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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 142-1997
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INQUIRY RE: A refusal by the City of Victoria to disclose records to the media related to the choice of a contractor to replace Memorial Arena

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1. Description of the review

As Information and Privacy Commissioner, I conducted an oral inquiry at the Office of the Information and Privacy Commissioner (the Office) on December 18, 1996 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the City of Victoria's refusal to provide Russ Francis, News Editor for Monday Magazine, the applicant, with access to certain records.

2. Documentation of the review process

On August 30, 1996 the applicant requested from the City of Victoria (the public body) copies of records relating to the choice of Pilot Pacific Developments Ltd. as the preferred contractor to replace Memorial Arena. The applicant was particularly interested in receiving a copy of the report which the City Council relied on before choosing Pilot Pacific. The City responded on September 24, 1996 by refusing access to the records in their entirety under sections 17 and 21 of the Act. The City informed the applicant that it would provide him with access to most of the requested records once the City had completed its negotiations with the preferred contractor.

The applicant requested a review of this decision on September 24, 1996. In early November 1996, he requested an oral inquiry to resolve the issues in dispute. On November 26, 1996 my Office issued a notice to the applicant, the public body, and four third parties that an oral inquiry would take place on December 18, 1996. My decision to hold an oral inquiry was based on section D.6 of my Office's Policies and Procedures (June 1996 edition).

3. Issues under review at the inquiry and burden of proof

The issues to be reviewed in this inquiry are the City of Victoria's decision to apply sections 17(1)(e), 21(1)(a)(i) and (ii), 21(1)(b), and 21 (1)(c)(i)-(iii) to the records in dispute. As well, the applicant raised section 25.

These sections 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:

....

(e) information about negotiations carried on by or for a public body or the government of British Columbia.

Disclosure harmful to business interests of a third party

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets defined in the schedule of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of 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,

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

....

21(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure, or

....

Information must be disclosed if in the public interest

25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or

(b) the disclosure of which is, for any other reason, clearly in the public interest.

(2) Subsection (1) applies despite any other provision of this Act.

....

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. In this case, under section 57(1), it is up to the City of Victoria to prove that the applicant has no right of access to the records in dispute under sections 17 and 21 of the Act.

4. The records in dispute

The records in dispute were compiled by the City of Victoria, its proposed contractors, and its consultant during the process of choosing a contractor to replace Memorial Arena in Victoria. These records include:

1. The successful proposal submitted by Pilot Pacific Developments;

2. The proposal submitted by The Prospero Group & SCI;

3. The proposal submitted by The Victoria Showplex Group;

4. The proposal submitted by The Waterfront Group;

5. An April 17, 1996 memorandum from Coriolis Consulting Corp. to the City of Victoria summarizing the four proposals; and a copy of the same memorandum, with annotations;

6. A May 15, 1996 memorandum from Coriolis Consulting Corp. to the City of Victoria entitled “Evaluation of Proposals,” and including, for three of the proponents, a

revised summary of the proposal, letters sent to the proponents requesting more detailed information, and the proponents' replies;

7. A June 26, 1996 Status Report on the Victoria Multipurpose Facility Proposal Call; and

8. The Committee of the Whole Report from its Meeting of June 27, 1996.

5. The City of Victoria's case

Victoria essentially argues that this request for access is premature:

> The negotiations for the development of a multiplex arena are on-going. A team of negotiators for the City headed by the City Manager are continuing to work towards a final agreement. The documentation requested, the recommendations to City Council, and the proposals of the four developers form the basis of these negotiations. (Submission of the City, p. 1)

The City is relying on sections 17 and 21 of the Act to deny access to the records: "Because the terms of an agreement were still being negotiated, the City believed that the release of this information could create financial harm to the City and to the various companies which had made proposals, if the records were released at this time."

I will review below the City's specific arguments on these sections.

6. <u>Monday Magazine</u>'s case

In his original request, Russ Francis asked for records relating to the choice of Pilot Pacific as the preferred contractor to replace Memorial Arena:

> While I realize that the report may eventually be made available, I believe it is to be very much in the public interest that it is supplied as soon as possible--before the city commits to a deal which may or may not be in the taxpayers' best interests.

I have summarized below his more detailed argument on how the public interest is at stake in this matter.

The applicant argues against a conservative information policy discouraging disclosure of records about a project like the proposal for Memorial Arena and states that he favours a liberal information policy, which rejects hierarchical control in favour of greater democracy and allows the people to exercise popular sovereignty and remain the ultimate repository of legitimacy. See David Sadofsky, <u>Knowledge as Power: political and legal control of information</u> (Praeger, 1990).

According to Monday Magazine's analysis of what is at stake in this inquiry,

> We may accept the position of the city that its officials know what's best for us, and all will be revealed only when the last 'i' is dotted on the final agreements with Pilot Pacific Developments Inc.
>
> Or we could have a wide-ranging public discussion of the many outstanding issues concerning this proposal, before the city commits its citizens to what might turn out, in the worst-case scenario, a financial nightmare. (Submission of the Applicant, p. 6)

Monday Magazine emphasizes that the purpose of the Act, as set out in section 2(1), is "to make public bodies more accountable to the public ...."

> To step back four years, on November 23, 1992, Victoria residents voted 63% against a proposal to borrow $2.05 million toward the $6 million cost of a recreation complex next to the arena. The cynical observer might regard the recent, mostly-secret moves concerning the Pilot Pacific proposal as revealing that the city is doing an end-run around the wishes of its citizens, as indicated in that referendum on a comparable issue. (Submission of the Applicant, p. 6)

The applicant indicated during the oral inquiry that no referendum is in fact required under the *Municipal Act* for the current arena proposal, because the City will not be doing any borrowing. But the interests of taxpayers, he argues, remain at risk.

I have discussed below Monday Magazine's specific arguments on the applicability of various sections of the Act to the records in dispute.

7. The third parties' case

Pilot Pacific was not present at the oral inquiry but made the following written submission through counsel:

> ... our client objects to the release of any documents by the City of Victoria that relate to our proposal and negotiations to develop a multi-purpose facility for the City of Victoria. Our negotiations with the City and with other entities that may be involved with the proposed facility are at a very critical stage and release of our proposal would be harmful to our business interests.

J. Fraser McColl, Sr. of The Victoria Showplex Group testified at the inquiry as an ardent booster of a new arena. In his view, the information requested by the applicant, including his own group's proposal, should be released to Monday Magazine. McColl

stated that there are no prices or financial figures in his proposal, which is based on public information. In his view, the public needs to know relevant information because there have been too many delays in building a new facility. McColl stated that he had never heard about a proposed $1 million guarantee by the City to the successful bidder, and he further questions how a private entity like Pilot Pacific can earn a profit on such an expensive facility without the infusion of public money.

Ronald Green, principal of The Waterfront Group, testified that he does not believe that his group's proposal was given proper consideration by the City. He has no objection to the disclosure of his group's records to the applicant. Buck Perrin of the same group was also skeptical of the possibility of earning profits on a proposed expenditure of $50 million to build a new arena. He fears that the decision in favour of Pilot Pacific was made before the public process was completed and supports the applicant's request for more information on the matter.

8. Discussion

I think it is relevant to indicate that I am neither a resident nor a taxpayer of the City of Victoria.

The context for this inquiry: Arguments for and against immediate disclosure

The City wishes to replace an old arena with a new facility built in partnership with the private sector. The process began in 1995 and has been administered by Coriolis Consulting Corp. of Vancouver.

What is the public interest in disclosure of the records in dispute in this case under the Act? At this point in time, the beginning of 1997, who is best serving the public interest? The choices include City Council, the City's negotiating team, the media as represented by the applicant, and/or the citizens of Victoria as a whole. Is it sufficient "for the public interest" for the records in dispute to be released once the City has signed, or is about to sign, an actual contract with its choice of developer? Are the taxpayers of Victoria being adequately represented, in terms of their prospective financial interests in the proposed venture, by City Council and/or its staff? These are large questions with implications for various segments of government and society in terms of the broad goal of the Act.

City Council considered details of the four developers' proposals at *in camera* meetings of the Committee of the Whole on May 23 and May 30, 1996. It then requested that "a public information process" be conducted on the four proposals: "Display boards of the general plans for each of the proposals were made available for public viewing at the City Hall during the week beginning June 17. Newspaper ads informed the public of the display." On June 27, 1996 Council approved the selection of Pilot Pacific Developments "as the proposer with whom the City would begin negotiations towards an agreement for the construction of the Multiplex arena." On September 26, 1996 Council

approved a Memorandum of Understanding with Pilot Pacific and instructed the City Manager to negotiate a Master Agreement on or before April 30, 1997:

> The Memorandum also included a provision for public meetings prior to final approval of the Master and Subordinate Agreements. This Memorandum of Understanding was released to the public upon approval by City Council. The negotiations have continued since that date. (Submission of the City, p. 2)

The City's perspective is that "it is the duty of the elected City Council to be mindful of the public's interests." Moreover, the "City is aware of the interest of the media and the public in this project and has made a concerted effort to provide information without jeopardizing the negotiations." (Submission of the City, pp. 2, 3)

Monday Magazine argues that it is "clearly in the public interest" for the records in dispute to be released. For this purpose, it summarized "a few of the fears held by city taxpayers about the multiplex proposal, based on the information that has been released to date."

> According to the official city version of the arrangement with Pilot Pacific, the City of Victoria will get a brand new $50 million arena, with three ice sheets, for no more than it is now spends each year to run the existing facility. [about $500,000] (Submission of the Applicant, p. 2)

According to the applicant, taxpayers are concerned about the maximum annual net cost to the City. Secondly, Monday Magazine claims on the basis of conversations with local business people (but not "evidence"), that there are concerns that the Pilot Pacific agreement was "a done deal," "arranged in advance," and "a charade." (Submission of the Applicant, p. 3; and Oral Submission of the Applicant.) The applicant also quotes Victoria Councillor Bob Friedland's claim that the Pilot Pacific deal could cost taxpayers "as much as $61.7 million in total, if things do not go well. This total is 60% of the city's entire $104 million annual budget. Again, release of all relevant records would likely help remove this fear, assuming it is without justification."

Monday Magazine is further concerned, in terms of the public interest, that city officials informed City Council on September 26, 1996 "that they were considering offering the company an annual guarantee of $1 million - the first time such a warranty had been mentioned in public." (Submission of the Applicant, p. 3) As noted above, at least one other group of proposers had never heard about the possibility of such a guarantee.

In support of his general argument on the issue of promoting the public interest in accountability, the applicant recounted his version of the experience of the City of Vancouver in attempting to solve a housing crisis for low-income people by entering into an agreement in 1989 with VLC (now Greystone Properties) to build affordable housing

on public land. The value of the deal was approximately $50 million. The applicant argues that the deal was great for the company but a "financial and policy disaster" for the taxpayers of Vancouver. Without belabouring the details of Monday Magazine's argument on this episode, it concludes as follows:

> Despite the very best minds at city hall, the agreement was not sufficiently scrutinized by the public before it was signed ....
> ... taxpayers were left in the dark as to the all-important details.
> (Submission of the Applicant, p. 5)

With respect to the proposed Victoria arena, the applicant argues that the public and journalists have to ask questions about the results of non-delivery by the winning bidder and the possible worst-case scenario for taxpayers. (Submission of the Applicant, p. 5)

Much of Monday Magazine's oral submission focused on how disclosure of the records would be in the "public interest." In my opinion, Monday Magazine has established that the public has a "need to know" about the withheld records due to the significance of the arena project to the City of Victoria. However, this need does not automatically translate to a "public interest" that requires disclosure under any of sections 17(1), 21(1), or 25 of the Act (see discussion of section 25 below).

The link to the need to know argument is found in the opening words of section 2(1) of the Act: "the purposes of this Act are to make public bodies more accountable to the public ...." This statement is part of the general rule that all records must be disclosed in response to a request under the Act, unless an exception applies. In my opinion, the need to know argument applies, in a broad way, to all records under the Act.

Public bodies should consider the need to know argument when exercising their discretion to disclose or withhold records under section 17(1) or any of the other discretionary exceptions (sections 12.1, 13, 14, 15, 16, 18, 19, and 20). If the public's need to know outweighs the harms and other protected interests listed in section 17(1), for example, then a public body may decide to disclose the records under consideration.

However, the need to know argument in favour of disclosure is not relevant to the application of section 21(1), a mandatory exception. Public bodies need to apply the third-party business information exception by considering whether records fall within the limits of what the Legislative Assembly has determined to be sensitive. The application of section 21(1) is clear: either the records fall within the exception, or they do not, based on the application of a three-part test (see discussion of section 21(1) below). The need to know argument cannot move the records outside the mandatory exception rule in section 21(1) or affect the application of the three-part test. The public interest argument in relation to section 21(1) (and the other mandatory exceptions: sections 12 and 22) becomes relevant only if a public body decides that section 25 applies to the records.

What has been disclosed to the public

The City has made available to the public the Invitation for Proposals, display boards for the four developers' proposals, the Memorandum of Understanding of September 26, 1996, and a financial information package with background from the City Manager. (Submission of the City, p. 2)

Other records are available to the public, including: "Memorandum of Understanding - Pilot Pacific Multiplex Proposal," dated September 23, 1996 (from the Committee of the Whole Agenda), with an attached financial information package; "City of Victoria, Information Package - Replacement of Memorial Arena" (11 pages); three colour brochures from Pilot Pacific developments ("Pilot Pacific introduces an outstanding pro hockey experience for recreational players," and two others in relation to Pilot Pacific's development of hockey arenas).

Section 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:

> ***...***
>
> ***(e) information about negotiations carried on by or for a public body or the government of British Columbia.***
>
> ***....***

In terms of actual potential harm, the City states as follows:

> If the negotiations fail, the direct costs to the City would be in the neighbourhood of $250,000 for various studies and staff time and the potential loss of a $50 million community facility. Providing documentation related to the selection of the developer or the actual proposals creates a very real risk that the negotiations could be disrupted. (Submission of the City, p. 2)

As will become clearer below, I ultimately accept the City's argument that some of the records in dispute should be withheld under this section.

If the rest of the records in dispute are released to the applicant and thus to the public, and the negotiations disrupted, it could be for several reasons. The losing developers might argue that they have not been fairly treated during the process and that the winning developer has had some kind of unfair advantage. Allegations of this sort were put forward during the oral inquiry. The public, and even the Council, might disrupt the negotiations on the grounds that it, or they, have not been adequately informed of the terms of the negotiations. Or the public in particular might demand a cessation of

negotiations with this particular developer on the basis of information disclosed from the records in dispute.

With respect to the possible risks attached to disclosure, the City can argue that it might lose a valuable facility; the taxpayers can argue that they may have avoided a substantial potential legal and financial liability if this particular proposal were to cease operations or go bankrupt. Thus the broad public interest in promoting accountability of public bodies under the Act would appear to favour disclosure in this instance, since it might reasonably be expected to protect, rather than harm, the financial or economic interests of Victoria taxpayers.

The City argues that complex negotiations like the present one require a long time line, which should not be disrupted by premature disclosure of the records in dispute. It argues, for example, that disclosing the proposal of Pilot Pacific and the reports of Coriolis Consulting "could jeopardize the project by forcing all parties to negotiate in a public forum. Clearly this would seriously affect the ability of each party to fully present its negotiating position." (Submission of the City, p. 3) With respect, this argument does not make much sense, given the actual contents of the records in dispute, which I will describe further below. There is nothing in these records that reports on any of the actual negotiations that have occurred with Pilot Pacific before or after the signing of the Memorandum of Agreement. In addition, the skeletal outlines of any sensitive information in the proposals and related records can be readily severed.

The records in dispute literally contain very little "information about negotiations carried on by or for a public body," in the language of section 17(1)(e), because at the time of their preparation and submission almost no negotiations had occurred, except to clarify the original proposals. The significant negotiations have taken place subsequent to the selection of Pilot Pacific as the winning contractor. In this connection, I think that a useful distinction can be made between disclosure of records that provide the framework or basis for subsequent negotiations (but only in the most general terms) as opposed to information about actual negotiations, which is what section 17(1)(e) is primarily intended to protect. The disclosure of information in the former category cannot reasonably be expected to harm the financial or economic interests of the City of Victoria in the context of this particular inquiry.

Monday Magazine admits that it cannot tell which of the records in dispute "might include information about negotiations with or for a public body," but states that the consent of at least two of the third parties "to release of the information argues, at least indirectly, in support of my detailed reliance below on a section 25 appeal to the public interest."

In my view, it is possible to separate the applicant's request for the records in dispute from any records about current negotiations or those that are actually forming the basis of current negotiations. In fact, the applicant's main interest is not the contents of present negotiations but rather to learn why the City picked Pilot Pacific originally. In its

view, the Memorandum of Understanding of September 25, 1996 does not explain why the City selected Pilot Pacific. (Oral Submissions of the Applicant) The City's response is that the proposal and consultant's summaries are serving as the basis for negotiations. I find that this is true to a limited extent; such information can be severed, as discussed below.

The City has another argument under section 17 about the risks of premature disclosure of development proposals on the working assumption that agreement will be reached with the successful applicant:

> When the negotiations failed, new groups had the opportunity to determine what other groups had proposed, giving the new groups a distinct advantage. An early release would mean that the City might not be provided with as large a base of candidates and possibly creating additional financial loss or harm to the City. (Submission of the City, p. 3)

This statement again indicates that disclosure of the records in dispute is potentially a two-edged sword. While there is a potential loss to the City, there is also the potential gain of exposing the financial risks of a major capital proposal from the private sector that taxpayers might find themselves underwriting at some future date.

Unlike many other capital projects undertaken by any city, there is considerable public interest in the proposed arena project from a cross-section of the public interested in sports and entertainment. This group, as indicated by the testimony of Mr. Fraser McColl at the oral inquiry, wants a new sports and entertainment complex and wants it as quickly and economically as possible. Mr. McColl, in particular, questioned how Pilot Pacific could propose to build a $50 million facility under the terms of this competition and make it commercially viable.

Section 21: Disclosure harmful to business interests of a third party

The City has taken a rather paternalistic approach to the losing third parties in this inquiry, arguing that it is against their best interests to have their proposals disclosed, since failure of the negotiations with Pilot Pacific could lead to reopening of negotiations with any of the original three proponents. (Submission of the City, p. 3) The problem with this argument, at least in part, is that two of the third parties (The Victoria Showplex Group and The Waterfront Group) attended the inquiry and indicated that they see no reason not to disclose their proposals to the public and also indicated a willingness to give copies to Monday Magazine. Section 21(3)(a) provides that subsections (1) and (2) do not apply if the third party consents to the disclosure.

The City argued that the records in dispute, especially the four proposals, are protected from disclosure under each of the three parts of the section 21 test: they contain financial and commercial information about each company (section 21(1)(a)(ii)); were

supplied implicitly or explicitly in confidence (section 21(1)(b)); and disclosure would significantly harm the competitive position of the proposers if an agreement is not reached with Pilot Pacific (section 21(1)(c)(i)): "If a second proposal call occurred, new proposers would be able to obtain the proposals of the third parties, which would give them a substantial advantage over the earlier proposers." (Submission of the City, p. 3) I note, in particular, the components of the three-part test, quoted at the beginning of this Order, that the City did not argue.

With respect to section 21(1)(b), the City testified orally that its policy is to treat proposals, such as those in dispute in this inquiry, in confidence. Although not written policy, this is the practice of the City's Purchasing Manager.

Monday Magazine points out that sections 21(1) and (2) do not apply if the third party consents to the disclosure, as two of the four third parties did during the oral inquiry. I agree and therefore find that the City cannot depend upon section 21 to prevent release of these particular proposals.

The applicant further points out with respect to the application of section 21 that "the two consenting third parties, both of whom represent large commercial operations, are apparently unconcerned about the release of parallel information about their own companies." (Submission of the Applicant, pp. 1, 2) The City's oral response was that it would be disappointed if these two third parties released their proposal but that they are free to release their own information.

Section 25: Information must be disclosed if in the public interest

I have reviewed above the applicant's argument about why the public interest is a sufficient argument compelling disclosure of the records in dispute. In its view, under section 25(1)(b), the City must disclose the information. However, I have come, reluctantly, to the view that section 25 can only be invoked upon the decision of a public body. Thus I cannot order disclosure under section 25 in this inquiry. (See Order No. 56-1995, October 4, 1995, pp. 8-10) The City decided that the public interest did not require disclosure under this section, since it was not clearly "in the public interest" to do so. (Oral Submission at the inquiry.) I defer to the City's judgment on this issue under section 25.

The possibility of severing

The City apparently did not seriously consider severing the records in dispute in response to the applicant's request, although it notes that portions of the records, such as drawings, have been shown to the public or are in the Memorandum of Understanding. In terms of disclosure at a future date, if a successful agreement is completed, it suggested that severance might have to occur under sections 21 and 22, such as portions of professional résumés. (Submission of the City, p. 3) The latter argument strikes me as irrelevant since résumés submitted as part of a public bidding process can hardly be

regarded as impacting inappropriately on the privacy of individuals if disclosed (unless sensitive personal information was unwisely included). The résumés in question are designed to show the professional qualifications of the proposers in the best possible light and, in my view, do not raise privacy interests in the context of a commercial competition for construction of an arena.

Review of the records in dispute

As usual in matters of this sort, the rather high-flying arguments presented above need to be tempered by a realistic appraisal of the actual contents of each of the records in dispute before I can render a decision.

(1) The proposal submitted by Pilot Pacific Developments:

The main components of this lengthy submission are the development concept, the team, and the new partnership with the City of Victoria. In terms of potentially sensitive matters from a business perspective, there is an estimate of capital cost with a listing of five specific figures (pp. 7, 8). Portions of these two pages must be withheld under section 21 of the Act because they satisfy all three parts of the test in section 21(1). There are then two pages of principal business terms between Pilot Pacific and the City, which are in fact very general, because this privately-held company prefers to divulge details during negotiations (pp. 14, 15, 17). These pages do not fall within the scope of section 21(1)(b) and therefore must be disclosed.

Perhaps two-thirds of the total Pilot Pacific proposal is background descriptive and promotional information about the three partners in this proposal. Much of it is evidently taken from printed brochures. As such, those portions must be disclosed since they do not fall within the scope of section 21(1)(b). I find support for this treatment of promotional and general information in bids in Ontario Order P-610 (Ministry of Housing, January 13, 1994, p. 5), where the Inquiry Officer wrote:

> ... disclosure of the names and addresses of the contractors, the total value of the bids, the list of proposed subcontractors, and other general information contained in the bid, would not result in one of the harms specified in section 17(1)(a), (b) or (c) [the equivalent to section 21(1) in the British Columbia legislation].

(2) The proposal submitted by The Prospero Group & SCI:

This proposal contains a note on p. 2-2 as follows:

> No information contained in this proposal shall be released to any unauthorized persons outside the City of Victoria. The Proponent has subsequently elected not to submit detailed plans or conceptual drawings.

The proposal also includes an unexecuted (at least in the copy submitted to me) confidentiality agreement, which reads:

> The information and ideas contained herein is of a proprietary nature. The proponent's proposal in its entirety is for the sole purpose of the City of Victoria in response to the formal request for proposals for the development of a Multi-Purpose Arena. No information contained in this proposal shall be released to any unauthorized persons outside the City of Victoria. (p. 8-1)

There are approximately 57 pages in this proposal. Most of them are promotional pieces and photographs of projects that the consortium has executed or participated in. None of this information meets the section 21 three-part test for non-disclosure. Nor would a 25-page 1994 annual report of RG Properties Ltd., a division of the Prospero Group of Companies. RG Properties is a publicly-traded company on the Toronto Stock Exchange.

The proposal itself includes the terms of a proposed agreement, an estimated budget, and a list of conditions (pp. 3-1 to 6-1 [4 pages]). These four pages meet the three tests in section 21(1) and therefore must be withheld, except for one paragraph on page 3-1.

(3) The proposal submitted by The Victoria Showplex Group:

This third party indicated at the oral inquiry that it had no objections to the release of its proposal. The City therefore cannot withhold this record under section 21 due to section 21(3)(a).

(4) The proposal submitted by The Waterfront Group:

This third party indicated at the oral inquiry that it had no objections to the release of its proposal. I note that this proposal includes a listing in dollar amounts of project costs for land and buildings and financing sources in terms of equity and long-term mortgages or additional equity. Under capital costs, this proposal states that such information is private and confidential, and none is included in the proposal itself. But it does include a financial model for the project for a five-year period that includes revenues, expenses, and earnings. But due to the third party's consent under section 21(3)(a), the City cannot withhold this record under section 21.

(5) An April 17, 1996 memorandum from Coriolis Consulting Corp. to the City of Victoria summarizing the four proposals; and a copy of the same memorandum, with annotations:

The primary record of summaries of the four proposals above is 14 pages with a list of questions for each proponent. The lists of questions on pages 3 and 4, 8, 11, and

14 may be withheld under section 17(1)(e). The proposal from the Waterfront Group has about a half page summary of financial matters (p. 2). The proposal from Pilot Pacific has a similar half page of capital costs and sources of financing (p. 6). The description of the Victoria Showplex Group proposal contains one line of financial information (p. 10). The description of the Prospero Group proposal has a few lines of financial information and some financing information (p. 13). This financial information should not be disclosed (sections 17(1) and 21(1)).

This record does not contain any recommendations to the City by its consultants. The annotated copy of the same record contains minor marginal comments by an unknown person. This information may be withheld because it may reveal evaluative comments of a city official (section 17(1)(e)).

(6) A May 15, 1996 memorandum from Coriolis Consulting Corp. to the City of Victoria entitled "Evaluation of Proposals," and including, for three of the proponents, a revised summary of the proposal, letters sent to the proponents requesting more detailed information, and the proponents' replies:

The cover page indicates that the memorandum is intended for members of the Committee of the Whole of City Council. The contents are an expanded version of record five. It also includes letters to each proponent and its responses. The business or financial information that can be regarded as sensitive under sections 17 and 21 is about the same amount as in record five and should not be disclosed to the applicant. Despite the label of the memorandum, there appears to be no actual "evaluation" of each proposal in this record.

(7) A June 26, 1996 Status Report on the Victoria Multipurpose Facility Proposal Call (it is stamped *in camera*):

This record was sent to the Finance Department of the City by Coriolis Consulting Corp., the consultant on the project. It was intended for City Council (p. 1). For the first time, it mentions the existence of a City Steering Committee on the project.

The first 12 pages are descriptive based on the consultant's summaries of the four proposals. Pages 10 to 12 are the summary results of public responses to displays on each of the projects. Pages 13 and 14 are conclusions and recommendations by the consultant. In my view, pages 13 and 14 may be withheld under section 17(1) of the Act. In addition, portions of pages 7 (Memorial site terms) and 8 (community use) may be withheld under section 17(1). I note in particular that the earlier summary does not contain any financial information.

(8) The Committee of the Whole Report from its Meeting of June 27, 1996:

This is simply an agenda item with a recommendation from Committee of the Whole to Council for the selection of a specific proposal and three terms for it. Attached

are the three-page results of the public review (also found at pages 10-12 of record 7), which may have already been made public. Nothing in the record falls within either section 17 or 21; therefore the entire record must be disclosed.

The City of Victoria's burden of proof

The crux of my decision is my finding that the City of Victoria has failed to meet its burden of proof under either sections 17 or 21 of the Act, with the exception of some portions of the records. (See Order No. 1-1994, January 11, 1994, pp. 8-10) I specifically held an *in camera* session during the oral inquiry in order to learn from the City what specific parts of the records in dispute raised interests protected by either section of the Act. I did not learn anything more to persuade me that the City had sufficient evidence to present to me to meet its overall burden of proof.

I have prepared a severed version of the records with the parts marked for disclosure by the City of Victoria.

9. Orders

I find that the head of the City of Victoria is not authorized to refuse access to parts of records 5, 7, and 8 under section 17 or required to refuse access to parts of records 1, 2, 3, 4, and 6 under section 21 of the Act. Under section 58(2)(a), I require the head of the City of Victoria to give the applicant access to those parts of the records that I have marked for release.

I also find that the head of the City of Victoria is authorized to refuse access to parts of records 5, 6, 7, and 8 under section 17 of the Act. Under section 58(2)(b), I confirm the decision of the head of the City of Victoria to refuse the applicant access to those parts of the records that I have marked for severance.

I also find that the head of the City of Victoria is required to refuse access to parts of records 1, 2, 3, 4, 5, and 6 under section 21 of the Act. Under section 58(2)(c), I require the head of the City of Victoria to refuse access to those parts of the records that I have marked for severance.

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David H. Flaherty January 15, 1997
Commissioner