



Order F22-63

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

Emily Kraft
Adjudicator

November 30, 2022

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Summary: A journalist made a request under the *Freedom of Information and Protection of Privacy Act* (FIPPA) to TransLink for access to records about Surrey light rail transit. TransLink withheld the information in dispute in this inquiry under s. 17(1) (harm to financial or economic interests). The adjudicator found that s. 17(1) applied to a small amount of information in dispute and ordered TransLink to disclose the information it was not authorized to withhold under s. 17(1).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c 165, ss. 17(1), 17(1)(b), 17(1)(e), 17(1)(f).

INTRODUCTION

[1] The applicant, who is a journalist, requested that the South Coast British Columbia Transportation Authority (TransLink) provide him with access to reports about Surrey light rail transit. In response, TransLink provided the applicant with 334 pages of responsive records but withheld some information under ss. 13 (advice or recommendations) and 17 (harm to financial or economic interests) of the *Freedom of Information and Protection of Privacy Act* (FIPPA).

[2] The applicant asked the Office of the Information and Privacy Commissioner (OIPC) to review TransLink's decision. Mediation by the OIPC did not resolve the matter and it proceeded to this inquiry.

[3] During the inquiry, TransLink reconsidered its severing decision and disclosed additional information to the applicant. Also, in its initial submission, TransLink explains that it is no longer relying on s. 13 to withhold the remaining information in dispute. Instead, it is only refusing access to that information under s. 17. As a result, s. 13 is no longer an issue in this inquiry.

[4] TransLink also mentions in its initial submission that it relied on s. 22 to withhold a small amount of information in the responsive records, although that was not listed as an issue in the OIPC investigator's fact report or notice of inquiry. However, TransLink goes on to say that it has abandoned reliance on s. 22. I understand that it has disclosed the information it withheld under s. 22 to the applicant. Therefore, s. 22 is not an issue in this inquiry.

ISSUE

[5] The issue to be decided in this inquiry is whether TransLink is authorized to refuse to disclose the information in dispute under s. 17(1) of FIPPA.

[6] Under s. 57(1), TransLink has the burden of proving that the applicant has no right of access to the information it withheld under s. 17(1).

DISCUSSION

Background

[7] TransLink is Metro Vancouver's regional transportation authority.

[8] In 2014, TransLink announced plans to build a light rail transit (LRT) network in the Surrey area. The network would consist of the Surrey-Newton-Guilford (SNG) line, operating along two routes connecting Surrey City Centre with Newton and Guilford town centres, and the Surrey-Langley line, operating along the Fraser Highway connecting Surrey City Centre with Langley City.

[9] Technical planning of the LRT network began in 2015. The work was to be carried out in two phases: the first phase would include construction and implementation of the SNG line (SNG Project), followed by the Surrey-Langley line in phase two.

[10] A business case for the SNG Project was scheduled to be submitted to the BC Treasury Board in the fall of 2017. To support approval of the project, the transportation consulting firms of Steer Davies Gleave (SDG), Hatch Mott MacDonald (Hatch), and Stantec were retained to prepare a series of reports regarding the project, including its design, scope, costs, and benefits, for presentation to the BC Treasury Board.

[11] The SNG Project received government approval in March 2018. However, in November 2018, the project was suspended in favour of extending the existing SkyTrain line to Langley. The project remains on hold.¹

¹ The information in this background section comes from TransLink's initial submission at paras 3 and 12-18.

Information at issue

[12] The information at issue is contained in one of the above-mentioned reports prepared for presentation to the BC Treasury Board. The report, titled “South of Fraser Rapid Transit, Preliminary Capital Cost Estimates” (Report),² outlines the scope and provides cost estimates for the SNG Project.

[13] The Report presents separate cost estimates for the construction and implementation of each route of the SNG line. It provides the total cost estimate for each route as well as a breakdown of each estimate. The breakdowns include amounts for a number of broad categories of costs, including property, roadwork, trackwork, design, project management, and contingencies. TransLink disclosed the total cost estimates, but withheld the cost breakdown information.

[14] TransLink also withheld the following information:

- Borrowing rates³ and inflation rates⁴ assumed in the estimates.
- Insurance and bonding costs included in the estimates (based on a percentage of the total costs).⁵
- Inflation rate and contingency percentage included in the estimates for property costs.⁶
- Total contingency percentage included in the estimates.⁷
- Allowances for:
 - public art;⁸
 - maintenance equipment and non-revenue service vehicles;⁹
 - a BC Hydro power upgrade;¹⁰
 - a procurement stipend to be paid to two unsuccessful proponents submitting proposals to design and construct the project;¹¹
 - design services (based on a percentage of the stop construction costs and remaining costs);¹² and
 - construction management services (based on a percentage of the construction costs).¹³

² The Report was prepared by Anthony Steadman and Associates with technical support from SDG, Hatch, and Stantec.

³ Records at p 296.

⁴ Records at p 290.

⁵ Records at p 296.

⁶ Records at p 295.

⁷ Records at p 296.

⁸ Records at p 293.

⁹ Records at p 293.

¹⁰ Records at p 294.

¹¹ Records at p 296.

¹² Records at p 295.

¹³ Records at p 295.

Section 17(1)

[15] 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 or the government of British Columbia.

[16] Subsections 17(1)(a) to (f) are examples of information that, if disclosed, could result in harm under s. 17(1).¹⁴ Subsections 17(1)(a) to (f) are not stand alone provisions, and even if information fits within those subsections, a public body must also prove that disclosure of that information could reasonably be expected to harm the financial or economic interest of a public body or the government of British Columbia or the ability of that government to manage the economy.¹⁵

[17] TransLink says that disclosing the withheld information “could reasonably be expected to harm TransLink financially as well as harm its negotiating position: s. 17(1)(b) and (e).”¹⁶ Although TransLink says it is relying on ss. 17(1)(b) and (e), some of what it submits relates to s. 17(1)(f), so I will consider that subsection as well. Therefore, in this case, the relevant portions of s. 17(1) are as follows:

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:

...

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;

...

(e) information about negotiations carried on by or for a public body or the government of British Columbia;

(f) information the disclosure of which could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia.

¹⁴ Order F19-03, 2019 BCIPC 4 at para 22.

¹⁵ Order F19-03, 2019 BCIPC 4 (CanLII) at paras 22-23; Order F20-56, 2020 BCIPC 65 (CanLII) at para 35.

¹⁶ TransLink’s initial submission at para 45.

[18] Information that does not fit under subsections (a) to (f) may still fall under the opening words of s. 17(1) as information that, if disclosed, 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.¹⁷

[19] The standard of proof for s. 17(1) is a reasonable expectation of probable harm, which is “a middle ground between that which is probable and that which is merely possible.”¹⁸ In order to meet that standard, a public body “must provide evidence ‘well beyond’ or ‘considerably above’ a mere possibility of harm.”¹⁹ The evidence must be detailed enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.²⁰

[20] A public body must also demonstrate that the release of the information itself would give rise to a reasonable expectation of harm.²¹ There must be a clear and direct connection between the disclosure of information and the harm that is alleged.²²

TransLink’s initial submission

[21] TransLink says that disclosure of the withheld information would reveal how it calculates its estimates and budgets for many types of projects. It says that access to this information would allow proponents bidding on future projects to “reconstruct the way in which TransLink devises its budgeting” with relative accuracy, giving them an advantage in future negotiations.²³ It says that the release of the withheld information could therefore reasonably be expected to harm it financially as well as harm its negotiating position under ss. 17(1)(b) and (e).²⁴

[22] TransLink says that the means or methods it uses to construct cost estimates have not changed since 2017 and 2018 and they are still used today.²⁵ It provides affidavit evidence from its vice president of engineering who says that, while the Report is somewhat dated, the valuations, contingency amounts,

¹⁷ Order F14-31, 2014 BCIPC 34 (CanLII) at para. 41.

¹⁸ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para 54.

¹⁹ *Ibid* at para 54.

²⁰ Order 02-50, 2002 CanLII 42486 (BCIPC) at para 137.

²¹ *British Columbia (Minister of Citizens’ Services) v British Columbia (Information and Privacy Commissioner)*, 2012 BCSC 875 at para 43.

²² Order F19-10, 2019 BCIPC 12 (CanLII) at para 31; Order F07-15, 2007 CanLII 35476 (BCIPC) at para 17.

²³ TransLink’s initial submission at paras 43-44.

²⁴ TransLink’s initial submission at para 45.

²⁵ September 16, 2022 email from JB.

stipend amounts, inflation percentages, borrowing rate percentages and allowance amounts “remain valid and are used by TransLink.”²⁶

[23] Regarding the inflation rates assumed in the estimate, TransLink says that it seeks to pass the risk of inflation to contractors, so if that information is disclosed, “the competitiveness of the response by future proponents” would be compromised.²⁷

[24] TransLink also says that if the inflation rate and contingency percentage included in the property cost estimates are disclosed, property owners would know the upper limit that TransLink would be prepared to pay for their properties. As a result, property owners would inflate their sale prices to TransLink’s upper limit, increasing its costs.²⁸

[25] TransLink says that, given the way the information is presented in the Report and that all but a small amount of information has been disclosed, if any of the withheld information is released it would reveal how TransLink calculates its cost estimates.²⁹

Applicant’s response submission

[26] The applicant says that the supply chain challenges and rising inflation following the COVID-19 pandemic have “rendered the 2017 and 2018 estimates obsolete.”³⁰ He says that no harm exists and the information in dispute must be disclosed.³¹

[27] He also cites Order F14-37, where the adjudicator found that s. 17(1)(f) did not apply to cost estimate information about a proposed project. In that case, the public body argued that disclosing cost estimates for a particular project would result in biased and unfair bids in a future request for proposal process for that project. The adjudicator rejected the public body’s argument, saying that any request for proposal process is inherently competitive, so cost estimate information would not preclude bidders from submitting their most competitive bids.³²

TransLink’s reply submission

[28] In reply, TransLink reiterates that the withheld information reveals *how* it constructs its estimates, which is the concern, not the actual estimates

²⁶ Affidavit of JB at para 34.

²⁷ TransLink’s initial submission at para 37.

²⁸ TransLink’s initial submission at para 38.

²⁹ TransLink’s initial submission at para 43.

³⁰ Applicant’s response submission at para 2.

³¹ Applicant’s response submission at para 3.

³² Applicant’s response submission at para 8, citing Order F14-37, 2014 BCIPC 40 at para 31.

themselves. It says that, since it still uses the same approach to the construction of cost estimates, the passage of time is irrelevant.³³ It also submits that Order F14-37 is distinguishable because it involved the application of s. 17(1) to cost estimates as opposed to the methods used to construct those estimates.

[29] TransLink also adds that some of the withheld information reveals elements of project costs that will not be subject to a competitive tender process, for instance, property costs.³⁴

Analysis and findings

Section 17(1)(b) – information that has monetary value

[30] TransLink submits that the release of the withheld information could reasonably be expected to cause it financial harm under s. 17(1)(b) but it does not say anything further about how it applies.³⁵

[31] Section 17(1)(b) is engaged where three criteria are established:

1. The information falls into the category of financial, commercial, scientific or technical information;
2. The information belongs to a public body or the government of British Columbia; and
3. The information has, or is reasonably likely to have, monetary value.³⁶

[32] Even if the information fits within s. 17(1)(b), TransLink must also prove the harm described in the opening words of s. 17(1).

Is the information financial, commercial, scientific or technical information?

[33] Previous orders have said that “financial information” relates to prices charged for goods and services, assets, liabilities, expenses, cash flow, profit and loss data, operating costs, financial resources or arrangements.³⁷

[34] I accept that the withheld information, that is, dollar figures and percentages associated with certain cost estimates, qualifies as financial information.

³³ TransLink’s reply submission at para 1.

³⁴ TransLink’s reply submission at para 3.

³⁵ TransLink’s initial submission at para 45.

³⁶ Order F11-25, 2011 BCIPC 31 at para 30.

³⁷ Order F22-35, 2022 BCIPC 39 at para 82.

Does the information belong to TransLink?

[35] The words “belongs to” in s. 17(1)(b) equate to ownership.³⁸

[36] Since the financial information was prepared for TransLink by the external transportation consulting firms that it retained, I accept that it belongs to TransLink for the purposes of s. 17(1)(b).

Does the information have monetary value?

[37] Previous orders have said that for information to have monetary value in the context of s. 17(1)(b), there must be a reasonable likelihood of independent monetary value in the information concerned.³⁹

[38] It is not apparent how the withheld information has independent monetary value. In the absence of any explanation, I am unable to conclude that the information has or is reasonably likely to have monetary value.

[39] As a result, I find that s. 17(1)(b) does not apply to the withheld information.

Section 17(1)(e) – information about negotiations

[40] TransLink cites s. 17(1)(e) in its submissions but does not explain how it applies.

[41] Previous orders have interpreted the phrase “information about negotiations” under s. 17(1)(e) as information that reveals negotiating analysis, strategies, options, positions, criteria, objectives, or other similar information.⁴⁰ Information that is compiled *for the purpose* of negotiations, or information that, if disclosed, may *affect* negotiations is not necessarily information *about* negotiations for the purposes of s. 17(1)(e).⁴¹

[42] The information in dispute here is cost estimate information about the SNG Project prepared for presentation to the BC Treasury Board. TransLink does not say, and it is not apparent from the records, that the information is linked to any actual negotiations carried on by or for TransLink or the provincial government. In my view, it is not “information about negotiations” for the purposes of s. 17(1)(e).⁴²

³⁸ Order F07-06, 2007 CanLII 9597 at para 18.

³⁹ See for example Order F15-58, 2015 BCIPC 61 at para 33.

⁴⁰ See for example Order F21-56, 2021 BCIPC 65 at para 47.

⁴¹ Order 00-39, 2000 CanLII 14404 (BCIPC) at pp 10-11.

⁴² For a similar finding, see Order F21-56, 2021 BCIPC 65 at paras 46-49.

[43] As a result, I find that s. 17(1)(e) does not apply to any of the withheld information.

Section 17(1)(f) – harm to negotiating position

[44] Previous orders have found that s. 17(1)(f) applies to information that reveals valuable information or a key aspect of a public body's negotiating position that could give another party a negotiating advantage to the detriment of the public body's financial interests or otherwise harm a public body's financial interests.⁴³

[45] TransLink says that if the withheld information is disclosed, it would allow proponents to reconstruct the way TransLink develops its budgets for other projects, giving proponents an advantage to TransLink's detriment in future unspecified negotiations.

[46] For the reasons that follow, with one exception that I will discuss below, I am not satisfied that the information in dispute could reasonably be expected to harm TransLink's negotiating position or financial or economic interests for the purposes of ss. 17(1)(f) and 17(1).

[47] First, I am not persuaded that the information in dispute would allow future proponents to reconstruct the way TransLink develops its budgets. Most of the withheld information is dollar estimates for a number of broad categories of costs and allowances. Since these estimates are specific to the SNG Project, it is not apparent how they would provide proponents with any insight into TransLink's budgets or estimates for future projects, and TransLink does not adequately explain.

[48] I recognize that the allowances for a few items are calculated based on a percentage of the estimated construction costs or total costs. For instance, the allowances for construction management services are calculated based on a percentage of the estimated construction costs. I accept that disclosing those percentages would reveal how TransLink develops its allowances for those particular items. However, I do not see, and TransLink does not explain, how proponents could use that limited information to reconstruct, with any accuracy, the way TransLink develops its budgets.

[49] Second, even if disclosure of the withheld information would allow proponents to reconstruct the way TransLink develops its budgets, TransLink has not sufficiently explained how that could reasonably be expected to harm its negotiating position.

⁴³ Order F22-35, 2022 BCIPC 39 at para 85.

[50] TransLink submits that disclosure of the withheld information would give proponents an advantage during future procurement processes and negotiations, compromising TransLink's ability to reach favourable agreements.⁴⁴ However, it provides no further information to support this assertion. For instance, it does not explain the type of agreements it is concerned about negotiating or the level of competition in its procurement processes. Further, it does not explain how disclosure of the withheld information could reasonably be expected to harm its financial or economic interests. Given the lack of information, I am not persuaded that there is a clear and direct connection between disclosure of the information in dispute and the harm TransLink alleges.

[51] TransLink cites Orders F20-38,⁴⁵ F18-51,⁴⁶ F10-34,⁴⁷ and 03-35⁴⁸ to support its position that ss. 17(1)(f) and/or 17(1) apply to the information in dispute. In those cases, the adjudicators had detailed submissions and evidence that provided important background information and examples of how specific harms could reasonably be expected to occur. I do not have that kind of detailed evidence or argument here. Without more information, those orders do not persuade me that ss. 17(1)(f) or 17(1) should apply to most of the withheld information in this case.

[52] However, as I will explain below, I am satisfied that disclosing a small amount of information related to property cost estimates on page 295 of the records could reasonably be expected to harm TransLink's negotiating position and financial interests under ss. 17(1)(f) and 17(1).

[53] TransLink says that if the inflation rate and contingency percentage included in the property cost estimates are disclosed, property owners who TransLink negotiates with would be advantaged because they would know the upper limit TransLink is prepared to pay for their properties. As a result, property owners would inflate their sale prices, driving up TransLink's costs.

[54] In my view, the inflation rate and contingency percentage included in the property cost estimates would not reveal the exact upper limit that TransLink is prepared to pay for any given property, but it would allow property owners to estimate the upper limit with enough accuracy that TransLink would be at a disadvantage in future negotiations with property owners. I accept that property owners would use this information to negotiate higher sale prices closer to TransLink's upper limit. This could reasonably be expected to harm TransLink's financial interests by increasing the amount of money it will need to spend to acquire properties. Therefore, I am satisfied that ss. 17(1)(f) and 17(1) apply to

⁴⁴ TransLink's initial submission at paras 36 and 43.

⁴⁵ Order F20-38, 2020 BCIPC 44.

⁴⁶ Order F18-51, 2018 BCIPC 55.

⁴⁷ Order F10-34, 2010 BCIPC 50.

⁴⁸ Order 03-35, 2003 CanLII 49214 (BCIPC).

the inflation rate and contingency percentage included in the property cost estimates.

[55] I have considered whether disclosing the actual property cost estimates would reveal the inflation rate and contingency percentage, and, in my view, there is not enough information about the properties in question to allow a reader to infer that information. Therefore, ss. 17(1)(f) and 17(1) do not apply to the actual property cost estimates.

[56] In conclusion, with the exception of the inflation rate and contingency percentage included in the property cost estimates on page 295, I find that there is insufficient evidence to establish that disclosure of the information in dispute could reasonably be expected to harm TransLink's financial or economic interests under s. 17(1).

[57] Therefore, with the exception of the severed information on page 295, described above, TransLink is not authorized under ss. 17(1), 17(1)(b), 17(1)(e), or 17(1)(f) to withhold the information in dispute.

CONCLUSION

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

1. Subject to item 2 below, I confirm, in part, TransLink's decision to refuse to disclose the information in dispute under ss. 17(1) and 17(1)(f).
2. TransLink is not authorized under ss. 17(1), 17(1)(b), 17(1)(e), or 17(1)(f) to refuse to disclose the information I have highlighted in the copy of the records provided to TransLink with this order.
3. I require TransLink to give the applicant access to the highlighted information described in item 2 above.
4. TransLink must concurrently copy the OIPC registrar of inquiries on its cover letter to the applicant, together with a copy of the records described at item 3 above.

[59] Pursuant to s. 59(1) of FIPPA, the public body is required to comply with this order by **January 12, 2023**.

November 30, 2022

ORIGINAL SIGNED BY

Emily Kraft, Adjudicator

OIPC File No.: F17-72347