

Competition Tribunal



Tribunal de la Concurrence

Reference: *The Commissioner of Competition v Vancouver Airport Authority*, 2017 Comp Trib 4
File No.: CT-2016-015
Registry Document No.: 57

IN THE MATTER OF the *Competition Act*, RSC 1985, c C-34 as amended;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

BETWEEN:

Commissioner of Competition
(applicant)

and

Vancouver Airport Authority
(respondent)



Decided on the basis of the written record
Before Judicial Member: D. Gascon J. (Chairperson)
Date of Order: March 20, 2017

CONFIDENTIALITY ORDER

FURTHER TO the application filed by the Commissioner of Competition (the "**Commissioner**") against the Respondent pursuant to section 79 of the *Competition Act*, RSC 1985, c C-34, as amended (the "**Act**");

AND FURTHER TO the draft confidentiality order filed on consent by the Commissioner and the Respondent;

THE TRIBUNAL ORDERS THAT:

[1] For the purpose of this order:

(a) "**Act**" means the *Competition Act*, RSC 1985, c C-34, as amended;

(b) "**Affiliate**" means, in respect of a Person, any other Person controlling, controlled by or under common control with such first Person, whether directly or indirectly, and "control" means directly or indirectly hold securities or other interests in a Person (i) to which are attached more than 50% of the votes that may be cast to elect directors or persons exercising similar functions or (ii) entitling the holder to receive more than 50% of the profits of the Person or more than 50% of its assets on dissolution;

(c) "**Confidential**" means a Record that meets one or more of the requirements of paragraph 2 of this Order;

(d) "**Designated Record**" means any Record that a Party claims is Confidential, in whole or in part, pursuant to paragraph 4 of this Order including Records listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, Records produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits or submissions;

(e) "**Designated Representative**" means any chairperson, executive chairperson, director, president, chief executive officer, division president, vice-president (current or retired), in-house counsel, secretary, treasurer, chief financial officer, chief operating officer, general manager, managing director, department manager or sales manager or any individual who performs the functions of any of the aforementioned positions;

(f) "**Document Review Vendor**" means a professional service provider that facilitates the review of Records by legal professionals;

(g) "**Independent Expert**" means an expert retained by a Party with respect to the Proceeding who (i) is not a current employee of the Respondent or its Affiliates, (ii) has not been an employee of the Respondent or its Affiliates within two years prior to the date of this Order, (iii) is not a current employee of a competitor of the Respondent or its Affiliates; and (iv) has not been an employee of a competitor of the Respondent or its Affiliates within two years prior to the date of this Order;

(h) "**Parties**" means the Commissioner and the Respondent, and "Party" means the Commissioner or the Respondent;

(i) **"Person"** means any individual or corporation or partnership, sole proprietorship, trust or other unincorporated organization capable of conducting business, and any Affiliates thereof;

(j) **"Proceeding"** means the application filed by the Commissioner against the Respondent (File Number CT-2016-015) for one or more orders pursuant to section 79 of the Act;

(k) **"Protected Record"** means any Record that the Parties agree or the Tribunal determines is Confidential, in whole or in part, pursuant to paragraph 8 of this Order including Records listed in affidavits of documents, excerpts from transcripts of examinations for discovery, answers to undertakings, Records produced with answers to undertakings, expert reports, lay witness statements, pleadings, affidavits or submissions;

(l) **"Record"** has the same meaning as in subsection 2(1) of the Act and, for greater certainty, includes any or all of the information contained in the Record;

(m) **"Respondent"** means Vancouver Airport Authority;

(n) **"Third Party"** means any Person other than the Commissioner or the Respondent; and

(o) **"Tribunal"** means the Competition Tribunal established pursuant to s. 3(1) of the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended.

[2] Disclosure of Records containing any of the following types of information could cause specific and direct harm and, if they or the information therein are not already publicly available (except through a breach of this Order), such Records may be designated as Protected Records:

(a) Information relating to prices (to the extent that such prices have not been published or made generally known to competitors and customers), capacity, specific output or revenue data or market shares, or negotiations with customers or suppliers about prices, rates or incentives;

(b) Confidential contractual arrangements;

(c) Financial data or reports, or financial information relating to the Respondent or its customers, suppliers or other Third Parties;

(d) Business plans, marketing plans, strategic plans, budgets, forecasts and other similar information;

(e) Internal market studies and analyses;

(f) Information related to the negotiating strategies of the Respondent, or its customers, suppliers, or other Third Parties; and

(g) Other Records containing competitively sensitive and/or proprietary information

of the Respondent or Third Parties and/or identifiable customer information (e.g., name, address, contact or financial information).

[3] If information from a Protected Record is incorporated into any other Record, that Record shall be a Protected Record. Any Protected Record shall cease to be a Protected Record if: (a) it or the protected information contained therein becomes publicly available (except if it becomes publicly available through a breach of this Order); (b) if the Parties agree in writing that the Record shall cease to be a Protected Record; or (c) the Tribunal determines that the Record shall cease to be a Protected Record.

[4] A Party who claims confidentiality over a Record shall, at the time of production or service on the other Party, as applicable, claim it as a Designated Record by marking it with "Confidential – Level A" or "Confidential – Level B" on the face of each Record and/or on each page that is claimed as Confidential. In the case of Records that cannot be marked on their face, the Party shall claim the Record as a Designated Record by indicating "Confidential – Level A" or "Confidential – Level B" in the file name of the Record.

[5] A Record that (a) contains information that discusses or analyzes a Third Party's negotiating position or strategy with the Respondent or (b) contains information of a Third Party that, if disclosed to the Respondent, would reasonably be likely to negatively impact, affect, or influence the Third Party's negotiating position when negotiating commercial arrangements in the future with the Respondent, such information including but not being limited to, margin information or information that discloses the profitability of the Third Party, may be claimed as "Confidential – Level A".

[6] All Designated Records shall, on a preliminary basis, be treated as Protected Records in accordance with their applicable designations, pending further determination pursuant to this Order.

[7] The inadvertent failure to designate a Record or portion thereof as Confidential at the time it is disclosed does not constitute waiver of the right to so designate after disclosure has been made.

[8] Following the exchange of Records or re-designation of Records pursuant to paragraph 14 of this Order, the Parties shall use their best efforts to agree as to whether the Designated Records (or portions thereof) are to be treated as Protected Records. If agreement cannot be reached, the Parties may apply to the Tribunal to determine whether any Designated Record or portion thereof is a Protected Record or what level of confidentiality should apply to the Designated Record. In the event of a challenge to a Record's designation as Confidential or as "Confidential – Level A", the Party that made the designation shall have the burden, on a balance of probabilities, of establishing that the Record (or portion thereof) is, in fact, Confidential or that it is entitled to designation as "Confidential – Level A", as the case may be.

[9] If a Record originates with or from more than one Party and is designated by at least one Party as a Designated Record, the highest level of confidentiality shall attach to that Record, subject to agreement by the Parties or determination by the Tribunal as to the Record's proper designation.

[10] Subject to an order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked "Confidential – Level A" ("Level A Protected Records") may be disclosed only to:

- (a) the Commissioner, Counsel for the Commissioner, and the Commissioner's staff;
- (b) outside counsel to the Respondent, including outside counsel's staff who are directly involved in the Proceeding;
- (c) Independent Experts retained by the Parties and their staff who are directly involved in the Proceeding, who have executed a confidentiality undertaking in the form attached as Schedule A; and
- (d) Document Review Vendors that have executed a confidentiality undertaking in the form attached as Schedule A.

[11] Subject to a further order of the Tribunal, the consent of the Party or Parties that produced and claimed confidentiality over the Protected Record, or as required by law, Protected Records marked "Confidential – Level B" ("Level B Protected Records") may be disclosed only to:

- (a) the individuals described in paragraph 10 of this Order; and
- (b) Designated Representatives of the Respondent who have executed a Confidentiality Undertaking in the form attached as Schedule A.

[12] Nothing in this Order prevents a Party from having full access to or disclosing Confidential Records that were produced by that Party.

[13] Nothing in this Order derogates from the Commissioner's rights and responsibilities under section 29 of the Act.

[14] A Party may at any time and with prior reasonable notice to the other Parties re-designate any of its own Level A Protected Records as Level B Protected Records or public Records, and/or may re-designate any of its own Level B Protected Records as public Records. Records re-designated as public shall cease to be Protected Records and shall form part of the public record if introduced into evidence at the hearing of the Proceeding, unless the Parties agree otherwise or the Tribunal so orders. If a Party changes the designation of a Record to Confidential, a prior disclosure of it shall not constitute a breach of this Order.

[15] If a Party is required by law to disclose a Protected Record, or if a Party receives written notice from a person who has signed a Confidentiality Undertaking pursuant to this Order that they are required by law to disclose a Protected Record, that Party shall give prompt written notice to the Party that claimed confidentiality over the Protected Record so that a protective order or other appropriate remedy may be sought.

[16] Outside counsel for a Party and his or her staff, Counsel for the Commissioner, the Commissioner and his staff, and Independent Experts and their staff may make copies of any Protected Record as they require in connection with the Proceeding.

[17] Nothing in this Order prevents a Party from having full access to Protected Records that originated from that Party, as applicable.

[18] For greater certainty, in accordance with Rule 62 of the *Competition Tribunal Rules*, all persons who obtain access to Records and information through this Proceeding are subject to an implied undertaking to use the Records and information solely for the purposes of this Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with this Proceeding) and any related appeals.

[19] At the hearing of the Proceeding:

(a) Protected Records tendered as evidence at the hearing of the Proceeding shall be identified and clearly marked as such, in accordance with paragraph 4 of this Order;

(b) Following submissions from the Parties, the Tribunal may determine whether the Record should be treated as a Protected Record;

(c) Protected Records shall not form part of the public record unless the Party or Parties claiming confidentiality waive the claim, or the Tribunal determines that the Record is not a Protected Record; and

(d) Records over which no privilege or confidentiality claim has been asserted shall, unless otherwise determined by the Tribunal at the hearing, form part of the public record in this Proceeding if introduced into evidence or otherwise placed on the record. Public Records shall be marked "Public" on the face of the Record.

[20] Where the Parties have agreed or the Tribunal has determined that only a portion of a Protected Record is Confidential, the Parties shall provide the Tribunal with the Protected Record with the Confidential portions redacted at the time any such Document is introduced into evidence or otherwise placed on the record, which redacted version shall be marked "Public" on the face of the Record and shall form part of the public record in this Proceeding. Each Protected Record shall identify the portions of the Record which have been redacted from the "Public" version, by highlighting such portions in the Protected Record.

[21] The termination of the Proceeding shall not relieve any person to whom Protected Records were disclosed pursuant to this Order from the obligation of maintaining the confidentiality of such Protected Records in accordance with the provisions of this Order and any Confidentiality Undertaking, subject to any further order of the Tribunal.

[22] Upon completion or final disposition of the Proceeding and any related appeals, all Protected Records and any copies of Protected Records, with the exception of Protected Records in the possession of the Commissioner and his staff, shall be destroyed or returned to the Party that produced them unless the Party that produced the Protected Records states, in writing, that they may be disposed of in some other manner, provided that outside counsel to the Parties,

including outside counsel to the Parties in jurisdictions outside Canada, and Counsel to the Commissioner may keep one set of Protected Records in their files.

[23] Nothing in this Order prevents or affects the ability of a Party from applying to the Tribunal for further orders or directions with respect to the use or disclosure of Records or information produced by another Party.

[24] The Parties shall bear their own costs associated with the request for and issuance of this Order.

[25] The Tribunal shall retain jurisdiction to deal with any issues relating to this Order, including without limitation, the enforcement of this Order and any undertakings executed pursuant to this Order. This Order shall be subject to further direction of the Tribunal and may be varied by order of the Tribunal.

DATED at Ottawa, this 20th day of March 2017.

SIGNED on behalf of the Tribunal by the Chairperson.

(s) Denis Gascon

SCHEDULE "A":

CONFIDENTIALITY UNDERTAKING

IN CONSIDERATION of being provided with Protected Records,

I, _____, of the city of _____, of the [province/state of] _____, hereby undertake and agree to maintain the Confidentiality of any Protected Record that I obtain, and in particular:

1. I will not disclose a Protected Record to any other person, except to a person permitted to receive it under the Confidentiality Order of the Tribunal dated [Month] ____, 2017, or such further order as the Tribunal may make.
2. I will not use the information or documentation so obtained for any purpose other than in connection with the Proceeding (including any application or proceedings to enforce any order made by the Tribunal in connection with the Proceeding, and any application under section 106 of the Act to vary or rescind any order made by the Tribunal in connection with the Proceeding), and any related appeals.
3. I will not copy, transfer, disseminate, or otherwise share or disclose any Protected Record or the information contained therein to any other person, entity, or party, except in accordance with the terms of the Confidentiality Order.
4. Upon completion of this Proceeding and any related appeals, I agree that all Protected Records in my possession shall be dealt with in accordance with instructions from counsel for the Party I am retained by or as prescribed by order of the Tribunal. I may retain in my Confidential files, subject to the requirements of confidentiality imposed by this undertaking, materials prepared by me, such as my expert report, as well as study results and materials of a general nature which do not replicate any Confidential information from a Protected Record.
5. I have read the Confidentiality Order, a copy of which is attached to this undertaking, and agree to be bound by it. I acknowledge that capitalized terms in this undertaking by me have the same meaning as defined in the Confidentiality Order. I further acknowledge that any breach of this undertaking by me will be considered to be a breach of the Confidentiality Order.
6. I acknowledge and agree that the Party that claims confidentiality over a Protected Record may not have an adequate remedy at law and would be irreparably harmed in the event that any of the provisions of this undertaking are not performed in accordance with its specific terms or otherwise breached. Accordingly, I agree that the Party that claims confidentiality over a Protected Record shall be entitled to injunctive relief to prevent breaches of this undertaking and to specifically enforce the terms and provisions hereof, in addition to any other remedy to which they may be entitled at law or in equity.
7. In the event that I am required by law to disclose any Protected Record that is subject to this undertaking, I will provide [insert name of retaining or employing Party] with prompt written notice so that the person that claimed confidentiality over such information or documentation may seek a protective order or other appropriate remedy. In any event, I will

furnish only that portion of the Protected Record that is legally required and I will exercise my best efforts to obtain reliable assurance that Confidential treatment will be accorded to it.

8. I will promptly, upon the request of the person providing a Protected Record, advise where it is kept by me.

9. I hereby attorn to the jurisdiction of the Tribunal to resolve any disputes arising under this undertaking.

SIGNED, SEALED AND DELIVERED before a witness this ____ day of _____, _____.

Name of Signatory:

Name of Witness:

COUNSEL

For the Applicant:

The Commissioner of Competition

Jonathan Hood
Katherine Rydel
Ryan Caron

For the Respondent:

Vancouver Airport Authority

Calvin S. Goldman, Q.C
Julie Rosenthal
Michael Koch
Ryan Cookson