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Order F14-40

BRITISH COLUMBIA PAVILION CORP (PAVCO)

Caitlin Lemiski
Adjudicator

September 18, 2014

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Summary: The applicant requested records about the new roof at BC Place Stadium. PavCo withheld some of the information in responsive records on the basis that disclosure would be harmful to the financial or economic interests of a public body (s. 17 of FIPPA) and that disclosure would be harmful to the business interests of a third party (s. 21). The adjudicator determined that PavCo was not authorized to refuse to disclose some of the information it withheld under s. 17 and that it was not required to refuse to disclose any of the information it withheld under s. 21. The adjudicator also determined that s. 25 applied to some of the information PavCo withheld under s. 21 because disclosure is clearly in the public interest and ordered PavCo to disclose that information forthwith.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1), 21(1) and 25(1)(a).

Authorities Considered: B.C.: Order 02-38, 2002 CanLII 42472 (BC IPC); Order 02-04, 2002 CanLII 42429 (BC IPC); 2002 CanLII 42472 (BC IPC); Order No. 162-1997, 1997 CanLII 1965 (BC IPC); Order F11-28, 2011 BCIPC 34 (CanLII); Order F12-04 2012 BCIPC 4 (CanLII); Order F08-22 2008 CanLII 70316 (BC IPC); Order F07-06 2007 CanLII 9597 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F14-04, 2014 BCIPC 4 (CanLII); Order 03-02, 2003 CanLII 49166 (BC IPC); Order F13-20, 2013 BCIPC 27 (CanLII); Order F05-29, 2005 CanLII 32548 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Order F14-37, 2014 BCIPC 40 (CanLII); Investigation Report F13-05, 2013 CanLII 95961 (BC IPC).. **AB.:** Order 98-011, 1998 CanLII 18637 (AB OIPC); Order 96-011, 1996 CanLII 11519 (AB OIPC).

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 S.C.R. 23.

INTRODUCTION

[1] This inquiry pertains to an applicant's request to the BC Pavilion Corporation ("PavCo") for records regarding the fixed fabric and retractable roof at BC Place Stadium ("BC Place"). PavCo responded by partially denying access to some of the records it located in response to the applicant's request under s. 17 (disclosure harmful to the financial or economic interests of a public body) and by denying access to other records it located under s. 21 (disclosure harmful to the business interests of a third party) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant was not satisfied with PavCo's response and he requested a review by the Office of the Information and Privacy Commissioner ("OIPC"). The applicant stated that the exceptions to disclosure did not apply and that, in any event, s. 25 requires PavCo to disclose all of the information it severed because it is about a risk of significant harm to the health or safety of the public or a group of people.[1]

[3] Mediation was unsuccessful and an inquiry was held. PavCo made initial and reply submissions. The applicant made an initial submission only. The OIPC invited three third parties, FabriTec Structures ("FabriTec"), Beauregard Engineering Corp. ("Beauregard") and Hightex Tensile Structures Ltd. ("Hightex"), to make submissions. Hightex made submissions, the others did not.

ISSUES:

[4] The issues in this inquiry are as follows:

1. Is PavCo required by s. 25 of FIPPA to disclose information?
2. Is PavCo authorized by s. 17 of FIPPA to refuse to disclose information?
3. Is PavCo required by s. 21 FIPPA to refuse to disclose information?

[5] FIPPA is silent on the burden of proof for s. 25. Previous orders have established that it is in both the interests of the applicant and the public body to make submissions on s. 25.[2] Section 57(1) of FIPPA provides that PavCo has the burden of proof on the other two issues.

[1] Investigator's Fact Report, para. 6.
[2] See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 37 and 38.

DISCUSSION

[6] **Background—**PavCo is a provincial crown corporation that manages BC Place. BC Place is the largest indoor gathering space in British Columbia and is used for trade shows as well as sports and entertainment events.[3]

[7] BC Place has recently undergone extensive renovations.[4] PavCo retained PCL as the general contractor for the renovations, including the new roof.[5] PCL oversaw a series of subcontractors.[6] The renovations began in 2008 with upgrades to prepare BC Place to host the opening and closing ceremonies of the 2010 Olympic and Paralympic Games.[7] After 2010, the renovations to BC Place continued, including the installation of a retractable roof.[8] The installation of the retractable roof is now complete, but PavCo submits that there are outstanding issues, including a construction deficiency related to lubricant stains.[9] At the time of this inquiry, PavCo submits that there was ongoing mediation.[10] PavCo provides details about the mediation *in camera.*[11]

[8] **Records in dispute—** The records at issue in this inquiry were provided to PavCo from PCL or from subcontractors.[12] There are 61 pages of records PavCo identified as responsive to the applicant's request. Some of the records were provided in full to the applicant, however several pages contain severing.

[9] The information PavCo severed under s. 17 of FIPPA is as follows:

- A letter prepared by Shade Worldwide Inc. (the "first Shade letter") and an attached letter prepared by Saint-Gobain Performance Plastics Corp. (the "first Saint-Gobain letter"). Both letters contain observations about the roof and recommendations for certain remedial work.[13]
- A second letter prepared by Shade (the "second Shade letter") and a second attached letter prepared by Saint-Gobain (the "second Saint-Gobain letter"). Both letters contain

[3] Public body's submission at paras. 4.07, 4.10, and 4.11.
[4] Public body's initial submission at para. 4.12.
[5] Public body's initial submission at para. 4.15.
[6] Public body's initial submission at para. 19.
[7] Public body's initial submission at para 4.12.
[8] Public body's initial submission at para. 4.14.
[9] Public body's initial submission at para. 4.16.
[10] Public body summary of initial submission.
[11] Public body's initial submission at paras. 4.17 and 4.19.
[12] Hayden affidavit at para. 45.
[13] Pages 56-58 of the records.

observations, as well as information about test results related to the roof, and recommendations.[14]

- An evaluation of certain aspects of the roof prepared by Shade and a covering letter discussing the evaluation prepared by PCL.[15]
- One heading, six lines of text and one photograph from a report prepared by Geiger Engineers (the "first Geiger report") detailing the results of its inspection of repairs to the fixed roof outer tension membrane, including repairs to the roof's panels and subpanels as well as the condition of the fabric portions of the roof.[16]
- Six lines of text and two photographs from a site visit report prepared by engineering firm Schlaich Bergerman (the "Schlaich report") detailing the results of its inspection of parts of the retractable roof.[17]

The information severed under s. 21 of FIPPA is as follows:

- A report prepared by Beauregard addressed to Hightex (the "Beauregard report") detailing the results of its inspection of certain components of the roof including a description of deficiencies and proposed remedial actions.[18]
- A report prepared by Geiger Engineers (the "second Geiger report") addressed to PCL, Hightex, and one other company, detailing the results of its inspection of certain hardware components of the roof.[19]
- A one-page memo from Buckland & Taylor Ltd. to Hightex (the "Buckland memo") detailing the results of their meeting about the condition of the roof.[20]

[10] I will first consider the applicant's argument that, notwithstanding whether ss. 17 or 21 apply, PavCo must disclose all of the information in dispute without delay because s. 25 of FIPPA applies.[21]

[14] Pages 59-61 of the records.
[15] Pages 40-44 of the records.
[16] Pages 26-33 of the records.
[17] Pages 45-55 of the records.
[18] Pages 1-16 of the records.
[19] Pages 34-39 of the records.
[20] Page 17 of the records.
[21] Applicant's submission at paras. 12-14.

[11] **Public interest override (s. 25)—**Section 25 requires public bodies to disclose information, whether or not a request is made, if disclosure is in the public interest. It overrides all other sections of FIPPA.

[12] The relevant parts of s. 25 at this inquiry are as follows:

> 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
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> (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
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies despite any other provision of this Act.

[13] **Standard of proof for s. 25—**Former Commissioner Loukidelis determined that the standard of proof for s. 25 is to be found in the wording of the section itself. [22] I will apply the same standard of proof regarding whether s. 25 applies here.

[14] **Position of the parties—**The applicant's argument regarding s. 25 is threefold. First, he submits that BC Place is a significant public asset that PavCo renovated at significant cost with no public consultation or a vote in the Legislature and the public has a right to know how its money is being spent.[23] Second, he submits that PavCo is exposing itself to legal liability by not disclosing information about the roof that could cause an injury, and it is in the public interest for PavCo to limit its liability.[24] Third, the applicant submits that s. 25 applies for health and safety reasons because individuals entering the stadium have a right to know if it is safe.[25]

[15] PavCo submits that the information at issue in this inquiry is not the sort that is contemplated by the wording of s. 25.[26] It submits that there is no evidence in the records or elsewhere that suggests that there is a significant risk of harm to the health or safety of the public or that disclosure is clearly in the public interest.[27]

[16] Hightex made no submission regarding whether s. 25 of FIPPA applies.

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[22] Order 01-20, 2001 CanLII 21574 (BC IPC) at para. 36.
[23] Applicant's submission at para. 11.
[24] Applicant's submission at para. 13.
[25] Applicant submission at para. 13.
[26] Public body's initial submission at para. 4.67.
[27] Public body's initial submission at para 4.69.

[17] **Applying s. 25**—Former Commissioner Loukidelis established that there is an element of urgency to disclosure under s. 25:

> …The s. 25(1) requirement for disclosure "without delay", whether or not there has been an access request, introduces an element of temporal urgency. This element must be understood in conjunction with the threshold circumstances in ss. 25(1)(a) and (b), with the result that, in my view, those circumstances are intended to be of a clear gravity and present significance which compels the need for disclosure without delay.[28]

[18] This is consistent with former Commissioner Flaherty's interpretation of s. 25 in Order No. 162-1997, where he agreed that the s. 25 duty "only exists in the clearest and most serious of situations."[29] Similarly, former Alberta Information and Privacy Commissioner Robert C. Clark has held that Alberta's statutory equivalent of s. 25 should be "defined narrowly" and that disclosures under that section should be reserved for "emergency-like" circumstances.[30] Commissioner Denham applied s. 25 in a manner consistent with these interpretations in her recent investigation report examining public body disclosures under s. 25.[31]

[19] **Section 25 analysis and finding—**In the present case, the evidence that the applicant and PavCo advance amount to conflicting assertions as to whether or not s. 25 applies. As such, while I am mindful of the parties' submissions, I have largely relied on the contents of the records themselves, as they provide a sufficient basis for determining whether the section applies.

[20] In reviewing the records at issue in this inquiry, I have determined that portions of the first five pages of the Beauregard report, which PavCo severed entirely under s. 21 of FIPPA, contain information that discloses information about a risk of significant harm to the health or safety of the public consistent with the requirement in s. 25(1)(a) because the information discloses the risk of a hazard to individuals' physical safety. I have no information about whether PavCo has mitigated the hazard. If I had evidence that this risk no longer exists, my decision would be different. Since BC Place is open to the public, the requirement of urgency for disclosure "without delay" is met.

[21] I am providing PavCo with a highlighted copy of the information to which I have determined s. 25(1)(a) applies along with a copy of this Order. Given the wording of s. 25, there is an obligation on PavCo to disclose this information forthwith. I reject the applicant's argument that s. 25 applies to all of the

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[28] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 53.
[29] Order No. 162-1997, 1997 CanLII 1965 (BC IPC) at para. 31.
[30] Order 98-011, 1998 CanLII 18637 (AB OIPC) at para. 90 citing Alberta Order 96-011.
[31] Investigation Report F13-05, 2013 CanLII 95961 (BC IPC); at paras. 12-16.

information in dispute in the interests of transparency.[32] Consistent with what several previous orders have held,[33] this argument, on its own, does not meet the evidentiary requirement of urgency that is consistent with the wording of s. 25 to disclose information "without delay".

[22] I will now consider whether ss. 17 or 21 apply to the records in dispute. The Ministry severed some records under s. 17 and other records under s. 21. For completeness, even though it is not necessary for me to do so, when I consider s. 21, I will determine whether it applies to the information to which I have already determined s. 25 applies. First however, I will consider the information PavCo severed under s. 17.

[23] **Disclosure harmful to the financial or economic interests of the public body (s. 17)—** Section 17 of FIPPA authorizes a public body to withhold information if disclosing it could reasonably be expected to harm the financial interests of a public body.

[24] The portions of s. 17 relevant to this inquiry are as follows:

> 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…
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> (3) The head of a public body must not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for that public body, unless the testing was done
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> (a) for a fee as a service to a person, a group of persons or an organization other than the public body, or
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> (b) for the purpose of developing methods of testing.

[25] **Applying s. 17—** Former Commissioner Loukidelis described the application of s. 17 in Order F08-22:

> Section 17, like FIPPA's other harms-based exceptions to disclosure, requires a reasoned assessment of the future risk of harm if the information in question is disclosed. Civil law conventionally applies the balance of probabilities for determining what happened in the past, with anything that is more probable than not being treated as certain. This approach is not followed for hypothetical

[32] Applicant's initial submission at para. 12.
[33] See Order F11-28, 2011 BCIPC 34 (CanLII) at para. 16 and Order F11-28 at 16, and Order F12-04 2012 BCIPC 4 (CanLII) at para. 9.

> or future events, which can only be estimated according to the relative likelihood that they would happen. Disclosure exceptions that are based on risk of future harm, therefore--as in other areas of the law dealing with the standard of proof for hypothetical or future events--are not assessed according to the balance of probabilities test or by speculation. Rather, the chance or risk is weighed according to real and substantial possibility.
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> Real and substantial possibility is established by applying reason to evidence. This is distinct from mere speculation, which involves reaching a conclusion on the basis of insufficient evidence. ...[34]

[26] Consistent with the former Commissioner's reasoning, the Supreme Court of Canada has recently held that the proper approach to harms-based exceptions such as s. 17 is that there should be evidence that a reasonable expectation of probable harm would result from disclosure of the information.[35] I have applied this reasoning here.

[27] **Position of the parties—**PavCo does not make submissions regarding sub clauses (a) to (f) of s. 17(1). Former Commissioner Loukidelis determined that these sub clauses are examples, and that s. 17(1) may apply if the words of the opening clause are met.[36] PavCo submits that there is ongoing mediation,[37] the details of which it provided *in camera*,[38] and that if the information it severed under s. 17 were disclosed, it could result in parties to mediation gaining access to confidential information.[39] This, PavCo submits, the details of which are *in camera*, could lead to a series of events which could result in financial harm to PavCo.[40]

[28] The applicant submits that the public has a right to information about BC Place's finances. He did not make any specific argument regarding s. 17.[41]

[29] Hightex made no submission about the merits of s. 17 to this case.

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[34] Order F08-22 2008 CanLII 70316 (BC IPC) at paras. 44-45.
[35] See Order F14-37, 2014 BCIPC 40 (CanLII) at para. 20 discussing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 S.C.R. 23.
[36] Order F08-22 at para. 43.
[37] Public body's summary of initial submissions.
[38] Public body's initial submissions at paras. 4.17 and 4.19.
[39] Public body's initial submissions at para. 4.30.
[40] Public body's initial submissions at paras. 4.30 and 4.31.
[41] Applicant's initial submissions at para. 15.

[30] **Analysis and finding regarding s. 17(1)—**The information PavCo redacted under s. 17 consists of engineers' observations, opinions, recommendations, and photographs about various parts of the roof. The question in this inquiry is whether PavCo has established that there is a reasonable expectation of probable harm to PavCo if this information were disclosed.

[31] PavCo submits that "[m]ediation is believed to be close to resolution"[42] and that disclosing the information it withheld under s. 17 could harm PavCo because "[t]he parties taking part in the mediation would have access to information that would otherwise have remained confidential."[43] PavCo provided information about the nature of the mediation, including who the parties to the mediation are, what the mediation is about, and an approximate dollar figure of the issues in dispute, *in camera.*[44] PavCo submits that disclosing confidential information could harm its financial interests by triggering a certain outcome, the details of which it explains *in camera*.[45] In addition, although it does not refer to any specific litigation, PavCo submits generally that its "negotiating position or position during litigation would likely be negatively impacted"[46] by the outcome it describes in its *in camera* submissions. PavCo's Interim President and CEO, Dana Hayden, deposed sworn statements *in camera* that are consistent with PavCo's *in camera* submissions.[47] In summary, PavCo is arguing that the confidential information the parties would have access to if this information were disclosed could reasonably be expected to harm PavCo's financial interests.

[32] After considering PavCo's submissions and reviewing the information it severed under s. 17, I have determined that there is a real and substantial possibility that disclosure of most of the information could result in financial harm to PavCo as described in the opening clause of s. 17(1) for the following reasons. PavCo's examples and reasoning of the financial harm that could result from disclosure are detailed and pinpoint what information in the records could result in the financial harm PavCo is alleging. The contents of the information, including the photographs, relate to the very issues PavCo has identified as being part of the ongoing mediation. The information is specific and reflects the expertise of the engineers who wrote it. While some of the photographs could be reproduced by anyone with a telephoto lens, I am satisfied that s. 17 applies to them because of the context in which they appear. Disclosing them could allow an individual to draw accurate inferences about other information to which PavCo has applied s. 17.

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[42] Public body's initial submissions at para. 4.19.
[43] Public body's initial submissions at para. 4.30.
[44] Public body's initial submissions at paras. 4.30-4.31.
[45] Public body's initial submissions at paras. 4.30-4.31.
[46] Public body's initial submissions at para. 4.30.
[47] Hayden affidavit at para. 40.

Some of the information PavCo severed under s. 17 is of such a general nature however, that the evidence is not adequate to support a finding that it applies. For example, PavCo severed heading, subject, salutation, date and distribution information. The evidence before me does not support a conclusion that disclosure of this information would be harmful to PavCo's financial or economic interests. I have marked the information to which I have concluded s. 17 does not apply and I will provide it to PavCo with a copy of this Order.

[33] **Results of product or environmental testing carried out by or for that public body—**Section 17(3) requires public bodies, subject to two exceptions, not to refuse access to the results of product or environmental testing carried out by or for that public body under s. 17(1). Because of the mandatory nature of this subsection and the fact that portions of both the second Shade letter and the second Saint-Gobain letter disclose the contents of test results, I will consider the application of s. 17(3) here.

[34] Using the wording of the section, the following three criteria must be met before s. 17(3) applies:

1. The information must be the results of product or environmental testing;
2. The testing must have been carried out by or for that public body;
3. The testing must not have been done for a fee as a service to a person, a group of persons or an organization other than the public body, or for the purpose of developing methods of testing.

[35] In regards to the first criteria, I conclude based on the contents of the records themselves that the second Shade letter and the second Saint-Gobain letter contain the results of product testing done to ensure the integrity of the roof. In regards to the second criteria, I find the testing was carried out for PavCo. The tests were carried out with respect to a public asset, for the benefit of a public body and by a subcontractor of the public body's contractor. My conclusion is consistent with the purpose of s. 17(3), which is to provide public access to a public body's test results, even where a public body might have discretion to withhold them under s. 17(1), while at the same time protecting third parties' test results from disclosure. Given my conclusion that the testing was done as a service to a public body,[48] I find that s. 17(3), which overrides s. 17(1), applies to some of the information pertaining to testing; therefore PavCo is not authorized to withhold it.

[48] I have no evidence as to whether any fees for the testing were paid. In either case I conclude that the testing was done for PavCo, therefore it cannot withhold the information under s. 17(1) of FIPPA.

[36] In summary, with respect to the rest of the information in dispute to which PavCo applied s. 17, I have determined that PavCo is authorized to withhold most of the information because there is a reasonable expectation of probable harm to PavCo if it were disclosed. With respect to a small amount of information, including heading, subject, salutation, date and distribution information, it is of such a general nature that the evidence is not adequate to support a finding that s. 17 applies and the Ministry is required to disclose this information.

[37] As I have finished considering the records to which PavCo applied s. 17, I will now consider the information PavCo severed under s. 21, including, the information to which I have already determined s. 25 applies.

[38] **Reasonable expectation of harm to a third party—**Section 21 requires public bodies to withhold information if disclosing it could reasonably be expected to harm a third party's business interests.

[39] The parts of s. 21 relevant 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
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> (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
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> (c) the disclosure of which could reasonably be expected to
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> (iii) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> …
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> (iv) result in undue financial loss or gain to any person or organization…

[40] All three parts of s. 21(1) must be met in order for the section to apply. I will consider each part in turn. As with s. 17, the Supreme Court of Canada has established that harms-based exceptions like s. 21 require a reasonable expectation of probable harm before the exception to disclosure can be said to apply.[49]

[49] See Order F14-37, 2014 BCIPC 40 (CanLII) at para. 20 discussing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 S.C.R. 23.

[41] **Commercial, Financial, or Technical information—** In this case, PavCo withheld the Beauregard report, the second Geiger report, and the Buckland memo in their entirety under s. 21. The information contained in these records shows that they were prepared for Hightex. Neither Hightex nor PavCo describe Hightex's relationship to PavCo in particular detail but it is evident from the submissions before me that Hightex was working on the new roof at BC Place, which PCL was hired by PavCo to complete. The information PavCo severed under s. 21 contains descriptions and photographs as well as analysis and recommendations related to the roof. PavCo submits that the information it severed is "technical information" as set out in s. 21(1)(a)(ii). It says that the information in the records was prepared by "specialists in the field of construction and engineering."[50] Dana Hayden of PavCo deposes that the records include proprietary information that is "the first of its kind in North America, and potentially worldwide."[51]

[42] Hightex did not make specific submissions regarding s. 21, but it characterizes the information in dispute as "technical information".[52]

[43] The applicant did not make submissions specifically regarding s. 21 of FIPPA.

[44] In Order F07-06[53], Adjudicator Francis considered the meaning of the phrase "technical information" as it appears in s. 17(1)(b) of FIPPA in part by turning to interpretations of the statutory equivalent in Ontario's *Freedom of Information and Protection of Privacy Act*.[54] In that case, she concluded that in order for information to be technical, it must be part of "an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts or their techniques" prepared by "a professional in a recognized speciality".[55] I find that this discussion of "technical information" in relation to s. 17(1)(b) of FIPPA applies for determining what is "technical information" for the purposes of s. 21(1)(a)(ii) in this case. I have concluded that much of the information PavCo redacted is "technical information" of a third party as set out in s. 21. The information was written by professional engineers and the contents of the records fall under the category of the applied science of engineering.

[45] In addition, although PavCo did not argue this, I have also concluded that much of the information that is the technical information of a third party is also their commercial information. My finding is consistent with former Commissioner

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[50] Public body's initial submissions at para. 4.41.
[51] Hayden affidavit at para. 41.
[52] Hightex's submission.
[53] Order F07-06 2007 CanLII 9597 (BC IPC).
[54] Freedom of Information and Protection of Privacy Act, R.S.O. 1990, CHAPTER F.31 at s. 18.
[55] F07-06 at para. 29.

Loukidelis' finding in Order 01-36.[56] Here, the records contain the analysis, recommendations and other information that is the product of the engineering firms who produced them. In the case of the photographs of the roof, which could be reproduced with a telephoto lens, they are the third party's commercial information in this case because of how they are presented as part of the information the engineers are conveying about the roof.

[46] In some cases, PavCo severed information under s. 21 that is general and discloses details such as heading, subject, salutation, date and distribution information. This is not technical information. It is also not trade secret information, commercial, financial, labour relations or scientific information. I have determined that s. 21 does not apply to this information and must be disclosed.

[47] **Supply of information**— I will next consider whether the information that I have determined is technical or commercial was "supplied, implicitly or explicitly, in confidence" to PavCo as set out in s. 21(1)(b). The meaning of supplied has been examined in many orders.[57] Determining whether information has been supplied in confidence is a two-part analysis. The first part is whether the information was supplied, implicitly or explicitly, to the public body. The second part is whether the information was supplied in confidence. I will first consider whether it is "supplied".

[48] In this case, the three records at issue contain information that includes observations about the roof's condition, analysis and recommendations. One of the three records, the second Geiger report, specifically lists PavCo as a recipient of the report. For this reason, I find that the second Geiger report was supplied to PavCo.

[49] The Beauregard report and the Buckland memo only list Hightex, a subcontractor, as a recipient of the report. However, in Order 02-04, former Commissioner Loukidelis held that information could be supplied to public bodies indirectly:

> [15] Contrary to the approach taken in Ontario under the supply requirement of the comparable Ontario provision, I do not read into s. 21(1)(b) a requirement that third-party information must have been supplied by the third party directly to the public body. I consider that third-party information may be supplied for the purposes of s. 21(1)(b) even if someone other than the affected third party supplied that information to

[56] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 22.
[57] See for example, Order F14-04, 2014 BCIPC 4 (CanLII) and Order 03-02, 2003 CanLII 49166 (BC IPC).

> the public body or the information was supplied to another person, who then supplied it to a public body.[58]

[50] In this case, Dana Hayden deposes that the Beauregard report and the Buckland memo were provided to PavCo from subcontractors as a result of contractual commitments.[59] I find that they were supplied to PavCo.

[51] **Supplied in confidence—**I will now consider whether the supplied information was supplied, implicitly or explicitly, in confidence. PavCo does not argue that the information was supplied explicitly in confidence; rather, it argues that it was supplied implicitly in confidence.[60] Hightex does not expressly argue whether the information was supplied explicitly or implicitly in confidence. Both PavCo and Hightex submit that Hightex includes confidentiality clauses in its agreements with subcontractors.[61] This, PavCo submits, is evidence that "the records withheld under section 21 were supplied on the understanding that they would remain confidential."[62] The parties did not provide me with copies of the confidentiality clauses to which they refer. In support of its position that the records were supplied implicitly in confidence, PavCo further submits that the records are not publicly available.[63]

[52] In Order 01-36, former Commissioner Loukidelis stated:

> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
>
> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
>
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
>
> 3. not otherwise disclosed or available from sources to which the public has access;
>
> 4. prepared for a purpose which would not entail disclosure.

[58] Order 02-04, 2002 CanLII 42429 (BC IPC), at para. 15. Also see Order F13-20, 2013 BCIPC 27 (CanLII) at paras. 20-21.
[59] Hayden affidavit at para. 44.
[60] Public body's initial submission at para. 4.49.
[61] Public body's initial submission at para. 4.50; and Hightex's submission at p. 1.
[62] Public body's initial submission at para. 4.50.
[63] Public body's initial submission at para. 4.51.

[53] Applying the four criteria above to the present case, two of the records are addressed only to Hightex, and information in the third record is addressed to PavCo and two of its subcontractors, as well as another firm that appears from the record to be contracted to perform work on the roof. The submissions are that Hightex required its subcontractors to keep the information confidential and that PavCo has not publicly disclosed the information. For these reasons, I accept that the way the information has been treated by the parties indicates a concern for protecting it and demonstrates an intention to communicate and maintain the information in confidence. I am further satisfied by the contents of the records themselves and the manner in which they were prepared and distributed to a limited group of recipients that they were prepared for a purpose which would not entail disclosure. For all the above reasons, I find that the information which I determined was supplied was supplied implicitly in confidence.

[54] **Harm to third party interests**—I will next consider whether disclosure of the information PavCo severed under s. 21 could reasonably be expected to cause one of the outcomes enumerated in sub clauses (i) and (iii). PavCo and Hightex argue that sub clause (i) applies. It provides that a public body must withhold information if disclosing it could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party the information is about.

[55] The standard of proof for harms-based exceptions such as s. 21(1) requires a reasonable expectation of probable harm from disclosure of the information.[64] As former Commissioner Loukidelis summarized in Order F05-29: "In a nutshell, the threshold of reasonable expectation of harm requires more than speculation or generalization. It implies confident belief founded on clear and direct connection between disclosure of specific information and the harm that is alleged."[65]

[56] In this case, PavCo submits that disclosure of the information "could reasonably be expected to harm significantly the competitive position of the third party as the information contains proprietary technology describing unique mechanical design particulars."[66] It submits that Hightex and its subcontractors developed new technologies in the course of constructing the new roof, and contends that "[i]f these specially designed components are revealed, it could reasonably be expected to compromise Hightex's competitive or innovative

[64] See Order F14-37, 2014 BCIPC 40 (CanLII) at para. 20 discussing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, [2012] 1 S.C.R. 23.
[65] Order F05-29, 2005 CanLII 32548 (BC IPC) at para 71.
[66] Public body's initial submission at para. 4.57.

position in the market place."[67] Hightex's arguments about the harm that could result to it from disclosure of the information are consistent with PavCo's. In addition, Hightex argues that "any partial disclosure of deficiencies without their explanations or solutions," could harm Hightex's reputation.[68]

[57] **Analysis and finding regarding harm to third parties—**PavCo and Hightex argue that disclosing the information would harm Hightex's and other third parties' negotiating positions as set out in s. 21(1)(c)(i) because of the unique proprietary technology Hightex and its subcontractors used to construct the roof. However, neither party identifies what information in the disputed records reveals information about the proprietary technology or unique designs, either directly or by inference. Based on my reading of the disputed records it is not apparent where they contain this information. What I am left with are a series of mere assertions that disclosing the information could cause Hightex and its subcontractors significant harm. This puts PavCo and Hightex's submissions in the speculative realm. For example, their submissions do not include evidence from any of the engineers who prepared the records, patents or patent applications, or reports about the unique nature of the roof's design to support their contention. In summary, the evidence before me does not establish a confident and objective evidentiary basis for determining that disclosure could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of Hightex or its subcontractors. For these reasons, I find that s. 21(1)(c)(i) does not apply to any of the information PavCo severed under s. 21.

[58] **Undue financial loss or gain—**Although the parties do not argue it explicitly, Hightex's submission that disclosure could injure its reputation and harm its position in the marketplace is consistent with an argument that disclosure could reasonably be expected to result in undue financial loss or gain as set out in s. 21(1)(c)(iii). In Order 00-10, former Commissioner Loukidelis determined that "[t]hat which is undue can only be measured against that which is due."[69] He stated that something that is undue includes "something that is unwarranted, inappropriate or improper"[70] and "something that is excessive or disproportionate, or something that exceeds propriety or fitness."[71] In that case, he determined that it would be a circumstance of undue gain if the public body disclosed beer sales figures to the applicant because "it would be unfair, and inappropriate, for Pacific Western to obtain otherwise confidential commercial information about two of its competitors and thereby reap a competitive

[67] Public body's initial submission at para. 4.58.
[68] Hightex's submission at p. 1.
[69] Order 00-10, 2000 CanLII 11042 (BC IPC); at para. 65.
[70] Order 00-10, at para. 64.
[71] Order 00-10, at para. 64.

windfall."[72] This, the former Commissioner determined, would in turn result in undue loss to the businesses the sales information was about.[73]

[59] In this case, the records contain information about the roof, but there is no evidence from the parties or in the contents of the records themselves that provide an evidentiary basis for concluding that disclosure would result in undue financial loss or gain to Hightex, its subcontractors, or to anyone else. Specifically, what would be "due" in the circumstances cannot be discerned from the parties' submissions or from the information itself, therefore there is nothing with which to measure what would be undue.

[60] For the reasons I have set out, I find that s. 21(1)(c)(iii) does not apply.

CONCLUSION

[61] In conclusion, I find that s. 25 of FIPPA requires PavCo to disclose portions of the first five pages of the Beauregard report forthwith. I find that PavCo is authorized under s. 17(1) to continue to withhold some of the information it severed. There are portions of information such as heading, subject, salutation, date and distribution information to which I have found s. 17 does not apply. I have also determined that s. 17(3), which overrides s. 17(1), applies to some of the information pertaining to testing; therefore PavCo is not authorized to withhold it. With respect to s. 21, I find that it does not require PavCo to withhold any of the information in dispute, including the information to which I have determined s. 25 applies.

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

1. I require PavCo to disclose information highlighted in orange forthwith as required by s. 25 of FIPPA, as indicated in the copy of the records provided to PavCo with a copy of this order.
2. Subject to paragraph 3 below, I authorize PavCo to refuse to disclose, in accordance with s. 17(1), the information in the requested records.
3. I require PavCo to disclose the information highlighted in yellow to which I have determined s. 17 does not apply, as indicated in the copy of the records provided to PavCo with a copy of this order.
4. I require PavCo to disclose all of the information it withheld under s. 21 of FIPPA.

[72] Order 00-10 at para. 71.
[73] Order 00-10 at para. 72.

5. I require PavCo to give the applicant access to this information on or before October 31, 2014, and concurrently, to copy the OIPC Registrar of Inquiries on the cover letter to the applicant together with a copy of the records.

September 18, 2014

ORIGINAL SIGNED BY

Caitlin Lemiski, Adjudicator

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