Order F13-19

BRITISH COLUMBIA SAFETY AUTHORITY

Ross Alexander, Adjudicator

September 26, 2013

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Summary: The British Columbia Safety Authority withheld a bridge inspection report from a journalist on the basis that disclosure would be harmful to a railway company's business interests. The adjudicator was not satisfied that disclosure of the report would be harmful, and found that s. 21 of FIPPA did not apply.

Statutes Considered: *Freedom of Information and Protection of Privacy Act* ss. 21(1) and 22; *Railway Safety Act*, [SBC 2004] Chapter 8 (British Columbia); *Railway Safety Act*, (R.S.C., 1985, c. 32 (4th Supp.)) (Canada);

Authorities Considered: B.C.: Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order F12-13, [2012] B.C.I.P.C.D. No. 18; Order F10-06, [2010] B.C.I.P.C.D. No. 9; Order 02-50, [2002] B.C.I.P.C.D. No. 51; Order 04-08, [2004] B.C.I.P.C.D. No. 8; Order F05-01, [2005] B.C.I.P.C.D. No. 1; Order 03-05, [2003] B.C.I.P.C.D. No. 5; Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29; Order 00-10, [2000] B.C.I.P.C.D. No. 11;

Cases Considered: *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773; *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. No. 505 (S.C.).

INTRODUCTION

[1] An applicant journalist requested records from the British Columbia Safety Authority ("Safety Authority") regarding the E & N rail line, now known as the Vancouver Island Rail Corridor ("rail line"). The Safety Authority disclosed some of the requested information, but withheld a bridge safety inspection report ("Report") dated October 2010. The Report was commissioned by Southern

Railway of Vancouver Island Limited ("SVI"), which was the company operating the rail line at the time of the Report. The Safety Authority withheld the Report on the basis that disclosure would harm SVI's business interests under s. 21 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

[2] The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Safety Authority's decision to withhold the Report. The applicant and the Safety Authority each provided submissions for this inquiry. Further, the OIPC invited SVI and the Island Corridor Foundation, which owns the physical rail line, to participate as third parties. SVI provided submissions, but the Island Corridor Foundation did not.

ISSUES

[3] The issue is whether s. 21(1) of FIPPA requires the Safety Authority to withhold the Report.

DISCUSSION

[4] **Background**[1]—The rail line is owned by the Island Corridor Foundation, which is a partnership of First Nations, regional and municipal governments. SVI operated the rail line from 2006 to March 2011, providing passenger and freight services.[2] There is currently no passenger service on the rail line, but SVI still operates a freight service.

[5] In October 2009, the Ministry of Transportation and Infrastructure ("Ministry") released a document titled "Evaluation of the E & N Railway Corridor: Baseline Reference Report". It provided an assessment of the rail line. However, the assessment was not detailed, and it recommended that a more comprehensive one be carried out.[3]

[6] SVI then commissioned a more detailed assessment of the condition of the rail line. The result was the Report, which SVI provided to the Safety Authority to support a funding application for rail line upgrades.[4]

[7] The Report is not the most current or thorough assessment of rail line bridges.[5] There is an assessment report dated February 15, 2012, which is

[1] The background is primarily based on information from the affidavit of the former general manager of SVI, D. McGregor ("GM affidavit").
[2] SVI is the wholly-owned subsidiary of Southern Railway of British Columbia Limited. This decision solely refers to SVI for simplicity, but the correct company may be Southern Railway of British Columbia Limited in some instances.
[3] This 2009 report is not in evidence. This information is based on the GM affidavit at para. 9.
[4] GM affidavit at paras. 14 and 19.
[5] The applicant's submissions and the GM affidavit at para. 30.

approximately 1,000 pages and is publicly available on the Ministry's website ("New Report").[6] The Ministry commissioned the New Report, which was authored by two engineering companies.

[8] **Record in Dispute**—The record in dispute is the Report, a 104-page document containing inspection details and recommendations regarding the condition and maintenance of rail line bridges and structures.

[9] **Harm to Third-Party Business Interests**—Numerous orders have considered the application of s. 21(1), and the principles for its application are well established.[7] The first part of the test requires the information to be a trade secret of a third party, or the commercial, financial, labour relations, scientific or technical information of, or about, a third party. The second part of the test requires the information to have been supplied to the public body in confidence. The third part of the test requires that disclosure of the information could reasonably be expected to cause significant harm to the third party's competitive position, result in similar information no longer being supplied to the public body, or other types of harm as set out in s. 21(1)(c).

Scientific or technical information of or about a third party – s. 21(1)(a)

[10] The first part of the test is s. 21(1)(a), which states:

> The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,

[11] Previous orders have defined the meaning of "technical information" under s. 21(1)(a)(ii) as information belonging to an organized field of knowledge falling under the general categories of applied science or mechanical arts.[8] This term is difficult to concisely define, but usually involves information prepared by a professional with the relevant expertise, and describes the construction, operation or maintenance of a structure, process, equipment or entity.

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[6] The applicant's initial submissions provide a website link to the New Report on the Ministry's website, where it is accessible as a series of PDF documents. None of the participants questioned the existence of the New Report, or objected to its admissibility. Further, the GM's affidavit that SVI provided with its initial submissions refers to the New Report, and SVI responded to the applicant's submissions about the New Report in its reply.

[7] See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2, Order 03-15, [2003] B.C.I.P.C.D. No. 15 or Order F12-13, [2012] B.C.I.P.C.D. No. 18.

[8] See, for example, Order F12-13, [2012] B.C.I.P.C.D. No. 18 at para. 11, or Order F10-06, [2010] B.C.I.P.C.D. No. 9 at para. 35.

[12] I find that the information in the Report is technical information that satisfies s. 21(1)(a)(ii) because it contains information drafted by an independent railway inspector about the bridges and other structures along the rail line that SVI was operating at the time.

Supplied in confidence – s. 21(1)(b)

[13] Section 21(1)(b) of FIPPA requires that the withheld information be "supplied, implicitly or explicitly, in confidence".

[14] SVI submits, based on the evidence of its former general manager Donald McGregor ("General Manager"), that it supplied the Report to the Safety Authority in confidence, and that the Report has been treated as confidential by SVI and the Safety Authority. This is corroborated by the Safety Authority, and the applicant does not dispute this point. The Report also states that its contents are confidential. I find that SVI supplied the Report to the Safety Authority in confidence.

Harm to third party interests – s. 21(1)(c)

[15] SVI submits that ss. 21(1)(c)(i), (ii) and (iii) apply to disclosure of the Report. These provisions refer to information:

> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> (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,
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> (iii) result in undue financial loss or gain to any person or organization, or
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> …

[16] The Safety Authority agrees with SVI's position and says it relies on information provided by SVI to sustain its case because it "does not have sufficient knowledge of the [SVI]'s circumstances to determine whether or not section 21 applies".

[17] The applicant states that disclosure of the Report cannot significantly harm SVI because the New Report already discloses information about the rail line that is more recent and thorough than the Report.

[18] SVI replies that disclosure of the Report will cause harm, notwithstanding the New Report. It says the overwhelming bulk of the information in the Report is still current, reliable and relevant.

[19] The Safety Authority has the burden of proving that disclosure of the Report could reasonably be expected to cause one of the harms set out in s. 21(1)(c).[9] Order F12-13 states the evidentiary and standard of proof requirements for applying s. 21 of FIPPA as follows:

> [35] …In order for the [public body] to meet its burden of proof:
>
> > [17] … there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm … . Referring to language used by the Supreme Court of Canada in an access to information case, I have said "there must be a clear and direct connection between disclosure of specific information and the harm that is alleged".
>
> [36] As noted in orders such as Order 00-10, the standard of proof applicable to harms-based exceptions like s. 21 is found in FIPPA's wording, namely whether disclosure of the information could reasonably be expected to cause the specific harm to be protected against. On the one hand, there is no need to prove certainty of harm. On the other, it is not enough to rely on speculation. Returning always to the standard set out in FIPPA, the expectation of harm from disclosure must be based on reason.[10]

[20] I will address ss. 21(1)(c)(i), (ii) and (iii) in turn.

Section 21(1)(c)(i) - Could disclosure of the Report reasonably be expected to result in significant harm to the competitive position or significantly interfere with the negotiating position of SVI?

[21] SVI submits that disclosure of the Report will cause significant harm to SVI's competitive position or interfere significantly with its negotiating position by:

a) revealing sensitive information about SVI's operations or the rail line, which will enable competitors to enhance their bids against SVI for rail contracts; and

b) harming SVI's negotiating position with business partners or investors, including interfering with funding that SVI is relying on to complete repairs on the rail line.

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[9] See s. 57 of FIPPA.

[10] [2012] B.C.I.P.C.D. No. 18 at para. 35 citing Order F07-15, [2007] B.C.I.P.C.D. No. 21 at para. 17. See also, Order 02-50, [2002] B.C.I.P.C.D. No. 51 at paras. 124-137 and *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773 at para. 58.

Loss of competitive advantage

[22] SVI submits that disclosure will enhance its competitors' abilities to successfully bid against SVI in competitions for rail contracts because the Report contains sensitive information about "SVI's maintenance operations and costs, including details through which train capacity, speed restrictions, and weight limits could be determined, along with costing issues for SVI."[11] The General Manager says that competitors could use the information in the Report to determine certain rail line repair, maintenance and operations costs, which they could use in a bidding war against SVI.

[23] Upon review, I find that the Report describes the condition of the rail line bridges and structures, and is nearly entirely based on an independent railway inspector's observations of the rail line. It is not about SVI's commercial activities on the rail line, and it does not refer to SVI's current or projected costs for operating the rail line. It is not apparent to me how SVI's competitors could use the information in the Report to determine SVI's costs to assist them in a bidding war. Moreover, the General Manager deposes that the Report "no longer represents" the state of the rail line.[12] This affidavit evidence, which was provided by SVI, contradicts SVI's submission that there would be harm from disclosure of the Report because the overwhelming bulk of the information in the Report remains current, reliable and relevant. Given the above factors just outlined, I find that disclosure of the information in the Report would not cause the harm as alleged within the meaning of s. 21(1)(c)(i).

[24] I also observe that most of the information in the Report is already publicly available in the New Report or from other sources, so it is unclear what Report information SVI's competitors could use to assist their bidding on future contracts that is not already known.[13] The New Report is more current, detailed and comprehensive than the Report, and it provides estimated rail line maintenance and repair costs as well as bridge specifications, drawings and photographs. I do not see how the disclosure of the Report information, that is by and large already in the public domain, could reasonably be expected to cause significant harm.[14]

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[11] SVI submissions at para. 30 based, in part, on GM affidavit at para. 26.
[12] GM affidavit at para. 25.
[13] The 2009 Ministry report provides an assessment of the rail line, according to the General Manager's evidence. Further, the Island Corridor Foundation owns the rail line, so it is not unlikely, in my view, that it would provide information about the condition of the rail line to interested parties – or to give interested parties access to the rail line to conduct their own investigations – if the Island Corridor Foundation were to invite other bids to operate the rail line.
[14] The Report does contain references to communications and interactions between the author of the Report and SVI representatives (primarily one SVI rail line inspector) that are not publicly available. However, there are no specific submissions as to harm resulting from disclosure of these excerpts, and no harm that is apparent to me from my review of the materials.

[25] In summary, I find that there is insufficient evidence for me to conclude that disclosure of the Report could reasonably be expected to harm significantly the competitive position of SVI with respect to competitors within the meaning of s. 21(1)(c)(i).

Harm to negotiations or relations with business partners or investors

[26] SVI submits that disclosure of the Report may negatively impact its negotiations with business partners because they may be concerned about SVI's maintenance of the rail line.[15]

[27] SVI submits that it cannot be expected to obtain evidence directly from its potential partners about the possible effect that the information in the Report would have on such negotiations. While this may be true, it does not alleviate the need to demonstrate how disclosure of the information would interfere significantly with its ability to negotiate with third parties.

[28] In this case, SVI hypothesizes what potential partners would conclude from reading the Report. This conclusion is far from certain considering the actual content and context of the Report. However, even if these partners are concerned about what the Report states concerning the maintenance of the rail line, it does not follow that it would significantly impact its future negotiations. For example, SVI could update its partners on the current state of maintenance and repairs on the rail line, or provide any necessary context regarding the Report.

[29] SVI also submits that disclosure of the Report would harm its negotiating position with respect to securing funding for the rail line. SVI states that the Federal and British Columbia Governments have each publicly announced funding for rail line upgrades, but that funding is conditional and not paid out.[16] SVI submits that disclosure of the Report would harm SVI's negotiating position for this funding because it would likely cause investors to have concerns about SVI's ability to complete repairs along the rail line.

[30] I am not persuaded by SVI's submissions on this point because SVI has provided no details about the conditions for funding, the terms of any agreements, or specific details about the state of negotiations by which I could judge its arguments. Further, part of the reason SVI commissioned the Report was to support its funding application for rail line upgrades.[17] To that end, the Report provides evidence supporting the need for rail line upgrades, which makes SVI's submission that disclosure of the Report would harm SVI's negotiation position for this funding even less persuasive. For these reasons the

[15] SVI submissions at para. 31.
[16] SVI submissions at para. 32 and GM's affidavit at para. 30.
[17] GM affidavit at paras. 11 and 14.

circumstances of this case are different than those in Order 04-08[18] and Order F05-01[19], in which third parties adduced *in camera* evidence of negotiations detailing how disclosure of the information would significantly harm their negotiating position for securing financing or funding.

[31] The General Manager also deposes that it would be potentially damaging if the public confuses the Report with the more current and thorough New Report, or if the Report interfered with or delayed the rail line upgrades in some other way. This argument does not persuade me. It is entirely speculative and assumes the release of the Report will be reported publicly without any reference to the New Report. It also assumes SVI itself would not be in a position to communicate that there is a more recent report which is both more up-to-date and accurate.

[32] In summary, I conclude that s. 21(1)(c)(i) does not apply in this case because disclosure of the Report could not reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of SVI.

Section 21(1)(c)(ii) – Disclosure could reasonably result in similar information not being supplied

[33] SVI submits that it voluntarily submitted the Report as part of collaborative discussions with the Safety Authority regarding rail line improvements, and it "would not share similar reports in the future" if the Report is disclosed.[20] It also submits that disclosure of the Report may result in other organizations refraining from sharing independent safety reports with the Safety Authority.

[34] The applicant submits that s. 21(1)(c)(ii) does not apply because there is a statutory compulsion to provide information.[21] She says that in this case the Safety Authority can compel SVI to provide annual inspection reports if SVI stops voluntarily supplying information to the Safety Authority.

[35] SVI replies that the Safety Authority does not have statutory authority to compel SVI to submit the Report, and that the Report does not form part of the annual report it must submit to the Safety Authority.

[36] The Safety Authority's position is that it depends on regulated parties to voluntarily provide information, since using its statutory power to compel disclosure takes significantly more time and resources, and having collaborative interactions with regulated companies advances the common goal of safety. The

[18] [2004] B.C.I.P.C.D. No. 8.
[19] [2005] B.C.I.P.C.D. No. 1.
[20] SVI submissions at para. 26.
[21] Order F10-06, [2010] B.C.I.P.C.D. No. 9 at para. 104.

Safety Authority states that it received the Report in order to discuss SVI's plans to maintain and upgrade the rail line, and to find related funding for these plans.

[37] I accept the Safety Authority and SVI's submissions that the Report was voluntarily provided in the context of rail line improvements and funding. I also accept the submission that the Report is not the annual report that SVI is required to submit to the Safety Authority to outline its safety management system. However, this is not determinative of the matters under s. 21(1)(c)(ii) because previous orders have established that s. 21(1)(c)(ii) of FIPPA does not apply where parties can be statutorily compelled, or have a financial incentive, to provide the information.[22]

[38] British Columbia railway safety is regulated by a complex network of statutory and regulatory provisions, mostly adopted from the federal framework.[23] The federal framework requires railway companies to inspect their tracks and supporting structures to ensure that the track is safe, and to produce copies of the inspection reports to railway safety inspectors on request.[24] These provisions are adopted into British Columbia law,[25] and the Safety Authority is primarily responsible for administering railway safety regulation in this province.[26]

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[22] See Order F10-06, [2010] B.C.I.P.C.D. No. 9 or Order 03-05, [2003] B.C.I.P.C.D. No. 5, for example. Also see Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29, upheld on judicial review: *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. No. 505 (S.C.).

[23] None of the parties referred to the legal authority regarding regulation of the rail line. However, the British Columbia *Railway Safety Act* applies.

[24] The *Railway Safety Act (Canada) (Canada Act)* confers broad powers and obligations. For example, s. 11 states that work to railways – including maintenance work – must be done in accordance with sound engineering principles, and s. 28 confers authority to railway safety inspectors, including for compelling documents or requiring persons to answer questions. There is also the *Railway Safety Management System Regulations* (*SMS*), which requires railway companies to implement and maintain safety management systems that have risk control strategies (s.2(f)) and periodic audit and evaluation features (s. 2(j)), among other requirements. There are also a series of more specific rules and standards for specific aspects of railways, such as the *Rules Respecting Track Safety*. This legislative framework requires railway companies to inspect their rail lines (including bridges), and enables railway safety inspectors to compel records. Transport Canada has also issued guidelines to assist railway companies on how to comply with the *Canada Act*, regulations and rules. One of these federal guidelines relates to the bridge safety management program portion of the overall railway safety management system. It outlines the requirements for rail companies, including recordkeeping and audit requirements. This required information includes the types of information contained in the Report.

[25] The British Columbia *Railway Safety Adopted Provisions Regulation* (*APR*) adopts provisions of the *Canada Act* with many of its regulations, rules and standards, as well as provisions from other federal statutes and regulations.

[26] Most of the provisions of the *BC Act* are delegated to the Safety Authority under s. 1 of the *Administration Delegation Regulation*. The statutory power at issue in this inquiry is delegated to the Safety Authority.

[39] Based on my review of this statutory framework, I find that the Safety Authority has the authority to compel the information in the Report from SVI, so s. 21(1)(c)(ii) does not apply.[27] The Safety Authority in effect concedes this point by saying it is time consuming to compel the information and that is one of the reasons why it prefers collaboration. However, the public body preferring not to compel information does not negate the fact it can do so.[28]

[40] Section 21(1)(c)(ii) of FIPPA also does not apply if there is a financial incentive to induce the third party to supply the information.[29] There is a clear incentive in this case for SVI, or any other third party in SVI's situation, to supply the information at issue. The evidence clearly points to the fact that SVI's plans to resume passenger service on the rail line depend on funding. The rail line must be upgraded for passenger service to resume, and the Report is necessary to receive the funding that will enable the required rail line upgrades to occur. This need for funding was a reason why the Report was commissioned and then provided to the Safety Authority.[30] I do not accept SVI's submission that it will not share similar information in the future if the Report is disclosed, or that another party would not share information in similar circumstances, due to the clear financial incentive to provide this information since millions of dollars in funding depend on it.[31]

[41] In conclusion, s. 21(1)(c)(ii) of FIPPA does not apply because the Safety Authority can compel similar information in the future. This provision also does not apply because SVI has a financial incentive to continue to supply the information to the Safety Authority in these circumstances. In the totality of the circumstances, it cannot be reasonably expected that disclosure will result in similar information no longer being supplied to the Safety Authority.

Section 21(1)(c)(iii) – Disclosure could reasonably result in undue financial loss or gain to any person or organization

[42] SVI submits that it will suffer undue financial loss from disclosure of the Report because rail line upgrades and funding issues are an ongoing process that could be "polluted" by disclosure of information in the Report that was not intended for public consumption. SVI submits the disclosure of the Report could

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[27] I note that at the time the federal *SMS* was passed by Parliament, industry stakeholders suggested a voluntary approach for safety assessment. However, Parliament chose a mandatory approach: Canada Gazette, 2001, Vol. 135 No. 1, Regulator Impact Analysis Statement at pp. 166 and 167. This approach was then adopted into British Columbia by the *APR*.

[28] *Fletcher Challenge Canada Ltd. v. British Columbia (Information and Privacy Commissioner),* [1996] B.C.J. No. 505 (S.C.) upholding Order No. 56-1995, [1995] B.C.I.P.C.D. No. 29.

[29] Order F10-06, [2010] B.C.I.P.C.D. No. 9.

[30] Safety Authority submissions. Also see the GM's affidavit at paras. 11 and 19.

[31] According to the evidence, the Federal and British Columbia Governments have each announced that they have set aside $7.5 million for restoring the rail line, which are conditional and not paid out: GM affidavit at para. 30.

result in funding not being advanced, and the General Manager deposes that disclosure will "unnecessarily diminish public confidence in the services provided by [SVI]", which would result in reduced passenger and freight traffic, prejudicing SVI's competitive position and resulting in a material financial loss.[32]

[43] SVI's argument about undue loss is premised in part on funding not being advanced in negotiations. For the reasons discussed above for s. 21(1)(c)(i), I am not satisfied that disclosure could reasonably result in harm to SVI's negotiations for rail line funding. However, even if there was a loss to SVI because of rail line maintenance concerns, I'm not satisfied that it would be an "undue" loss.[33] Further, if SVI is suggesting that disclosure of the Report will cause the public to have safety concerns about the rail line that will result in decreased rail line traffic, I find this proposition to be speculative. Circumstances have changed since the Report was drafted, including the fact that there have been subsequent upgrades to the rail line, and the release of the New Report that provides a more recent and comprehensive assessment of the rail line. In addition, the submission that disclosure will result in reduced passenger traffic is particularly speculative since there is currently no passenger service on the rail line.

[44] For the reasons set out above, I do not find that there is a reasonable expectation that SVI will incur a financial loss from disclosure of the Report.

[45] In conclusion regarding s. 21(1) of FIPPA, I find that s. 21 does not apply to the Report because the s. 21(1)(c) requirement has not been met.

CONCLUSION

[46] I find that s. 21(1) of FIPPA does not require the Safety Authority to refuse to give the applicant access to the Report. For the reasons given above, under s. 58 of FIPPA, I require the Safety Authority to give the applicant access to the Report on or before November 8, 2013 pursuant to s. 59. I also require the Safety Authority to copy me on its cover letter to the applicant, together with a copy of the records.

September 26, 2013

ORIGINAL SIGNED BY

Ross Alexander, Adjudicator

OIPC File No.: F11-47213

[32] GM's affidavit at para. 31.
[33] Order 00-10, [2000] B.C.I.P.C.D. No. 11.