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Order F19-03

BC PAVILION CORPORATION

Erika Syrotuck
Adjudicator

January 25, 2019

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Summary: The applicant requested records relating to the Vancouver Whitecaps lease or licence agreement with the BC Pavilion Corporation (PavCo). PavCo refused access to a small amount of information on the basis of ss. 17(1) and 21(1) of FIPPA. The adjudicator found that neither ss. 17(1) or 21(1) apply to the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 21(1) and 22(1).

INTRODUCTION

[1] A journalist made a request to the BC Pavilion Corporation (PavCo) for "all records from September 10, 2016 to present day regarding any amendments or modifications to the Vancouver Whitecaps lease, contract, and licence agreement with PavCo for games, practices and other events at BC Place Stadium." PavCo sent a fee estimate in response to this request. As a result, the applicant narrowed his request, seeking the "final (non-draft) amendment or modification of the Vancouver Whitecaps' lease or licence agreement with BC Place since September 2016, including any cover letter(s) that would have accompanied the document."

[2] PavCo located one responsive record titled "Sponsorship Addendum Agreement" (Agreement) and disclosed a small portion of the information but withheld the balance under ss. 17 (harm to financial or economic interests) and 21(1) (harm to business interests of a third party) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant then asked the Office of the

Information and Privacy Commissioner (OIPC) to review PavCo's decision to withhold the information. Mediation failed to resolve the matter and the applicant requested that the matter proceed to inquiry. PavCo then disclosed additional information but that did not resolve the issues in dispute and the inquiry proceeded.

[3] The OIPC invited the Vancouver Whitecaps FC LP (Whitecaps) to participate in the inquiry. PavCo, Whitecaps and the applicant all provided inquiry submissions.

PRELIMINARY ISSUES

Adequate search for records

[4] In his submission, the applicant says that PavCo refused to engage in good faith negotiations to help him narrow his request in order to avoid any fees. The OIPC investigator's fact report[1] says that the applicant's complaint that PavCo failed in its duty to assist was treated separately and was resolved. Therefore, I see no basis to add this issue to the inquiry and decline to do so.

Request to disallow applicant's submissions

[5] The Whitecaps argue that the applicant's submissions should be disallowed by the Commissioner or be given no weight because they improperly raise new issues, are untrue and unsupported by evidence, mischaracterize the relationship between the Whitecaps and its lawyers, and ignore the fact that one of FIPPA's purposes is to protect the interests of private organizations, such as the Whitecaps.[2]

[6] The applicant has raised issues in addition to those listed on the Notice of Inquiry. I have addressed the applicant's complaint above. The applicant's comments on the relationship between the Whitecaps' and their lawyers are irrelevant to the issues in this inquiry and I will not address them.

[7] However, a party's right to make submissions is an essential part of procedural fairness. Therefore, it is difficult to conceive of circumstances where it would be appropriate to entirely disallow a party's submissions in an inquiry. In this case, it would be unfair for me to disregard the applicant's submissions because the opposing party says that his submissions are untrue and unsupported by evidence. It is my role as decision maker to weigh evidence and find facts.

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[1] The fact report is a summary of agreed facts that sets out the issues in an inquiry.
[2] Whitecaps reply submissions.

[8] Finally, I do not agree with the Whitecaps' assertion that a purpose of FIPPA is to protect the interests of private organizations. The purposes of FIPPA are set out in s. 2 and include giving the public a right of access to records and specifying limited exceptions to the rights of access. Private organizations that contract with public bodies do so with the knowledge that public bodies are subject to FIPPA.

Late addition of s. 22

[9] In the copy of the Agreement that PavCo submitted to the OIPC for this inquiry, PavCo withheld the name of the arbitrator under s. 22 of FIPPA. Section 22 requires that public bodies refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[10] PavCo did not make submissions on s. 22 or seek permission to add it as an issue in this inquiry. If PavCo believed that s. 22 applied, it should have applied s. 22 when it first made its severing decision. However, s. 22 is a mandatory exception to disclosure and public bodies cannot decline to apply it if they believe it applies. Therefore, I have decided that it is appropriate to consider whether PavCo is required to refuse to disclose the arbitrator's name under s. 22.

[11] Having said that, I can address this issue summarily.[3] Section 22 only applies to personal information. "Personal information" is recorded information about an identifiable individual other than contact information. "Contact information" means 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.[4] In the circumstances of this case, I am satisfied that the arbitrator's name is in the Agreement in order for the Whitecaps and PavCo to identify and contact her if they require arbitration. Since the Arbitrator's name is contact information in this circumstance, s. 22 does not apply and PavCo cannot withhold this name.

ISSUES

[12] The issues in this inquiry are:

1. Is PavCo authorized to withhold the information in dispute under s. 17(1) of FIPPA?

2. Is PavCo required to withhold the information in disputer under s. 21(1) of FIPPA?

[3] For this reason, it was not necessary to seek further submissions from the parties.
[4] Schedule 1 of FIPPA for defines "personal information" and "contact information."

[13] Section 57(1) says that PavCo has the burden of proving that the applicant has no right of access to the information in dispute under both ss. 17(1) and 21(1).

DISCUSSION

Background

[14] PavCo is a provincial crown corporation whose shareholder is the provincial government. PavCo owns and manages BC Place and the Vancouver Convention Centre.

[15] The Whitecaps are a privately owned professional soccer club that operates a team in Major League Soccer, the top professional soccer league in the United States and Canada. The Whitecaps play their home games at BC Place. The Whitecaps have entered into a licence agreement with PavCo that governs its use of BC Place.

Record in Dispute

[16] The record in dispute is a 27 page "Sponsorship Addendum Agreement" (Agreement) between PavCo and the Whitecaps. The Agreement sets out the locations within BC Place that the Whitecaps can use for sponsorship activities and how the Whitecaps can use them. The Agreement also addresses how the potential future sale of naming rights to BC Place stadium would affect the Whitecaps.

[17] PavCo has disclosed most of the Agreement. It has withheld some information under ss. 17(1), and/or 21(1).

Section 17(1)

[18] Section 17(1) authorizes a public body to refuse to disclose information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia.

[19] In this case, the relevant portions of s. 17(1) are:

> 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.

[20] Section 17 begins with a general clause followed by the word "including" and then a list of categories of information in subsections (a) through (f).

[21] In Order F08-22, Commissioner Loukidelis explained the relationship between the categories of information and the opening words of s. 17(1):

> Sections 17(1)(a) to (e) 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) … The intent and meaning of the listed examples are interpreted in relation to the opening words of s. 17(1), which, together with the listed examples, are interpreted in light of the purposes in s. 2(1) and the context of the statute as a whole. [5]

[22] Past orders have clearly stated that it is not enough for a public body to meet the requirements of one of the circumstances in (a) through (f), but that a public body must also demonstrate that disclosure would result in financial or economic harm to a public body.[6] In Order F10-39 the adjudicator expressly rejected the public body's argument that where one of the circumstances in (a) through (f) applies, a public body does not need to prove the harm described in the opening words of s. 17(1) (i.e. harm to financial or economic interests of a public body or the ability of the government to manage the economy). In other words, the circumstances in 17(1) (a) - (f) do not create standalone provisions, to be read apart from the rest of the section.[7]

[23] I will interpret and apply s. 17 in the same way. Therefore, even if PavCo shows that the information falls within one of the circumstances in (a) through (f), it must also prove that disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the ability of the government of British Columbia to manage the economy.

[24] It is well established that the language "could reasonably be expected to" in access to information statutes means that in order to rely on the exception, a public body must establish that there is a reasonable expectation of probable harm.[8] This language tries to mark out a middle ground between that which is probable and that which is merely possible.[9] In order to establish that there is

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[5] F08-22, 2008 CanLII 70316 (BCIPC) at para 43.
[6] See Order F12-02 2012, BCIPC 2, at para. 42; Order 113-1996, 1996 CanLII 1404 (BC IPC).
[7] Order F10-39, 2010 CanLII 77325 (BC IPC) at paras. 24, 32-33.
[8] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 at para. 54.
[9] *Ibid.*

a reasonable expectation of probable harm, a public body must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[10] It is not the information itself but its disclosure that must give rise to a reasonable expectation of harm.[11]

[25] In Order 02-50 Commissioner Loukidelis explained that there must be "detailed and convincing evidence" and a "clear and direct connection" that disclosure of the disputed information could reasonably be expected to result in the harm alleged under s. 17(1).[12]

PavCo's position

[26] PavCo has withheld the following information from the Agreement on the basis of s. 17(1):

- terms regarding sponsorship in return for naming the pitch for game day;
- terms about BC Place naming rights;
- how much the Whitecaps will pay to PavCo under the Agreement; and
- the "Current Status" of PavCo's contracts with food and beverage sponsors (found in Schedule A to the Agreement).

[27] PavCo submits that disclosure of the Agreement would negatively affect its prospect of achieving better terms in the future from potential name sponsors.[13] PavCo says that disclosure of the terms regarding the naming rights in the Agreement would provide valuable insights into its negotiating strategy and give parties interested in BC Place naming rights a significant advantage by knowing what it has accepted as suitable in the past with its resident teams. PavCo says that prospective clients who know an acceptable offer have little incentive to agree to pay a higher fee for PavCo's services.[14] PavCo says that revealing its negotiating strategies will influence potential name sponsors to orient their negotiations to the detriment of PavCo's financial interests.[15]

[28] PavCo says that it is self-apparent that the confidential information of one party, will if disclosed, be used to the business advantage of the other party in a transaction and there should be no independent evidence necessary to convince one of the truth of that proposition.[16]

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[10] *Ibid.*
[11] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)* 2012 BCSC 875 at para. 43.
[12] Order 02-50, 2002 CanLII 42486 (BC IPC) at para. 137.
[13] PavCo's submissions, at para. 30.
[14] *Ibid* at para. 34.
[15] *Ibid.*
[16] *Ibid* at para. 30.

[29] Overall, PavCo says that the consequences of disclosing the Agreement would result in increased financial costs, prolonged negotiations and less favourable terms. It says it could be put in a defensive negotiating position and its ability to reject specific demands without concessions would be undermined.[17]

[30] PavCo submits that since its operating shortfalls are paid with public funds, restricting PavCo's ability to maximize revenue results in the need for a greater investment by the government. PavCo says that, because of this, a risk of harm to its negotiating position or business relationships with its licencees (i.e. the Whitecaps) creates a risk of harm to the financial or economic interests of the government. [18]

[31] PavCo referenced Orders F10-34 and F15-68 in which the Commissioner and adjudicator respectively found that disclosing information in dispute would harm the public bodies' financial or economic interests.

Applicant's submissions

[32] The applicant says that s. 17 does not apply. He points to previous orders from this office ordering PavCo to disclose information because the adjudicator found that s. 17 did not apply.[19]

Analysis

[33] I am not satisfied that disclosure of any of the information in dispute under s. 17(1) could reasonably be expected to harm the financial or economic interests of PavCo.

[34] PavCo has argued that disclosure of the information in dispute will harm its negotiating position with potential name sponsors, but has not provided convincing detail or evidence to support its case. For example, PavCo says that disclosure will reveal PavCo's negotiating strategy, preferences and tactics, but PavCo has not pointed to any specific parts of the information in dispute or explained what the information would show about PavCo's negotiating strategy, preferences or tactics. From my review of the information in dispute, it is not clear what PavCo's negotiating strategies, preferences or tactics are, let alone which parts of the information in dispute would reveal them. Similarly, it is not evident how disclosing the information in dispute would result in increased financial costs, prolonged negotiations and less favourable terms.

[17] PavCo's submissions, at para. 37.
[18] PavCo's submissions, at para. 29
[19] The applicant referenced several orders including F15-46, 2015 BCIPC 49; F16-02, 2016 BCIPC 2; F14-05, 2014 BCIPC 6; F14-49, 2014 BCIPC 53; and F16-27, 2016 BCIPC 29.

[35] In support of its position, PavCo has made several broad arguments that do not, in my view, establish a clear and direct connection between the disclosure of the information in dispute and the alleged harms. For example, I understand PavCo to be saying that disclosure of the Agreement will set a baseline for future negotiations, financially and otherwise. PavCo has also asserted that it is self-apparent that the confidential information of one party, if disclosed, will be used to the business advantage of another party in a transaction. In my view, these arguments are too lacking in detail to assist me in understanding which, if any, specific harms will result from disclosing the portions of the Agreement that are at issue in this case.

[36] PavCo referenced Orders F10-34 and F15-68. In Order F15-68, the adjudicator had extensive submissions and supporting evidence which provided convincing details and examples of how specific harms could reasonably be expected to result.[20] In Order F10-34, Commissioner Denham found that the evidence described plausible hypothetical outcomes that could reasonably be expected to harm the public body's financial and economic interests.[21] These orders do not persuade me that I should make a similar finding here. Unlike in those orders, PavCo has not provided detailed evidence and argument to establish a clear and direct connection between disclosure of the information in dispute and the harm it alleges.

[37] In conclusion, I find that PavCo has not established that disclosure of the information in dispute could reasonably be expected to harm the financial or economic interests of a public body or the ability of the government of British Columbia to manage the economy. Therefore, PavCo is not authorized to refuse to disclose the disputed information under s. 17(1).

Section 21(1)

[38] Section 21 requires a public body to refuse to disclose information if disclosure could reasonably be expected to harm the business interests of a third party.

[39] The portions of s. 21 pertaining to this inquiry are:

> **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

[20] Order F15-68, 2015 BCIPC 74 at paras. 40 – 42, 46.
[21] Order F10-34, 2010 BCIPC 50 at paras. 24 – 25.

> (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
>
> (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,
>
> (iii) result in undue financial loss or gain to any person or organization, or…

[40] PavCo says that it repeats and adopts the submissions and evidence of the Whitecaps in respect of s. 21(1).

[41] The Whitecaps submit that the following information should be withheld under s. 21(1):

- the date the Agreement expires;
- terms with respect to delivering services on game day and terms about naming rights; and
- the amount that the Whitecaps will pay to PavCo in consideration for the rights granted in the Agreement.

[42] Section 21(1) creates a three part test; each of the elements in ss. 21(1)(a), (b) and (c) must be met in order for a public body to withhold information under s. 21(1). I will consider each requirement.

Section 21(1)(a) – type of information

[43] FIPPA does not define "commercial information." Past orders have said that commercial information under s. 21(1)(a) is information that relates to commerce, or the buying, selling, exchange or providing of goods and services; the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[22]

[44] The Whitecaps submit that the information in dispute is commercial or labour relations information.[23] PavCo submits that the information in dispute is the Whitecaps' commercial property.[24] The applicant agrees that the Agreement contains commercial information.[25]

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[22] Order F17-47, 2017 BCIPC 52 at para. 10; Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17.
[23] Whitecaps initial submissions at para. 15.
[24] PavCo's initial submission at para. 14.
[25] Applicant's submissions at para. 15.

[45] In my view, all of the information in dispute under s. 21 is commercial information. The Agreement sets out how the Whitecaps can use PavCo's assets regarding sponsorship. This relates to the buying, selling, exchanging or providing of goods and services and is therefore commercial information for the purpose of s. 21(1)(a).

[46] As a result it is unnecessary for me to address whether some of the information is also labour relations information.

Section 21(1)(b) – Supplied in confidence

[47] I will first consider whether the Whitecaps "supplied" the information in dispute to PavCo, and if so, whether it did so "in confidence."

Supplied

[48] Information contained in an agreement will not normally be "supplied" to the public body for the purpose of s. 21(1)(b) because terms in an agreement are typically negotiated. However, there are two circumstances where information in an agreement may be supplied rather than negotiated. The first circumstance is where the information is relatively "immutable" or not susceptible to change, for example fixed overhead or labour costs. The second circumstance is where disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was supplied by a third party.[26]

[49] The Whitecaps say that the information is "supplied" because they provided the information in dispute to PavCo during the course of negotiating the Agreement; either to request to include certain terms or to justify the Whitecaps' position about the wording of certain terms.[27] The Whitecaps' Vice-President, Finance and Administration says that the Whitecaps provided information regarding its commercial activities, business plans, business strategy, business models and sources of revenue to PavCo during the course of negotiating the Agreement for these purposes.[28] The Whitecaps submit that the terms in the Agreement reflect information provided by the third party and reveal something about the way its business is conducted.[29]

[50] I understand the Whitecaps to be saying that disclosure of the information in dispute would allow an informed observer to draw accurate inferences about underlying confidential information supplied by them to PavCo. However, the Whitecaps have not explained what accurate inferences could be drawn from

[26] Order 01-39, 2001 CanLII 21593 at paras. 45-50.
[27] Whitecaps initial submissions at para. 17.
[28] Affidavit of the Whitecaps' Vice President, Finance and Administration at para. 13.
[29] Whitecaps initial submissions at para. 17.

which parts of the information in dispute.[30] It is not evident to me how any of the information in dispute would allow an informed observer to draw accurate inferences about underlying confidential information supplied by a third party. Further, all of the information in dispute appears to be information that would have been susceptible to change during negotiations and is therefore not information that is "immutable." On my review of the information in dispute, all of it appears to be negotiated, rather than supplied.

[51] In conclusion, I am not satisfied that the information in dispute was "supplied" by a third party. As such it is unnecessary for me to address whether the "in confidence" element is met. Similarly, I will not consider whether the Whitecaps have shown that disclosure of the information will reasonably be expected to cause any of the harms under s. 21(1)(c).

CONCLUSION

[52] Under s. 58 of FIPPA, I require PavCo to give the applicant access to the information in dispute by March 11, 2019. PavCo must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

January 25, 2019

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

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[30] For a similar analysis, see Order 01-39, 2001 CanLII 21593 at para. 50.