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Order F16-02

BC PAVILION CORPORATION

Celia Francis
Adjudicator

January 27, 2016

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Summary: A journalist requested access to reports on the number of attendees at Whitecaps and BC Lions games. PavCo denied access to the responsive record under s. 17(1) (harm to financial interests of public body) and s. 21(1) (harm to third party's business interests). The adjudicator found that neither exception applied and ordered PavCo to disclose the record to the journalist.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 17(1), 17(1)(f), 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii), 25(1).

Authorities Considered: B.C.: Order F15-58, 2015 BCIPC 61 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F15-64, 2015 BCIPC 70; Order F14-49, 2014 BCIPC 53 (CanLII); Order F14-28, 2014 BCIPC 31 (CanLII); Order 01-39, 2001 CanLII 21593 (BC IPC); Order F13-22, 2014 BCIPC 4 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order 01-26, 2001 CanLII 21580 (BC IPC); Order 02-04, 2002 CanLII 42429 (BC IPC); Order F11-14, 2011 BCIPC 19 (CanLII); Order F10-24, 2010 BCIPC 35 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order 04-06, 2004 CanLII 34260 (BC IPC); Order 02-50, 2002 CanLII 42486 (BC IPC).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *Jill Schmidt Health Services Inc. v. British Columbia (Information and Privacy Commissioner)*, [2001] B.C.J. No. 79, 2001 BCSC 101; *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.

INTRODUCTION

[1] This order arises out of a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") by a journalist to the BC Pavilion Corporation ("PavCo") for reports on game-by-game attendance (*i.e.*, number of attendees) for the Vancouver Whitecaps FC ("Whitecaps") and BC Lions, for the period September 30, 2011 to July 26, 2013. PavCo initially denied access to the record under s. 21(1) (harm to third party interests) of FIPPA.

[2] The journalist requested a review of PavCo's decision by the Office of the Information and Privacy Commissioner ("OIPC"). During mediation by the OIPC, PavCo decided to apply s. 17(1) (harm to economic or financial interest of public body) to the record, as well as s. 21(1). Mediation did not resolve the issues in dispute and the matter proceeded to inquiry. The OIPC invited and received submissions from the journalist, PavCo, the Whitecaps and the BC Lions. The OIPC also invited Ticketmaster Canada LP ("Ticketmaster") to participate in the inquiry but did not receive any submissions from it.

ISSUES

[3] The issues before me are whether PavCo is required by s. 21(1) and authorized by s. 17(1) of FIPPA to deny access to the requested records. Under s. 57 of FIPPA, PavCo has the burden of proving that the applicant is not entitled to access to the requested record.

DISCUSSION

Background

[4] PavCo, a provincial Crown corporation, was formed in 2008 and reports to the Legislative Assembly through the Minister of Transportation and Infrastructure. It owns and manages BC Place which provides venues for meetings and sporting and entertainment events. PavCo described BC Place as the "largest sports, exhibition and entertainment venue of its kind in British Columbia". The Whitecaps are a privately-owned professional soccer club. The BC Lions are a privately-owned professional football team.[1]

[1] PavCo's initial submission, paras. 7-15; Ramsay affidavit, paras. 3-11; Ford affidavit, para. 7; Skulsky affidavit, para. 6.

Record in dispute

[5] The record in dispute is a two-page document recording the number of attendees for each of the Whitecaps and BC Lions games, for the period in question.[2]

Preliminary matter: public interest disclosure – s. 25

[6] The journalist argued that s. 25(1)(b) applies to the information in dispute.[3] The Whitecaps and BC Lions noted this issue was not listed in the Notice of Inquiry and argued that, in any case, s. 25 does not apply.[4]

[7] Section 25(1)(b) requires public bodies to disclose information when it is clearly in the public interest to do so. There is no need to establish temporal urgency in order for s. 25(1)(b) to apply.[5] The journalist did not raise s. 25 in his request for review to the OIPC and it was not listed as an issue in the Fact Report that the OIPC issued to the parties at the start of this inquiry. Moreover, based on my review of the record, I am not persuaded that there is a clear public interest under s. 25(1)(b) in disclosing the information. Therefore, I will not consider the journalist's submission on s. 25 any further.[6]

Standard of proof for harms-based exceptions

[8] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst* 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 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: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent

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[2] PavCo's initial submission, para. 6. One page lists the figures for Whitecaps games and the other lists them for BC Lions games.
[3] Journalist's submission, para. 122.
[4] Reply submission of Whitecaps and BC Lions, paras. 13-16.
[5] See Order F15-64, 2015 BCIPC 70, at para. 13.
[6] See Order F14-49, 2014 BCIPC 53 (CanLII), at para. 6, for a similar finding on the late raising of s. 25.

> probabilities or improbabilities or the seriousness of the allegations or consequences".[7]

[9] I have taken these approaches in considering the arguments on harm under s. 17(1) and s. 21(1)(c).

Harm to financial interests – s. 17(1)

[10] PavCo argued that s. 17(1)(f) applies to the information in dispute. The relevant provisions read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
>
> 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.

[11] Previous orders have noted that ss. 17(1)(a) to (f) are examples of information the disclosure of which may result in harm under s. 17(1). Information that does not fit in the listed paragraphs may still fall under the opening clause of s. 17(1).[8]

Would disclosure result in financial harm?

[12] PavCo argued that disclosure of the requested information could reasonably be expected to harm its negotiating position with its clients: its tenants; Live Nation, an event promoter; and other event promoters for whose business PavCo competes with other venues.

[13] **Harm to negotiating position with tenants** — PavCo argued that many of its clients, including its two anchor tenants (which I take to be the Whitecaps and BC Lions), "have indicated a reluctance to consider future bookings at PavCo's venues if their commercial information" is disclosed.

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[7] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.

[8] See for example, Order F15-58, 2015 BCIPC 61 (CanLII), at para. 25, and Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 43.

[14] PavCo provided no evidence that its tenants have expressed "reluctance" to book, or have actually refused to book, with BC Place following disclosure of the type of information at issue here. Significantly, I note that, in their joint submission to this inquiry, neither the Whitecaps nor the BC Lions "indicated a reluctance", or said they would refuse, to consider future bookings at BC Place if the information in issue, or their other commercial information, were disclosed. I also take note that PavCo did not dispute the journalist's argument that BC Place is the only suitable venue for the Whitecaps and BC Lions in BC.[9]

[15] **Harm to negotiations with Live Nation** — PavCo said that Live Nation (one of its "largest repeat clients" and parent company of Ticketmaster) has "strongly opposed" the disclosure of information in previous access requests and that Live Nation has said it would "take its business elsewhere", if "the type of information in issue here" were disclosed. PavCo said Live Nation currently represents 80% of the live entertainment business at BC Place[10] and that loss of Live Nation's business would result in a "significant reduction in revenue" for PavCo and thus the Province. PavCo also expressed concern that disclosure could have a negative effect on upcoming negotiations with Ticketmaster, arguing that this could in turn compromise its ongoing "transactional business" with Live Nation.[11]

[16] PavCo provided no additional details or evidence to support its contentions regarding Live Nation or Ticketmaster. I note that neither Live Nation's nor Ticketmaster's information is in issue in this inquiry. Moreover, the case in which Live Nation "strongly opposed" release of information under FIPPA did not concern the type of information in issue here, as PavCo contended, but related to a contract between BC Place and Live Nation for a music festival.[12] PavCo also did not explain how disclosure of the number of attendees might cause a "deterioration" in its relationship with Ticketmaster and thereby compromise its negotiating position with Ticketmaster or Live Nation or both. These things are also not obvious from the information itself.

[17] **Harm to negotiations with other event promoters —** PavCo said that it operates in an "extremely competitive industry" against a variety of Canadian and American venues and that it competes directly with Century Link Field and Safeco Field in Seattle. PavCo argued that disclosure of the information in dispute would undermine its ability to negotiate with event promoters and compete with other venues, as promoters would view disclosure of "this type of sensitive business information" as a "dangerous precedent", threatening the confidentiality of the number of attendees for "future, yet-booked events" at BC Place. This would, PavCo argued, have "an obvious chilling effect on future

[9] Journalist's submission, para. 6.
[10] PavCo said that live entertainment generates approximately 30% of BC Place's revenue.
[11] PavCo's initial submission, para. 30; Ramsay affidavit, paras. 16-22.
[12] Exhibit B, Ramsay affidavit.

bookings for live entertainment at BC Place". PavCo added that the potential loss of revenue would have a "substantial negative financial impact on BC Place", resulting in harm to the financial and economic interests of BC Place and the Province, given PavCo's mandate to generate economic and community benefit for the people of BC. PavCo said it could not quantify the potential future loss but argued that the damage to its relationships with clients, resulting from disclosure, "is real and tangible". It added that the "uncertainty" surrounding this inquiry has "already imposed a tariff on those relationships at the expense of BC Place and the future revenues it generates for the Province of BC".[13]

[18] PavCo's submissions stated that BC Place has hosted a number of trade shows, sporting, music and other events. However, it did not explain how or to what extent it competes with other venues for such events. PavCo also provided no evidence that disclosure of similar information has led event promoters to refuse to book events or to cancel events at BC Place, or to say they would use other venues. PavCo also did not explain what it meant by "real and tangible" damage to its relationships with its clients. Nor did it explain what it meant by a "tariff" on these relationships or quantify it in financial terms.

[19] I accept that loss of current and future bookings might result in loss of revenue to BC Place and hence to the Province. However, PavCo provided no evidence that other event promoters have expressed "reluctance" to book, or have actually refused to book, with BC Place following disclosure of the type of information at issue here.[14] Previous orders have also dismissed this kind of "chilling effect" argument.[15]

Conclusion on s. 17(1)(f) and s. 17(1)

[20] For reasons given above, PavCo has not, in my view, provided evidence that is "'well beyond' or 'considerably above' a mere possibility of harm", as the Supreme Court of Canada held is necessary to show a reasonable expectation of harm from disclosure of information. PavCo's arguments are speculative, in my view, and do not persuade me that disclosure of the number of attendees could reasonably be expected to result in the harm to its negotiations with its clients under s. 17(1)(f), as it argued, or harm more generally under s. 17(1).

Harm to third-party interests

[21] The Whitecaps and BC Lions made a joint submission, arguing that disclosure of the number of attendees would be harmful to their business

[13] PavCo's initial submission, para. 29; Ramsay affidavit, paras. 23-27.
[14] Journalist's submission, para. 6.
[15] See, for example, Order F14-49, 2014 BCIPC 53 (CanLII), at para. 19; Order F11-14, 2011 BCIPC 19 (CanLII), at para. 51; Order F10-24, 2010 BCIPC 35 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC).

interests under s. 21(1).[16] Although PavCo acknowledged that it has the burden of proof under s. 21(1), it made no submission on this provision, except to say it supported the arguments of the Whitecaps and BC Lions.[17] Where relevant, however, I have considered PavCo's arguments on s. 17.

[22] The relevant parts of s. 21(1) of FIPPA read 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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> …
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization, or…

[23] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[18] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld.

[24] As PavCo has the burden of proof regarding s. 21(1), it must first demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, PavCo must demonstrate that the information was supplied to the public body, implicitly or explicitly, in confidence. Finally, PavCo must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c). In assessing the parties' arguments on s. 21(1), I have taken the approach set out in previous orders and court decisions, as discussed below, bearing in mind that the burden of proof is on PavCo.

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[16] Whitecaps and BC Lions' initial submission, para. 12.
[17] PavCo's initial submission, paras. 16-17.
[18] See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15**,** 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).

Is the information "commercial information"?

[25] FIPPA does not define "commercial information". However, previous orders have said that "commercial information" relates to commerce, or the buying, selling or exchange of goods and services, and that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[19]

[26] The Whitecaps and BC Lions said the number of attendees represent the actual number of people whose tickets were scanned at the entrance gates at each game the respective teams played at BC Place.[20] They argued that these figures are their "commercial information", as the figures relate to the buying of the teams' goods and services.[21]

[27] PavCo's only submission on this point was that the information in issue is not its property.[22] The journalist disagreed that the information is the teams' "commercial information".[23]

[28] I agree that information on the number of attendees at games relates to the buying and selling of the services of the respective teams. I find that the information in issue is "commercial information" of or about the Whitecaps and BC Lions.

Was the information "supplied in confidence"?

[29] The next step is to determine whether the information in issue was "supplied in confidence". The information must be both "supplied" and supplied "in confidence".[24] The Whitecaps and BC Lions said that they supplied the scanned attendance figures in confidence to PavCo. The journalist disputed their confidentiality arguments.[25] I will first deal with whether the information was "supplied" for the purposes of s. 21(1)(b).

[30] "**Supplied**" — The Whitecaps and BC Lions said they "supplied" the number of attendees to PavCo.[26] The Whitecaps said Ticketmaster manages its ticketing operations under an agreement that includes collecting and storing the

[19] See Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC), at para. 62.
[20] Whitecaps and BC Lions' initial submission, para. 7.
[21] Whitecaps and BC Lions' initial submission, paras. 15-17.
[22] Ramsay affidavit, para. 23.
[23] Journalist's submission, para. 103.
[24] See Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, for example. See also Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[25] Journalist's submission, para. 105.
[26] Whitecaps' and BC Lions' initial submission, para. 19.

number of attendees.[27] Both teams said the number of attendees is obtained through the use of handheld scanning devices that scan tickets that attendees present at their games and that the figures are in turn collected in Ticketmaster's computer software system.[28] PavCo said that it accessed the figures in question from Ticketmaster.[29]

[31] The parties' submissions indicate that the Whitecaps and BC Lions did not supply the information in issue directly to PavCo, but rather that Ticketmaster supplied the information. Past orders have, however, said that information need not have been supplied by the third parties whose information it is in order for the information to be "supplied".[30] I am satisfied that that the information in issue was "supplied" to PavCo for the purposes of s. 21(1)(b).[31]

[32] **Supplied "in confidence" —** A number of orders have discussed the test for determining if third-party information was supplied, implicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[32]

> The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body 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 public body;
>
> 3. not otherwise disclosed or available from sources to which the public has access;
>
> 4. prepared for a purpose which would not entail disclosure.

[33] The Whitecaps and BC Lions said they supplied the number of attendees to PavCo under "circumstances of implicit confidentiality".[33] They said that it is

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[27] Ford affidavit, para. 18.
[28] Ford affidavit, para. 17; Skulsky affidavit, para. 17.
[29] PavCo's initial submission, paras. 1, 6.
[30] See, for example, Order 01-26, 2001 CanLII 21580 (BC IPC), at para. 29, and Order 02-04, 2002 CanLII 42429 (BC IPC), at para. 15.
[31] See Order 01-36, 2001 CanLII 21590 (BC IPC), where former Commissioner Loukidelis found that Western Rubber, a scrap tire recycler, "supplied" a list of scrap tire generators to the public body.
[32] Order 01-36, 2001 CanLII 21590 (BC IPC), at para. 26.
[33] Whitecaps and BC Lions' initial submission, paras. 20, 21, 24.

their "understanding" that PavCo and Ticketmaster keep such information confidential and that this "expectation of confidentiality" is "based, in part, on the many years of dealings between the parties where this type of attendance information has never been publically released by PavCo".[34]

[34] Both teams said the information in issue is not shared with the public and is not available from other sources. Both also argued that the information is "highly sensitive and confidential even within their own organizations" and is only shared with those who need to know it for their job requirements, such as senior executives, select management employees and select sales team members. They acknowledged that they share the information in issue with their respective leagues, but do so only under an expectation of confidentiality.[35] PavCo said it is industry standard and practice to keep confidential scanned ticket data on the number of attendees for sporting events.[36]

[35] Piecing together elements from the parties' submissions and evidence, I am satisfied that Ticketmaster supplied the information, implicitly "in confidence", on behalf of the Whitecaps and BC Lions, to PavCo. I find that the information in issue was supplied implicitly "in confidence" to PavCo for the purposes of s. 21(1)(b).

Would disclosure lead to significant harm?

[36] The Whitecaps and BC Lions argued that disclosure of the number of attendees could reasonably be expected to result in significant harm under ss. 21(1)(c)(i) and (iii). They raised the following concerns with disclosure of the requested information: damage to their reputations; harm to their negotiating position with sponsors and to their competitive position with other teams; and undue gain to their competitors.

[37] The teams' concerns in these areas centred on "scanned attendance figures" (*i.e.*, number of attendees) versus "announced attendance figures". They explained that "scanned attendance figures" represent the actual number of attendees whose tickets are scanned on entry to each game. They said that "announced attendance figures" take into account several elements: "scanned attendance figures"; "tickets distributed" or "issued"; and "others who may be in attendance".[37] The teams said it is industry practice to publicly provide "an

[34] Skulsky affidavit, para. 17; Ford affidavit, para. 16.
[35] Whitecaps' and BC Lions' initial submission, paras. 21-24; Skulsky affidavit, paras. 14-17; Ford affidavit, paras. 14-16.
[36] Ramsay affidavit, para. 21.
[37] For example, volunteers, participants in the half-time show or those entering BC Place on "credentials" rather than tickets and who enter via employee entrances. The teams also said the handheld devices used to collect the scanned attendance figures malfunction on occasion and attendees may not be included.

Announced Attendance", rather than relying on the number of tickets scanned entering the building, which "may be different".[38]

[38] **Damage to reputation —** The Whitecaps and BC Lions said that the scanned attendance figures do not provide an "accurate insight" into the number of people actually attending. They argued that disclosure of the information on the actual number of attendees would place them in "the unfair position of having to justify why the Scanned Attendance Figures are different than announced attendance". They further argued that public perception is extremely important to professional sports teams such as theirs and the release of inaccurate information is damaging to their reputation.[39]

[39] The journalist said that actual attendance figures for soccer matches have been disclosed in the UK, with no evidence that harm to the relevant soccer clubs has resulted.[40] The Whitecaps and the BC Lions responded that disclosures in another country, under a different legislative scheme, are not helpful here.

[40] I understand that there may be differences between the "scanned attendance figures" (*i.e.*, the number of attendees) and the "announced attendance figures". The teams did not, however, explain in what circumstances they might have to "justify" any difference between these two sets of figures, nor why doing so would put them in an "unfair position". They also did not explain how the "scanned attendance figures" were "inaccurate", nor how release of this supposedly "inaccurate information" might be damaging to their reputation. They also did not link the damage they fear to harm for the purposes of s. 21(1)(c)(i) or (iii). Even if I accept that harm to reputation is harm under s. 21(1)(c)(i) or (iii), PavCo and the two teams have not persuaded me that any such harm is reasonably expected to result from disclosure of the scanned attendance figures.

[41] **Harm to negotiating and competitive position —** The Whitecaps and BC Lions said that they both operate in a "very competitive entertainment market", competing with each other, with other amateur and professional sports teams and with other "entertainment sources" for advertisers, sponsorships and ticket buyers, who are "key to their financial operations". They said that, like other professional sports teams, they use "announced attendance figures" to market themselves to potential sponsors and broadcasters. They argued that any information that "unfairly" calls into question the accuracy of the announced attendance "is therefore expected to negatively impact sponsorship, advertising and tickets sales", which in turn is likely to cause significant harm to their

[38] Whitecaps' and BC Lions' initial submission, paras. 21-22; Skulsky affidavit, paras. 8-9; Ford affidavit, paras. 9-10.
[39] Whitecaps' and BC Lions' initial submission, paras. 29-30.
[40] Journalist's submission, paras. 2, 23-49, 77. He said the actual attendance figures were "far lower" than the "official attendance" figures.

competitive position, interfere significantly with their negotiating position and result in undue loss.[41]

[42] The journalist argued that the Whitecaps and BC Lions do not compete directly with these "minor league sports franchises" which cater to different demographics. In his view, attendance is "a direct result of the on-field performance and competitiveness of the teams, the game presentation and entertainment value, and ticket prices". He also argued that the Whitecaps and BC Lions have a monopoly in their respective fields and there is nowhere else in BC the two teams could play and "remain sustainable businesses".[42]

[43] The Whitecaps and BC Lions did not explain how disclosure of the number of attendees might "unfairly" call into question the accuracy of the announced attendance figures. Nor did they explain how this might "negatively impact" their relationships with advertisers, sponsors and others, nor how this would in turn reasonably be expected to cause harm for the purposes of s. 21(1)(c)(i) or (iii).

[44] The evidence of the Whitecaps' Vice President, Finance & Administration, was that, where the actual attendance figures (number of attendees) differ from the announced attendance figures, he "expect[s] their release to negatively impact" their sponsorship, ticket sales and advertising sales.[43] The BC Lions' Chief Executive Officer and President provided similar evidence.[44]

[45] An expectation of an (unquantified) "negative impact" does not, in my view, equate to a reasonable expectation of significant harm or undue loss for the purposes of ss. 21(1)(c)(i) and (iii). Past orders have said that it is necessary to show an obstruction to actual negotiations.[45] PavCo and the two teams have not done so.

[46] I have also taken into account the journalist's argument that attendees are able to observe for themselves that BC Place is not fully occupied, when the "announced attendance" figures indicate that the venue is "sold out".[46] Moreover, by the Whitecaps and BC Lions' own admission, in such situations, "it is readily apparent that not all seats are occupied" and "it is obvious to the public that the announced attendance does not purport to be actual attendance".[47] If these things are obvious to the public, I conclude that they are also obvious to

[41] Whitecaps' and BC Lions' initial submission, paras. 31-34; Skulsky affidavit, paras. 23-26; Ford affidavit, paras. 21-28.
[42] Journalist's submission, para. 78, 105.
[43] Ford affidavit, paras. 27-28.
[44] Skulsky affidavit, para. 26
[45] See, for example, Order F05-05, 2005 CanLII 14303 (BC IPC), at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 34260 (BC IPC).
[46] Journalist's submission, para. 80.
[47] Whitecaps' and BC Lions' reply submission, para. 9.

the sponsors and broadcasters about whom the BC Lions and the Whitecaps expressed concern. I therefore fail to understand how disclosure of the actual attendance figures (number of attendees) could cause harm to the two teams' negotiating and competitive position.

[47] **Undue gain —** The two teams argued that release of the number of attendees, which they said is not otherwise available, would provide their competitors with an "unfair advantage" by giving them commercially valuable information, effectively for nothing, resulting in undue gain to the competitors. The Whitecaps and BC Lions said they would not gain a similar benefit, as actual attendance information is not available from their competitors.[48]

[48] Previous orders on s. 21(1)(c)(iii) have said that the ordinary meaning of "undue" financial loss or gain includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be "undue".[49]

[49] The teams provided no evidence that there is a market for the information among their competitors to explain how the information in issue is "commercially valuable". Nor did they explain what their competitors might do with the information, how it would give their competitors an advantage — "unfair" or otherwise — or how this could result in "undue" gain to the competitors. PavCo and the two teams have not, in my view, established that disclosure of the information in issue could reasonably be expected to result in undue gain to the teams' competitors.

Conclusion on s. 21(1)

[50] I found above that the information in issue is "commercial information" for the purposes of s. 21(1)(a)(i) and that it was "supplied in confidence" under s. 21(1)(b).

[51] However, PavCo and the two teams have not persuaded me that disclosure of the information in issue could reasonably be expected to cause harm under s. 21(1)(c)(i) or (iii). A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".[50] PavCo, the Whitecaps and the BC Lions have provided no such

[48] Whitecaps' and BC Lions' initial submission, paras. 31-34; Skulsky affidavit, paras. 23-26; Ford affidavit, paras. 21-28.
[49] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19.
[50] See Order 02-50, 2002 CanLII 42486 (BC IPC), at paras. 124-137, which discussed the standard of proof in this type of case and summarized leading decisions on the reasonable expectation of harm.

evidence to support their submission that harm under s. 21(1)(c) could reasonably be expected to result from disclosure of the information in issue. PavCo has not met its burden of proof respecting s. 21(1). I find that s. 21(1) does not apply to the requested information.

CONCLUSION

[52] For reasons given above, under s. 58(2)(a), I require PavCo to give the applicant access to the requested information by March 10, 2016. PavCo must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

January 27, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F13-55000