offer submissions

on the applicability of s. 25 FIPPA to this inquiry. I will address s. 25 arguments first because if s. 25 applies PavCo must disclose the information in dispute even if other provisions in FIPPA require or authorize it to refuse disclosure.[6] The pertinent parts of s. 25 read as follows:

> **25** (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies despite any other provision of this Act.

[11] The applicant submits that s. 25(1)(b) requires full disclosure of the Agreement and writes, "It is clearly in the public interest to know whether the Lions are paying fair market value rent, if any, and that PavCo is acting as a responsible steward of a public asset…".[7]

[12] The BC Lions submit that s. 25 has no application to the information in dispute and writes:

> In this instance, there is no evidence that disclosure of the Redacted Information relates in any way to a risk of significant harm to the environment or to health and safety. Furthermore, there is no evidence advanced by the Applicant that the public interest will be served by, or even that public is interested in, the release of the BC Lion's confidential business information. [8]

[13] I agree with the BC Lions submission that the information in dispute does not relate to a risk of significant harm to the environment or to health and safety. I am satisfied that s. 25(1)(a) does not apply.

[14] In considering the application of s. 25(1)(b) I accept the many OIPC Orders[9] that interpret "without delay" as meaning that even if disclosure of information in dispute is "clearly in the public interest" its disclosure will only be required if there is an urgent need to do so. Order 02-38 states:

> …I have indicated that the disclosure duty under s. 25(1)(b) is triggered where there is an urgent and compelling need for public disclosure. The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This

[6] Section 25(2) states that s. 25(1) applies despite any other provision of FIPPA.
[7] Applicant's Initial Submission at para. 49.
[8] BC Lions Reply Submissions para. 18.
[9] See for example Order F09-04, 2009 CanLII 14731 (BC IPC), Order F07-23, 2007 CanLII 52748 (BC IPC) and Order F07-04, 2007 (CanLII 9595 (BC IPC).

> element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.[10]

[15] Neither the applicant nor BC Lions address the issue of urgency in their s. 25(1)(b) arguments.

[16] From the evidence and submissions provided I am unable to conclude that the circumstances in this case present an urgent need, in a temporal sense, for disclosure of the severed information. The Agreement was signed in November, 2011 and the applicant offers no argument as to why there is now a pressing need for its full disclosure. I am satisfied that there is no time-based urgency existing in this case and that s. 25 has no application.

Harm to Business Interests of a Third Party – s. 21

[17] I now turn my attention to whether PavCo is required under s. 21(1) to refuse disclosure of the information in dispute in the Agreement. Section 21(1) reads as follows:

> **21** (1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
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> (iii) result in undue financial loss or gain to any person or organization, or
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> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations .

[10] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 53.

[18] Previous orders have established a three part test for determining whether s. 21(1) applies and I adopt that approach here.[11] A public body is required to withhold third party information only if all three parts of the test have been satisfied.

[19] As noted, the BC Lions have the burden of proof regarding s. 21(1), so they must first demonstrate that disclosure of the information at issue would reveal one of the types of information referred to in s. 21(1)(a). Next they must demonstrate that the information was supplied to PavCo implicitly or explicitly in confidence. Finally, they must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c). Regarding this third element the BC Lions submit that disclosure of the Agreement will significantly harm its competitive position and interfere significantly with its negotiating position (s. 21(1)(c)(i)) and will result in undue financial loss to itself and undue financial gain to its competitors (s. 21(1)(c)(iii)).[12]

Section 21(1)(a)

[20] The BC Lions submit that disclosure of the information in dispute would reveal financial and commercial dealings between itself and PavCo. The applicant agrees with this conclusion.[13] The information in dispute is about fees PavCo charges BC Lions for the facilities and services, and about complimentary tickets and insurance coverage. I am satisfied that the information in dispute is financial and commercial information.

Section 21(1)(b)

[21] Determining whether s. 21(1)(b) applies to the information at issue requires applying a twofold test. The third party information must have been "supplied" and it must have been supplied "implicitly or explicitly in confidence".

[22] Previous orders have stated that as a general rule, terms in a contract or agreement are negotiated rather than supplied for the purposes of s. 21(1)(b). For example, Order F14-28 states:

> The issue of whether information in a contract is supplied has been considered in many orders. Previous orders have found that the information in a contract is not usually supplied within the meaning of s. 21(1)(b), even when there is little or no overt negotiation giving rise to the terms in

[11] See, for example, Order 03-02, 2003 49166 BC IPC (CanLII), Order 03-15, 2003 49185 BCIPC (CanLII) and Order 01-39, 2001 21593 BCIPC (CanLII).
[12] BC Lions Initial Submission para. 32.
[13] Applicant's Initial Submission para. 52.

a contract. This is because the other party agreed to those terms. The term "supplied", as stated in Order F08-22:

> *" …is intended to capture immutable third-party business information, "not contract information that by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor" or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary."* [14]

[23] There are, however, occasions where information that might normally be considered negotiated may be information supplied in confidence by a third party. Order 01-39 (upheld on judicial review) has been cited and followed in a number of cases[15] for clarifying the distinctions between negotiated and supplied information contained in a contract. The Order states:

> Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations that information may be found to be "supplied." It is important to consider the context which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
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> The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of "supplied", CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information. Moreover, as discussed below, where information originally supplied in a bid proposal is simply accepted by the other party and incorporated into a contract, the mere fact that disclosure of the contract will

[14] Order F14-28, 2014 BCIPC 31 (CanLII) para. 15 cross referencing F08-22, 2008 CanLII 70316 (BC IPC)-22 para.60.
[15] See for example Order F14-28, 2014 BCIPC 31 (CanLII), Order F13-22, 2013 BCIPC 29 (CanLII); Order F11-14, 2011 BCIPC 19 (CanLII); Order F11-08, 2011 BCIPC 10 (CanLII).

> allow readers to learn the terms of the original bid will not shield the contract from disclosure.[16]

[24] In summary, for information in an agreement to be considered "supplied" under s. 21(1)(b), the information must be one of the two types referred to in Order 01-39. The information must either be immutable (not susceptible to change through negotiation between the parties) or must enable accurate inferences to be drawn about confidential information that was supplied by a third party that is not expressly contained in the contract. Previous orders confirm that the term "accurate inferences" extends the definition of "supplied" to include disclosure of "seemingly innocuous" information that would allow persons to see the financial and commercial affairs of a third party in ways that are precluded by s. 21(1) of FIPPA.[17] I will apply the approach from Order 01-39 in my review of the redacted information and the parties' submissions.

[25] The applicant refers to a number of OIPC orders (in particular F08-22 and the passage quoted above in paragraph 22) to support his position that the redacted information does not meet ss. 21(1)(b) or 21(1)(c) tests. He submits:

> The contract was not supplied information - it was negotiated. There is no likelihood of significant harm to the Lions; whatever harm may be advanced by the Lions is speculative and, as such, must be disallowed.[18]

[26] The BC Lions concede that as a general rule, information that has been "negotiated" between a public body and a third party is not "supplied" by the third party for the purpose of s. 21(1)(b)[19] but submit that the information in dispute does qualify as information it "supplied" to PavCo. The BC Lions state:

> Examples of information supplied by the BC Lions and not negotiated between the parties are the amount of the first level of net ticket sales, revenues of the BC Lions with respect to the broadcasting of its games and the limits of its insurance policies.[20]

[27] In addition, the BC Lions argue that the applicant and the public at large could make "accurate inferences regarding sensitive business information of the BC Lions" if those portions of the Agreement that include "information on rent, facility fees, suites, food and beverage, utilities, event personnel and services, complimentary tickets, advertising, broadcasting and parking"[21] are disclosed. In short, the BC Lions submit that the information in dispute meets either one or

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[16] Order 01-39, 2001 CanLII 21593 (BC IPC), at paras. 45 and 50, upheld and quoted in *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 at paras.73-78.
[17] See for example Order 03-02 para. 43.
[18] Applicant's Initial Submission para. 52.
[19] BC Lions' Initial Submission para. 19.
[20] Ibid para. 20.
[21] Ibid para. 21.

both of the circumstances referred to in Order 01-39 where information in an agreement is "supplied" rather than negotiated.

[28] The BC Lions submit that the types of information in the Agreement that they point to as having been supplied (i.e., net first level ticket sales, broadcasting revenue and insurance policy limits) are examples of "original or proprietary information of the BC Lions that is unchanged in the License Agreement."[22] I do not find this argument to be persuasive for the following reasons.

[29] Almost the entirety of the information under the Tickets subject heading has been redacted. That information confirms the authority, responsibilities, rights and commitments of the parties regarding the pricing of tickets for BC Lions games, revenues generated from ticket sales and the allocation of complimentary tickets. On its face it is apparent these contract terms were negotiated terms. None of them reveals private financial information supplied by the BC Lions in the sense that supplied is described in Order 01-39. Similarly, the paragraph redacted under the Television and Radio Broadcasts subject heading confirms the terms agreed upon for the apportionment of potential earnings and does not in any way suggest original, proprietary information supplied by the BC Lions. Information falling under the Insurance subject heading represents a requirement of PavCo, that the BC Lions evidently agreed to, in order to ensure that the BC Lions could meet its indemnity responsibilities under s. 16 of the Agreement. Requirements or demands agreed to by third parties in their contracts with public bodies do not equate to proprietary business information "supplied" by third parties.

[30] There is no evidence that the Agreement contains information that the BC Lions supplied PavCo which might normally be considered immutable such as financial statements, confirmation of credit rating, copies of collective agreements to which they are bound or fixed costs they currently face. I am not satisfied that the information withheld under the referred-to subject headings qualifies as proprietary or immutable information that the BC Lions "supplied" to PavCo.

[31] I now turn my attention to the second circumstance in which otherwise negotiated information may be found to have been supplied, specifically when its disclosure "would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was 'supplied' by the third party, that is, about information not expressly contained in the contract".[23] The BC Lions submit:

> …the disclosure of the Redacted Information permits the Applicant (and the public at large) to make accurate inferences regarding sensitive business

[22] Ibid para 20.
[23] Order 01-39, 2001 CanLII 21593 (BC IPC), para. 50.

> information of the BC Lions... The terms of the License Agreement include details regarding the operations of the BC Lions with respect to rent, facility fees, suites, food and beverage, utilities, event personnel and services, complimentary tickets, advertising, broadcasting and parking. Allowing the Applicant access to the full unsevered License Agreement permits the Applicant to see into the financial and commercial affairs of a private company. Such access is not consistent with the purposes of FIPPA.
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> The extent of the inferences regarding the private financial affairs of the BC Lions that can be drawn by the Applicant is compounded by the other information previously released by PavCo to the Applicant, and the further information that is presently sought by the Applicant. [24]

[32] I understand the BC Lions to be arguing that the applicant qualifies as a particularly well "informed observer"[25] and thus would be able to make accurate inferences from disclosure of the information in dispute.

[33] The examples offered by the BC Lions under the "accurate inferences" claim fall under the subject headings of Rent; Hospitality Areas; Media system and advertising; Tickets; Television and Radio Broadcasts. The BC Lions does not provide specific evidence or arguments on what accurate inferences the applicant could draw from disclosure of the information in dispute. My review of the information under the noted subject headings satisfies me that there is no implicit reference to the BC Lions circumstances or "seemingly innocuous" information that would allow an informed observer, including one as informed as the applicant, to draw accurate inferences about underlying confidential information that was "supplied" by the BC Lions but not expressly contained in the Agreement.

[34] In response to the BC Lions submission that disclosure would reveal the financial and commercial affairs of a private company and that would be contrary to the purposes of FIPPA, I note the following statement of former Commissioner Loukidelis in Order F09-04:

> A central goal of FIPPA, which has been in force for over 15 years, is to make public bodies more accountable to the public through a right of public access to records, subject to only limited exceptions. FIPPA should be administered with a clear presumption in favour of disclosure… Businesses that contract with government must fully appreciate that the transparency of those dealings has no comparison in fully private transactions.[26]

[35] I am satisfied that disclosure of the information in dispute would not be inconsistent with the purposes of FIPPA.

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[24] BC Lions' Initial Submission paras. 21-22.
[25] As per Order 01-39 para. 50.
[26] Order F09-04, 2009 CanLII 14731 (BC IPC), at para. 18.

[36] In summary I find that the BC Lions submissions fall short of what is required to establish that the information in dispute was "supplied" within the meaning of s. 21(1)(b). Given my finding on that point, it is not necessary to consider whether the information was supplied "implicitly or explicitly in confidence", under s. 21(1)(b), nor whether disclosure could reasonably be expected to result in the harms listed in s. 21(1)(c).

CONCLUSION

[37] For the reasons given above, although the information in dispute is financial and commercial information under s. 21(1)(a)(ii), it was not "supplied" under s. 21(1)(b). Therefore, the BC Lions has not met its burden of proof in this case, and PavCo is not required to refuse disclosure under s. 21 of FIPPA.

ORDER

[38] Under s. 58 FIPPA I require PavCo to comply with the terms of Order F14-05 and provide the applicant with a copy of the complete, un-redacted Agreement within 30 days of the date of this order, by **April 21, 2015** and concurrently copy the Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 9, 2015

ORIGINAL SIGNED BY

Vaughan Barrett, Adjudicator

OIPC File No.: F12-49180