Order F20-51

SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY (TRANSLINK)

Elizabeth Barker
Director of Adjudication

November 16, 2020

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Summary: An applicant requested reports about a fatality that occurred on the tracks of a SkyTrain station. The public body refused access to some information in the records under s. 22 (harm to third party personal privacy) of the *Freedom of Information and Protection of Privacy Act*. The applicant claimed the records should be disclosed under s. 25 (public interest disclosure). The adjudicator found that s. 25 did not apply and s. 22 applied to some of the disputed information. The public body was ordered to disclose the balance of the information to the applicant.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a), 22(2)(f), 22(2)(i), 22(3)(a), 22(3)(d), 22(3)(j), 22(4), 25(1)(a) and 25(1)(b).

INTRODUCTION

[1] An applicant requested that South Coast British Columbia Transportation Authority (TransLink) provide him with access to the incident report and the investigation report regarding a fatality that occurred at a SkyTrain Station. TransLink provided records but withheld some information from them under ss. 15(1)(l) (harm to law enforcement) and 22 (harm to personal privacy) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant disagreed with TransLink's decision and requested that the Office of the Information and Privacy Commissioner (OIPC) conduct a review. The applicant also claimed that disclosure of the records was in the public interest under s. 25 of FIPPA. During mediation, the applicant withdrew his

request for the information withheld under s. 15(1)(l).[1] Mediation did not resolve the ss. 22 and 25 issues and they proceeded to inquiry.

ISSUES

[3] The issues I will decide in this inquiry are as follows:

1. Is TransLink required to refuse to disclose the information in dispute under s. 22?
2. Is TransLink required to disclose the information in dispute under s. 25?

[4] Section 57(2) says that the applicant has the burden of proving that disclosure of any personal information in the records would not be an unreasonable invasion of third party personal privacy under s. 22. FIPPA does not say who has the burden of proving that s. 25 applies. However, previous BC orders have said that it is in the interests of both parties to provide the adjudicator with whatever evidence and argument they have regarding s. 25.[2]

DISCUSSION

Background

[5] The applicant's access request relates to a 2015 incident at a SkyTrain station where an individual was hit by a train and died. The applicant, who is a journalist, says that he is concerned with issues related to suicide deaths on the SkyTrain, the trauma to drivers and bystanders and how public bodies and the government respond. He has written articles about the issue and says he is doing research for a further article.[3]

Information in Dispute

[6] There are three partially severed records in dispute. Two records are forms and the various fields in the form are filled-in with details of the incident. One form is called "Accident/Incident Report Form" and the other is called "Safety Investigation: In-Track, [code name]". The third record has no title and it appears to be a print-out from an electronic case management system.

[7] TransLink has provided the applicant with most of the information in the records, but is refusing to disclose the following:

- A one-sentence description of the deceased. The deceased's name and contact details are not recorded anywhere in the records.

[1] The s. 15(1)(l) information was TransLink's code name for the type of incident.
[2] For example, see: Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 39.
[3] Applicant's request for review.

- Descriptions of the deceased's actions and the incident.
- The time when various emergency officials arrived, departed or were notified.
- A one-word descriptor in a box titled "passenger injuries".
- The employee ID numbers for the TransLink employee who responded to the incident and completed the Accident/Incident Report Form and the supervisor who reviewed the form. The name and signature of the employee and the signature of the supervisor have already been disclosed to the applicant.
- The name and phone number of someone who witnessed the incident.
- TransLink conclusion about whether the incident was accidental or intentional and why it reached that conclusion.
- TransLink conclusion about whether drugs or alcohol were a factor and why it reached that conclusion.
- A partial sentence describing the track and front of train after the incident.

[8] For added clarity, the information that TransLink withheld under s. 15 is not information in dispute in this inquiry.

Public Interest, s. 25

[9] The applicant submits that TransLink should disclose the information in dispute pursuant to s. 25. Section 25 requires public bodies to proactively disclose information about a risk of significant harm or when disclosure is clearly in the public interest. Section 25 says:

> 25 (1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people, or
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
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> (2) Subsection (1) applies despite any other provision of this Act.
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> (3) Before disclosing information under subsection (1), the head of a public body must, if practicable, notify
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> (a) any third party to whom the information relates, and
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> (b) the commissioner.

[10] Section 25 imposes an obligation to disclose information even if there has been no request for the information. This obligation overrides every other section in FIPPA, including the mandatory exceptions to disclosure found in Part 2 and the privacy protections contained in Part 3. Given this broad override of privacy interests, the threshold for proactive disclosure under s. 25 is very high, and s. 25 only applies in the clearest and most serious situations.[4]

[11] The applicant does not say whether he relies on s. 25(1)(a) or s. 25(1)(b). However, his submissions address both sections, so I will consider each in turn.

Risk of significant harm, s. 25(1)(a)

[12] Section 25(1)(a) requires a public body to immediately disclose information about a risk of significant harm to the environment or to human health or safety. Former Commissioner Loukidelis said that determining whether s. 25(1)(a) applies is contextual and he provided the following non-exhaustive list of types of information that should be disclosed under s. 25(1)(a):

- Information that discloses the existence of the risk;
- Information that describes the nature of the risk and the nature and extent of any harm; and
- Information that allows the public to take action necessary to meet the risk or mitigate or avoid harm.[5]

[13] The applicant submits:

> Clearly, there is a risk for both sober and intoxicated citizens of standing too close to the platform edge at SkyTrain stations and there is a risk that citizens who are severely depressed will attempt suicide by SkyTrain.[6]
> …
> Not one platform on the entire system has a barrier to separate people and objects from trains. This means that every single minute of every single operating day, the public and staff are at risk of injury or fatality or at risk of witnessing an injury or fatality (and thus being a risk of mental illness).[7]
> …
> The obvious risk of danger to public health and safety can be prevented and mitigated by full disclosure of the public body's records about incidents of catastrophic injury and fatality. In order for the local citizenry to pressure government to take remedial action, all facts must be accessible to the public.[8]

[4] See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.
[5] Order 02-38, 2002 CanLII 42472 (BC IPC) at para. 56
[6] Applicant's submission at para. 34.
[7] Applicant's submission at para. 42.
[8] Applicant's submission at para. 44.

[14] TransLink says that to the extent that the applicant relies on s. 25(1)(a):

> There is no evidence in this case that the incident in question gives rise to a 'risk of significant harm' to the health or safety of the general public or a group of people. TransLink submits that it is evident from the small amount of information that has been severed that this was an isolated incident that did not give rise to risk to the public.[9]

[15] I find that the information in dispute in this case is about the tragic decision one individual made resulting in their own death. The information does not describe a broader risk to the health or safety of the public or a group of people or reveal details that would prevent a similar incident occurring to someone else. For instance, the information is not about track safety, barriers, mental health education or other means to prevent people from being hit by trains.

[16] I conclude that s. 25(1)(a) does not apply.

Clearly in the public interest, s. 25(1)(b)

[17] What constitutes "clearly in the public interest" is contextual and determined on a case-by-case basis. A public body must consider whether a disinterested and reasonable observer, knowing what the information is and knowing all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest.[10]

[18] The first question to answer when deciding if s. 25(1)(b) applies is whether the information concerns a matter that engages the public interest. One should consider if the matter is the subject of public debate or discussion by the media or the Legislature, for example, or if the matter relates to a systemic problem rather than to an isolated situation.

[19] If the information is about a matter that engages the public interest, the next question is whether the nature of the information at issue meets the high threshold for disclosure. The factors to consider include whether disclosure would:

- contribute to educating the public about the matter;
- contribute in a substantive way to the body of information that is already available;

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[9] TransLink's initial submission at para. 20.

[10] For the principles discussed here, see also OIPC Investigation Report F16-02 at pp. 26-27 (https://www.oipc.bc.ca/reports/investigation-reports/) and the OIPC guidance document titled "Section 25: The Duty to Warn and Disclose", December 2018 (https://www.oipc.bc.ca/resources/guidance-documents/).

- facilitate the expression of public opinion or allow the public to make informed political decisions; or
- contribute in a meaningful way to holding a public body accountable for its actions or decisions.

[20] The applicant says that "mental health has been one of the most debated and discussed public health topics of our time. The provincial government, in 2017, established a ministry about mental health and addictions."[11] He submits that disclosing the information would help educate the public, so "the first steps can be taken to a fulsome and informed public debate about funding for proper platform safety on Metro Vancouver's rapid transit system and for additional supports for vulnerable people in society."[12]

[21] The applicant also references several academics who have written about the costs of suicide on commuter rail in terms of the loss of human lives, driver and bystander trauma, and the delays of railway service and remedial actions to prevent suicide. One academic he cites encourages a measured and sensitive approach to communicating about incidents, rather than suppressing them.[13] The applicant also cites BC Coroners Service statistics about deaths on SkyTrain tracks and the estimated cost to provide barriers in all stations. He also references a series of news articles he personally wrote about the topic of SkyTrain suicides.

[22] TransLink submits:

> To the extent that the Applicant relies on s. 25(1)(b), the evidence does not establish that compelling disclosure of the personal information at issue is clearly (unmistakably) in the public interest. The fact that there was an isolated incident on the SkyTrain platform in 2015 is not sufficient to meet the high threshold required to mandate disclosure. To quote Order F16-50, the information at issue "does not approach that level of magnitude or broader public significance" that is required under s. 25(1)(b).
>
> The information which was disclosed in the response package confirms that there was an incident on the SkyTrain platform to which there was one witness. The information that has been severed speaks to observations concerning the individual involved and the actions that the individual had taken as well as the name and telephone number of the witness and the employee number of the individual who completed the Accident/Incident Report form. None of the information in the response package suggests

[11] At para. 20.
[12] Para 41.
[13] Karolina Krysinska and Diego De Leo in the *Australian and New Zealand Journal of Psychiatry* (2008); Prof. Brian Mishara, director of the Centre for Research and Intervention on Suicide and Euthanasia at the Université du Québec à Montréal; Prof. Patrick Sherry of the University of Denver, *Remedial Actions to Prevent Suicides on Commuter and Metro Rail Systems* (2016).

> that the incident was attributable in any way to TransLink's conduct to warrant public scrutiny: Order F09-18, [2009] B.C.I.P.C.D. No. 24 at paras. 11 - 13. It is difficult to understand how the disclosure of the names and other details of those involved and observations that were made of an isolated incident would contribute to the education of, or debate amongst, the public on an important topical issue or otherwise further public discourse, particularly as much of the information is highly sensitive in nature.[14]

[23] The applicant's evidence does not establish that the deceased's actions and death were the subject of public debate or discussion by the media, the Legislature, Officers of the Legislator or oversight bodies. However, his evidence about the media, academic and the BC Coroners Service writing about death and safety on commuter rail establishes that those topics are matters of public interest. However, I find that the information in dispute is not about those matters.

[24] The information in dispute is about the specifics of one person's tragic death, the identity of the person who witnessed the incident, and the basic and expected processes followed after the fact. The records and the information in dispute are not about the broader topic of suicide or commuter rail safety, and they do not contain information that discusses or examines the deceased's death as part of a larger systemic problem. I am not persuaded that disclosing this information would educate the public in any meaningful way about death and safety issues related to commuter rail or help the public express their political views and push for improvements in safety on TransLink, in the way the applicant suggests.

[25] I find that s. 25(1)(b) does not apply.

Third Party Personal Privacy, s. 22

[26] Section 22 requires public bodies to refuse to disclose personal information if its disclosure would be an unreasonable invasion of a third party's personal privacy.[15]

Personal information

[27] Section 22 only applies to personal information, so the first step in a s. 22 analysis is to determine if the information is personal information. FIPPA defines "personal information" as "recorded information about an identifiable individual other than contact information." Contact information is defined as "information to

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[14] TransLink's initial submission at paras. 21-22. TransLink makes the same points in its reply at p. 1.

[15] Schedule 1 of FIPPA says: "third party" in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than (a) the person who made the request, or (b) a public body.

enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual."[16]

[28] The information that TransLink is refusing to disclose under s. 22(1) is described above in paragraph 7. TransLink submits that the information withheld under s. 22(1) is personal information because it concerns the individual involved in the incident, a witness who observed it, and the employee who completed the Accident/Incident Report Form.[17]

[29] For the reasons that follow, I find that the information in dispute does not identify the deceased. The deceased's name and contact information do not appear anywhere in the records. Further, the description of the deceased is very general and could apply to many people using TransLink. I also considered whether one could accurately infer who the deceased is by combining the disputed information with the already-disclosed information or other available information. The parties submissions and evidence do not address whether this is possible, and it is not apparent to me that it would be. There is nothing to indicate that the deceased's identity and death have ever been widely or publicly known and discussed. I conclude that one could not accurately infer the deceased's identity by knowing the information at issue in this case. Therefore, I find that none of the information in dispute is the deceased's personal information.

[30] I also find that the information about when an official from a particular public body arrived and departed the scene is not personal information. The official is identified only by their job title, and it is publicly known that many individuals have the same job title. I find that one cannot determine the official's identity based on their job title even with the added context provided by the records.

[31] In addition, the partial sentence that describes the track and front of the train after the incident is not about any identifiable individual, so it is not personal information.

[32] However, I find that the ID numbers of the employee and supervisor are personal information. The employee's name and signature and the supervisor's signature have already been disclosed, so the information is about identifiable individuals.

[33] I also find that the name and phone number of the person who witnessed the incident is about an identifiable individual, so it is personal information as well.

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[16] See Schedule 1 of FIPPA for the definitions of personal information and contact information.
[17] TransLink's initial submission at para. 25.

Not an unreasonable invasion, s. 22(4)

[34] The second step in the s. 22 analysis is to determine if the personal information falls into any of the types of information listed in s. 22(4). If so, its disclosure is not an unreasonable invasion of third party personal privacy.

[35] TransLink says none of the factors enumerated in s. 22(4) apply in this case.

[36] The applicant says, "Under section 22(4), there is no unreasonable invasion of a third party's personal privacy if there are compelling circumstances affecting anyone's health or safety…. The most compelling circumstance is to prevent further incidents and save lives."[18] I understand this to be an argument that s. 22(4)(b) applies.

[37] Section 22(4)(b) says:

> (4) A disclosure of personal information is not an unreasonable Invasion of a third party's personal privacy if
> …
> (b) there are compelling circumstances affecting anyone's health or safety and notice of disclosure is mailed to the last known address of the third party,

[38] I agree with previous orders which have said that s. 22(4)(b) is not applicable or relevant in the context where a public body has refused to disclose personal information.[19] Section 22(4)(b) only applies when a public body has decided to disclose a third party's personal information and mailed a notice to the third party at their last known address. A public body relying on s. 22(4)(b) must also establish that there were compelling circumstances affecting someone's health or safety justifying the disclosure.

[39] I conclude that s. 22(4)(b) does not apply in the present case because TransLink did not disclose the third parties' personal information or mail a notice of disclosure to the third parties' last known address.

I also find that no other parts of s. 22(4) apply to the personal information in dispute.

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[18] Applicant's submission at paras. 38-39.
[19] Order F19-02, 2019 BCIPC 2 (CanLII) at paras 20-27; Order F20-37, 2020 BCIPC 43 (CanLII) at para. 92; Order F20-36, 2020 BCIPC 42 (CanLII) at paras. 63-64; Order F19-36, 2019 BCIPC 40 (CanLII) at paras. 84-85; Order F12-05, 2012 BCIPC 6 (CanLII) at para. 31.

Presumed unreasonable invasion of privacy, s 22(3)

[40] The third step in a s. 22 analysis is to determine whether s. 22(3) applies to the balance of the personal information. If so, disclosure is presumed to be an unreasonable invasion of the third party's personal privacy. TransLink submits that ss. 22(3)(a), (d) and (j) apply.[20] The applicant does not discuss s. 22(3) in his submission.

[41] Sections 22(3)(a), (d) and (j) say the following:

> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,
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> …
>
> (d) the personal information relates to employment, occupational or educational history,
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> …
>
> (j) the personal information consists of the third party's name, address, or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

[42] TransLink submits that s. 22(3)(a) applies to much of the withheld information, but it does not identify the specific information it means. TransLink cites Order F07-20, a case where the father of a man who committed suicide asked the Office of the Chief Coroner for a copy of his son's suicide note.[21] The adjudicator found that the suicide note shed light on the deceased's state of mind and related to his medical or psychological condition or history, so s. 22(3)(a) applied.

[43] The personal information in the present case is not the same as the information in Order F07-20. The personal information is two employee ID numbers and a witness' name and phone number. That personal information is not about anyone's medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation, and I find that s. 22(3)(a) does not apply.

[44] TransLink submits that s. 22(3)(d) applies to the employee ID numbers.[22] Previous OIPC orders have found that a person's employee number or other personal identifiers assigned to an employee may form part of their employment

[20] TransLink's submission at para. 28.
[21] Order F02-70, 2007 CanLII 52745 (BC IPC) at para. 16. The adjudicator found that the Coroner must refuse access to the suicide note under s. 22(1).
[22] TransLink's initial submission at para. 28.

history under s. 22(3)(d).[23] I make the same finding here. The employee ID numbers are a unique identifier which relate to the employees' employment.

[45] TransLink also submits that s. 22(3)(j) applies to the witness' name and telephone number, but it does not explain how the presumption would apply. There is nothing in the parties' submissions and evidence suggesting that the witness' name and phone number will be used for mailing lists or solicitations. Therefore, I find that s. 22(3)(j) does not apply.

Relevant circumstances, s. 22(2)

[46] The final step in the s. 22 analysis is to consider the impact of disclosure of the personal information in light of all relevant circumstances, including those listed in s. 22(2). The following parts of s. 22(2) play a role in this case:

> 22 (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
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> …
>
> (f) the personal information has been supplied in confidence,
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> …
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> (i) the information is about a deceased person and, if so, whether the length of time the person has been deceased indicates the disclosure is not an unreasonable invasion of the deceased person's personal privacy.

[47] I have considered s. 22(2)(a) and whether disclosure of the personal information is desirable for the purpose of subjecting the activities of TransLink or the government to public scrutiny. The applicant does not specifically reference any of the s. 22(2) circumstances, but his s. 25 submissions relate to s. 22(2)(a). He says that the "danger to public health and safety can be prevented and mitigated by full disclosure of the public body's records about incidents of catastrophic injury and fatality."[24] He submits that access to the information in dispute would help the public pressure the government to take stronger action to improve safety on TransLink.

[48] I am not persuaded that disclosing the personal information at issue here would assist the public in the way the applicant suggests. The witness' name and

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[23] Order F20-13, 2020 BCIPC 15 (CanLII) at para. 55; Order F14-41, 2014 BCIPC 44 (CanLII) at para. 46; Order F15-17, 2015 BCIPC 18 (CanLII) at para. 37; Order 03-21, 2003 CanLII 49195 (BCIPC) at paras. 25-26 and Order No. 161-1997, 1997 CanLII 1515 (BC IPC) at p. 5.
[24] At para. 44.

phone number and the employee ID numbers merely reveal who observed the incident or was involved afterwards. It shines no light on TransLink's and the government's design or implementation of safety protocols. Therefore, I find that this factor does not weigh in favour of disclosure of the personal information.

[49] I have also considered s. 22(2)(f) and whether the witness provided their name and phone number in confidence. The applicant and TransLink do not address this in their submissions and there is no evidence that this personal information was expressly supplied to TransLink in confidence. However, I find it reasonable to conclude that the witness would have expected, given the context, that they were providing their personal details to TransLink for the sole purpose of officials investigating the incident. There is nothing to suggest that the witness would have expected or agreed to TransLink recording or disclosing their name and phone number for any other purpose. In my view, the context in which the witness provided their name and phone number weighs strongly against disclosure to the applicant.

[50] TransLink submits that s. 22(2)(i) applies because the incident occurred less than five years ago, so insufficient time has elapsed to justify disclosure.[25] The applicant submits that the public should not have to wait 20 years before the information is disclosed.[26]

[51] I find that s. 22(2)(i) does not apply in this case because none of the personal information is about the deceased. The personal information is two employee ID numbers and the witness' name and phone number.

[52] In addition, I conclude that none of the other s. 22(2) circumstances are relevant considerations in this case.

Summary, s. 22

[53] I find that only some of the information TransLink withheld under s. 22(1) is about identifiable individuals and qualifies as personal information. The personal information is two TransLink employee ID numbers and a witness' name and phone number. Section 22(4) does not apply to any of the personal information.

[54] I find that the s. 22(3)(d) presumption against disclosure applies to the employee ID numbers, and there are no relevant circumstances that weigh in favour of disclosure. Therefore, I find that the presumption has not been rebutted

[25] TransLink's initial submission at paras. 30-31. TransLink cites Order F18-08, 2018 BCIPC 10 which addressed s. 22(2)(i) in the context an individual's request for access to her deceased husband's hospital discharge summaries. The adjudicator said that 16 years was insufficient time to diminish the deceased's privacy rights.
[26] Applicant's submission at paras. 40-41.

and s. 22(1) applies. Disclosing the employee ID numbers would be an unreasonable invasion of the employees' personal privacy.

[55] I conclude that none of the s. 22(3) presumptions apply to the witness' name and phone number. However, there are no relevant circumstances, including s. 22(2)(a), that weigh in favour of disclosing that information to the applicant. I also find that the context in which the witness supplied these personal contact details to TransLink weighs strongly against its disclosure. I conclude that disclosing the witness' name and phone number would be an unreasonable invasion of the witness' personal privacy, so s. 22(1) applies.

[56] In conclusion, the only information that TransLink must refuse to disclose under s. 22(1) is the two employee ID numbers and the witness name and phone number, all of which are in the Accident/Incident Report.

CONCLUSION

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

1. I confirm TransLink's decision that it is not required to disclose the information in dispute under s. 25(1)(a) or (b).

2. I confirm, in part, TransLink's decision to refuse to disclose information under s. 22(1). TransLink must refuse to disclose the two employee ID numbers and the witness's name and phone number in the Accident/Incident Report under s. 22(1).

3. TransLink is required to disclose the balance of the information in dispute to the applicant.

4. TransLink must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records it provides to the applicant.

Pursuant to s. 59(1) of FIPPA, TransLink is required to comply with this order by December 30, 2020.

November 16, 2020

ORIGINAL SIGNED BY

Elizabeth Barker, Director of Adjudication

OIPC File No.: F15-63069