Order F20-23

BRITISH COLUMBIA PAVILION CORPORATION

Celia Francis
Adjudicator

June 2, 2020

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Summary: A journalist requested a copy of proposals submitted to the British Columbia Pavilion Corporation (PavCo) in 2015 to replace artificial turf at BC Place. PavCo ultimately disclosed most of the responsive records, withholding some information under s. 21(1) (harm to third-party financial interests) and s. 22(1) (unreasonable invasion of third-party personal privacy) in the proposal of the successful proponent, Centaur Products Inc. (Centaur). The adjudicator found that neither exception applied and ordered PavCo to disclose all of the information in dispute to the journalist.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 22(1).

INTRODUCTION

[1] This case concerns a proposal to replace the artificial turf at BC Place in Vancouver. In July 2015, a journalist made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) for copies of the proposals that four named proponents submitted in response to a request for proposal (RFP) that the British Columbia Pavilion Corporation (PavCo) issued for the BC Place Artificial Turf Field Replacement Project. In January 2016, PavCo disclosed the four proposals, withholding information in three of them under s. 17(1) (harm to financial interests of public body), s. 21(1) (harm to third-party financial interests) and s. 22(1) (unreasonable invasion of third-party personal privacy). The journalist requested a review by the Office of the Information and Privacy Commissioner (OIPC) of PavCo's decision to withhold information.

[2] During OIPC's mediation of the request for review, PavCo decided not to apply s. 17(1). Mediation did not resolve the ss. 21(1) and 22(1) issues, however, and they proceeded to inquiry. PavCo later revised its decisions and disclosed

additional information. Ultimately, only the application of ss. 21(1) and 22(1) to Centaur Products Inc.'s (Centaur) proposal remained at issue in this inquiry.

[3] The OIPC received submissions from Centaur and the journalist. PavCo said it would not supply a submission or evidence. It said that, in discussions with Centaur, PavCo had agreed to have Centaur provide submissions and evidence on its own behalf. It also said it would abide by the resultant OIPC order.[1]

[4] I infer from these statements that PavCo has abandoned its earlier reliance on s. 21(1). However, Centaur maintains that s. 21(1) applies to some of the information in the proposal. I have, therefore, considered Centaur's arguments on s. 21(1).

[5] After the inquiry closed, the OIPC invited Polytan Sportstättenbau GmbH (Polytan)[2] to participate in the inquiry. However, it declined.[3]

ISSUES

[6] The issues to be decided in this inquiry are these:

1. Does s. 22 require PavCo to withhold information?

2. Does s. 21 require PavCo to withhold information?

[7] Under s. 57(3)(b) of FIPPA, Centaur has the burden of proving that the applicant has no right of access to information under s. 21. Under s. 57(2), the journalist has the burden of proving that disclosure of third-party personal information would not be an unreasonable invasion of the third party's personal privacy under s. 22.

DISCUSSION

Information in dispute

[8] The record in this case is Centaur's March 2015 proposal to PavCo for the Artificial Turf Replacement Project (Project). The information in dispute is the information that Centaur wants withheld from this proposal under s. 21(1)[4] and the information that PavCo withheld under s. 22(1).[5]

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[1] PavCo's email of February 5, 2020.
[2] Polytan manufactured the artificial turf for Centaur. Its lab results form part of Centaur's proposal.
[3] Communication of May 26, 2020 with OIPC Registrar.
[4] Portions of pages 5, 7-12,17 and 20 and all of pages 34-158.
[5] A name on page 6.

Third-party business interests – s. 21(1)

[9] 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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> (i) trade secrets of a third party, or
> (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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> …

[10] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[6] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, Centaur must demonstrate that disclosing the information at issue would reveal one or more of the following: trade secrets of a third party; or 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, it 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).

[11] I find below that s. 21(1) does not apply. This is because, while I find that s. 21(1)(a) and s. 21(1)(b) apply, I also find that Centaur has not established a reasonable expectation of harm under s. 21(1)(c).

Type of information – s. 21(1)(a)

[12] Centaur argued that the information in dispute is its financial, commercial and technical information.[7] The journalist said the information is commercial but did not elaborate.[8]

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[6] See, for example, Order 03-02, 2003 CanLII 49166 (BCIPC), Order 03-15, 2003 CanLII 49185 (BCIPC), and Order 01-39, 2001 CanLII 21593 (BCIPC).
[7] Centaur's initial submission, pp. 2-3.
[8] Journalist's response submission, para. 18.

[13] FIPPA does not define these types of information. However, previous orders have held the following:

- "Commercial information" relates to commerce, or the buying, selling, exchanging 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.[9]
- "Commercial" and "financial" information of or about third parties includes hourly rates, global contract amounts, breakdowns of these figures, prices, expenses and other fees payable under contract.[10]
- "Technical information" is information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts. It usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment or entity.[11]

[14] **Pricing information** (pages 5, 7-12 and 17) – Centaur wants PavCo to withhold Centaur's proposed pricing for the Project on pages 5 and 7-12, specifically, the dollar figures for: two options for providing the replacement turf; each step required in the replacement (e.g., removal of the existing turf and shipping and installation of the new turf); and the purchase of maintenance and repair equipment. The information in dispute on page 17 is Centaur's proposed payment terms.

[15] I find that all of the information in dispute in these pages is financial information of or about Centaur for the purposes of s. 21(1)(a)(ii).

[16] **Profile information** (page 20) – The information at issue on this page is 5 ½ lines of text on a page entitled "Company Profile & Experience". It concerns Centaur's installation experience and describes another aspect of its business.

[17] I find that the information at issue on this page is commercial information of or about Centaur for the purposes of s. 21(1)(a)(ii).

[18] **Lab test results** (pages 34-158) – The information on these pages concerns the results of various types of laboratory tests performed on Polytan's turf, which Centaur proposed to install as part of the Project. It describes the

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[9] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[10] For example, Order F19-11, 2019 BCIPC 13 (CanLII) at para. 14, 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.
[11] See, for example, Order F13-19, 2013 BCIPC 26 (CanLII), at paras. 11-12, Order F12-13, 2012 BCIPC 18 (CanLII), at para. 11.

components of the turf, test objectives, technical aspects of the tests, analyses of the tests and the test results. It includes photographs, technical diagrams showing how the tests were performed and graphs and charts analyzing the test results. I find that this information is technical information of or about Polytan and Centaur for the purposes of s. 21(1)(a)(ii).

Supplied in confidence – s. 21(1)(b)

[19] The next step is to determine whether the information at issue was "supplied, implicitly or explicitly, in confidence." The information must be both "supplied" and supplied "in confidence."[12]

[20] Centaur said that the information was "supplied in confidence as part of the Proposal submission by Centaur for the Request for Proposal for the BC Place Artificial Turf Replacement Project in 2015."[13]

[21] The journalist argued that the information was not supplied in confidence, noting that contracts with public bodies are subject to FIPPA.[14] I agree that previous orders have generally found that the information in contracts with public bodies was not supplied in confidence for the purposes of s. 21(1)(b). However, the record at issue here is not a contract but a proposal.

[22] "**Supplied**" – Centaur's name appears on the cover page of the proposal, in which the information in dispute appears. It is clear from the contents of the proposal that Centaur submitted it to PavCo in response to PavCo's RFP on the artificial turf replacement project. I find, therefore, that the information was "supplied" for the purposes of s. 21(1)(b).

[23] "**In confidence**" – A number of orders have discussed examples of how to determine if third-party information was supplied, explicitly or implicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[15]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.

[12] See, for example, Order F17-14, 2017 BCIPC 15 (CanLII), at paras. 13-21, Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, and Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[13] Centaur's initial submission, pp. 2-3.
[14] Journalist's response submission, paras. 18-21.
[15] Order 01-36, 2001 CanLII 21590 (BC IPC).

> …
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> [26] 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.

[24] The submissions did not include the RFP. I do not know, therefore, if it included a statement that PavCo would accept and maintain proponents' proposals in confidence. As noted above, PavCo said nothing about this issue.

[25] However, the proposal itself contains a statement on page 2 that the information "provided is confidential". Centaur also asserted that it supplied the information in confidence. I therefore accept the evidence that the information in dispute was explicitly supplied "in confidence" for the purposes of s. 21(1)(b).

Reasonable expectation of harm – s. 21(1)(c)

[26] I found above that ss. 21(1)(a) and (b) apply to the information in dispute. I will now consider whether disclosure of this information could reasonably be expected to result in harm under s. 21(1)(c).

Standard of proof for harms-based exceptions

[27] Numerous orders have set out the standard of proof for showing a reasonable expectation of harm.[16] The Supreme Court of Canada confirmed the applicable standard of proof for harms-based exceptions:

> [54] 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

[16] For example, Order 01-36, 2001 CanLII 21590 (BCIPC), at paras. 38-39.

> 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".[17]

[28] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[18] Bracken J. confirmed that it is the release of the information itself that must give rise to a reasonable expectation of harm.

[29] I have applied these principles in considering the arguments on harm under s. 21(1)(c).

Discussion and findings

[30] Centaur's overarching argument was that disclosure of the information in dispute would significantly harm its competitive position. The journalist disagreed.

[31] **Pricing and payment term information** (pages 5, 7-12 and 17) – Centaur said that the Canadian artificial turf industry is very competitive and that:

- A competitor could use the detailed pricing information to evaluate Centaur's suppliers for the various components of the project and seek similar or better pricing directly from those suppliers;
- This would harm Centaur's competitive position by making it less financially competitive for the next artificial turf RFP or tender;
- Centaur has worked diligently to source unique and industry leading suppliers for the different components of the project over many years and at significant cost; and
- Competitors could use the payment term information as part of a strategy that would harm its competitive position for future artificial turf RFPs or tenders.[19]

[32] The journalist pointed out that five years have passed since Centaur submitted its proposal. He suggested that pricing would not be the same now because of inflation and various factors affecting the manufacturer and distributer.[20]

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[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)* [*Community Safety*], 2014 SCC 31, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3, at para. 94. See also Order F13-22, 2014 BCIPC 31 (CanLII), at para. 13, and Order F14-58, 2014 BCIPC 62 (CanLII), at para. 40, on this point.
[18] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875, at para. 43.
[19] Centaur's initial submission, page 2.
[20] Journalist's response submission, paras. 23-32.

[33] Centaur did not say who its competitors and suppliers are. Presumably, however, at least three of its competitors are the other proponents who submitted proposals in the RFP. I also gather from its submission and the proposal that Polytan is a supplier.

[34] Centaur also did not elaborate on the competitive nature of the artificial turf industry. In its arguments on harm, Centaur said it was the exclusive distributor of turf systems in Canada. This appears to conflict with its argument that, in Canada at least, the artificial turf industry is competitive.

[35] Centaur also did not explain how the payment term information is part of a "strategy" nor what it meant by this term. Centaur also did not explain how its competitors could use any of the information in the way it argued nor how this use could significantly harm Centaur's competitive position.

[36] As the journalist noted, the pricing information in question is five years old. It consists of what appear to be high level figures, while the payment information appears under the heading "Centaur Standard Payment Terms" and appears to be straightforward. It is not clear why competitors might be interested in this dated information, still less how or why they would or could use the information in the way Centaur argued.

[37] The journalist argued that economic and market conditions, as well as technology, would have changed. He added that, "What was commercially sensitive in 2015 need not be in 2020."[21] I agree. Any future bid process would be for a different project with different products and services wanted and with different conditions and factors prevailing. Centaur could be expected to offer and price its terms, services and products accordingly, as would its competitors and suppliers.

[38] **Profile information** (page 20) – Centaur said that, as a private company, its size in terms of revenue and assets is not publicly known. It said that disclosure of the information would significantly harm its competitive position, as competitors could use the information in future tenders and RFPs when working with consultants to exclude Centaur based on size. For example, it said, a requirement to participate in the RFP or tender could be for a company to have a minimum of $50 million in annual revenue and $10 million in assets.[22]

[39] The information in question on this page consists of high level, promotional information on Centaur's business. It is clearly designed to make Centaur look attractive to its potential clients and is of a type that a company

[21] Journalist's response submission, para. 24.
[22] Centaur's initial submission, page 3.

might post on its website. Centaur's revenue and assets are also mentioned, but only as rough, high level figures.

[40] Centaur did not explain, and I do not see, how disclosure of this information would enable its competitors to work with consultants to exclude Centaur on the basis of its revenue and assets. Centaur also did not explain how such a collaboration would in turn significantly harm its competitive position.

[41] **Lab test information** (pages 34-158) – Centaur's main concern is that the disclosure of this information could reasonably be expected to harm the competitive position both of Polytan, the manufacturer of the LigaTurf RS+ turf system used in the Project, and Centaur, as the exclusive distributor of turf systems in Canada.[23]

[42] The journalist argued that it is reasonable for products and processes to have advanced in the last five years. He suggested that, with the passage of time, therefore, any harm no longer exists.[24]

[43] Centaur said that the artificial turf industry is a competitive global industry and disclosing the test results would allow Polytan's competitors to "gain insight".[25] Centaur did not explain what it meant by "gain insight" nor how competitors might use the lab results to do so, to Polytan's financial detriment.

[44] Centaur also said that the LigaTurf RS+ turf installed at BC Place in 2015 remains one of Polytan's most installed turfs for soccer fields. It believes "that there would be little benefit to making this information available as opposed to the significant negative impact to Polytan and Centaur by releasing this information."[26]

[45] Centaur added this:

> The technical information includes highly sensitive chemical tests which would provide confidential information as to the chemical formulation used to produce filament and turf. The in-depth information includes design of the filaments (grass blades) and the construction of the complete system (components, amount of infill, etc.) The chemical formulation is the most important contributor to the performance of the turf filaments, which is the main component of a turf system. The formulation of the filament is proprietary knowledge of Polytan, the turf manufacturer, and is considered a core competency of Polytan. By making this public, it would lead to competitors attempting to reverse engineer different

[23] Centaur's initial submission, page 3.
[24] Journalist's response submission, para. 29.
[25] Centaur's initial submission, page 3.
[26] Centaur's reply submission, page 2.

> products to attempt to match developments in research and development that Polytan have made at considerable expense over many years.[27]

[46] Centaur did not point to portions of the lab test results that might reveal the "highly sensitive chemical tests" or chemical formulation of the blades. I could not identify any such information in the records. However, some of the information appears to be general, boilerplate information reflecting FIFA's requirements for artificial turf.[28] Other information appears to be of a promotional character. Some information is similar to information disclosed elsewhere in the proposal.

[47] I can also see that much of the information at issue reveals the design, physical characteristics and construction of the individual turf components. It also shows how the turf performed during various tests. Centaur did not explain how disclosure of this five-year old information would allow competitors to "reverse engineer" different products in an attempt to match Polytan's research developments. Centaur also did not explain why Polytan's competitors would want to do so.

[48] Centaur also did not explain the competitive nature of the global turf industry, who Polytan's competitors are and how these competitors could use the lab test results to significantly harm Polytan's competitive position. Also, as noted above, Polytan declined to participate in the inquiry. Moreover, Centaur did not explain how disclosure of the information could reasonably be expected to harm its own competitive position.

Conclusion on s. 21(1)(c)

[49] Centaur's submissions on harm, which did not include any affidavit evidence, amount to little more than assertions and do not persuade me that disclosure of the information in dispute could reasonably be expected to significantly harm its competitive position or that of Polytan. This is also not clear from the information itself.

[50] Centaur has 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. 21(1)(c).[29] It has not demonstrated a clear and direct connection between disclosing the information in dispute and a reasonable expectation of the alleged harms. Therefore, I find that Centaur has not met its burden of proof and that s. 21(1)(c) does not apply to the

[27] Centaur's initial submission, page 3.
[28] FIFA stands for "Fédération Internationale de Football Association", that is, the International Federation of Association Football.
[29] *Community Safety*, at para. 54.

information in dispute. I find that PavCo is not required to refuse the journalist access to this information under s. 21(1).

Unreasonable invasion of third-party privacy – s. 22(1)

[51] The approach to applying s. 22(1) of FIPPA has long been established. See, for example, Order F15-03, where the adjudicator said this:

> Numerous orders have considered the approach to s. 22 of FIPPA, which states that a "public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." This section only applies to "personal information" as defined by FIPPA. Section 22(4) lists circumstances where s. 22 does not apply because disclosure would not be an unreasonable invasion of personal privacy. If s. 22(4) does not apply, s. 22(3) specifies information for which disclosure is presumed to be an unreasonable invasion of a third party's personal privacy. However, this presumption can be rebutted. Whether s. 22(3) applies or not, the public body must consider all relevant circumstances, including those listed in s. 22(2), to determine whether disclosing the personal information would be an unreasonable invasion of a third party's personal privacy.[30]

Is it personal information?

[52] FIPPA defines "personal information" as recorded information about an identifiable individual, other than contact information. "Contact information" is defined in Schedule 1 of FIPPA as "information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."

[53] The only information in dispute under s. 22(1) is the name, title and signature of the Centaur employee who signed the proposal on Centaur's behalf.[31] The name appears on a line beginning "Contact Name". The information in dispute appears in a business context and is clearly there to enable the individual in question to be contacted at his place of business.

[54] I find that this information is "contact information" and not "personal information". I find, therefore, that s. 22(1) does not apply to it.

[55] Curiously, PavCo disclosed the same information elsewhere in the proposal, along with other individuals' names and business titles it had earlier

[30] Order F15-03, 2015 BCIPC 3 (CanLII), at para. 58.
[31] Page 6 of the proposal.

withheld under s. 22(1).[32] PavCo did not explain this inconsistent severing. Given my finding that the information is not personal information, however, this issue is moot.

CONCLUSION

[56] For reasons given above, under s. 58(2)(a) of FIPPA, I require PavCo to give the journalist access to all of the information in dispute. As a term under s. 59, I require PavCo to give the applicant access to this information by July 15, 2020. PavCo must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

June 2, 2020

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F16-65795

[32] PavCo's letter of March 6, 2020 to the journalist stated it was disclosing all of the information it had withheld on pages 2, 25, 29, 30, 40 and 43 of the proposal but withholding information (the name and title) on page 6 under s. 22(1).