OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
for British Columbia

Protecting privacy. Promoting transparency.

Order F16-27

BC PAVILION CORPORATION

Celia Francis
Adjudicator

May 25, 2016

CanLII Cite: 2016 BCIPC 29
Quicklaw Cite: [2016] B.C.I.P.C.D. No. 29

Summary: A journalist requested the contract between the NHL and PavCo for hosting the 2014 Heritage Classic hockey game. PavCo disclosed most of the contract, withholding some information under s. 17(1) (harm to financial interests of public body) and s. 21(1) (harm to third-party business interests). The adjudicator found that neither section applied and ordered PavCo to disclose the information in dispute to the journalist.

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

Authorities Considered: B.C.: Order F15-58, 2015 BCIPC 61 (CanLII); Order F08-22, 2008 CanLII 70316 (BC IPC); Order F14-05, 2014 BCIPC 6 (CanLII); Order F15-46, 2015 BCIPC 49 (CanLII); Order F14-49, 2014 BCIPC 53 (CanLII); 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 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 04-06, 2004 CanLII 34260 (BC IPC); Order F16-17, 2016 BCIPC 19 (CanLII); Order F14-28, 2014 BCIPC 31 (CanLII); Order F13-22, 2014 BCIPC No. 4 (CanLII); Order F14-58, 2014 BCIPC 62 (CanLII); Order F15-04, 2015 BCIPC 4 (CanLII); Order F05-16, 2005 CanLII 24732 (BC IPC); Order 02-50, 2002 CanLII 42486 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Order 03-05, 2003 CanLII 49169 (CanLII); Order F09-04, 2009 CanLII 14731 (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; British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner), 2012 BCSC 875; *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 concerns a request for a contract between the National Hockey League and the BC Pavilion Corporation ("PavCo"). In December 2013, a journalist made the following request to PavCo under the *Freedom of Information and Protection of Privacy Act* ("FIPPA"):

> The contract (including financial terms) with the National Hockey League, Vancouver Canucks, Ottawa Senators … for use of B.C. Place Stadium for the 2014 Tim Hortons Heritage Classic game, related events, conversion, move-in, and move-out.

[2] PavCo responded in April 2014 by disclosing a copy of the contract ("licence agreement"), severing some information under s. 17(1) (harm to financial interests) and s. 21(1) (harm to third-party business interests) of FIPPA. The journalist requested that the Office of the Information and Privacy Commissioner ("OIPC") review PavCo's decision to deny access to some of the information. Mediation by the OIPC did not resolve the review and the matter proceeded to inquiry. The OIPC received submissions from the journalist, PavCo and NHL Enterprises Canada L.P. ("NHL").

ISSUES

[3] The issues before me are whether PavCo is authorized by s. 17(1) and required by s. 21(1) to withhold information. Under s. 57(1) of FIPPA, PavCo has the burden of proving that the journalist does not have a right of access to the withheld information.

DISCUSSION

Background

[4] PavCo is a provincial Crown corporation which reports to the Legislative Assembly through the Minister of Transportation and Infrastructure. PavCo owns and manages BC Place Stadium ("BC Place"), which has seating for 54,500 or more and provides a venue for meetings and sporting and entertainment events.[1] In addition to hosting regular BC Lions and Vancouver

[1] Affidavit of Graham Ramsay, Director, Business Management, BC Place Stadium, paras. 9-10.

Whitecaps games, BC Place hosts one-off sporting events, such as the NHL Heritage Classic, and various rugby and soccer matches. Each event involves a separate licence agreement, such as the one in issue here.[2]

[5] The NHL said it is the "premier professional hockey league in North America".[3] The NHL has, over the last several seasons, presented "specialty" games, such as the "Winter Classic", "Heritage Classic" and "Stadium Series", which are played in larger venues such as football and baseball stadiums and tend to attract larger numbers of spectators. In 2013, the NHL decided to offer a "Heritage Classic" hockey game between the Ottawa Senators and the Vancouver Canucks in Vancouver. This game took place at BC Place in March 2014.[4]

Record in dispute

[6] The record in issue is the 27-page "Licence Agreement – Canadian Heritage Classic" of May 7, 2013. This agreement set out the terms and conditions for holding the "Heritage Classic" live hockey game at BC Place in March 2014 between the Vancouver Canucks and the Ottawa Senators. PavCo disclosed the majority of the agreement.

[7] The information PavCo withheld is: licence and cancellation fees; insurance terms; food and beverage sales; sponsorships and merchandizing; number and type of complimentary tickets allotted to PavCo; number of free parking spots at BC Place allotted to the NHL; and certain fees and sales revenues the NHL would retain. PavCo and the NHL argued that ss. 17(1) and 21(1) apply to all of the disputed information, with the exception of the withheld items at Schedule B, section 3 of the agreement, to which PavCo argues only s. 17(1) applies.

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

[2] Ramsay affidavit, para. 13.
[3] The NHL has 30 teams, only one of which - the Vancouver Canucks - is based in Vancouver. The Canucks' home games are played at Rogers Arena, which is privately owned and operated.
[4] NHL's initial submission, paras. 4-8; Affidavit of Daniel Ages, Senior Counsel, NHL, paras. 4-5.

> "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".[5]

[9] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[6] 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.

[10] 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)

[11] PavCo argued that 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**
>
> 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.

[12] 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).[7]

---

[5] *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.

[6] 2012 BCSC 875, at para. 43.

[7] 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.

Would disclosure result in financial harm?

[13] The journalist said that BC Place is a publicly-owned facility and that it is the only enclosed stadium in western Canada. As such, he argued, BC Place has a monopoly in the Pacific Northwest as far as large-scale NHL games like the Heritage Classic are concerned. He said that citizens have a right to know whether their stadium is being operated in a fiscally responsible manner.[8]

[14] PavCo admitted that each contract for use of BC Place is "distinct" but said "there are a limited number of variables that collectively constitute the negotiated deal". It said that each prospective client (licencee) seeks to minimize its costs, while PavCo seeks to maximize its revenue on behalf of BC taxpayers. PavCo argued that disclosure of "fundamental business terms", such as those in issue here, "would result in obvious harm" to its negotiations with its licencees and to its ability to compete with other venues for events, and thus lead to a "potential loss of revenue". PavCo argued that this anticipated loss of revenue "will have a substantial negative impact on BC Place". This would, in turn, it argued, result in financial or economic harm to the Province, "given PavCo's mandate to generate economic and community benefit for the people of BC".[9]

[15] **Harm to negotiations with licencees —** PavCo argued that disclosure of the information in dispute would negatively affect PavCo's prospects of "achieving better terms for future contracts" with current and prospective licencees, such as International Rugby, Cricket and National Soccer. It said that these sports organizations would "pressure" PavCo for better terms, to the financial detriment of BC Place and PavCo. PavCo said it regularly deals with former licencees who wish to hold another event at BC Place. BC Place's Director, Business Management, gave evidence that, when negotiating fees for new bookings, prospective licencees use their knowledge of previous licence agreements "in an attempt to negotiate a better agreement for them[selves]". He said they invariably ask for a reduction in licence fees, as compared to their previous contracts, "sometimes directly resulting in a less advantageous agreement for BC Place". He added that these "business dynamics … play out in the marketplace with real consequences to the profitability of BC Place and PavCo".[10]

Analysis

[16] I accept that each party to contract negotiations will attempt to negotiate the most advantageous deal for itself. I also accept that BC Place's licencees 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

[8] Journalist's submission, paras. 20, 36, 95.
[9] PavCo's initial submission, paras. 31, 35-36; Ramsay affidavit, paras. 15-16, 20.
[10] Ramsay affidavit, para. 18.

each new negotiation, licencees attempt to negotiate lower fees than they paid last time. However, by PavCo's own admission, and as many previous OIPC Orders have noted, each contract is "distinct" and negotiated under different conditions and circumstances. Indeed, the NHL's evidence confirms that a number of the terms of the agreement were specific to this event.[11]

[17] While PavCo said negotiations "sometimes" result in a less advantageous agreement for BC Place, it did not explain how such agreements were less advantageous to BC Place, nor why or how often PavCo had agreed to less advantageous contracts. There is, for example, no evidence that PavCo was compelled for some reason to accept less advantageous terms on certain occasions or whether it chose to accept them, perhaps in order to gain some other advantage. PavCo also did not explain or quantify the "real consequences" to its profitability resulting from the less advantageous agreements.

[18] Moreover, PavCo did not describe any current or future negotiations in which it is or will be involved. Nor did it link disclosure of the withheld information in this licence agreement, which was for a large-scale event, with harm to any current or future negotiations regarding other one-off sporting events, whether large or small. I also take into account the journalist's observation (which PavCo and the NHL did not dispute) that, for a variety of reasons, BC Place is not likely to host another Heritage Classic game for some years or even decades.[12] I conclude that, by that time, circumstances will be different.

[19] Negotiations involve give and take on both sides. So, depending on the circumstances, there may be cases where licencees agree to pay higher fees than they did last time or where PavCo achieves better terms than it did last time on "variables" other than fees. Although PavCo did not say if contract negotiations sometimes result in more advantageous terms for PavCo and less advantageous terms for the licencees, I infer that this does occur. Indeed, I infer that it happened during negotiations over the licence agreement in issue here. For example, the NHL admitted that the insurance terms[13] were more favourable to BC Place than the NHL would normally accept. The NHL also said that it was required to agree to restrictions on its advertising, merchandizing and sponsorships, which it would not normally accept.[14]

[20] For reasons given above, PavCo has not, in my view, established that disclosure of the disputed information in this case could reasonably be expected to lead to harm for the purposes of s. 17(1)(f) or s. 17(1).

---

[11] Ages affidavit, para. 24
[12] Journalist's submission, paras. 19, 64.
[13] Section D of the agreement.
[14] Ages affidavit, para. 19, 25.

[21] **Harm to PavCo's ability to compete with other venues —** PavCo said that BC Place operates in an "extremely competitive industry", competing with various venues in BC, the rest of Canada, Washington State and "throughout the world", most of which are privately owned and not subject to FIPPA.[15] PavCo argued that placing BC Place's "valuable commercially sensitive pricing information" in the hands of other venues would put BC Place at a competitive disadvantage in negotiating with prospective clients for events. It said, for example, that competing facilities could use the disputed information to undercut BC Place's pricing. This would, PavCo argued, harm BC Place's ability to compete internationally for events with other venues.[16]

Analysis

[22] While PavCo listed various sporting events it has hosted or will host, it did not provide sufficient convincing detail to support its assertions. For example, it did not explain the competitive nature of the industry in which it operates or how often or to what extent it competes with other venues for events. PavCo also provided no examples of cases where its prices have been undercut, or threatened with undercutting, as a result of disclosing terms of a license agreement.

[23] I also note that the NHL itself admitted that BC Place, with its capacity and retractable roof, was the only appropriate venue in BC for hosting the Heritage Classic game. The NHL said it had no other option than to use BC Place to stage this type of event in BC.[17] This, in my view, undermines PavCo's argument about losing bookings to its competition with other venues in this area, at least as far as Heritage Classic games or similar large-scale games are concerned.

[24] Even if PavCo had satisfied me that it might lose future bookings of sporting events, it did not explain the nature or extent of any potential loss of revenue that might result, nor how this would have a "significant negative financial impact" on BC Place and the Province. PavCo has not, in my view, established that disclosure of the information in dispute could reasonably be expected to harm to its ability to compete with other venues, for the purposes of s. 17(1)(f) or s. 17(1).

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

[25] For reasons given above, PavCo has not, in my view, provided evidence that is well beyond or considerably above a mere possibility of harm, which the Supreme Court of Canada held is necessary to establish a reasonable

[15] PavCo named Rogers Arena and Century Link Field as examples.
[16] Ramsay affidavit, paras. 15-16.
[17] NHL's initial submission, para. 8; Affidavit of Daniel Ages, Senior Counsel, NHL, para. 9.

expectation of harm from disclosure of information. PavCo has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harms. Rather, it 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 to its negotiations with licencees or harm to its ability to compete effectively with other venues in its negotiations with prospective clients for sporting events, under s. 17(1)(f) or more generally under s. 17(1).

[26] PavCo has not met its burden of proof respecting s. 17(1). Therefore, I find that s. 17(1) does not apply to the information in dispute. My findings are consistent with those in Order F14-05,[18] Order F15-46[19] and Order F14-49[20] in which the adjudicators rejected similar arguments from PavCo.

Harm to third-party interests

[27] The NHL argued that s. 21(1) applies to all of the withheld information, except for a few items.[21] Although it has the burden of proof, PavCo did not make a submission on s. 21(1) but said it supported the NHL's arguments.

[28] 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
>
> (a) that would reveal
>
> …
>
> (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,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> …

[18] 2014 BCIPC 6 (CanLII).
[19] 2015 BCIPC 49 (CanLII).
[20] 2014 BCIPC 53 (CanLII).
[21] The NHL referred here to the withheld information in Schedule B, section 3 of the agreement. Only PavCo wishes it withheld, under s. 17(1).

[29] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[22] 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 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 this approach, which is set out in previous orders and court decisions. I have also kept in mind that the burden of proof is on PavCo.

Is the information "financial or commercial information"?

[30] FIPPA does not define "commercial" or "financial information". However, previous orders have held that 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.[23]

[31] The parties all submitted that the withheld information is commercial and financial information of or about the NHL.[24] The information in dispute includes fees payable, insurance and other terms, sales and revenue figures, numbers of tickets and parking spots to be allotted to the parties to the agreement. I am satisfied, based on how previous orders have interpreted these terms, that this information is the "commercial" and "financial" information of or about the NHL.

Was the information "supplied in confidence"?

[32] 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".[25] The NHL and PavCo argued that the information was "supplied in confidence" for the purposes of s. 21(1)(b).[26] The journalist

---

[22] 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).

[23] 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.

[24] Journalist's submission, para. 60. PavCo's initial submission, para. 16. NHL's initial submission, para. 11.

[25] 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.

[26] PavCo's initial submission, para. 16. NHL's initial submission, paras. 12-26.

generally disputed this argument, saying it was negotiated.[27] Given my finding below, I have only had to consider whether the information was "supplied".

[33] A number of orders have 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 to the public body but which does not expressly appear in the agreement.[28]

[34] Key judicial review decisions have confirmed the reasonableness of this approach.[29]

[35] **"Supplied"** — The NHL 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 that this is a "narrow interpretation", which has been applied in cases where a third party is offering its services to a public body — services for which taxpayers are ultimately paying and the terms for which should be disclosed to the public for transparency reasons. The NHL argued that these principles do not apply to this situation, where the NHL and PavCo, as commercial entities, are engaging in a strictly commercial function for use of a facility, which, it said, "happens" to be owned by a Crown corporation but which would normally be privately owned. The NHL 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".[30]

---

[27] Journalist's submission, para. 95, for example.
[28] 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.
[29] 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 and *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848, 2002 BCSC 603.
[30] NHL's initial submission, paras. 15-23.

Analysis

[36] Past orders have generally found that contract terms are negotiated, rather than "supplied", based on the facts of those cases. I do not consider this to be a "narrow interpretation". Rather, the NHL is, in my view, attempting to distinguish previous cases, based on the facts of this situation. Contracts and agreements are by their nature commercial. It is, thus, hardly surprising that the NHL and PavCo were engaged in a "commercial function", of mutual benefit, in negotiating the licence agreement and hosting this event. If the NHL is suggesting that this licence agreement should not be subject to accountability and transparency principles because both parties were engaged in a commercial, profit-making transaction and because the NHL normally stages its games in privately-owned facilities, I disagree. PavCo's mandate is to generate revenue for BC and it is accountable for the management of BC Place, a publicly-owned facility. Licence agreements for use of BC Place are subject to the same transparency principles as other agreements involving public bodies. Moreover, as discussed below, for a number of reasons, the NHL had no option but to hold this event at BC Place.[31]

[37] In any case, there is convincing evidence that the information in dispute was negotiated as opposed to "supplied". The disclosed information itself states that the parties "agree" to the terms set out in the licence agreement. The evidence of the NHL's senior counsel is that he "was involved in negotiating … the terms of the Agreement between the Third Party [the NHL] and BC Pavilion Corporation".[32] PavCo's evidence also makes it clear that the licence agreement was negotiated.[33] These things all support my conclusion that the withheld information was negotiated, instead of having been "supplied" within the meaning of s. 21(1)(b).

[38] **"Accurate inference" exception** — The NHL argued, in the alternative, that disclosure of the withheld information would allow the drawing of an accurate inference about underlying confidentially supplied information. The NHL said this is particularly true of the terms which "differ significantly" from its standard contract terms and which "stem from BC PavCo's status as a Crown corporation". The NHL argued that disclosure of the withheld information would allow a reasonably informed observer to determine things such as the NHL's risk tolerance and the limits of its insurance.[34]

[31] Ages affidavit, para. 9
[32] Ages affidavit, paras. 4, 28.
[33] Ramsay affidavit, paras. 2, 14, 16-19.
[34] NHL's initial submission, paras. 24-25

Analysis

[39] The evidence of the NHL's senior counsel went through the withheld items clause by clause. He deposed that disclosure of the indemnity language would reveal underlying information about the NHL's risk tolerance, which was supplied in confidence to PavCo.[35] He did not, however, explain what he meant by underlying risk tolerance information nor how disclosure of the indemnity language would reveal it. He also did not specifically say, or explain, how disclosure of the other withheld terms (*i.e.*, the terms which "differ significantly" from its standard contracts) would allow the drawing of accurate inferences about underlying information confidentially supplied to PavCo. These things are not evident from any of the withheld information itself. The NHL has not, in my view, established that disclosure could allow the drawing of accurate inferences about underlying information the NHL supplied confidentially to PavCo.

Conclusion on s. 21(1)(b)

[40] 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.

Would disclosure lead to significant harm?

[41] Since my finding that s. 21(1)(b) does not apply to the information in issue means that s. 21(1) does not apply, I need take the matter no further. However, for completeness, I will deal with the parties' arguments on s. 21(1)(c) and harm. The journalist generally disputed the NHL's position on harm, referring to a number of orders he considered relevant. The NHL argued that disclosure of the disputed information could reasonably be expected to result in harm under ss. 21(1)(c)(i) and (ii).

[42] **Harm to negotiating and competitive position - s. 21(1)(c)(i)** — In the NHL's view, it is "clear" that disclosure of the information in dispute could cause significant harm to its competitive position and interfere significantly with its negotiating position in future negotiations for licence agreements with other facilities. It said that, because of PavCo's status as a Crown corporation, many of the withheld terms differ significantly from those it normally accepts in similar agreements. The NHL said that PavCo required certain restrictions on the NHL's marketing and merchandizing activities during the event, which were not usual features of the NHL's venue licence agreements. The NHL said that PavCo also said that, to deviate from its position on these items, it would need legislative or Cabinet approval, which was not possible at that time because the BC legislature had recessed. The NHL also argued that disclosure of these different terms would let other facility owners know, during future negotiations, what the NHL

[35] Section H of the agreement.

had agreed to in this case. This would, it continued, undermine the NHL's ability to negotiate better terms in the future.[36]

[43] The NHL's senior counsel's concerns over disclosure of the individual terms include the following:[37]

- disclosure of the financial compensation for use of BC Place[38] would result in harm to the NHL's competitive position in negotiating the use of a facility in the future
- the insurance terms[39] were substantially different from those the NHL would normally accept and their disclosure would "significantly harm" the NHL's competitive and negotiating position in subsequent negotiations with other facilities
- terms restricting the NHL's ability to conduct raffles and other charitable programs[40] were not typical for the NHL; they were specific to this event due to PavCo's status as a Crown corporation and their disclosure would harm the NHL's competitive position in future negotiations for facility use
- disclosure of the number of complimentary tickets and suites which PavCo was to receive[41] would be harmful to the NHL's position in future negotiations because the NHL does not normally agree to provide any tickets to a facility owner or manager

[44] The senior counsel's evidence regarding disclosure of the other "unique features" of the licence agreement was similar. Beyond the kinds of statements I set out above, however, the NHL did not provide details. It did not, for the most part, explain how the various withheld terms were different from those in its other venue licence agreements. Nor did the NHL explain how disclosure of these terms could harm its negotiating or competitive position in future. It also did not explain the nature or size of the competitive environment in which it operates, the nature of any current or future negotiations it may be engaged in, nor how disclosure of the withheld information could harm its competitive position in those negotiations.

[36] NHL's initial submission, paras. 27-28; Ages affidavit, paras. 8, 13-14.
[37] Ages affidavit, paras. 12, 18-32.
[38] Withheld information in Section B(a) and (b) and Section C(a) and (b).
[39] Withheld information in Section D.
[40] Withheld information in Section J(q).
[41] Withheld information in Schedule A and Exhibit A.

[45] I accept that some or all of the withheld terms are different from those the NHL normally seeks during negotiations on venue licence agreements. However, as many previous orders have said, market conditions and other circumstances will be different in future negotiations. It is precisely because relevant factors would likely be different in future bidding processes that previous orders have found that harm could not be reasonably expected to occur due to disclosure of contracts and agreements.[42]

[46] Moreover, the NHL's senior counsel deposed that the NHL will agree to "deviations" from its standard terms only in "exceptional circumstances and where the NHL has determined that the risks associated with such deviation are manageable and minimal, have been adjusted for in other business terms of the agreement, and will not affect the NHL's negotiating position for future events".[43] In my view, the senior counsel's evidence is at odds with the NHL's position on potential harm to its future negotiations flowing from disclosure of the withheld information. If the NHL ensures that any deviations from its standard terms will not affect its future negotiating position, how could disclosure of the disputed information in this case result in harm to its future negotiations? I would also note that the NHL is not obligated to enter into future agreements that are to its disadvantage.[44]

[47] As previous orders have noted more than once, a contractor's resistance to disclosure does not amount to harm. It is necessary to show an obstruction to actual negotiations.[45] The NHL and PavCo have not done so.

[48] **Information no longer supplied - s. 21(1)(c)(ii)** — The NHL also said that disclosure of the information in dispute would make it "hesitant" to provide its financial and commercial information to PavCo in future contractual agreements. The NHL said it will also be hesitant to use BC Place as a venue for its events as long as it is owned by a Crown corporation.[46] I note, however, that the NHL did not say it would refuse to use BC Place in future. Moreover, it seems unlikely that the NHL will not provide information to PavCo in the future because, as the NHL's senior counsel deposed, BC Place is "the only appropriate venue" in BC for hosting an event like the Heritage Classic and "there were no other options for the NHL other than to utilize this venue in order to stage this type of event in British Columbia."[47] As the journalist said, BC Place has a monopoly in the area,

---

[42] See Order F14-58, 2014 BCIPC 62 (CanLII), at para. 46, Order F15-04, 2015 BCIPC 4 (CanLII), at para. 33, and Order F16-17, 2016 BCIPC 19 (CanLII), at para. 37, which made similar findings in response to such arguments.
[43] Ages affidavit, para. 8.
[44] See, for example, Order 03-15, 2003 CanLII 49185 (BC IPC), at paras. 25 & 27, and Order F05-16, 2005 CanLII 24732 (BC IPC), at para. 31, on these points.
[45] See See Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 112, and Order F05-05, 2005 CanLII 14303 (BC IPC), at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 4260 (BC IPC).
[46] Ages affidavit, para. 11.
[47] Ages affidavit, para. 9

due to its capacity and features, and there is no other suitable venue for hosting this or other similar large-scale games.[48]

[49] Past orders have said s. 21(1)(c)(ii) does not apply where there is a financial incentive for the third party to supply the information.[49] The NHL's evidence that BC Place was the only suitable venue in which to stage the Heritage Classic indicates that indeed there was — and would be in the future — a clear financial incentive for the NHL to contract with BC Place to host this or other large-scale hockey events. In my view, the NHL's evidence undermines its position on s. 21(1)(c)(ii).

Conclusion on s. 21(1)(c)

[50] The NHL's arguments on harm are little more than assertions and do not persuade me that any of the harms under s. 21(1)(c)(i) or (ii) could reasonably be expected to result from disclosure. A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".[50] The NHL and PavCo have provided no such evidence to support their submissions. In summary, they have not persuaded me that disclosure of the information in dispute could reasonably be expected to cause the NHL harm under s. 21(1)(c). It also bears repeating that "[b]usinesses that contract with government must fully appreciate that the transparency of those dealings has no comparison in fully private transactions".[51] I find that s. 21(1)(c) does not apply to the information in dispute.

Conclusion on s. 21(1)

[51] I found above that the information in issue is "commercial" and "financial" information for the purposes of s. 21(1)(a)(i) but that it was not "supplied in confidence" under s. 21(1)(b). I also found that PavCo and the NHL have not established a reasonable expectation of harm under s. 21(1)(c). PavCo has not met its burden of proof respecting s. 21(1). I find that s. 21(1) does not apply here.

---

[48] Journalist's submission, paras. 36, 62-63.
[49] See Order 01-20, 2001 CanLII 21574 (BC IPC), at para. 112, and Order F05-05, 2005 CanLII 14303 (BC IPC), at para. 96, citing para. 61 of Order 04-06, 2004 CanLII 4260 (BC IPC).
[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.
[51] Order F09-04, 2009 CanLII 14731 (BC IPC), para. 18.

CONCLUSION

[52] For reasons given above, under s. 58(2)(a) of FIPPA, I find that PavCo is not authorized to refuse to give the applicant 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 July 7, 2016. PavCo must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

May 25, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

OIPC File No.: F14-57429