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Order F19-10

**SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY
(TRANSLINK)**

Erika Syrotuck
Adjudicator

March 19, 2019

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Summary: The applicant requested access to the Burrard Station East Entrance Concept Design Report. TransLink refused to disclose parts of the record on the basis of ss. 13(1), 17(1) and 15(1)(l) of the *Freedom of Information and Protection of Privacy Act*. The adjudicator found that TransLink was not authorized to withhold information in dispute under ss. 13(1) and 17(1) but was authorized under s. 15(1)(l) to withhold some of the information in dispute.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 13(1), 13(2)(i), 17(1), and 15(1)(l).

INTRODUCTION

[1] The applicant made a request to the South Coast British Columbia Transportation Authority (TransLink) for the Burrard Station East Entrance Concept Design Report (Report). TransLink provided some records but withheld a 152 page report in its entirety under ss. 13(1) (advice and recommendations) and 17(1) (harm to financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The applicant requested that the Office of the Information and Privacy Commissioner (OIPC) review TransLink's decision to withhold the Report. Mediation did not resolve the issues and the applicant requested that the matter proceed to inquiry.

[2] Before the start of the inquiry, TransLink advised that it would also be relying on s. 15(1)(l) (harm to security of a property or system) to withhold a small

amount of information in the Report. The OIPC granted permission for TransLink to add this issue to the inquiry.

[3] During the inquiry, TransLink disclosed additional information to the applicant but continued to withhold information under ss. 13(1), 17(1) and 15(1)(l) of FIPPA. This did not resolve the issues, and the inquiry proceeded.

ISSUES

[4] The issues in this inquiry are whether TransLink is authorized to refuse to disclose the information in dispute under ss. 13(1), 15(1)(l) or 17(1) of FIPPA.

[5] Under s. 57(1) the burden of proof is on TransLink to prove that the applicant has no right of access to all or part of the record.

DISCUSSION

Records in Dispute

[6] The record in dispute is a 152 page East Entrance Conceptual Design Study Report (Report). The Report sets out design and layout options for a potential new east entrance to the Burrard SkyTrain Station. TransLink disclosed some of the information in the Report to the applicant but has withheld some information under both ss. 13 (1) and 17(1). In addition, it has withheld a small amount of information under s. 15(1)(l) only.

Section 13

[7] Section 13(1) authorizes a public body to refuse to disclose information that would reveal advice or recommendations developed by or for a public body. If information falls within any of the categories listed in s. 13(2) then a public body may not refuse to disclose it under s. 13(1).

Section 13(1)

[8] The purpose of s. 13(1) is “to provide for the free, full and frank participation of public servants or consultants in the deliberative process.”¹ In *College of Physicians*, the BC Court of Appeal said that “advice” should be interpreted to include an opinion that involves exercising judgment and skill to weigh the significance of matters of fact and includes expert opinion on matters of fact on which a public body must make a decision for future action.²

¹ *John Doe v Ontario (Finance)* 2014 SCC 36 (CanLII) at para. 51.

² *College of Physicians of B.C. v. British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 113.

[9] TransLink submits that the information it has refused to disclose under s. 13(1) is policy advice or recommendations because it was prepared to assist TransLink in exploring the possibility of a new entrance to the Burrard Station.³ TransLink says that to complete the Report, it consulted with various experts and consultants.⁴ TransLink has provided a detailed explanation of how each piece of information it withheld is advice or recommendations under s. 13(1).⁵

[10] The applicant does not specifically comment on whether the information at issue is advice or recommendations under s. 13(1).

[11] It is clear that the Report contains advice and recommendations. The Report sets out options for future action, which are clearly informed by the opinions of experts. I find that this information is advice or recommendations within the meaning of s. 13(1).

Section 13(2)

[12] Section 13(2) specifies categories of records and information that may not be withheld under s. 13(1). Subsection (i) is at issue in this inquiry and reads:

13(2) The head of a public body must not refuse to disclose under subsection (1):

(i) a feasibility or technical study, including a cost estimate, relating to a policy or project of the public body,

[13] Past orders have found that the record needs to be a technical or feasibility “study” in order for s. 13(2)(i) to apply.⁶ In Order F13-08, the adjudicator said that a study implies that a decision still needs to be made about whether to proceed with a course of action.⁷ In Order F14-37, the adjudicator found that a “technical study” included reports which recorded the application of specialized engineering and related scientific expertise to study the condition of a bridge. In that case, the reports contained cost estimates and were designed to inform the public body’s plans to maintain and rehabilitate the bridge.⁸

³ TransLink’s initial submissions, at para. 17.

⁴ TransLink’s initial submissions, at para. 18.

⁵ TransLink’s initial submissions, at para. 21; Affidavit of TransLink’s Vice President of Infrastructure Management and Engineering, at para. 6.

⁶ See for example, Order F14-37, 2014 BCIPC 40 at paras. 62-64; Order F15-44, 2015 BCIPC 47, at para. 24; Order F17-07, 2017 BCIPC 8 at para 17.

⁷ Order F13-08, 2013 BCIPC 9, at para. 65.

⁸ Order F14-37, 2014 BCIPC 40, at para. 64.

Parties' submissions

[14] The applicant says that it is clear from the disclosed portions of the Report that it is designed to assess the practicability of an east entrance for Burrard Station and/or contains engineering information of a technical nature that will inform decision making about possible modifications to the station.⁹

[15] TransLink says that it does not dispute the fact that the Report is technical in nature and relates to its proposed project.¹⁰ Despite this, TransLink says that s. 13(2)(i) does not apply until a decision has been made on the Burrard Street East Entrance Project.¹¹ TransLink says that an interpretation of s. 13(2)(i) that requires a study prepared by internal staff to be disclosed *prior* to a public body making a decision on the subject matter of that report fails to give effect to the underlying purpose of s. 13(1) and the proper scope of the exceptions in s.13(2).¹²

[16] In support of this argument, TransLink says that the overarching purpose of s. 13(1) is to preserve an effective and neutral public service so as to permit public servants to provide full, free and frank advice to the public body.¹³ It also says that previous orders have recognized that s. 13 provides public bodies with a zone of privacy for full and frank discussion regarding policy and other decisions that are under consideration.¹⁴

[17] TransLink says that, properly interpreted, the 13(2) exceptions are designed to ensure that public bodies are accountable to the public for their decisions or actions.¹⁵ With regards to s. 13(2)(i) in particular, TransLink submits that public accountability is not served by disclosing a technical study before the public body makes a decision on the subject matter of the study.¹⁶

[18] The applicant says that s. 13(2) supports FIPPA's overall goal of making public bodies more accountable. The applicant says that a close review of the s. 13(2) exceptions reveals that they are almost all inputs into the decision making process and that these exceptions require public bodies to be transparent with the information underlying their decisions. The applicant says that the exceptions in s. 13(2) serve to limit the scope of s. 13(1) which is itself a limited exception to the public's right of access.¹⁷

⁹ Applicant's submissions at para. 27.

¹⁰ TransLink's initial submissions at para. 36.

¹¹ TransLink's initial submissions at para. 46.

¹² TransLink's initial submissions at para. 36.

¹³ TransLink's initial submissions at para. 40 citing Order 01-15, 2001 CanLII 21569 (BC IPC).

¹⁴ TransLink's initial submissions at para. 40.

¹⁵ TransLink's initial submissions at para. 42.

¹⁶ TransLink's initial submissions at para. 43.

¹⁷ Applicant's submissions at paras. 21-23.

[19] The applicant says that, unlike other s. 13(2) exceptions, s. 13(2)(i) does not contain any words limiting its application. The applicant says that s. 13(2)(g) applies to “final” reports or audits; s. 13(2)(l) to plans or proposals “if the plan or proposal has been approved or rejected by the head of a public body”; and s. 13(2)(m) to information “cited publicly as the basis for making a decision or formulating a policy.” The applicant says that the legislature clearly intended to circumscribe the s. 13(2) exceptions and did so where appropriate.¹⁸

[20] Further, the applicant says that s. 20 allows a public body to refuse to disclose information that will be published or released to the public within 60 days. The applicant says that, in this way, the legislature did provide a mechanism for public bodies to keep feasibility or technical studies secret for a reasonable amount of time while a decision is being made.¹⁹

Analysis

[21] In my view, the Report is a feasibility study relating to a project of TransLink. The Report is a feasibility study because it sets out a series of options and assesses how each option meets certain project objectives. In addition, I think there is no question that modifying the east entrance of the Burrard SkyTrain Station is a project of TransLink.

[22] However, I do not accept TransLink’s interpretation that s. 13(2)(i) only applies after a decision has been made.

[23] In my view, there is no basis for narrowing the scope of s. 13(2)(i) until after a decision has been made because s. 13(2) is a clearly worded exception to 13(1). In other words, I do not think there is any ambiguity about the wording of s. 13(2). It is clear that public bodies cannot refuse to disclose certain types of records under s. 13(2), even if those records contain advice or recommendations within the meaning of s. 13(1).

[24] In Order F11-04, Commissioner Denham rejected a similar argument by a public body. In that case, the public body had argued that s. 13(2) must be interpreted in a manner that reflects a broad approach to s. 13(1) and does not impair the deliberative process. In rejecting that argument, Commissioner Denham said that it is clear from the wording of s. 13(2) that public bodies “must not refuse to disclose under subsection (1)” any of the categories of records listed.²⁰

¹⁸ Applicant’s submissions at para. 29.

¹⁹ Applicant’s submissions at para. 30.

²⁰ Order F11-04, 2011 BCIPC 4, at paras. 47 - 48.

[25] Further, if the Legislature had intended s. 13(2)(i) to be limited it would have expressly said so, in the way it did with 13(2) (g), (m) and (l). In my view, the fact that the legislature included limitations in some paragraphs but not others is intentional and does not support TransLink's argument that s. 13(2)(i) does not apply until the public body has made a decision.

[26] In summary, I reject TransLink's argument that s. 13(2) only requires disclosure after a decision has been made. I find that s. 13(2)(i) applies to the Report. Therefore, TransLink is not authorized to withhold it under s. 13(1).

Section 17

[27] Section 17(1) authorizes a public body to refuse to disclose information that, if disclosed, could reasonably be expected to harm the financial or economic interests of a public body. The relevant portions of s. 17(1) are:

17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:

...

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

[28] Past orders have stated that ss. 17(1)(a) through (f) are examples of the types of information the disclosure of which may result in harm, and that they are not standalone provisions.²¹ Even if TransLink shows that the information falls within one of the circumstances in (a) through (f), it must also prove that disclosure of the information could reasonably be expected to harm the financial or economic interests of a public body or the ability of the government of British Columbia to manage the economy.²²

[29] I will interpret and apply s. 17 in the same way.

[30] The words "could reasonably be expected to" mean that the public body must establish a reasonable expectation of probable harm.²³ This language tries to mark out a middle ground between that which is probable and that which is

²¹ Order F10-39, 2010 CanLII 77325 (BCIPC) at paras 24, 32-33; Order F08-22, 2008 CanLII 70316 (BCIPC) at para 43.

²² See Order F12-02 2012, BCIPC 2, at para. 42; Order F11-11, 2011 BCIPC 14, at para. 45; Order 113-1996.

²³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.

merely possible.²⁴ In order to establish that there is a reasonable expectation of probable harm, the public body must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground.²⁵

[31] Additionally, there must be a clear and direct connection between the disclosure of specific information and the harm that is alleged.²⁶

TransLink’s position

[32] TransLink says it is concerned that the premature disclosure of the non-approved plans could reasonably be expected to result in financial harm under s. 17(1).²⁷ Specifically, TransLink submits that the premature release of information about transportation infrastructure or design would reasonably be expected to cause it undue financial loss.

[33] TransLink submits that the risk of financial harm is not speculative. TransLink says it experienced financial loss in relation to the premature disclosure of information concerning the planning and construction of the Canada Line.²⁸ Specifically, TransLink says that members of the public started litigation against it to stop the Canada Line project and to claim damages. TransLink says that although the courts dismissed the Canada Line litigation, it still incurred significant financial loss because of project delays.²⁹ TransLink says that after this claim was dismissed, it faced more litigation for damages based on expectations that arose during the planning process.³⁰

[34] TransLink says that during the recent reconstruction of the New Westminster SkyTrain station, a neighbouring business raised a substantial damage claim due to a change in pedestrian routes during construction, which the owner claimed was contrary to the construction plan. TransLink submits that the claim was settled without going to trial but added further cost to TransLink.³¹

[35] TransLink also says that disclosure of the non-approved plans could reasonably be expected to result in undue financial loss to a third party.³² TransLink says that construction will make the third party’s property less attractive for prospective tenants as it will be adjacent to a construction zone for

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ Order F07-15, 2007 CanLII 35476 (BCIPC) at para. 17.

²⁷ TransLink’s initial submissions at para. 55.

²⁸ TransLink’s initial submissions at para. 58.

²⁹ TransLink’s initial submissions at para. 59.

³⁰ TransLink’s initial submissions at para. 60.

³¹ TransLink’s initial submissions at para. 61.

³² TransLink has not identified the third party by name. It says it has withheld the name of the third party throughout the Report. See para. 63 of TransLink’s initial submissions.

a number of years, which will likely reduce the per square foot rental rates. Additionally, TransLink says that existing tenants may seek rental abatements. TransLink says that the proximity of TransLink's proposed construction may also impair the third party's property value.³³

Applicant's Submissions

[36] The applicant says that any litigation that may arise from the Burrard Station East Entrance Project is the result of TransLink's own conduct, not from public knowledge of the information in dispute.³⁴ For example, the applicant says that the Canada Line litigation resulted from TransLink's decision to use an intrusive construction technique. The applicant says that the alleged damage occurred whether or not TransLink previously considered or represented that it was considering a less intrusive technique.³⁵ In addition, the applicant says that any expectations were largely based on representations made gratuitously by TransLink or its agents.³⁶

[37] The applicant suggests that public disclosure and discussion of TransLink's plans may reduce the risk of litigation since the public will be able to review the other options and offer feedback that could assist TransLink in conducting the project in a way that minimizes undesirable impacts on others.³⁷

[38] Further, the applicant says since one of the purposes of FIPPA is to promote accountability in public bodies, FIPPA should not be used to allow public bodies to hide wrongdoing. To illustrate his point, the applicant says that if an applicant requests internal emails that were defamatory to the applicant, a public body should not be able to withhold the records on the grounds that they may disclose a cause of action to the applicant and therefore cost the public body money.³⁸

Analysis

[39] For the reasons that follow, I am not satisfied that disclosure of the Report could reasonably be expected to harm the financial or economic interests of TransLink under s. 17(1).

[40] First, I understand TransLink to be saying that disclosing the Report will create expectations that, if changed, will cause members of the public to sue TransLink and that the cost of resolving the litigation will cause it financial or economic harm. However, TransLink has not explained how any of the

³³ TransLink's initial submissions at para. 63.

³⁴ Applicant's submissions at para. 55.

³⁵ Applicant's submissions at para. 57.

³⁶ Applicant's submissions at para. 56.

³⁷ Applicant's submissions at para. 59.

³⁸ Applicant's submissions at para. 55.

information that it has withheld under s. 17(1) would create expectations that would, if the information were to change, cause members of the public to commence litigation against it. For example, it has not pointed to any specific parts of the Report it thinks will create expectations or explained what kinds of expectations it thinks surrounding businesses may have about the information in dispute.

[41] In addition, it is unclear to me how expectations would be created in the same way as in the cases that TransLink references. I say this because the Report sets out options for the design and construction of modifications to the Burrard Station and in doing so makes it clear that no decision has been made about construction methods, pedestrian routes or other matters. In my view, TransLink has not established a direct connection between disclosure of the specific information in the Report and a reasonable expectation of a party commencing litigation against it.

[42] Finally, I am not persuaded by TransLink's submissions on undue financial loss to the third party. In my view, TransLink's assertions that disclosure of the Report will reduce the per square foot rates the third party can charge or that the existing tenants may seek rental abatements are unsupported by any persuasive evidence. TransLink also has not explained how, if any undue financial loss to the third party were to occur, it could reasonably be expected to harm TransLink's financial or economic interests under the opening words of s. 17(1).

[43] In summary, I am not satisfied that disclosure of the information in dispute could reasonably be expected to harm the financial or economic interests of TransLink. Therefore, s. 17(1) does not apply to the information in dispute.

Section 15(1)

[44] Section 15(1)(l) says that a public body may refuse to disclose information if the disclosure could reasonably be expected to harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

[45] The standard of proof for s. 15(1)(l) is the same as for s. 17(1); the public body must show that there is a reasonable expectation of probable harm from the disclosure of the information. The 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."³⁹

³⁹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 40.

[46] There are several diagrams depicting the layout of the current Burrard SkyTrain Station in the Report and TransLink applied s. 15(1)(l) to some of the labels showing the function of certain rooms within the station. In other words, the information that TransLink has already disclosed shows the location of rooms and corresponding doors, but not the labels describing the function of each room.

Parties submissions

[47] TransLink says that disclosure of the withheld labels could be used to facilitate a terrorist attack and harm the safety and security of the Burrard SkyTrain Station. TransLink provided descriptions of the kinds of impacts that would result if specific rooms were compromised. For example, TransLink states that if the fan room was compromised, TransLink would lose the ability to operate the ventilation system, which in turn would prevent TransLink from being able to clear smoke from the tunnels.⁴⁰ TransLink says that the components and locations identified by the severed labels are not accessible to the public.

[48] TransLink says that a terrorist attack is not speculative because it periodically receives notices threatening terrorist attacks. As an example, TransLink described a security advisory report about a terrorist attack that it received in May 2018.⁴¹

[49] The applicant also states that one must assume that a prudent public body relies on a variety of measures such as locks, alarm systems, surveillance cameras, or security patrols to protect sensitive facilities. The applicant says that the withheld labels only show where the facilities are located; it does not describe how to infiltrate, undermine or compromise them.⁴²

[50] Further, the applicant says that TransLink has already disclosed the current location of the Pump Room and the Utilities Room because the doors to these two rooms are physically labeled, such that members of the public already know what is in these two rooms.⁴³ In support of this, the applicant included photographs of these doors in his submissions.⁴⁴

[51] In response, TransLink says that the fact that these two rooms are labeled does not address the remaining concerns about the layout of those rooms or the location of those rooms in relation to other components of the station or the layouts and locations of the other rooms that TransLink is withholding under s. 15(1)(l). TransLink also says it would be antithetical to its concerns to provide

⁴⁰ Affidavit of the Vice President of Infrastructure Management and Engineering of TransLink at para. 10(a).

⁴¹ TransLink's initial submissions at para. 52.

⁴² Applicant's submissions at para. 49.

⁴³ Applicant's submissions at para. 50.

⁴⁴ Exhibits G and H, applicant's submissions.

specific information on how to use the information at issue to compromise the station.⁴⁵

[52] TransLink also states that if designs for a station are prematurely released and then change before actual construction, “certain members of the public will develop an understanding and expectation regarding routes and will need to be re-educated as to the new design in order to ensure safety”.⁴⁶ In response, the applicant says that inconvenience to a public body resulting from members of the public developing expectations regarding routes which might require a public body to conduct re-education comes nowhere close to satisfying the requirements of s.15.⁴⁷

Analysis

[53] I am satisfied that the Burrard SkyTrain Station is a building for the purpose of s. 15(1)(l).

[54] TransLink’s evidence establishes that it periodically receives notices threatening terrorist attacks and I accept that such threats are likely to continue in the future. I am persuaded that disclosing the function of specific rooms in combination with where they are located within the station could create an increased vulnerability in relation to a terrorist attack. Given the high consequences of a terrorist attack, I am persuaded by what TransLink said even though it does not lay out how precisely one would infiltrate or compromise the locations. In my view, TransLink’s evidence establishes a sufficiently direct connection between disclosing the functions of the various rooms in the current Burrard SkyTrain Station and the harms alleged.

[55] However, I am not persuaded that disclosure of the location of the Pump Room and the Utilities Room in the Report could reasonably be expected to harm the security of any property or system. This is because the applicant’s evidence shows that the location of these rooms is already publicly available. I note that TransLink has not disputed that these doors are labeled in a way that is visible to the public. Further, I do not understand what TransLink says about harm from disclosing the layout of these two rooms; the disclosed information already shows where the door is in relation to the rest of the rooms and no other features of the rooms are visible on the drawings. It is not clear to me what other information could be gained about the layout of the rooms by disclosing the labels.

⁴⁵ TransLink’s reply submission at para. 20.

⁴⁶ TransLink’s initial submissions at para. 53.

⁴⁷ Applicant’s submissions at para 53.

[56] In conclusion, TransLink is authorized to withhold the information that it has refused to disclose under s. 15(1)(l) except for the labels identifying the Utilities Room and the Pump Room.

CONCLUSION

[57] For the reasons above, I make the following orders under s. 58(2):

1. TransLink is not authorized to refuse to disclose the information in dispute under ss. 13(1) and 17(1) of FIPPA.
2. TransLink is authorized, in part, to refuse to disclose the information in dispute under s. 15(1)(l). TransLink is only authorized to withhold the highlighted information on the pages I have sent to TransLink along with this order.
3. I require TransLink to give the applicant access to the information it is not authorized to withhold by May 2, 2019. TransLink must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the applicant, together with a copy of the records.

March 19, 2019

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

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