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Order F18-28

# SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY (TRANSLINK)

Elizabeth Barker
Senior Adjudicator

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**Summary:** An applicant asked for a copy of the purchase of services agreement between the public body and a third party. The agreement related to the public body's commuter rail service. The third party objected to the public body's decision to disclose all of the agreement. The third party submitted that s. 21(1) (harm to third party business interests) applied to some of the information in the agreement. The adjudicator found that s. 21(1) did not apply and ordered the public body to disclose all of the agreement to the applicant.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, ss. 21(1)(a)(i), 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii).

## INTRODUCTION

[1] An applicant asked the South Coast British Columbia Transportation Authority, commonly known as TransLink, for a copy of its purchase of services agreement with Canadian Pacific Railway Company (CP). TransLink informed CP that it had decided to disclose the requested agreement. CP objected to disclosure of some parts of the agreement under s. 21(1) (harm to third party business interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). CP asked the Office of the Information and Privacy Commissioner (OIPC) to review TransLink's decision. Mediation failed to resolve the dispute, and CP requested that it proceed to inquiry. TransLink, CP and the applicant all provided inquiry submissions.

## ISSUE

[2] The issue in this inquiry is whether TransLink is required by s. 21(1) of FIPPA to refuse to disclose the information in dispute to the applicant. Section 57(3)(b) of FIPPA says that the burden is on CP, as the third party objecting to disclosure, to prove that the applicant has no right of access to the information withheld under s. 21(1).

## DISCUSSION

### *Information in dispute*

[3] The record in this case is titled *Amended and Restated Purchase of Services Agreement*. The agreement details the terms under which TransLink uses CP's railway for its commuter rail services. TransLink has disclosed most of the agreement to the applicant and only a small amount of information remains at issue. The disputed information is about how the parties will calculate charges and payments under the agreement. It is exclusively numerical information (i.e., dollar amounts, percentages and mathematical calculations).

### *Harm to Third Party Business Interests*

[4] Section 21(1) requires a public body to withhold information the disclosure of which would harm the business interests of a third party. The portions of s. 21(1) that are relevant in this case state:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (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,
>
> (b) that is supplied, implicitly or explicitly, in confidence, and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization,

> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

[5] The principles for applying s. 21(1) are well established.[1] The party resisting disclosure, which in this case is CP, must establish the following three elements:

- Disclosure would reveal the type of information listed in s. 21(1)(a);
- The information was supplied, implicitly or explicitly, in confidence.
- Disclosure of the information could reasonably be expected to cause one or more of the harms in s. 21(1)(c).

***Type of Information - s. 21(1)(a)***

[6] CP submits that the disputed information constitutes financial and commercial information. TransLink says that it accepts that the information in dispute qualifies as commercial or financial information about CP. The applicant does not say anything directly on this point, although he refers to the information in dispute as "financial terms" multiple times in his submission.

[7] FIPPA does not define what is meant in s. 21(1) by the terms "commercial" or "financial" information. However, previous orders have stated that "commercial" information relates to commerce, or the buying, selling, exchanging or providing of goods and services.[2] They have also said that contract amounts, prices, hourly rates, expenses and other fees payable under a contract are both "commercial" and "financial" information.[3]

[8] The disputed information is about how CP and TransLink will calculate monetary charges and payments for services under the agreement. For that reason, I find that it is commercial and financial information of or about both CP and TransLink and s. 21(1)(a)(ii) applies.

***Supplied in confidence – s. 21(1)(b)***

[9] For s. 21(1)(b) to apply, the information must have been supplied, either implicitly or explicitly, in confidence. This is a two-part analysis. The first step is to determine whether the information was supplied. The second step is to determine whether the information was supplied "in confidence."

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[1] See: Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49182 (BC IPC).
[2] See: Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17; Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62.
[3] See: Order 03-15, 2003 CanLII 49185 (BC IPC) at para. 41; Order F16-17, 2016 BCIPC 19 (CanLII), at para. 24.

### *Supplied*

[10] Previous orders have addressed the application of s. 21(1)(b) to agreements and contracts between public bodies and private-sector service providers. Those orders have consistently found that information in an agreement negotiated between two parties does not, in the ordinary course, qualify as information that has been "supplied" to the public body. They have said that information contained in contractual terms is generally negotiated and jointly created by the parties to the contract. There are two exceptions, however, where information in an agreement may be supplied, rather than negotiated information. The exceptions are explained well in Order 01-39:

> Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
> …
>
> The second situation in which otherwise negotiated information may be found to be supplied is where its disclosure would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was "supplied" by the third party, that is, about information not expressly contained in the contract: Order 01-20 at para. 86. Such information may be relevant to the negotiated terms but is not itself negotiated. In order to invoke this sense of "supplied", CPR must point to specific evidence showing what accurate inferences could be drawn from which contractual terms about what *underlying confidentially supplied information*...[4] [emphasis added]

[4] Order 01-39, 2001 CanLII 21593 (BC IPC), at paras. 45 and 50. Order 01-39 also involved CP objecting to TransLink's decision to disclose their agreement. Former Commissioner Loukidelis determined that the information in the agreement was not "supplied" within the meaning of s. 21(1)(b).

[11] The approach quoted above in Order 01-39 was upheld on judicial review and has been consistently followed in numerous BC orders.[5] As I discuss below, I consider this interpretation of "supplied" information to be sound and it is the one that I have used in this case, despite CP's argument that I should do otherwise.

*Parties' representations on "supplied"*

[12] CP makes three submissions about this stage of the s. 21(1) analysis. It submits that the information in dispute was supplied in accordance with the jurisprudence of the OIPC. In the alternative, it says that the definition of "supplied" information in s. 21(1)(b) should include "negotiated" information. In the further alternative, it submits that s. 21(1) is inoperable because it is unconstitutional. I will address each of CP's submissions in turn.

[13] TransLink says that it concluded that it was not authorized to refuse to disclose the information in dispute because it was part of a negotiated agreement and was not "supplied" within the meaning of s. 21(1)(b). The applicant makes no submission about whether the information in dispute was supplied.

*Supplied in accordance with OIPC jurisprudence*

[14] CP's first submission regarding "supplied" is that the information in dispute was "submitted in accordance with the jurisprudence of the OIPC."[6] However, for the reasons that follow, I find that this is not the case.

[15] The disputed information appears in an agreement, which is a context OIPC jurisprudence has repeatedly said is usually associated with negotiated, not supplied, information. In fact, CP frequently refers to the disputed information as "negotiated" information in its submissions.[7] There is nothing to indicate that the disputed information originates exclusively with CP, nor does CP say that it provided it to TransLink. Instead, the evidence establishes that CP and TransLink engaged in negotiations regarding the terms in their agreement. CP says that the original agreement between TransLink and CP was set to expire, so TransLink sent a letter to CP setting out proposed new compensation terms.[8] Initially, the parties did not agree and CP filed an application for arbitration. They ultimately reached agreement without going to arbitration and the new agreement was

[5] Upheld on judicial review in *CPR v. The Information and Privacy Commissioner et al (In The Matter of the Judicial Review Procedure Act)*, 2002 BCSC 603. For other examples see: Order F08-22, 2008 CanLII 70316 (BC IPC); Order F16-17, 2016 BCIPC 19 (CanLII) and Order F14-28, 2014 BCIPC 31 (CanLII).
[6] CP's initial submission at paras. 14-17.
[7] CP's reply submission at para. 6, 17, 18 and 19.
[8] The letter was actually sent by West Coast Express Limited, the wholly owned TransLink subsidiary designated by TransLink to manage its commuter rail service.

signed.[9] Based on that evidence, I conclude that the disputed information is the mutually agreeable end-result of CP and TransLink's discussions about what the terms of their agreement should be. There is no evidence that the disputed information reflects only what CP said or brought to the negotiating table.

[16] I have also considered whether the information falls into the two exceptions to the rule that information in a contract is usually negotiated as described in the quote from Order 01-39 above. CP does not argue or provide evidence that the disputed information is immutable. Its submissions relate to the second exception as it says that disclosing the disputed information would allow accurate inferences about CP's information. Specifically, CP says that anyone with knowledge of the industry could use the disputed information to estimate CP's operating margins and the financial value of the agreement to CP.[10]

[17] Establishing the information was "supplied" in that sense requires "specific evidence showing what accurate inferences could be drawn from which contractual terms about what underlying confidentially supplied information."[11] There is no evidence here that the information CP says could be accurately inferred (i.e., CP's operating margins and the financial value of the agreement) is information that CP ever provided TransLink. Absent any cogent evidence to support CP's assertion in that regard, I am not persuaded that disclosing the disputed information would allow accurate inferences about information CP supplied to TransLink in confidence but which does not expressly appear in the agreement.

[18] Therefore, I find that CP has not established that the information in dispute was "supplied" under s. 21(1)(b) in accordance with how that term has been consistently interpreted in BC orders.

*Expand interpretation of supplied information*

[19] Next, I will address CP's alternative submission which is that the OIPC should reconsider its interpretation of "supplied" information to include "negotiated" information. CP provides three main arguments to support this submission: 1) the current interpretation is without proper foundation, 2) the interpretation should include the type of information the federal *Access to Information Act* (ATIA) does, and 3) the current interpretation has a chilling effect. For the following reasons, I am not persuaded that the word "supplied" in s. 21(1)(b) should be interpreted to include "negotiated" information.

[9] This background comes from the affidavit of CP's Director of Interline and Passenger-East (Director).
[10] CP's initial submission at para. 17. Affidavit of the Director at paras. 15-16.
[11] Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 50.

*Improper foundation for current interpretation*

[20] CP submits that the OIPC should reconsider its interpretation of the term "supplied" in s. 21(1)(b) because it was made "without proper foundation or rationale" and without citing previous authority.[12] CP traces the history of the interpretation from its first appearance in BC in Order 26-1994 back to the Information and Privacy Commissioner of Ontario's Order 36,[13] issued in 1988. I have reviewed the orders CP cites. I do not consider it to be significant that no prior authority is cited in the 1988 Ontario orders, given that it seems that was the first year the Ontario Commissioner issued orders and the case law was new. I am not persuaded that these earlier orders (they do provide reasons) fail to give a proper foundation and rationale for the principle that information in an agreement or contract is, with few exceptions, negotiated and not supplied information.

[21] Subsequent BC Orders have provided further analysis and reasons for the principle and have consistently applied it. For example, in Order 00-22, former Commissioner Loukidelis said that information negotiated in an agreement between two parties does not ordinarily qualify as information that has been "supplied" to a public body, and his reasoning was upheld on judicial review.[14] He expanded on this in Order F06-20 where he explained that "the concept of 'supply' is intended to capture truly immutable third-party business information, not contract information that—by the finessing of negotiations, sheer happenstance or mere acceptance by a public body of a proposal—is incorporated in a contract in the same form that it was delivered by the third-party contractor."[15]

[22] I agree with the interpretation of "supplied" as expressed in BC Orders and decisions and find the reasons they give for that interpretation to be sound.

*Federal Access to Information Act (ATIA)*

[23] CP also submits that the interpretation of "supplied" in s. 21 should include negotiated information in order to be consistent with s. 20(1) of the ATIA. CP specifically identifies ss. 20(1)(c) and (d) of the ATIA which protect negotiated information. The relevant parts of s. 20(1) of the ATIA states:

> 20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains
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> (a) trade secrets of a third party;

[12] CP's initial submission at para. 41, 44 and 45.
[13] *Ontario (Industry, Trade and Technology) (Re)*, 1988 CanLII 1416 (ON IPC).
[14] Order 00-22, 2000 CanLII 14389 (BC IPC) upheld on judicial review in *Jill Schmidt v. British Columbia (Information and Privacy Commissioner et al)* 2001 BCSC 101.
[15] Order F06-20, 2006 CanLII 37940 (BC IPC) at para. 11.

> (b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
> …
> (c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
>
> (d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

[24] CP points out that ss. 20(1)(c) and (d) of the ATIA protect more types of third party business information from disclosure than equivalent provincial statutes because ss. 20(1)(c) and (d) do not require that the information be "supplied." CP says: "There is no logical reason to have a Federal regime different from all of the provincial regimes. Presently, organizations can negotiate with the federal government and still have their information protected under the ATIA. However, that same information will not be protected under the Act if it is negotiated with the provincial government."[16] CP submits that a third party will receive different treatment depending on whether it contracts with a provincial or a federal government, that this is an absurd consequence, and there is no rationale for having two "inconsistent and irreconcilable regimes for the protection of third party information."[17] Therefore, CP says, it is an absurd interpretation of s. 21(1)(b) to exclude "negotiated" information from the meaning of "supplied" information.

[25] The differences in how the ATIA and FIPPA deal with "negotiated" information are not due to a broader interpretation of the word "supplied" under the federal law. It is because the federal legislators chose to include added protections for third party business information in ss. 20(1)(c) and (d). In the ATIA orders CP cites where the provision that protects confidentially "supplied" information is considered ( i.e., s. 20(1)(b)), the interpretation of "supplied" is consistent with how it is interpreted in BC Orders.[18]

[26] CP says that there is no rationale for having two different regimes in Canada for protecting third party business information. My role in this case is to consider whether s. 21(1) of FIPPA applies to the information in dispute. It is also

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[16] CP's initial submission at para. 56.
[17] CP's initial submission at paras. 57 and 65-66.
[18] *Halifax Development Ltd.* v. *Canada (Minister of Public Works and Government Services)*, [1994] F.C.J. No. 2035 at p. 2 (negotiated lease terms); *Canada Post Corp. v. National Capital Commission*, 2002 FCT 700 at para. 13 (negotiated financial sponsorship); *Recall Total Information Management Inc. v. Canada (National Revenue)*, 2015 FC 1128 at para. 32 (contract amendment); *Equifax Canada Co. v. Canada (Human Resources and Skills Development)*, 2014 FC 487 (contract terms).

beyond the scope of this inquiry to determine why the federal Parliament and the BC Legislature chose to protect a different range of third party business interests, and I decline to make any kind of finding about that. In summary, the fact that the ATIA protects more types of information from disclosure than s. 21(1) of FIPPA does not convince me that I must interpret "supplied" to include "negotiated" information.

*Chilling effect*

[27] CP also submits that "negotiated" information should be included within the interpretation of "supplied" information in s. 21(1)(b) "to avoid a chilling effect on third party negotiations with public bodies."[19] CP says that disclosing confidential negotiated information will result in third parties being less willing to enter into negotiations and agreements with public bodies to the detriment of the public body and citizens. CP says that when the Legislature enacted s. 21 it sought to prevent the chilling effect that disclosing a third party's information could cause.

[28] In my view, this chilling effect argument is about how disclosure of information could reasonably be expected to cause the harm specifically mentioned in s. 21(1)(c)(ii). I agree that the Legislature identified this as important, which is evidenced by the fact that it is specifically listed as a harm in s. 21(1)(c)(ii). It is a matter for consideration in the harms assessment stage of a s. 21(1) analysis but only for the types of information to which ss. 21(1)(a) and (b) apply. In my view, the chilling effect argument is not a sound reason for reinterpreting the word "supplied" in s. 21(1)(b) to include information that is negotiated.

[29] In conclusion, I have carefully considered, but am not persuaded by, CP's arguments about broadening the interpretation of "supplied" information in s. 21(1)(b).

*Constitutional objections*

[30] In the further alternative, CP submits that s. 21(1) is inapplicable for constitutional reasons. It says that railways are federal matters by virtue of s. 92(10)(a) and (c) of the *Constitution Act, 1867* and that the federal *Canada Transportation Act* (CTA) prevails.[20] It also says that doctrines of interjurisdictional immunity and paramountcy apply.

[31] The *Constitution Act, 1867* bifurcates Canadian law into federal and provincial matters. The Supreme Court of Canada said the following about interjurisdictional immunity:

[19] CP's initial submission at para. 85.
[20] CP's initial submission at paras. 86-106.

> The doctrine of interjurisdictional immunity protects the "core" of a legislative head of power from being impaired by a government at the other level… Its application involves two steps. The first is to determine whether a statute enacted or measure adopted by a government at one level trenches on the "core" of a power of the other level of government. If it does, the second step is to determine whether the effect of the statute or measure on the protected power is sufficiently serious to trigger the application of the doctrine....[21]

[32] CP submits that the doctrine of interjurisdictional immunity applies in this case because railways fall under federal jurisdiction by virtue of s. 92(10)(a) and (c) of the *Constitution Act, 1867*. It says that disclosure of the business terms of an agreement that governs the operations of a railway service may reasonably be expected to impair the operations and management of railways.[22]

[33] I agree that rail transportation is a matter which falls under federal jurisdiction by operation of the *Constitution Act, 1867*. However, I am not persuaded that FIPPA pertains to, regulates or exercises power over rail transportation. FIPPA is provincial legislation that establishes and regulates an individual's right to access records in the custody or control of a public body. As such it relates to civil rights, a matter that s. 92(13) of the *Constitution Act* says belongs within provincial jurisdiction. CP's submissions on this point consist of assertions that do not satisfactorily establish that s. 21(1) of FIPPA impairs the core of a federal undertaking. I find that the doctrine of interjurisdictional does not apply.

[34] Regarding the doctrine of paramountcy, the Supreme Court of Canada explained it as follows:

> In sum, if the operation of the provincial law has the effect of making it impossible to comply with the federal law, or if it is technically possible to comply with both laws, but the operation of the provincial law still has the effect of frustrating Parliament's purpose, there is a conflict. Such a conflict results in the provincial law being inoperative, but only to the extent of the conflict with the federal law….[23]

[35] The CTA applies to federally regulated modes of transportation such as rail. CP refers to s. 126 of the CTA, which states that a railway company may enter into a contract with a shipper that the parties agree to keep confidential. CP does not say why s. 126 is significant in this case. The record at issue here is obviously an agreement, but there is no evidence that it is the type of confidential agreement that s. 126 mentions.

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[21] *Rogers Communications Inc. v. Châteauguay (City)*, 2016 SCC 23 at para. 59.
[22] CP's initial submissions at para. 94.
[23] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at at para. 29.

[36] CP also says that the information in dispute is subject to s.152.4 of the CTA. Section 152.4 says (emphasis added):

> Agreements
>
> Providing copies
>
> 152.4 (1) A railway company or a public passenger service provider[24] must provide to any person who requests it
>
> (a) a copy of any agreement entered into ***on or after*** the day on which this section comes into force concerning the use of the railway company's railway, land, equipment, facilities or services; and
>
> (b) subject to subsection (2), a copy of any agreement entered into ***before*** the day on which this section comes into force concerning the use of the railway company's railway, land, equipment, facilities or services.
>
> Exclusion
>
> (2) The Agency may, on application by a railway company or a public passenger service provider, exclude an agreement, or any specified portion of an agreement, from the application of paragraph (1)(b) on the grounds that harm would likely result to the applicant if the agreement, or the specified portion, were to be disclosed.[25]

[37] CP's submission is that there is no s. 152.4(2) exclusion in this case but, if there were, it would render s. 21(1) of FIPPA inoperable because the federal CTA takes precedence. [26] CP also says:

> The application of section 21 of the Act would avoid and negate the procedure for disclosure under section 152.4(1) of the CTA. The legislative purpose behind section 152.4(1) is that there should be an appropriate balance between the legislative scheme for the regulation of railway service contracts and the disclosure of confidential terms to the public and competitors.[27]

[38] There is no evidence that s. 152.4(2) applies in this case. Section 152.4 has been in force since 2007 and the agreement at issue here was entered into in November 2015. It seems to me that s. 152.4(1)(a) applies as the agreement was entered into after the provision came into force, so s. 152.4(1)(a) requires disclosure upon request. The Canadian Transportation Agency has not excluded the agreement, pursuant to s. 152.4(2), from the application of s. 152.4(1)(b).

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[24] Section 87 of the CTA *says "*public passenger service provider" *means* VIA Rail Canada Inc., a passenger rail service provider designated by the Minister or an urban transit authority.

[25] Section 6 of the CTA defines "Agency" as the Canadian Transportation Agency.

[26] CP's initial submissions at para. 100.

[27] CP's initial submissions at para. 103. It also cites Order 04-01, 2004 CanLII 34255 (BC IPC), which was not truly about paramountcy as it involved two valid provincial statutes: FIPPA and the *Vancouver Charter*. Section 8.1 of the *Vancouver Charter* expressly overrides FIPPA to the extent of conflict or inconsistency between FIPPA and the *Vancouver Charter* provision at issue.

[39] Both the provincial and the federal statute provide for public access to an agreement. CP has not shown how, in this case, there is an inconsistency or conflict between s. 21(1) of FIPPA and s. 152.4 of the CTA or why it would be impossible to comply with both laws. In summary, I find that CP has not established that the doctrine of paramountcy applies such that s. 21(1) of FIPPA is inoperable.

[40] In conclusion, I find that CP has not met its burden of establishing that the information in dispute was "supplied" within the meaning of s. 21(1)(b). It is not necessary, therefore, to consider if the disputed information was supplied in confidence, or whether disclosure could reasonably be expected to cause the harms in s. 21(1)(c). However, I will do so for the sake of completeness.

***In Confidence***

[41] For s. 21(1)(b) to apply, the information must also have been supplied, "implicitly or explicitly, in confidence." To establish confidentiality of supply, it must be shown that information was supplied "under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided." [28]

[42] CP's Vice President of Strategic Planning Services (VP) says that CP took every possible step to protect the confidentiality of the information in the agreement including setting out a detailed confidentiality provision at s. 1.1 of the agreement. He says that CP relied on that express confidentiality provision when it entered into the agreement. TransLink and the applicant make no submission about whether CP supplied the information in confidence.

[43] TransLink does not expressly say whether it considers the information to be confidential. Instead, it cites several BC Orders that state that if the information in dispute fails to meet the "supplied" element of s. 21(1)(b), a public body is not authorized to deny access regardless of how confidential the parties intended the terms of the agreement to be.[29]

[44] I have reviewed s.1.1 in the agreement, which says that its terms and conditions are confidential and shall only be divulged to the parties' insurers, advisors and investors or as the law requires. It also states that CP understands and acknowledges the agreement and all information provided by CP to TransLink are subject to FIPPA. In particular, s. 1.1(b) says that CP will identify in writing any confidential information prior to or at the time CP discloses it to TransLink. Section 1.1(c) says CP and TransLink acknowledge the agreement is subject to disclosure pursuant to the CTA.

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[28] Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 23.
[29] Order 01-20, 2001 CanLII 21574 (BC IPC); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 315-1999, 1999 CanLII 1281 (BC IPC).

[45] CP's says that it took every possible step to protect the confidentiality of the information in the agreement including incorporating the s.1.1 confidentiality provision. However, CP provides no evidence or explanation about what actually transpired when CP disclosed information to TransLink (i.e., who said and did what). In particular, there is no evidence or explanation about what s. 1.1(b) stipulates, namely whether CP identified any information in writing as confidential prior to or at the time it was disclosed to TransLink.

[46] In conclusion, CP's evidence does not satisfactorily support its assertion about confidence. I find that CP has not met its burden of proving that the information was supplied implicitly or explicitly in confidence pursuant to s. 21(1)(b).

***Reasonable Expectation of Harm – s. 21(1)(c)***

[47] The standard of proof for s. 21(1) is whether disclosure of the information at issue could reasonably be expected to result in the specified harm. Meeting this standard requires demonstrating "that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but it need not be proved on the balance of probabilities that disclosure will in fact result in such harm."[30] The Supreme Court of Canada said the following about this standard and the evidence required to meet it:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground... This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences"….[31]

*Parties' submissions on harm*

[48] CP says that disclosure of the information could be used "to CP's detriment in existing or future negotiations, or to raise issues in respect of existing, ongoing agreements with CP."[32] CP's Director of Interline and Passenger-East (Director) says CP has operating agreements with other

[30] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206 [*Merck Frosst*].
[31] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[32] CP's initial submissions at para. 36.

passenger and commuter rail agencies including but not limited to RTM (Montreal), Metrolinx (Toronto), Metra (Chicago), VIA Rail and Amtrak. He says each agreement has unique terms and the agreement in this case contains provisions not in CP's other agreements. He says, "CP will be at a commercial disadvantage as other agencies will demand similar provisions as part of future agreements."[33] He also says that if the information is released, anyone with knowledge of railway costing could reasonably estimate the financial value of the agreement to CP.

[49] CP also says that it does not have a geographic monopoly and that other railway track companies could use the information to compete against CP. The Director says that "CN is a competitor who could negotiate with the Public Body for the services," and "there have been" commuter rail lines running on both CN and CP track in Toronto and Montreal. He also says that in the United States "there are any number of rail transportation companies… that could offer services."[34]

[50] CP also submits that there will be a "chilling effect" if the information is disclosed. It explains this effect as follows:

> The requirement to disclose the Information will have a negative long term impact on CP's behaviour in the marketplace in negotiating agreements with any B.C. public body or indeed any provincial public body in Canada. In particular, CP will be unwilling to engage in negotiations that involve creative or novel solutions because CP will know that such arrangements are subject to disclosure and could be used against it in its negotiations with other organizations. This adverse effect on negotiated agreements with a public body is contrary to the public interest in the provision of quality services at an optimal cost.[35]

[51] The VP also says that "If CP is required to disclose the Information, CP would be reluctant in the future to negotiate a contract with a public body that includes unique concessions to that public body. Similarly, CP would be unlikely to engage in any kind of creative arrangements in respect of pricing, or other material terms of such a contract." [36]

[52] TransLink submits that CP has not met the evidentiary burden of demonstrating that disclosure of the information in dispute could reasonably be expected to cause significant harm within the meaning of s. 21(1)(c).[37]

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[33] Director's first affidavit at paras. 17 and 23. Also, CP's reply submission at paras. 8, 19 and 20.
[34] All quotes in this paragraph are from the Director's second affidavit at paras. 2 and 4.
[35] CP's initial submission at paras 83. Also CP's reply submission at para. 10.
[36] VP's affidavit at para. 12 and CP's reply submission at para. 5-6.
[37] TransLink's submission at para. 24.

[53] The applicant submits that CP has presented no evidence of significant harm to its competitive or negotiating position. He also says that while other agencies may seek similar terms when negotiating with CP, CP is under no obligations to agree and it is free to negotiate other terms. He submits that CP has a monopoly over the railway tracks it operates and says that they are unique to CP and other railways can only offer services on lines they operate on other routes. This, the applicant says, gives CP strong negotiating power and it is not obliged to agree to identical terms in each of its contracts.[38]

*Analysis and findings on harm*

CP submits that disclosure of the information in dispute will significantly harm its competitive position and significantly interfere with its negotiating position. However, I find that CP's supporting evidence is vague and lacking in detail, so it is not persuasive. For instance, CP says that CN and other unidentified rail companies have the potential to provide the same services CP does. However, CP does not say which companies are actually in direct competition to provide the same services. Further, while it is possible that disclosure of the information in dispute has the potential to heighten competition, that is not harm under s. 21(1)(c)(i). I agree with the numerous previous orders, which have said that disclosure of existing contract pricing and related terms that result in the mere heightening of competition is not significant harm or significant interference with competitive or negotiating positions under s. 21(1)(c)(i).[39]

[54] There is no information about the existing and/or future negotiations CP says would be harmed by disclosure. In addition, whether the information in dispute would still be relevant in the future is debatable given that factors such as the competitive landscape, economy and negotiating conditions inevitably change and would not be identical in all geographic locations where CP may compete. CP does not say how the information would still be relevant in future negotiations.

[55] CP also does not say why the possibility that it may have to respond to demands for similar terms in future contract negotiations would harm its competitive position or interfere with its negotiation position. Responding to the other party's demands during negotiations is normal and to be expected. There is no evidence to indicate that CP would be compelled to accept such negotiating demands.

[56] As for CP's "chilling effect" argument, although it does not directly say so, I understand this to be an argument that s. 21(1)(c)(ii) applies. CP's submission

[38] Applicant's submission at para. 22.
[39] For examples, see: Order F06-20, 2006 CanLII 37940 (BC IPC) at para. 20, Order F07-15, 2015 BCIPC 7 at para 43 and Order F15-53, 2015 BCIPC 56 at para. 28; Order F17-41, 2017 BCIPC 45 at para. 74.

is that if the withheld terms in the current agreement are disclosed, in the future it will be unwilling to negotiate a contract with a public body that contains unique concessions to that public body or engage in creative arrangements with respect to pricing and other terms. The evidence on this point is not persuasive as it consists of the VP's assertions unaccompanied by factual detail. I do not accept that CP would refuse to negotiate terms that are mutually beneficial in order to win a contract CP wants. It seems obvious that any business that bids for work clearly wants that work and has a financial incentive to negotiate mutually acceptable and beneficial terms. CP's submission and evidence fail to persuade me that CP would not similarly be motivated by financial incentive and want to negotiate terms that would entice a public body into an agreement.

[57] Finally, CP provides no evidence, even in the broadest sense, about the magnitude of the harms it mentions. Consequently, I cannot assess whether disclosure could reasonably be expected to "significantly" harm or interfere with CP's competitive or negotiating positions.

[58] In considering the circumstances of this case, I am reminded that s. 21 does not operate as a blanket protection from all negative effects on third parties doing business with government.[40] For instance, in Order 00-22, former Commissioner Loukidelis said that a level of exposure under FIPPA is to be expected by third parties conducting business with public bodies and that by choosing a standard of significant harm, the Legislature clearly contemplated situations where disclosure could simply harm the interests of a private business, but still be permitted. He said:

> No doubt the rights of access created by the Act are intended to serve the public interest in openness and accountability, as s. 2 of the Act demonstrates. Of course, s. 21 itself makes it clear that the Act's right of access may be used by a business for its private advantage. A requester may, in a given case, be able to acquire information of a competitor, and therefore gain a private advantage, because disclosure would not cause "significant harm" to the competitor. The Legislature contemplated this result when it chose the standard of *significant* harm for s. 21(1).
>
> If recent trends in the forming of public-private partnerships, or in outright privatization of public body services, continue, businesses involved in such arrangements must assume some level of possible exposure through the Act. Public scrutiny of the kinds of public-private business arrangements just described accords with the Act's legislative goals. The Legislature has tempered the Act's objectives, of course, by protecting private interests through s. 21(1). Where s. 21 permits disclosure of information, it will accord with the Act's objectives of openness and

[40] Order 00-22, 2000 CanLII 14389 (BC IPC) at p. 8.

> accountability. Where s. 21(1) prohibits disclosure, the Act's public objectives bow to private needs.[41]

[59] In conclusion, I find that what CP says about harm under s. 21(1)(c) is assertion supported by evidence that is vague and lacking in detail. CP has not met the required standard of proof articulated by the Supreme Court of Canada cited above in paragraph 47 by providing evidence that demonstrates that disclosure will result in a risk of harm that is well beyond or considerably above a mere possibility.

***Summary - s. 21(1)***

[60] CP has established that the information in dispute is commercial and financial information of or about CP, so s. 21(1)(a)(ii) applies. However, CP has not proven that the information in dispute was supplied, implicitly or explicitly, in confidence under s. 21(1)(b) or that disclosure could reasonably be expected to cause harm under s. 21(1)(c).

## CONCLUSION

[61] For the reasons given above, I make the following order under s. 58(2) of FIPPA:

1. TransLink is not authorized or required by s. 21(1) to refuse to disclose the information in dispute.

2. TransLink is required to give the applicant access to the entire agreement by August 30, 2018. TransLink must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

July 18, 2018

**ORIGINAL SIGNED BY**

Elizabeth Barker
Senior Adjudicator

OIPC File No.: F16-66755

[41] Order 00-10, 2000 CanLII 11042 (BC IPC) at p. 9.