Order F21-29

BC PAVILION CORPORATION

Elizabeth Barker
Director of Adjudication

July 12, 2021

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Summary: An applicant requested BC Pavilion Corporation provide access to its stadium use agreement with the Canadian Soccer Association for the FIFA Women's World Cup Canada 2015. BC Pavilion Corporation refused to disclose parts of the record under s. 21(1) (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator ordered BC Pavilion Corporation to disclose the information to the applicant because s. 21(1) did not apply.

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

INTRODUCTION

[1] The applicant asked BC Pavilion Corporation (PavCo) for access to the agreement between PavCo and the Canadian Soccer Association (third party) for use of BC Place Stadium for the FIFA Women's World Cup Canada 2015.

[2] PavCo refused him access to the records under ss. 17 (harm to the public body's financial or economic interests) and 21 (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[3] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review PavCo's decision. During mediation, PavCo notified the third party who, in turn, asserted that s. 21 applied to certain parts of the records.[1] PavCo also withdrew its reliance on s. 17 during mediation. Mediation did not resolve the s. 21 issue and it proceeded to inquiry.

[1] Notice was given pursuant to s. 23 of FIPPA.

Preliminary matter – late submission

[4] PavCo, the third party and the applicant all made written submissions. In its reply to the applicant's submission, the third party says that I should find the applicant's submission inadmissible because it was late. The applicant's submission was due at the close of business on a Friday but it is dated the Sunday, two days later.

[5] The third party does not say that it was prejudiced in any way by this. The third party and PavCo clearly were able to respond to the applicant's submission, and they did not seek additional time to do so. I find nothing hinges on the fact that the applicant's submission was two days late. It is admissible and I have considered it.

ISSUE

[6] The only issue to be decided in this inquiry is whether PavCo is required to refuse to disclose the information under s. 21(1) of FIPPA..

[7] Section 57(1) of FIPPA states that PavCo has the burden of proving that s. 21(1) applies and the applicant has no right of access to the information PavCo says it accepts that it has the burden of proving that the information is properly withheld under s. 21(1), but it relies on the third party to make the case. PavCo says that it repeats and adopts the third party's submissions and any supporting materials.[2]

DISCUSSION

Background

[8] PavCo is a provincial crown corporation that owns and manages BC Place Stadium in Vancouver. The third party is the governing body for soccer in Canada and is affiliated with the Fédération Internationale de Football Association (FIFA).[3]

Record

[9] The record in this case is titled "Stadium Use Agreement" (Agreement). It is between PavCo and the third party.[4] The main body of the Agreement is eight

[2] PavCo's submission at paras. 5-6.
[3] PavCo and the third party provided no background about themselves. This information comes from Order F18-13, 2018 BCIPC 16 at para. 7 and *West Toronto United Football Club v. Ontario Soccer Association*, 2014 ONSC 5881 at para. 4.
[4] The Agreement states that its goal is to clarify the objectives in a separate, February 1, 2011 "FIFA Stadium Agreement" between PavCo, the third party and FIFA. That record was not before me in this inquiry.

pages which have been disclosed to the applicant. The information in dispute in the Agreement is all of the information in Schedule A and four appendices, totalling 16 additional pages.[5]

Harm to Third Party Business Interests – s. 21(1)

[10] Section 21(1) requires a public body to withhold information if its disclosure could reasonably be expected to harm the business interests of a third party. The portions of s. 21(1) that are relevant in this case state:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (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,
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> …
>
> (iii) result in undue financial loss or gain to any person or organization,
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> …

[11] The principles for applying s. 21(1) are well established. All three of the following elements must be met in order for s. 21(1) to apply:

- Disclosure would reveal one or more of the types of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence under s. 21(1)(b); and
- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

Type of information, s. 21(1)(a)

[12] The third party submits that the information in dispute is commercial and financial information. It says that the information "creates a specific commercial and financial blueprint for hosting a FIFA sanctioned international football match."[6] More specifically, the third party says the information is about the following:

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[5] For clarity, the actual Agreement has 24, sequentially numbered pages. However, the record that PavCo provided for the purposes of this adjudication has an additional blank page at the end that is clearly not part of the Agreement.

[6] Third party's initial submission at para. 14.

> …match day stadium fee rental payments, exclusive use rental payments, deposit amounts, reimbursement costs, television, media and broadcast requirements, commercial rights, advertising rights, media rights, ticketing, merchandise, security, food and beverage, utilities, stadium operations, and release of funds. [The information] also includes a detailed financial summary of the estimated cost, and also the guaranteed and maximum costs related to the hosting of matches ….[7]

[13] The applicant does not dispute that the information is commercial or financial information.

[14] FIPPA does not define the terms financial and commercial. Past orders have said that "commercial" information relates to commerce, or the buying, selling, exchanging or providing of goods and services, but the information does not need to be proprietary in nature or have an independent monetary or marketable value.[8] Further, previous orders have decided that information about money and its uses, for instance, prices, expenses, hourly rates, contract amounts and budgets is "financial" information.[9]

[15] I find that the information in dispute is a mix of commercial and financial information. It includes dollar amounts for rent, fees and profit, and details about equipment, facilities and services that will be exchanged for money. It also includes the rules governing the parties' interactions related to the matters covered by the Agreement.

[16] In addition, s. 21(1)(a) requires that the information be "of or about a third party". I find that the disputed information is about the third party, although not exclusively. It is also about PavCo. That is because the information in dispute sets out PavCo's and the third party's respective obligations, rights and entitlements under the Agreement.

Supplied in confidence, s. 21(1)(b)

[17] For s. 21(1)(b) to apply, the information that I have found is commercial and financial information must have been supplied, implicitly or explicitly, in confidence. First, I will decide if the information was "supplied" to PavCo and then, only if it was, whether it was supplied in confidence.

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[7] Third party's initial submission at para. 13.
[8] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; F20-23, 2020 BCIPC 27 at para. 10; F19-03, 2019 BCIPC 04 at para. 43.
[9] For example: Order F20-41, 2020 BCIPC 49 at paras. 21-22; Order F20-47, 2020 BCIPC 56 at paras. 100-101; Order F18-39, 2018 BCIPC 42 at para. 19.

Supplied

[18] Previous orders have consistently said information in an agreement or contract between two parties is ordinarily negotiated and does not qualify as information that has been supplied to the public body.[10] The reasoning is that information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are negotiated and not "supplied" if the other party must agree to them in order for the agreement to proceed.[11] The intention of s. 21(1)(b) is to protect information of a third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed because the other party agreed to it.[12]

[19] However, past orders have recognized two exceptions to this general rule. Information in an agreement or contract that might in the normal course be considered to be negotiated may qualify as supplied information if:

1. the information is relatively immutable or not susceptible to alteration during negotiation, and it was incorporated into the agreement unchanged; or

2. the information would allow an accurate inference about underlying confidential information the third party "supplied" that is not expressly contained in the contract.[13]

Parties' submissions

[20] PavCo and the third party's position is that Schedule A and the appendices should be withheld in their entirety. Even the headings/subheadings have been severed under s. 21(1). Appendices A, C and D contain only headings/subheadings and are, otherwise, blank pages. Schedule A and Appendix B have additional content.

[21] The third party submits that the information in dispute was supplied and not negotiated information because it is in a separate schedule and appendices. It says:

> First, while [the disputed information] makes up part of a legal agreement between Third Party and Public Body, it is not contained within the body of

[10] Order 01-39, 2001 CanLII 21593 (BC IPC) at paras. 43-50, upheld on judicial review in *Canadian Pacific Railway v British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. See also, Order 04-06, 2004 CanLII 34260 (BC IPC) at paras. 45-46; Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 81; Order F19-03, 2019 BCIPC 04 at para. 48; Order F15-53, 2015 BCIPC 56 at para. 13; Order F15-10, 2015 BCIPC 10, at paras. 22-24.
[11] Order 01-39, *Ibid*.
[12] Order 01-39, *Ibid.*
[13] Order 01-39, *Ibid*.

> the agreement and is explicitly separate and apart from the agreement. The [disputed information] is largely made up of the specific commercial and financial requirements of FIFA and Third Party for hosting international football matches during the FIFA Women's World Cup 2015 Canada that apply solely for the City of Vancouver.[14]

[22] The third party's Deputy General Secretary says:

> FIFA has very specific requirements for hosting officially sanctioned FIFA football competitions which it owns the rights and without agreement on the commercial and financial terms set out in Schedule "A" of the Agreement, Vancouver would have been excluded from hosting any matches during the 2015 FIFA Women's World Cup.
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> For the FIFA Women's World Cup 2015, Canada Soccer entered into Stadium Use Agreements with each of the host cities. Each such Stadium Use Agreement was substantially the same and was based on the non-negotiable commercial and financial terms required by FIFA. However, each Stadium Use Agreement was tailored to the unique characteristics of each host city.[15]

[23] The Deputy General Secretary also says that the third party is involved in ongoing negotiations in Toronto, Montreal and Edmonton to host matches for the 2026 FIFA World Cup.[16]

[24] The applicant says the information in dispute was negotiated, not supplied for the purposes of s. 21(1)(b).[17]

Findings – supplied

[25] The disputed information in Schedule A and the appendices are clearly part of a stadium use agreement. The third party's evidence is that it negotiates stadium use agreements and is currently engaged in negotiating that type of agreement for the 2026 games.

[26] However, the third party submits that the general principle that agreements and contracts are negotiated information does not apply to Schedule A and the appendices. The third party says that Schedule A and the appendices are separate and apart from the main body of the Agreement and are based on the non-negotiable terms required by FIFA. Although the third party does not

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[14] Third party's initial submission at para. 19 and the affidavit of the third party's Deputy General Secretary at para. 4.
[15] Deputy General Secretary's affidavit at para. 4.
[16] Deputy General Secretary's affidavit at para. 7.
[17] Applicant's submission at para. 49.

expressly say so, I understand that it is arguing that the disputed information was immutable and not open to change during negotiation.[18]

[27] The third party says that the disputed information is *largely* made up of the specific commercial and financial requirements of FIFA. It also says that the stadium use agreements it entered into in 2015 were *based on* the non-negotiable commercial and financial terms required by FIFA. However, it also says that stadium use agreements are tailored to the unique characteristics of the host city. These statements indicate to me that not all the information in dispute was immutable and non-negotiable FIFA requirements. The third party does not expand on its statements about FIFA requirements or provide evidence to illustrate what it means by discussing the specific information at issue.

[28] Schedule A and its appendices clearly contain the terms governing PavCo's and the third party's interactions and responsibilities during the games. There are many terms in Schedule A that explicitly state that one party "agrees" or they both "mutually agree" to certain things.[19] For instance, Schedule A says that the parties have agreed to the contents of Schedule D. Further, I cannot see how the terms that set out the amount of rent, associated fees, ticket and concession revenue, for example, would not have been open to discussion and negotiation. The same applies to the terms covering a range of topics, including media and advertising, concession, personnel, security, the configuration and use of various parts of the stadium and which party will control certain equipment-related matters. It is not obvious which specific information in any of those terms would not have been susceptible to change during negotiations. The third party does not explain or say anything about the particular details in the terms.

[29] I find that the third party's assertions and general or vague statements are not enough to establish that the information in Schedule A and the appendices was supplied. Without some explanation or persuasive and illustrative evidence, I am not satisfied that the information was immutable and non-negotiable. For instance, it would have helped if the third party had identified actual information or terms and explained why it asserts they were non-negotiable. It also would have assisted to have evidence about what the third party and PavCo communicated to each other during negotiations about the specific information and contractual terms. I decline to engage in guess work in order to fill in the gaps in the third party's evidence.

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[18] The third party did not argue that the disputed information was supplied because its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was provided by the third party, but not expressly contained in the agreement.

[19] A few examples are at Schedule A, items 3.1, 5.6, 5.19, 7.1, 7.2, 8.2, 8.3, 13.3 and 13.4.

[30] Therefore, having carefully considered the Agreement as a whole and what the third party says, I am not satisfied that Schedule A and the appendices contain information that was supplied, as opposed to being negotiated. I find that PavCo and the third party have not established that the information in dispute was supplied under s. 21(1)(b).[20]

[31] As explained above, all three elements of s. 21(1) must be met in order to refuse access under s. 21(1). PavCo and the third party have established that s. 21(1)(a) applies but not s. 21(1)(b), so technically that is the end of the matter. Nonetheless, I will consider the third party's arguments about s. 21(1)(c) for the sake of completeness.

Reasonable Expectation of Harm, s. 21(1)(c)

[32] Deciding if s. 21(1)(c) applies requires deciding if disclosure of the information in dispute "could reasonably be expected to" cause the type of harm listed in s. 21(1)(c). While PavCo and the third party do not need to prove on a balance of probabilities that the harm will occur, they must establish that disclosure will result in a risk of harm that is well beyond the merely possible or speculative.[21]

[33] The third party submits that disclosure of Schedule A and the appendices could harm significantly its competitive position, interfere significantly with its negotiating position, or cause it undue financial loss. It does not specify which provisions of s. 21(1)(c) apply, but what it says raises ss. 21(1)(c)(i) and (iii).

[34] The third party says that, if disclosed, the information would be used by other national football associations throughout the world who compete against the third party to host FIFA events. It also says "the release of any commercial or financial information could lessen its competitive advantage over other less experienced FIFA member associations."[22]

[35] The third party also says that Canada, Mexico and the United States have won the rights to jointly host the 2026 FIFA World Cup, and the third party is currently in negotiations with Toronto, Montreal and Edmonton. The third party says:

> If the Confidential Information is released and used by any of Toronto, Edmonton or Montreal, it could result in any of them taking positions that are no longer acceptable to FIFA based on outdated information from 2015. The result could be one or all of Toronto, Montreal or Edmonton

[20] Because the information was not supplied, no purpose would be served by considering if it was supplied *in confidence* which is the second part of s. 21(1)(b).
[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[22] Third party's initial submission at para. 23.

> withdrawing from hosting matches during the 2026 FIFA World Cup resulting in significant financial losses to Third Party.[23]

[36] The third party also says:

> …there are currently 23 host cities in the running to host matches during the 2026 FIFA World Cup. If the Confidential Information is released prior to the selection of the final 16 host cities, it is likely to have some influence on the selection committee and a consideration in determining whether Toronto, Edmonton and Montreal are awarded games.[24]

[37] The third party's Deputy General Secretary provides the following evidence about that argument:

> There are currently 23 potential host cities soon to be narrowed down to 16 final host cities. Should the information in Schedule "A" be released to the public, it could have a negative impact ~~effect~~ [sic] on not only the ongoing negotiations between Canada Soccer and each of Toronto, Edmonton and Montreal, but could influence considerations on the final selections of host cities for the 2026 FIFA World Cup.
>
> It is financially advantageous for Canada Soccer to host as many games as possible, and it is very likely that the release of this confidential information could be a factor in determining how many matches Canada may receive which would cause undue financial harm to Canada Soccer.[25]

Findings, s. 21(1)(c) harm

[38] For the reasons that follow, I find that what the third party says about harm is assertion and speculation unsupported by cogent evidence. Specifically, it does not explain or illustrate what it claims by linking it back to the actual information in dispute or providing corroboration.

[39] As a result, I do not understand how it is reasonable to conclude that Toronto, Montreal or Edmonton would take positions that are "no longer acceptable to FIFA based on outdated information from 2015" and "withdraw" from hosting matches during 2026 FIFA World Cup. The third party also does not explain how that could cause it financial losses, and it does not provide context or evidence to exemplify how the loss would amount to "undue" financial loss under s. 21(1)(c)(iii).

[40] Similarly, the third party does not explain its concern that the information could be used by other nations' football associations to the third party's

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[23] Third party's initial submission at para. 24.
[24] Third party's initial submission at para. 25.
[25] Deputy General Secretary's affidavit at paras. 7-8.

competitive disadvantage. It does not say what other nations it means. I have considered whether the other nations the third party means are the United States and Mexico because they are also hosting 2026 matches, and the third party says that there are 23 cities in the running for 16 final host city spots. Even if that is who the third party means, it still has not explained why Mexico and the United States' football associations would be interested in the details of a past agreement between a Canadian soccer body and a Canadian stadium authority about a Canadian stadium that is not even in the running to host matches in 2026. Absent any explanation and supporting evidence, I am not persuaded by this harm argument.

[41] Further, the third party does not explain how s. 21(1)(c) harm could reasonably be expected from disclosing what the parties decided about terms governing equipment, for example, or the size and assignment of dressing rooms. The same applies for the headings/subheadings and paragraph and page numbers that have been severed under s. 21(1), all of which are the kind of generic, non-specific information one would expect in a stadium use agreement for a sporting event.

[42] Therefore, I find that the third party has not provided sufficiently cogent explanation and evidence to demonstrate that the risk of harm under s. 21(1)(c) is well beyond speculative or merely possible. PavCo relied on the third party's argument and evidence in this inquiry, so I find that PavCo has not met its burden of proving that disclosing the information in dispute could reasonably be expected to cause harm under s. 21(1)(c).

[43] In conclusion, while PavCo has shown that s. 21(1)(a) applies, it has not established that ss. 21(1)(b) and (c) apply. I find that PavCo is not required to refuse to disclose the information in dispute under s.21(1).

CONCLUSION

[44] For the reasons given above, I make the following orders under ss. 58 of FIPPA:

1. PavCo is required to give the applicant access to the information in Schedule A and Appendices A-D because PavCo is not authorized or required to refuse access under s. 21(1) of FIPPA.

2. When PavCo complies with item 1 immediately above, it must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records.

Pursuant to s. 59(1) of FIPPA, PavCo is required to comply with this order by August 24, 2021.

July 12, 2021

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

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