Office of the Information & Privacy Commissioner for British Columbia

Protecting privacy. Promoting transparency.

Order F14-14

BC PAVILION CORPORATION

Vaughan L. Barrett
Adjudicator

May 15, 2014

CanLII Cite: 2014 BCIPC 17
Quicklaw Cite: [2014] B.C.I.P.C.D. No. 17

Summary: In responding to a request for access to an Agreement between it and the third party, the public body withheld information under both s. 17 and s. 21. Before the inquiry began, the public body took the position that s. 21 did not require it to withhold information. The inquiry proceeded without the third party's participation. Order F14-05 held that s. 17 did not authorize the public body to withhold information. The third party learned of the order and applied for it to be re-opened, on the basis that the Office is not *functus officio* and that it should have been given notice under s. 54(b) of the inquiry. The inquiry is re-opened, notice will be given under s. 54(b) and the applicability of s. 21 to information in the record will be considered.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 23, 54(b)

Authorities Considered: B.C.: Order F14-05, 2014 BCIPC 6 (CanLII); Order 01-52, 2001 CanLII 21606; Decision F06-10, 2006 CanLII 37937; Order F06-21, 2006 CanLII 42693; Decision F10-04, 2010 BCIPC 16 (CanLII); Order F08-03, 2008 CanLII 13321; Order F07-15, 2007 CanLII 35476; Order F09-01, 2009 CanLII 3225.

Cases Considered: *Zutter v. British Columbia (Council of Human Rights)*, [1995] B.C.J. No. 626; *Guide Outfitters Association Inc. v British Columbia (Information and Privacy Commissioner)*, 2004 BCCA 210; *British Columbia (Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1700; *Chandler v Alberta Association of Architects,* [1989] 2 SCR 848; *(Ministry of Public Safety and Solicitor General) v Stelmack*, 2011 BCSC 1244.

INTRODUCTION

[1] In Order F14-05,[1] issued on February 24, 2014, I held that PavCo was not authorized to withhold information under s. 17 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA") from the licence agreement ("Agreement") identified by the BC Pavilion Corporation ("PavCo"), a public body under FIPPA, between it and BC Lions respecting the latter's use of BC Place Stadium. Section 21 of FIPPA was not considered in that order.

[2] On March 25, 2014, this Office received a request from BC Lions to re-open the order. This request was communicated to the access applicant and to PavCo by this Office's letter dated March 28, 2014. That letter invited submissions from the applicant, PavCo and BC Lions on the request to re-open and submissions have been received.

[3] For the reasons given below, I have decided that Order F14-05 can and should be re-opened in order to complete the inquiry, by deciding whether s. 21 requires PavCo to withhold information from the requested record.

Procedural background

[4] On April 25, 2013, the Office issued a notice of written inquiry to the applicant and to PavCo. This notified them that an inquiry would be held under Part 5 of FIPPA on June 7, 2013. The notice stated the issues to be considered in the inquiry were whether PavCo "is required to refuse access under s. 21" of FIPPA and whether it "is authorized to refuse access under s. 17" of FIPPA. The notice stated that the burden of proof in the inquiry was, under s. 57(1), on PavCo "to prove that the applicant has no right of access to the records or part."

[5] The investigator's fact report issued on the same date as the inquiry notice noted that PavCo had, in its original decision of March 29, 2012, withheld information from the Agreement under ss. 15 and 17 of FIPPA, but also under s. 21. The report added that, during mediation by the Office, PavCo had withdrawn its application of s. 15. It also stated that, during the inquiry, the Information and Privacy Commissioner or her delegate would consider whether PavCo is, first, "required to refuse access under s. 21" of FIPPA and "authorized to refuse access under s. 17" of FIPPA.

[6] The notice of written inquiry in this proceeding also said this, in part, in relation to s. 54(b):

> The parties should be aware in preparing their submissions that if, during the conduct of the inquiry the adjudicator considers it necessary to notify,

[1] 2014 BCIPC 6 (CanLII).

> under s. 54(b) of FIPPA [FIPPA], a person or persons whose interests may be affected, notice will be given to them.

[7] Order F14-05 noted that PavCo had severed some information under ss. 15, 17 and 21, that PavCo had subsequently withdrawn its reliance on ss. 15 and 21 and relied in the inquiry only on s. 17 of FIPPA. The order then stated that the only issue in the inquiry was whether PavCo was authorized under s. 17 of FIPPA to refuse to disclose the information in dispute. The order stated that the burden of proof was on PavCo.

Nature of the record in issue

[8] At para. 6, Order F14-05 describes the record in issue as a November 2011 licensing Agreement between PavCo and the BC Lions "under which the BC Lions are afforded the right to use BC Place Stadium for each of its home games and for ancillary events". My order went on to describe "the Agreement" as follows:

> [7] **Record at Issue**—The Agreement, under which PavCo gives the BC Lions the right to use BC Place, is the record at issue in this inquiry. The Agreement compromises 53 pages including 16 pages of attached schedules. It provides details on the fees paid by the BC Lions for BC Place facilities including the field, balconies and private suites and for services including utilities, security, ticket sales, food and beverage, advertising and merchandising. Most fees and charges are based on variable rates. The redacted portions concern fees charged for the facilities and services, which services are provided without cost, and information about complimentary tickets and insurance coverage.

[9] At para. 18 of the order, I noted that PavCo had submitted that "its two anchor tenants voiced 'strong opposition' to disclosure of their respective license Agreements". The record before me in the inquiry disclosed that BC Lions is one of the anchor tenants mentioned and thus the Agreement is one of the licence Agreements mentioned.

Outline of the submissions

[10] BC Lions argues that it should have been notified by PavCo of its decision no longer to rely on s. 21. BC Lions also says that failure to give notice was a breach of procedural fairness and natural justice.[2] It also argues that this Office should have given it notice under s. 54(b) of the inquiry, as this was appropriate in the circumstances. The interests of BC Lions were clearly implicated in Order F14-05, it is argued, and the fact that BC Lions was not

[2] Because I have decided, for reasons given below, that s. 54(b) notice was and is appropriate here, I need not address BC Lions' argument on breach of the rules of natural justice and fairness.

notified meant it had no opportunity to make representations during the inquiry about whether s. 21 requires PavCo to refuse disclosure. BC Lions cites previous decisions from this Office as confirming that, in cases involving a mandatory exception to access—such as is involved in this case—notice is appropriate and has been given, thus affording affected parties an opportunity to be heard in the inquiry. This Office has the implied authority to re-open Order F14-05 and it is appropriate to do so in the circumstances in order to consider s. 21 after having heard from BC Lions.[3]

[11] PavCo takes no position on whether the fact that this Office did not give notice to BC Lions was breach of procedural fairness and natural justice. Nor does PavCo take any position on the s. 54 issue.

[12] The applicant, who objected to re-opening the order, sees impropriety of some kind on the part of BC Lions, since it is only at this stage raising concerns. He also appears to intimate that PavCo might have had something to do with this. He sees this as a "stalling tactic". He also makes submissions touching on the substance of the arrangements between PavCo and BC Lions. He argues that the inquiry should not be re-opened.

[13] BC Lions acknowledges that it has filed a petition for judicial review of Order F14-05, saying it did because s. 59 otherwise would have required PavCo to disclose information BC Lions contends must be withheld before this Office had the opportunity to consider BC Lions' request to re-open the inquiry. It denies the applicant's allegation that the judicial review application is part of a stalling strategy. It also rejects the applicant's contention that it has acted in a way that is disrespectful of this Office or its processes, pointing out that it was not aware that the inquiry was underway.[4]

Should BC Lions be given notice under s. 54(b)?

[14] For reasons discussed below, I consider that, before deciding whether there is authority to re-open the order, I should decide whether it is appropriate in the circumstances that BC Lions receive a copy of the applicant's request for review. Section 54(b) provides that the Commissioner "must give a copy" of the request to the public body and to "any other person that the commissioner

---

[3] BC Lions did not explicitly suggest that the inquiry should be re-opened in relation to s. 17, not just s. 21. This is appropriate, since the failure to give s. 54(b) notice did not taint the entire inquiry or order, *i.e.*, in relation to s. 17 as well.

[4] The process leading to this decision began before BC Lions' application was filed in the Supreme Court of British Columbia. In the circumstances, it is appropriate, in fact desirable, to complete this process despite the filing of that application. In deciding to proceed, I have kept in mind related observations made by former Commissioner Loukidelis in the above-cited decision flowing from Order 01-52. I also have in mind the decision of the Court of Appeal in *Zutter v. British Columbia (Council of Human Rights)*, [1995] B.C.J. No. 626, which touches on the question of a tribunal providing relief that might otherwise be available on judicial review.

considers appropriate". In turn, under s. 56(3), any person given a copy of the request must be given an opportunity to make representations". As I discuss below, I only need to decide whether I have the authority to re-open the order and hear from BC Lions if it was or is appropriate for BC Lions to receive a copy of the request for review.

[15] The issue of whether a party should be given notice of an inquiry, and thus the opportunity to be heard, has been dealt with in several decisions and orders under FIPPA. It has also been addressed by the Court of Appeal.

[16] The most helpful decision for present purposes is a decision of former Commissioner David Loukidelis that he issued after, but in relation to, Order 01-52.[5] After he had issued that order, the Guide Outfitters Association and others argued that they should have been given the opportunity to be heard in the inquiry leading to the order. An application for judicial review on this and other points was pending and, before the application was heard, Commissioner Loukidelis issued a decision on whether s. 54(b) notice was appropriate.[6]

[17] In that decision, he concluded that he should first decide whether s. 54(b) notice was appropriate in the circumstances. Only if that was the case would it be necessary to consider whether Order 01-52 could and should be re-opened. He noted this, at p. 10, about the authority to give notice under s. 54(b):

> The question is whether they [the applicants for participation] were "persons that the commissioner considers appropriate" under s. 54(b). This phrase, by definition, involves discretion on my part, or on the part of a person (usually a member of my staff) who is acting for me in a delegated capacity with respect to the processing of a request for review of a public body's access decision.

[18] At p. 11, he went on to say this about the typical how and when of notice being given under s. 54(b):

> In practical terms, when my office receives a request for review, my staff – usually a portfolio officer [investigator] authorized to investigate and mediate under s. 55 – assesses who must or should be given notice of the request for review under FIPPA. This will include the head of the public body, the access applicant and any person to whom the public body has properly given notice under s. 23. There may be instances where it only becomes apparent at the review stage that a person was not notified by the public body under s. 23 when, as provided in s. 23, that person ought to

[5] 2001 CanLII 21606.

[6] Preliminary decision, May 10, 2002. Accessible here on the Office's website: http://www.oipc.bc.ca/rulings/decisions.aspx.

> have been. It is also possible that a public body may entirely overlook that the s. 21 or s. 22 disclosure exception might apply to some of the information involved. In such cases, the person who there is reason to believe might be a third party under s. 21 or s. 22 is given notice of the review under s. 54(b). These are only examples of when notice under s. 54(b) may be considered appropriate.
>
> Although s. 54 speaks to notice that is to be given "on receiving a request for review", there may be cases in which the relevance of additional disclosure exceptions and the need for notice to further persons will only become evident at the inquiry stage. In those cases, when that notice determination is made, it is acted on by me, or my delegate if the inquiry function has been delegated to someone else.

[19] In the end, Commissioner Loukidelis decided that s. 54(b) notice should not be given to the Association.

[20] On judicial review Satanove J. quashed the decision, but this was reversed on appeal. In *Guide Outfitters Association Inc. v British Columbia (Information and Privacy Commissioner)*,[7] the Court of Appeal upheld the Commissioner's s. 54(b) decision, saying this about the nature and scope of s. 54(b):

> [29] … [Section] 54 of FIPPA, the section under consideration here, is framed in much more general terms. It provides simply that the Commissioner, upon receiving a request for review (as occurred here), must afford notification to the head of the public body concerned and any other person that the Commissioner considers appropriate. The emphasized category of parties to whom notice is to be given is phrased in such a way as to afford a fair measure of discretion to the Commissioner. The Commissioner must engage in a process of consideration and analysis to reach an informed decision on such an issue. The use of the terminology "that the Commissioner considers appropriate" is an indication that the Commissioner is to exercise his judgment as to who might reasonably be thought to be affected by his decision; this of course will inform any decision as to those groups or individuals who should receive notice and be given formal standing at any inquiry.…

[21] There are several examples of cases where s. 54(b) notice has been given during the inquiry process. In Decision F06-10,[8] for example, a union asserted its right to request a Part 5 review. This argument was rejected, but Commissioner Loukidelis in that instance decided that there were possible third-party interests that merited the giving of s. 54(b) notice. At para. 43, he said that, "[m]ainly because s. 21 is a mandatory exception, I have decided to permit its application to be raised on this review and that, in addition to the participation

[7] 2004 BCCA 210.
[8] 2006 CanLII 37937.

of the Teacher who requested the review, it is appropriate under s. 54(b) to allow the Unions to participate on that issue."[9]

[22] In my judgement, BC Lions is a party that might reasonably be thought to be affected by disclosure. As reflected in Order F14-05, the Agreement includes financial and commercial information the disclosure of which, an objective observer could reasonably conclude, touches on the interests of BC Lions.[10] I also note that PavCo initially decided that s. 21 required it to refuse disclosure of parts of the Agreement, and gave notice under s. 23(2).[11] Section 23 speaks, as a threshold matter, to situations where the public body has reason to believe that information which might be protected under s. 21 is involved. This was the context in which PavCo initially gave BC Lions notice under s. 23(2) and PavCo's later decision to no longer rely on s. 21 did not change that fact. Having considered the submissions before me, I have decided that it is appropriate that BC Lions be given notice under s. 54(b).[12]

[23] In light of this conclusion, I need not address BC Lions' argument that PavCo's failure to give notice of its changed decision was a breach of natural justice and fairness.

[24] The remaining issue is whether I have authority to re-open Order F14-05 so that BC Lions and the other parties have an opportunity to make representations on the application of s. 21 to the Agreement.

Is there authority to re-open Order F14-05?

[25] I am satisfied that the inquiry from which Order F14-05 resulted can be re-opened on the basis that I am not, viewed from the perspective of the case law, *functus officio*. Reliance is placed on the decision of the Supreme Court of Canada in *Chandler v Alberta Association of Architects*[13] and cases applying the principles articulated in that case. In *Chandler*, a committee of a professional regulatory body held hearings into the applicants' practices and then made findings and orders that were outside of the committee's statutory authority. The

---

[9] As another example, see Order F06-21, 2006 CanLII 42693, where the OIPC gave notice under s. 54(b) to several other parties on the basis that their interests might be affected. Also see Decision F09-01 and Decision F08-07, the latter of which discussed interpretation of s. 54(b) in light of *Guide Outfitters Association*. Decision F08-07 was upheld on judicial review, though that proceeding did not address interpretation of s. 54(b): *British Columbia (Labour and Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*, 2009 BCSC 1700.

[10] For clarity, nothing in this decision is intended to express any view on the merits of the applicability of s. 21 to information in the Agreement. That issue will be decided based on evidence and submissions received by this Office.

[11] Both the investigator's fact report and the notice of inquiry mentioned the s. 21 aspect of PavCo's decision.

[12] Also see the orders and case cited below, footnote 21.

[13] [1989] 2 SCR 848.

issue for the Court was whether the body was *functus officio*[14] and thus could not re-open the matter.

[26] While the Court affirmed that the *functus officio* principle applies to administrative tribunals, the majority decided that the interest in finality of proceedings did not apply in the administrative context with the same vigour as in court proceedings. Court decisions can be appealed fully, but tribunal decisions subject only to appeal on a point of law raise different considerations.[15] This is how Sopinka J. put it:

> [The principle of *functus officio*]…is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.[16]

[27] The Court added that if a tribunal "has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task."[17]

[28] Based on previous decisions from this Office, and the authorities they cite, I am satisfied that I have the authority to re-open this inquiry. As Commissioner Loukidelis said:

> Clearly, *functus officio* must be more flexible, and less formalistic, in its application to administrative proceedings under FIPPA than to a court. It should not be strictly applied where there are statutory indications that the decision-making process is continuing or can be resumed or reopened to enable functions to be completed and objectives to be achieved under FIPPA.[18]

[29] Further, in the above-cited decision relating to Order 01-52, Commissioner Loukidelis alluded to the ability of this Office to re-open a matter in appropriate circumstances. Although he did not have to decide whether he had authority to

---

[14] In English, this Latin phrase means, in essence, that a person or body has fully discharged their authority and thus retains no authority in the specific matter than can properly be exercised further in the matter.

[15] A similar observation can be made in relation to judicial review of tribunal decisions in cases where the standard of review is reasonableness.

[16] *Chandler* at p. 862.

[17] *Chandler* at p. 862.

[18] [2008] BCIPCD No. 12, at para 22.

re-open the order, it is quite clear that he considered the law permitted him to do so. At p. 7 of his decision, he said this: "if a person was not given an opportunity to be heard when that opportunity had to be extended—in this case under s. 54 of FIPPA—it is possible for the decision to be re-opened without waiting for a Court order setting it aside or declaring it invalid".

[30] In Decision F10-04, Senior Adjudicator Celia Francis offered this perspective on the authority to re-open:

> [49] **3.3 Test for Re-opening**—The law is clear that an administrative tribunal that is without a statutory provision for reconsideration, and the decisions of which are not subject to a full right of appeal, can re-open its decisions to consider new evidence or argument in wider circumstances than can a court. The judicial history of the doctrine of *functus officio* and the development of finality in administrative law that flows from *Chandler* show that the more flexible application of the principle of finality to administrative tribunals is not premised on the discretion of a trial court to re-open between the pronouncement and formal entry of its judgement (the test in *Zhu v. Li*). The reason for the flexibility in administrative law is that judicial review of a tribunal decision is a more limited review than a right of full appeal of a judicial decision to a higher court. Because of the more limited nature of judicial review and its narrow scope for the admission of extra-record evidence, *Chandler* struck a more flexible application of the principle of finality, "in order to provide relief which would otherwise be available on appeal."
>
> …
>
> [58] The request for re-opening [of Order 01-52] turned on an issue of participatory rights in the inquiry under FIPPA. Considering the threshold question of whether the applicants for re-opening had been entitled to be notified and to participate in the inquiry under FIPPA, Commissioner Loukidelis observed that the law seemed clear enough that, if a person was not given an opportunity to be heard when that opportunity was required to be given, it was possible for the decision to be re-opened without waiting for a court order setting it aside or declaring it invalid. However, he concluded that it was not necessary to consider re-opening in that case, because no participatory rights that were due had been denied. That issue and others were considered on judicial review and on further appeal, where Order 01-52 was ultimately upheld.[19]

[19] 2010 BCIPC 16 (citations omitted), upheld on judicial review on this point: *British Columbia (Ministry of Public Safety and Solicitor General) v Stelmack*, 2011 BCSC 1244. Further, in footnote 38 of Decision F10-04, Senior Adjudicator Francis, citing *Chandler*, said this: "*Chandler*, paras. 22-27, itself recognized the distinction between re-opening to address a change of circumstances (relief that would otherwise be available on appeal) versus a vitiating error in a decision, as well as the distinction between a fresh start to cure a breach of procedural fairness

[31] A leading text on administrative law suggests that, absent statutory authority to reconsider a decision or rehear a matter, if the required procedure has not been followed, a tribunal may re-open the matter:

> If the decision is a nullity because the required procedure was not followed, or if a court has quashed the decision, the tribunal may start again. If the decision was made in the absence of a person affected by the order, who should have been notified but was not, the tribunal may reopen the matter.[20]

[32] As the above discussion of the s. 54(b) issue indicates, it was and is appropriate here for BC Lions to receive a copy of the request for review. It follows that BC Lions should have been given an opportunity to make representations in the inquiry on whether s. 21 requires information to be withheld.

[33] I am also mindful of the fact that, as indicated earlier, this Office has in previous cases considered it necessary to ensure that mandatory exceptions such as s. 21 and s. 22 of FIPPA are considered in an inquiry. For example, in Order F08-03, Commissioner Loukidelis said this:

> [78] Section 22, however, is a mandatory exception to the right of access under FIPPA. Under s. 22, a public body "must" refuse to disclose any personal information in circumstances where the disclosure would be an unreasonable invasion of personal privacy. As regards mandatory exceptions, and consistent with the approach I took in Order 02-22, other jurisdictions have held that, even if raised for the first time during the exchange of submissions, mandatory exceptions must be considered by the adjudicator.
>
> [79] Due to its mandatory nature, and taking into account all of the circumstances. I find it both necessary and appropriate to consider the s. 22 exception as it related to the s. 86 reports regardless of which or whether a party raised it. Even where s. 22 is not raised in an inquiry, I consider myself obliged to put my mind to its application where, as here, on my review of the records it is apparent s. 22 applies to some information in them....[21]

---

that vitiates a whole proceeding and resumption at the point of error to address a discrete failure to make a proper disposition."

[20] S. Blake, *Administrative Law in Canada* (5th ed, 2011), Lexis Nexis Canada, at p. 135.

[21] 2008 CanLII 13321. This passage was specifically approved by Russell J. in *Stelmack*, at para. 537. While not binding in relation to the s. 21 issue at hand, I consider these comments to be of assistance in this case. They also support my above conclusion that s. 54(b) notice to BC Lions would be appropriate here. Further, in the past this Office has, in cases involving s. 21, given s. 54(b) to contracting parties. See, for example, Order F07-15, 2007 CanLII 35476 and Order F09-01, 2009 CanLII 3225.

[34] Notice under s. 54(b) was and is appropriate and the fact it was not given meant BC Lions did not have an opportunity to be heard when it should have had an opportunity. This inquiry is therefore not yet complete within the meaning of s. 58(1). That section requires the Commissioner or her delegate to, "[o]n completing an inquiry under section 56", "dispose of the issues by making an order". The s. 21 issue was raised by PavCo's decision to deny access under that section. When PavCo ceased to take the position that s. 21 prevented access, this did not mean that, for s. 58 purposes, s. 21 ceased to be an issue in the inquiry. Order F14-05 will be re-opened to permit representations to be made on s. 21 and that issue will be decided.

CONCLUSION

[35] This Office will, in accordance with s. 54(b) of FIPPA, give BC Lions a copy of the applicant's request for review, a copy of the investigator's fact report and the notice of written inquiry. The Office's Registrar of Inquiries will also issue to all three parties a notice of written inquiry respecting s. 21.

May 15, 2014

ORIGINAL SIGNED BY

_____
Vaughan L. Barrett
Adjudicator

OIPC File No.: F12-49180