



S-17 1134

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF A PETITION UNDER THE *JUDICIAL REVIEW PROCEDURE ACT*, RSBC 1996 c 241, IN RESPECT OF ORDER F16-51 MADE BY A DELEGATE OF THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA ON DECEMBER 22, 2016

BETWEEN

B.C. PAVILION CORPORATION

PETITIONER

AND

THE INFORMATION AND PRIVACY COMMISSIONER FOR BRITISH COLUMBIA and BOB MACKIN

RESPONDENTS

PETITION TO THE COURT

(Judicial Review of Order F16-51

pursuant to the *Judicial Review Procedure Act*, RSBC 1996, c 241)

THIS IS THE PETITION OF:

B.C. Pavilion Corporation
200 – 999 Canada Place
Vancouver, BC
V6C 3C1

ON NOTICE TO:

**Office of the Information and Privacy
Commissioner for British Columbia**
4th Floor, 947 Fort Street
Victoria BC V8V 3K3 (as required by *JRPA* s. 15)

Bob Mackin
North Vancouver BC

The Attorney General for British Columbia
Ministry of Attorney General for British Columbia
11th Floor – 1001 Douglas Street
Victoria BC V8V 1X4 (as required by *JRPA* s. 16)

TED Conferences LLC
11th Floor - 330 Hudson Street
New York, NY 10013

This proceeding is brought for the relief set out in Part 1 below.

If you intend to respond to this Petition, you or your lawyer must

- (a) File a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) Serve on the Petitioner
 - i. 2 copies of the filed Response to Petition, and
 - ii. 2 copies of each affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the Petitioner,

- (a) if you were served with the Petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the petition anywhere else, within 49 days after that service, or
- (d) if the time for response has been set by order of the court, within that time.

(1)	<p>The address of the registry is:</p> <p style="text-align: center;">800 Smithe Street Vancouver, British Columbia V6Z 2E1</p>
(2)	<p>The ADDRESS FOR SERVICE of the Petitioner is:</p> <p style="text-align: center;">B.C. Pavilion Corporation 200 – 999 Canada Place Vancouver, BC V6C 3C1</p> <p style="text-align: center;">Fax # for service of the Petitioner: n/a Email address for service of the Petitioner: n/a</p>
(3)	<p>The name and office address of the Petitioner's lawyer is:</p> <p style="text-align: center;">B.C. Pavilion Corporation (Attention: Clark Ledingham, General Counsel) 200 – 999 Canada Place Vancouver, BC V6C 3C1</p>

CLAIM OF THE PETITIONER

Part 1: ORDERS SOUGHT

1. The following relief by way of application for judicial review of Order F16-51 (the "2016 Disclosure Order"), issued by a delegate of the Information and Privacy Commissioner for British Columbia (the "Commissioner"), dated 22 December 2016, requiring the petitioner to disclose to the respondent Bob Mackin (the "Applicant") certain redacted contract pricing information regarding a license with TED Conferences LLC ("TED") for the 2014 TED conference at the Vancouver Convention Centre (the "Redacted Information"):

- (a) an order in the nature of *certiorari* quashing and setting aside the 2016 Disclosure Order;
- (b) an order and declaration that the 2016 Disclosure Order is ultra vires;

- (c) a declaration that the head of the petitioner B.C. Pavilion Corporation may refuse to disclose the Redacted Information to the Applicant pursuant to s. 17(1) or s.17(1)(f) of the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 ("FIPPA");
- (d) in the alternative to (c), a direction that the Commissioner reconsider and determine the matter of whether the petitioner may refuse to disclose the Redacted Information, together with any directions that the Court thinks appropriate for the reconsideration;
- (e) costs; and
- (f) such further and other relief as this Court considers just and appropriate.

Part 2: FACTUAL BASIS

2. The petitioner B.C. Pavilion Corporation ("PavCo") is an agent of the Government of British Columbia under s. 2 of the *British Columbia Enterprise Corporation Act*, RSBC 1996, c 35. PavCo reports to the Legislative Assembly through the Minister of Transportation and Infrastructure. PavCo's mandate is to generate significant economic and community benefits for British Columbia by the prudent management of world class public convention, sports, and entertainment facilities. PavCo achieves this through the ownership and management of BC Place and the Vancouver Convention Centre ('VCC'). These facilities provide a venue for such events as global summit meetings and high profile conferences such as TED at VCC, and world-class sporting and entertainment events at BC Place. (Affidavit No.2 of Ken Cretney, para 4).

OIPC Order F16-51

3. On 27 November 2013, the Applicant requested under FIPPA disclosure of the contract for use of the Vancouver Convention Centre for the 30th anniversary TED conference (March 17-21, 2014) including financial terms (the "TED License Agreement").

4. On 21 January 2014, PavCo denied access to the TED License Agreement in its entirety under s. 17(1) (harm to financial interests of public body) and s. 21(1) (harm to third-party business interests) of FIPPA.

5. On 22 January 2014 the Applicant requested a review of PavCo's decision by the Office of the Information and Privacy Commissioner (the "OIPC").

6. On 19 December 2014 and after mediation with the OIPC, PavCo further responded to the Applicant's request by providing a redacted copy of the TED License Agreement. PavCo continued to rely upon s. 17(1) and s. 21(1) of FIPPA.

7. Mediation by the OIPC was otherwise unsuccessful and the matter proceeded to an inquiry which was conducted by a delegate of the Commissioner on written submissions only (the "2016 Inquiry").

8. On 9 June 2016 the petitioner PavCo delivered initial submissions to the OIPC, relying on s. 17(1), s. 17(1)(f) and s. 21(1) of FIPPA at the 2016 Inquiry. In support of its submissions, PavCo tendered the following affidavit evidence:

(i) *In Camera* Affidavit of Ken Cretney, President and CEO of PavCo, sworn 27 May 2016;

(ii) Affidavit No. 2 of Ken Cretney, sworn 9 June 2016, exhibiting letters from the President and CEO of Tourism Vancouver, and the Mayor of the City of Vancouver;

(iii) Affidavit of Katherine McCartney, Director, Operations for TED, sworn 9 June 2016. [collectively, the "Affidavit Evidence"]

9. In particular, PavCo relied on s. 17(1), and s. 17(f) of FIPPA as authority to refuse to disclose the information to the Applicant:

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.

10. PavCo also relied on s. 21(1) of FIPPA as authority to refuse disclosure of the information to the Applicant, which is not at issue in these proceedings.

11. On 22 December 2016 a delegate of the Respondent Commissioner, Adjudicator C. Francis (the "Adjudicator"), issued the 2016 Disclosure Order. In the 2016 Disclosure Order the Adjudicator found, among other things, that PavCo is not authorized or required under sections 17(1), or 21(1) of FIPPA to refuse to disclose the TED License Agreement. The Adjudicator further ordered that PavCo give the applicant access to the TED License Agreement pursuant to s. 58(2)(a) of FIPPA by 7 February 2017.

12. In Order F16-51, Adjudicator Francis was prepared to accept the principle that "negotiations involve give and take on both sides" based on conclusions reached in previous OIPC Orders (para 33). However, the Adjudicator was apparently unwilling to accept the corollary that the 'give and take' of negotiations is affected by disclosure of one party's confidential pricing information. Such an expectation of harm is based on reason.

13. The Adjudicator stated that "PavCo said that it competes internationally to host events and that it is currently in discussions with a number of future clients on possible future contracts for use of VCC space" (para 31, emphasis added). Specific evidence on this point was provided to the OIPC both in the *in camera* affidavit of PavCo's CEO and the affidavit filed on behalf of TED. The Adjudicator further stated that "(PavCo) argued that disclosure of the withheld information would negatively affect its prospects of achieving better terms for these future contracts, because its prospective clients would have an advantage in knowing what fees PavCo had accepted in the past ..." (para 31,

emphasis added). Again, specific evidence on this point was provided *in camera* to the OIPC.

14. Nevertheless, the Adjudicator concluded that PavCo “had not provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 17(1)”. The Adjudicator specifically characterized the Affidavit Evidence in total as “assertions, unsupported by evidence, which do not persuade me that disclosure of the information in dispute could reasonably be expected to result in harm under s. 17(1)(d), s. 17(1)(f) or, more generally, under s. 17(1)” (at para 46).

15. Further, the Adjudicator stated “PavCo also did not dispute the journalist’s argument that the VCC is the only venue in BC capable of hosting a large event like TED talks. This, in my view, undermines PavCo’s argument about losing business to other venues in BC, at least as far as TED talks are concerned” (para 42, emphasis added), accepting the journalist Applicant’s characterization of the VCC (para 31 and 39).

16. PavCo made no such argument to the OIPC. To the contrary, the Adjudicator noted that “PavCo said it competes internationally to host events” (para 31) in a highly competitive market - that is, with other convention centres located outside of Canada, as was the case with TED. The public body provided uncontroverted evidence on this point. The Adjudicator’s effective conclusion of the VCC as a ‘monopoly facility’ for business purposes is contrary to both the sworn evidence provided to the OIPC and to common sense. It is a fundamental error of fact that taints the Adjudicator’s assessment of reasonable harm to PavCo under s. 17 of the Act.

PART 3: LEGAL BASIS

17. The Commissioner’s delegate committed the following reviewable errors:

- (a) the Commissioner’s delegate erred in the interpretation and application of s. 17(1) and s. 17(1)(f) of FIPPA, and in particular:

- (i) erred in the interpretation and application of the concept of reasonable expectation of harm for the purposes of s. 17(1) of FIPPA;
 - (ii) imposed a standard of proof higher than required by s. 17(1) of FIPPA; and,
 - (iii) erred in her interpretation and application to the TED License Agreement of the phrase "information the disclosure of which could reasonably be expected to harm the negotiating position of a public body..." in s. 17(1)(f).
- (b) the Commissioner's delegate erred in:
- (i) failing to conduct or provide a contextual analysis of the evidence as it applied to the reasonable expectation of probable harm within the meaning of s. 17(1) of FIPPA; and
 - (ii) concluding that the evidence was insufficient to establish a reasonable expectation of probable harm within the meaning of s. 17(1) of FIPPA; and
 - (iii) concluding that the evidence was insufficient to establish "harm to the negotiating position of a public body" within the meaning of s. 17(1)(f) of FIPPA.
- (c) the Commissioner's delegate erred in requiring that PavCo meet a virtually impossible standard of proof for the application of s. 17(1) and s. 17(1)(f) in that it (among other things):
- (i) requires PavCo to quantify with precision the financial harm to PavCo arising from an event – disclosure of the Redacted Information – which has not occurred because the public body has not publicly disclosed this information and has refused to disclose

the information in reliance on the s. 17(1) exemption provision of FIPPA, in order for PavCo to successfully rely on s.17(1), and;

- (ii) requires PavCo to quantify with precision the harm to the negotiating position of PavCo arising from an event – disclosure of the Redacted Information – which has not occurred because the public body has not publicly disclosed this information and has refused to disclose the information in reliance on the s. 17(1)(f) exemption provision of FIPPA, in order for PavCo to successfully rely on s.17(1)(f); and
- (iii) requires PavCo to substantiate that it was ‘compelled’, ‘obliged’ or ‘forced’ to modify future licenses with other licensees in order to quantify the harm to the negotiating position of PavCo arising from an event – disclosure of the Redacted Information – which has not occurred because the public body does has not publicly disclosed this information and has refused to disclose the information in reliance on the s. 17(1)(f) exemption provisions of FIPPA, in order for PavCo to successfully rely on s.17(1)(f),

which is an incorrect and unreasonable construction and application of s. 17(1) and s. 17(1)(f) of FIPPA; and

(d) such further and other grounds as counsel may advise.

18. PavCo pleads and relies upon:

- (a) the *Supreme Court Civil Rules*;
- (b) the *Judicial Review Procedure Act*, RSBC 1996, c 241 as amended;
- (c) the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165 as amended;

- (d) applicable administrative law principles;
- (e) the inherent jurisdiction of this Honourable Court; and
- (f) such further and other authority as counsel may advise.

Automatic Stay of Order F16-51 Consequent Upon Judicial Review

19. PavCo pleads and relies upon FIPPA s 59(2), pursuant to which the commencement of this judicial review application acts as an automatic stay of Order F16-51 in accordance with the terms of s 59.

PART 4: MATERIAL TO BE RELIED ON

- 1. Affidavit #1 of Scott Myers, sworn 3 February 2017; and
- 2. The complete *In Camera* record before the OIPC; and
- 3. Such further and other material as counsel may advise.

The Petitioner estimates that the hearing of the Petition will take two days.

Date: 6 February 2017



B.C. PAVILION CORPORATION
Per: Clark Ledingham, General Counsel
Solicitor for the Petitioner

To be completed by the court only:

Order made

[] in the terms requested in paragraphs _____ of Part 1 of the Petition.

[] with the following variations and additional terms:

Date:

Signature of [] Judge [] Master

No. S-171134
Vancouver Registry

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