Order F16-51

BRITISH COLUMBIA PAVILION CORPORATION

Celia Francis
Adjudicator

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Summary: A journalist requested access to the contract between PavCo and TED Conferences for the March 2014 Ted Conference. The adjudicator found that s. 17(1) (harm to financial interests of public body) and s. 21(1) (harm to third-party business interests) did not apply to the withheld information and ordered PavCo to disclose it to the journalist.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 17(1)(d), 17(1)(f), 21(1)(a)(ii), 21(1)(b).

Authorities Considered: B.C.: Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15**,** 2003 CanLII 49185 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 00-22, 2000 CanLII 14389 (BC IPC); Order F05-05, 2005 CanLII 14303 (BC IPC); Order F13-06, 2013 BCIPC 6 (CanLII); Order F13-07, 2013 BCIPC 8 (CanLII); Order F15-53, 2015 BCIPC 56 (CanLII); Order F16-17, 2016 BCIPC 19 (CanLII); Order 04-06, 2004 CanLII 34260 (BC IPC); Order F14-28, 2014 BCIPC 31 (CanLII); Order F13-22, 2014 BCIPC No. 4 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F14-46, 2015 BCIPC 49 (CanLII); Order F16-27, 2016 BCIPC 29 (CanLII); Order F15-68, 2015 BCIPC 74 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-05, 2014 BCIPC 6 (CanLII); Order F15-46, 2015 BCIPC 49 (CanLII); Order F14-49, 2014 BCIPC 53 (CanLII); Order 00-41, [2000] B.C.I.P.C.D. No. 44.

Cases Considered: *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; *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904; *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; *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner), 2012 BCSC 875.*

INTRODUCTION

[1] Late in 2013, a journalist requested access under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") to the contract between the British Columbia Pavilion Corporation ("PavCo") and TED Conferences, LLC ("TED"), for the TED conference to be held at the Vancouver Convention Centre ("VCC") in March 2014. PavCo responded in early 2014 by denying access to the contract in its entirety under s. 17(1) (harm to financial interests of public body) and s. 21(1) (harm to third-party business interests) of FIPPA.

[2] The journalist requested a review of PavCo's decision to deny access by the Office of the Information and Privacy Commissioner ("OIPC"). In late 2014, PavCo disclosed the contract in severed form. Mediation by the OIPC was otherwise unsuccessful and the matter proceeded to inquiry. The OIPC received submissions from the journalist, PavCo and TED.

ISSUES

[3] The issues before me are whether PavCo is authorized by s. 17(1), and required by s. 21(1), of FIPPA to deny access to information. Under s. 57(1) of FIPPA, PavCo has the burden of proving that the journalist has no right of access to the information in dispute.

DISCUSSION

Background

[4] PavCo is a Provincial crown corporation that reports to the Legislature through the Minister of Transportation and Infrastructure. It owns and manages the VCC, which hosts events such as meetings and conferences.[1]

[5] TED describes itself as a "non-profit, nonpartisan organization devoted to the sharing of ideas," usually in the form of short talks of 18 minutes or less ("TED talks").[2]

[1] PavCo's initial submission, paras. 7-9.
[2] TED's initial submission, Affidavit of Katherine McCartney, Director, Operations, TED Conferences, LLC, para. 2.

Information in dispute

[6] The information at issue is in the schedules to the license agreement between PavCo and TED for the March 2014 TED conference at the VCC. PavCo disclosed the body of the license agreement (pp. 1-6) but withheld all of the information in the attached schedules (pp. 7-22). PavCo said that the withheld information is the "final contract price" and "details of pricing components".[3]

Harm to third-party interests

[7] TED argued that s. 21(1) applies to all of the withheld information.[4] The journalist argued that it does not apply. The relevant parts of s. 21(1) of FIPPA in this case 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,
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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
>
> (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, …

[8] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[5] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, PavCo must demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, PavCo must demonstrate that disclosure of the information could reasonably be expected to cause one or more of the harms set out in s. 21(1)(c). In assessing the parties' arguments on s. 21(1), I have taken this approach, which is set out in previous orders and court decisions.

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[3] PavCo also withheld the signatures (but not the names) of the PavCo and TED representatives who signed the license agreement and both the names and signatures of those who signed Schedule B. PavCo disclosed the headings of the schedules.

[4] PavCo did not make a submission on s. 21(1), even though it has the burden of proof.

[5] 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 "financial or commercial information"?

[9] TED submitted, without elaboration, that the withheld information is its commercial and financial information.[6] The journalist agreed that the withheld information meets the first part of the s. 21(1) test.[7]

[10] FIPPA does not define "commercial" or "financial information." However, previous orders have held that

- "commercial information" relates to commerce, or the buying, selling, exchange or providing of goods and services; the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value[8]

- hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract are both "commercial" and "financial" information of or about third parties[9]

[11] The withheld information includes the license fee[10] and applicable taxes TED was to pay PavCo for use of portions of the VCC for the March 2014 TED conference, plus any special terms and conditions for the license and any services PavCo was to provide. I am satisfied that this information is "commercial" and "financial" information of or about TED.

Was the information "supplied in confidence"?

[12] The next step is to determine whether the information in issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[11] TED argued that the information was "supplied in confidence" for the purposes of s. 21(1)(b).[12] The journalist argued

[6] TED's initial submission, para. 5.
[7] Journalist's submission, para. 49.
[8] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[9] For example, Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41, Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 4, Order F05-05, 2005 CanLII 14303 (BC IPC) at para. 46, Order F13-06, 2013 BCIPC 6 (CanLII) at para. 16, Order F13-07, 2013 BCIPC 8 (CanLII) at para. 36, Order F15-53, 2015 BCIPC 56 (CanLII), at para. 11, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24. In Order 04-06, 2004 CanLII 34260 (BC IPC), at para. 36, former Commissioner Loukidelis found that such information was also "about" the public body.
[10] The disclosed pages state that the license fee was the aggregate of basic rent, service charges and food and beverage charges.
[11] 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.
[12] TED's initial submission, paras. 8-17.

that the information was not "supplied" but negotiated.[13] Given my finding below, I have only had to consider whether the information was "supplied".

"*Supplied*"

[13] BC orders have consistently found that information in an agreement or contract will not normally qualify as "supplied" by the third party for the purposes of s. 21(1)(b), because the information is the product of negotiations between the parties. This is so, even where the information was subject to little or no back and forth negotiation. There are two exceptions to this general rule:

- where the information the third party provided was "immutable" – and thus not open or susceptible to negotiation – and was incorporated into the agreement without change; or
- where the information in the agreement could allow someone to draw an "accurate inference" about underlying information a third party had supplied in confidence but which does not expressly appear in the agreement.[14]

TED's submission

[14] TED acknowledged that past orders have generally found that contract terms are not "supplied" within the meaning of s. 21(1)(b), because the parties have agreed to them. However, it said, this is a "narrow interpretation," which only applies in cases where a third party is offering its services to a public body, so the terms should be disclosed to the taxpayer for transparency reasons. TED argued that these principles do not apply to this situation, where TED and PavCo, as commercial entities, are engaging in a strictly commercial function for use of a facility which, TED said, "happens" to be owned by a Crown corporation but which would normally be privately owned. TED argued that a "more principled interpretation of 'supplied' which recognizes the strictly commercial context of this case … should be adopted and applied in this case".[15]

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[13] Journalist's submission, paras. 45-49.
[14] See, for example, Order 01-39 2001 CanLII 21593 (BC IPC) at para. 45, and Order F13-22, 2014 BCIPC No. 4 (CanLII) at para. 17. Key judicial review decisions have confirmed the reasonableness of this approach. See Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 58, referring to *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 and *K-Bro Linen Systems Inc. v. British Columbia (Information and Privacy Commissioner)*, 2011 BCSC 904.
[15] TED's initial submission, paras. 9-17.

Analysis

[15] Past orders have generally found that contract terms are negotiated, rather than "supplied," based on the facts of those cases. I do not consider the findings in those previous cases to be evidence of a "narrow interpretation" of the word "supplied" in s. 21. If TED is suggesting that this license agreement should not be subject to accountability and transparency principles because both parties were engaged in a commercial, profit-making transaction, I disagree. PavCo's mandate is to generate revenue for BC and it is accountable for the management of the VCC, a publicly-owned facility.[16] License agreements for use of the VCC are subject to the same transparency principles as other agreements involving public bodies.

[16] In any case, there is convincing evidence that the information in dispute was negotiated as opposed to "supplied" within the meaning of s. 21(1)(b). For instance:

- the license agreement and its schedules state that they set out the terms for TED's use of the VCC and the fees TED was to pay PavCo for that use
- TED "covenants and agrees" to various terms and conditions throughout the license agreement[17]
- TED signed the license agreement, acknowledging that it had read and "agreed to be bound by all the covenants, agreements, terms and conditions contained in this License Agreement and in all attachments hereto"[18]
- Schedule A sets out the "Negotiated Room Rental Charge"[19]
- Schedule B states that the parties "agree to revise the License Agreement as follows … " and that its terms are part of the license agreement between the parties[20]
- TED acknowledged that PavCo "negotiated and agreed to terms" for TED's use of the VCC[21]
- TED's Director of Operations says that she was in involved in "contract discussions" on TED's behalf regarding the terms of the license agreement for TED's use of the VCC. I take this to mean she was involved in negotiations concerning those terms.

[17] **Exceptions to "supplied"** — TED argued in the alternative that the withheld information comes within one of exceptions set out in paragraph 13

[16] Cretney affidavit #2, paras. 4-5; March 2016 Mandate letter to PavCo, Exhibit A.
[17] For example, Article 8.a), Cancellation and Termination, and Article 9, Use of Premises.
[18] Page 6.
[19] See the second line on p. 18.
[20] Paragraphs 2 and 3 on p. 21.
[21] TED's initial submission, para. 11.

above.[22] However, TED provided no support for this argument. It did not, for example, explain how the withheld information was "immutable" or how disclosure of the withheld information would allow someone to accurately infer underlying, confidentially supplied information. These things are also not evident from any of the withheld information itself. TED has not, in my view, established that the withheld information falls into one of the exceptions to "supplied" information.

Conclusion on s. 21(1)(b)

[18] For reasons given above, I find that the information in dispute was not "supplied" within the meaning of s. 21(1)(b). Therefore, I find that s. 21(1)(b) does not apply to the information in dispute.

Finding on s. 21(1)

[19] I found above that the withheld information is financial and commercial information of or about TED, so s. 21(1)(a)(ii) applies to it. However, I found that s. 21(1)(b) does not apply because the information was not "supplied." As noted above, information must meet all three parts of the test in s. 21(1). This means that s. 21(1) does not apply and it is not necessary for me to decide whether disclosure could reasonably be expected to result in harm under s. 21(1)(c). PavCo has not met its burden of proof regarding s. 21(1). I find that s. 21(1) does not require PavCo to refuse access to the withheld information in this case.

Harm to financial interests – s. 17(1)

[20] PavCo argued that s. 17(1)(d), s. 17(1)(f) and, more generally, s. 17(1) apply to the information in dispute. The relevant provisions read as follows:

> **Disclosure harmful to the financial or economic interests of a public body**
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> 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:
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> …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;
>
> …
>
> (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.

[22] TED's initial submission, para. 9.

[21] 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).[23]

Standard of proof for s. 17(1)

[22] 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 probabilities or improbabilities or the seriousness of the allegations or consequences".[24]

[23] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[25] Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

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

Would disclosure result in harm under s. 17(1)?

[25] PavCo said that its mandate is to maximize revenues and generate significant economic and community benefits for BC, including through its management of the VCC, which provides a venue for meetings and conferences and contributes to the growth of the tourism industry. PavCo said its strategies in achieving its mandate include seeking "high profile" out-of-province events, such

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[23] See for example, Order F08-22, 2008 CanLII 70316 (BC IPC), at para. 43.
[24] *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.
[25] 2012 BCSC 875, at para. 43.

as TED talks, which attract many out of town visitors to Vancouver. As such, PavCo said, the TED conference is "a powerful economic engine" for Vancouver and its businesses, and TED is "fundamental to the fulfilment of PavCo's economic mandate." PavCo said its positive business relationship with TED is critical to its ability to secure annual license agreements with TED. PavCo argued that disclosure of the information in dispute would damage its business relationship with TED, resulting in harm to PavCo's financial interests through the loss of TED as a client. This would, PavCo argued, impair its ability to maximize revenue from VCC, increasing the risk of an operating shortfall (which would be paid for with public funds) and creating a risk of harm to the financial or economic interests of the BC government.[26]

[26] TED said that, in order "to ensure the continual success of our conferences, the flexibility to change venues and offer a fresh approach to the TED conferences requires us to execute a License Agreement on a yearly basis." TED said that it currently does not have a signed agreement past the 2017 TED conference, although it has "tentative holds" on dates at the VCC for TED conferences up to 2026, "pending completed contracts and our ongoing business relationship with both VCC and the City of Vancouver." TED said disclosure of what it called the "highly confidential" terms and conditions of the license agreement in issue here would have a detrimental impact on its business relationship with PavCo, as TED would no longer be able to trust that its commercially sensitive information would remain confidential.[27]

[27] The journalist said that the VCC is a publicly-owned, monopoly facility, with "world-class amenities and services" and a convenient location, close to hotels, restaurants and transportation facilities. He argued that BC's taxpayers have a right to know if PavCo is charging TED fair market value, if TED is "truly an asset" to BC and if TED is "getting an advantage over other show managers, simply because of the celebrities it attracts".[28]

Analysis

[28] I accept that the TED conferences attract thousands of delegates from out of province and that they bring direct and indirect economic benefits to Vancouver businesses.[29] However, as PavCo admitted, it is currently "in discussions" with many other potential clients, besides TED, for future use of the VCC facilities.[30] In

[26] PavCo's initial submission, paras. 12-13, 16, 19-42; Cretney affidavit #1. Most of this affidavit was received *in camera*.
[27] McCartney affidavit, paras. 7-14. TED also made arguments about the harm it would suffer to its reputation and its negotiating position with other conference venues, which I deal with below under s. 17(1)(d).
[28] Journalist's submission, paras. 12-22.
[29] Letters from Ty Speer, President and CEO, Tourism Vancouver, and Gregor Robertson, Mayor of Vancouver, Exhibits B and C to Cretney affidavit #2.
[30] Cretney affidavit #1, para. 6.

each case, PavCo can be expected to negotiate as good a deal as possible for itself and BC taxpayers.

[29] TED did not say what role the terms of the license agreement played in its decision to move the TED conference to Vancouver. TED also did not specifically state that it would refuse to hold future TED conferences in Vancouver if the withheld information were disclosed. Rather, TED said that disclosure is "likely" to make it "reluctant" to use the VCC for its events and that it would "be encouraged to re-evaluate [its] current relationship with Vancouver."

[30] TED said that it has "many choices" about the venues it uses to host its events.[31] It is also clear from TED's evidence that it is not likely to hold its TED conferences in Vancouver indefinitely and that its decision on whether to stay in Vancouver or move to another jurisdiction will depend on more than its "positive business relationship" with PavCo. For example, other factors, such as its relationship with the City of Vancouver and offers it receives from other venues, would evidently play a role in TED's decision to stay in Vancouver or go elsewhere. Moreover, TED itself said it wants the flexibility to change venues and offer a fresh approach to its conferences.

Harm to PavCo's negotiating position under s. 17(1)(f)

[31] PavCo said that it competes internationally to host events and that it is currently in discussions with a number of clients on possible future contracts for use of VCC space. It argued that disclosure of the withheld information would negatively affect its prospects of achieving better terms for these future contracts, because its prospective clients would have an advantage in knowing what fees PavCo had accepted in the past and would have little incentive to pay a higher fee for PavCo's services. PavCo argued that its financial costs would increase as a result, due to prolonged negotiations and less favourable terms of agreement, leading to harm under s. 17(1)(f).[32]

[32] The journalist said that the VCC is a publicly-owned, monopoly facility, with "world-class amenities and services" and a convenient location, close to hotels, restaurants and transportation facilities. In his view, the public should know whether the VCC is being operated in a fiscally responsible manner.[33]

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[31] TED's initial submission, para. 18; McCartney affidavit, para. 14.
[32] PavCo's initial submission, paras. 32-41; Affidavit #1 of Ken Cretney, Interim President and Chief Executive Officer, PavCo. Most of this affidavit was received *in camera*.
[33] Journalist's submission, para. 36.

Analysis

[33] As many previous OIPC Orders have noted, negotiations involve give and take on both sides.[34] Thus, depending on the circumstances, there may be cases where licensees want different services from PavCo, they agree to pay higher or lower fees than they did last time or PavCo achieves better or worse terms than it did last time.

[34] PavCo did not describe the nature of its current or future negotiations with potential clients. However, I accept that each party to contract negotiations will attempt to negotiate the most advantageous deal for itself. I also accept that the VCC's licensees may use information from past agreements (their own and others') in an attempt to obtain better terms than they had previously. It is also not surprising that, with each new negotiation, licensees attempt to negotiate lower fees than they paid previously.

[35] PavCo did not say why it agreed to the terms of the license agreement in this case. There is no evidence that it was compelled to do so. PavCo also did not explain how disclosing the fee TED paid PavCo for the use of the VCC would oblige PavCo to agree to license the VCC to another client on the same terms. Even if PavCo were forced to agree to the same terms with another client, it did not explain how this could result in harm under s. 17(1)(f).

[36] PavCo also did not explain the nature or extent of any potential increase in its financial costs from "prolonged negotiations" that could flow from disclosure of the information in issue. Nor did PavCo explain how disclosure could result in less favourable terms of agreement in negotiations with prospective clients. PavCo also did not explain how these things could result in financial harm to PavCo and the Province.

[37] I have considered PavCo's argument that Order F15-68,[35] which found that s. 17(1) applied to terms in concluded agreements, is similar to this situation. In that case, however, the senior adjudicator had extensive evidence supporting the alleged s. 17(1) harms. The same kind of evidence is not present here.

Undue financial gain or loss to a third party under s. 17(1)(d)

[38] **Undue gain to PavCo's competitors —** PavCo argued that it operates in a competitive industry. It argued that disclosure of the withheld information would provide its competitors (*i.e.*, other convention centres) with an understanding of PavCo's negotiation strategies and pricing structures, and what PavCo has accepted as "suitable" in the past, thereby giving the competitors a competitive

[34] See, for example, Order F14-46, 2015 BCIPC 49 (CanLII), Order F16-27, 2016 BCIPC 29 (CanLII).
[35] Order F15-68, 2015 BCIPC 74 (CanLII).

windfall.[36] Disclosure could, PavCo argued, lead to an undue gain to those competitors under s. 17(1)(d), as they would acquire competitively valuable information, effectively for nothing. PavCo noted that TED prefers to execute annual agreements for each conference and argued that PavCo's competitors could "entice" TED to their venues by making a competitive offer, based on their knowledge of PavCo's negotiation strategies.[37]

[39] The journalist argued that there is no other facility in BC that could provide a suitable venue for "a convention of TED's scope and scale."[38]

Analysis

[40] Past orders have said that, if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor and the loss to the third party will be "undue."[39]

[41] PavCo did not explain how disclosure of the information in dispute would reveal its negotiating strategies or pricing structures. PavCo also did not explain how the withheld information was "competitively valuable," beyond saying its competitors would use it to try to entice TED away. PavCo did not, moreover, explain the nature or extent of any potential financial gain to its competitors that might flow from disclosure, still less how this gain would be "undue." PavCo also did not describe the competitive nature of the environment in which it operates. For example, it did not explain how often or to what extent it competes with other venues for conferences.

[42] PavCo also did not dispute the journalist's argument that the VCC is the only venue in BC capable of hosting a large event like TED talks. This, in my view, undermines PavCo's argument about losing business to other venues in BC, at least as far as TED talks are concerned.

[43] **Undue loss to TED —** TED said that it receives "many unsolicited offers" from cities in other jurisdictions to host TED conferences and it is important to TED "from a competitive and negotiating position" that the terms of its agreements with facility owners be kept confidential. Thus, TED said, disclosure of what it called the "highly confidential" terms and conditions of the license agreement in issue here would undermine its negotiating position with future conference venues. TED

[36] PavCo's initial submission, para. 38.
[37] PavCo's initial submission, para. 42.
[38] Journalist's submission, para. 36.
[39] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC), at p. 18-1, where former Commissioner Loukidelis considered the interpretation of "undue financial loss and gain" in the context of s. 21(1)(c)(iii).

also argued that it would suffer damage to its reputation as a result of controversy instigated by having signed the license agreement.[40]

[44] The journalist described TED's concerns about harm to its business interests as "purely speculative" and "fear-mongering". He noted that TED conferences attract 1,000 attendees over five days and that it is advertising a per person attendance fee of $8,500 for its April 2017 TED conference.[41]

Analysis

[45] TED did not describe the "unsolicited offers" it has received from other jurisdictions or how they compare to the terms and conditions of the license agreement in issue here. It also did not explain how disclosure of the information in dispute would undermine its negotiating position with other venues or cause damage to its reputation. TED also did not explain the nature or extent of any financial loss that it might suffer as a result, still less how any such loss might be "undue."

Conclusion on s. 17(1)

[46] For reasons given above, PavCo and TED have not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 17(1). They have not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harms. Rather, they provided assertions, unsupported by evidence, which do not persuade me that disclosure of the information in dispute could reasonably be expected to result in harm under s. 17(1)(d), s. 17(1)(f) or, more generally, under s. 17(1). PavCo has not met its burden of proof respecting s. 17(1). Therefore, I find that s. 17(1) does not authorize PavCo to withhold the information in dispute.

[47] My findings are consistent with those in Order F14-05,[42] Order F15-46,[43] Order F14-49,[44] and Order F16-27 which rejected similar arguments from PavCo. I also note that past orders have said that

> Businesses who contract with public bodies must have some understanding that those dealings are necessarily more transparent than purely private transactions. Even if one assumes loss could be expected to the third party, such loss would not be "undue".[45]

[40] McCartney affidavit, paras. 7-14. TED's arguments on these points appeared in the context of PavCo's arguments about the risk of s. 17(1) harm to its business relationship with TED.
[41] Journalist's submission, paras. 12-22.
[42] 2014 BCIPC 6 (CanLII).
[43] 2015 BCIPC 49 (CanLII).
[44] 2014 BCIPC 53 (CanLII).
[45] Order F16-27, Order F08-22, Order 00-41, [2000] B.C.I.P.C.D. No. 44, at p. 8.

CONCLUSION

[48] For the reasons given above, under s. 58(2)(a) of FIPPA, I find that PavCo is not authorized or required to refuse to give the journalist access to the information it withheld under ss. 17(1) and 21(1) and that it is required to give him access to this information by February 7, 2017. PavCo must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the journalist, together with a copy of the records.

December 22, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F14-56082