



Order F23-55

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

Jay Fedorak
Adjudicator

July 20, 2023

CanLII Cite: 2023 BCIPC 64
Quicklaw Cite: [2023] B.C.I.P.C.D. No. 64

Summary: A complainant made 13 requests for video images of himself on transit vehicles from TransLink. TransLink responded denying access citing s. 6(2) of the *Freedom of Information and Protection of Privacy Act* (FIPPA). The adjudicator found that the recorded images stored on TransLink’s CCTV system were records as defined in Schedule 1 of FIPPA. He found that TransLink had incorrectly applied s. 6(2) and failed to meet its obligations under s. 6(1). He also found that FIPPA required TransLink to make every reasonable effort to retain copies of records responsive to requests until the complainant had exhausted all avenues of review. The adjudicator confirmed that TransLink’s responses to the complainant did not contravene ss. 8(1) or 9.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSBC 1996 c. 165, ss. 6(1), 6(2), 8(1) and 9.

INTRODUCTION

[1] This inquiry is about whether TransLink has complied with its duty under s.6 of the *Freedom of Information and Protection of Privacy Act* (FIPPA) to respond openly, accurately, completely and without delay to access requests and whether it responded properly in accordance with ss. 8 and 9 of FIPPA.

[2] Over the course of eight months, an individual (complainant) made 13 requests to TransLink for video images of himself on transit vehicles. TransLink responded that it would only process two of his requests at a time because processing more than that would unreasonably interfere with its operations. It cited s. 6(2) as justification for its refusal to process the requests.

[3] The complainant complained to the Office of the Information and Privacy Commissioner (OIPC) that TransLink had not responded to his 13 requests appropriately. During mediation, TransLink revealed that it had not saved the video images responsive to these requests and its CCTV system had overwritten them all.

[4] Mediation failed to resolve the matter and the complainant requested that it proceed to an inquiry.

ISSUE

[5] The issues to be decided in this inquiry are as follows:

1. Whether the video footage on the public body's transit vehicles requested by the complainant constitutes a record as defined by Schedule 1.
2. Whether TransLink responded openly, accurately and completely and without delay to the complainant's requests in accordance with s. 6(1).
3. Whether giving the complainant access to the requested video footage requires creating a record under s. 6(2) of FIPPA, and if it does, whether the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and whether creating the record would unreasonably interfere with the operations of the public body.
4. Whether TransLink responded to the complainant's requests in accordance with s. 8.
5. Whether TransLink responded to the complainant's requests in accordance with s. 9.
6. Whether FIPPA requires TransLink to retain a requested record, including video footage, until TransLink has fulfilled all its duties under Part 2 of FIPPA and any request for review or complaint has concluded under Part 5.

[6] FIPPA does not set out the burden with regards to ss. 6, 8 and 9. Past orders have found that the burden is on the public body to show that it has performed its duties.¹

DISCUSSION

[7] **Background** – The complainant has made many requests over the last five years for access to video recordings that the TransLink CCTV system has captured of him on buses and SkyTrains and at stops and platforms. The 13

¹ Order F20-13, 2020 BCIPC 15 (CanLII), para 13, for example.

requests that are the subject of this complaint involve CCTV recordings of the complainant.

[8] According to TransLink, it installed a CCTV and audio recording system on its buses in 2009 for the purpose of:

- improving safety and security of its passengers and drivers against acts of terrorism or violence; and
- assisting in the investigation of claims, accidents, on-board incidents and fare disputes.²

[9] TransLink states that the outward facing cameras on its buses also assist the police in investigating motor vehicle accidents and other incidents within view of the bus. It has installed cameras on 1,700 buses: six cameras per regular bus and eight per articulated bus. Combined these constitute more than 10,000 cameras. The cameras are positioned to record the front of the bus, the doors and the interiors. A digital video recorder on the bus records visual images and audio and retains them for seven days, after which they are overwritten. Buses also contain microphones for recording conversations in the vicinity of the driver. Each SkyTrain car has four inward facing cameras.³

[10] TransLink has made two applications for relief from responding to the complainant's requests under s. 43. The adjudicators in both cases denied TransLink the requested relief, most recently Order F23-37.⁴ Several months before TransLink made the application that resulted in Order F23-37, it was already refusing, without the OIPC's approval, to process more than two of the complainant's requests at a time, citing s. 6(2) as justification for not processing the complainant's other requests.

[11] As TransLink destroys all audio and video recordings collected by its surveillance system after seven days, it acknowledges that it no longer has the originals or copies of any of the recordings for the 13 requests subject to this inquiry.

1. *Does the video footage constitute a "record" under Schedule 1 of FIPPA?*

[12] Schedule 1 of FIPPA defines a "record" as follows:

includes books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records;

² TransLink's initial submission, para. 18.

³ TransLink's initial submission, para. 15.

⁴ F17-36, 2017 BCIPC 40 (CanLII); F23-37, 2023 BCIPC 44 (CanLII).

[13] TransLink accepts that the video footage that its CCTV system captures (what it describes as the “raw data”) is a record for the purposes of Schedule 1. Nevertheless, it takes the position that this raw data is not responsive to the complainant’s requests and that records responsive to the complainant’s requests do not exist until TransLink manipulates the raw data to create a new record. It argues as follows:

Responsive records to the Complainant’s various video footage access requests do not exist until they are created using a machine readable record by searching for video footage, reviewing that footage (which typically involves reviewing several cameras) to search for the information requested, manipulating that information and blurring the identities of third parties to create the requested record.

The video footage – the raw data – is not, and cannot be, handed over to an access requester. The raw data needs to be pulled from TransLink’s server as a first step to creating the requested record. The raw data must be manually adjusted to reconcile it with the information requested in a way that does not interfere with TransLink’s FIPPA obligations to produce a product that combines videos which are all responsive relating to a particular request.⁵

[14] TransLink argues that the requested records do not exist until its employees access the video footage that all relevant cameras have collected and then combine them together in a particular format to make them available to the complainant.

[15] TransLink describes the process for accessing images from its CCTV system as follows. Each bus contains cameras and a digital video recorder (DVR). The DVR stores images while the bus is running. Skytrain vehicles also contain cameras and a recorder. Skytrain platforms contain cameras. To view footage from the CCTV system requires connecting to the bus DVR or Skytrain recorder and transferring the images to a TransLink server and then to a particular computer. TransLink does not explain how it obtains access to images from the Skytrain platforms. The images will include all footage from the four to nine cameras on the bus or Skytrain car.

[16] TransLink uses a software program to review the images, identify the requested footage and save it to an electronic folder. To make the images available to the requester, TransLink converts the images to a video clip. When law enforcement officials request access to the images, they receive the images without masking the images of individuals. When an individual makes a request under FIPPA, TransLink uses masking software to conceal the identities of third parties.

⁵ TransLink’s initial submission, paras. 5-6.

[17] The complainant does not address the question as to whether the video footage constitutes a record.

Analysis

[18] In this case, I must decide whether the requested records (video footage of the complainant on the TransLink CCTV system) meet the definition of “any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means.”

[19] It is clear to me that TransLink is recording the images of the complainant using its vehicle and platform cameras. It stores these images on a DVR or other recording device. These recordings meet the definition of a “record” for the purposes of FIPPA. These recording devices are things on which information is stored by electronic means. Therefore, the images constitute information stored on such a thing, which meets the definition of records.

[20] That TransLink must transfer the images from the recording devices to a file format to enable an individual to view the images does not mean that the images do not exist prior to the transfer. The images may change formats, but the records exist at the time the cameras capture the images and store them on the recording devices. The complainant has not requested the records in any specific formats. He has requested video images. Having selected a CCTV system that involves the transfer and manipulation of images, does not give TransLink the authority under FIPPA to determine that those images do not constitute responsive records. It would defeat the purpose of FIPPA if public bodies could use technology as an excuse to avoid their responsibilities.

[21] It is important to note that the purpose of the CCTV system is to capture images of transit users for viewing later. I find it misleading for TransLink to argue that these recordings of images are not records responsive to the complainant’s requests. It is plain and obvious that obtaining access to any electronic records requires the use of a device or software program to translate the raw electronic code in which the record is stored to a format that is intelligible to a viewer. This merely constitutes the changing of the format of an existing record. The same process applies to most records subject to access requests. Public bodies must scan paper records into a pdf format to disclose them electronically. Email records are stored on servers in an electronic code format that must be converted by email software programs to make them visible to the viewer. This does not mean that the records do not exist until the public body produces them for disclosure.

[22] Therefore, I find that the images responsive to the complainant’s requests are records for the purposes of FIPPA as soon as those images are captured on the cameras and stored in the recording devices.

2. *Did TransLink respond openly, accurately and completely and without delay to the complainant's requests in accordance with s. 6(1)?*

[23] Section 6(1) reads as follows:

The head of a public body must make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely.

[24] Section 6(1) imposes several obligations on a public body. The first is to respond without delay. I have reviewed all of TransLink's responses to the complainant's 13 requests. TransLink responded to each request within the 30 days that FIPPA requires. In many cases, TransLink responded within a few days. Therefore, I find that TransLink met its responsibility to respond without delay.

[25] Section 6(1) requires TransLink to respond openly, accurately and completely. This means that the response must be transparent and respond with respect to all the requested records. The response must also accurately identify all responsive records and must comply accurately with the requirements of FIPPA. Under s. 4, an applicant has a right of access to any record in the custody or under the control of a public body.

[26] TransLink responded to the first three requests as follows:

Pursuant to s. 6(2)(b) of the Freedom of Information & Protection of Privacy Act, we are unable to process this volume of requests from you without significant disruption to our operations. It's extremely challenging to deal with the requests already queued, so any new requests must be refused until those are completed. We are, therefore, unable to open and process these three (3) new requests.

As indicated in my recent email, we are prepared to open a maximum of two (2) new requests from you per calendar month, which is feasible. We expect to have all of your outstanding requests completed, and should be in a position to accept new requests from you after March 1st.⁶

[27] TransLink responded to all subsequent requests as follows:

As indicated in [the] email to you of January 25, 2022, until we have completed your active requests, we are unable to process this new request without considerable disruption to our operations, and must – therefore – refuse this request under s. 6(2)(b) of the Freedom of Information & Protection of Privacy Act.

⁶ OIPC Investigator's Fact Report, para. 2.

[28] These responses address all the records responsive to the complainant's requests. They also provide a true account of the reasons for TransLink's actions or failures to act. In this sense, I find the response of TransLink to be open.

[29] There is an issue, however, with the accuracy of the response. TransLink has cited s. 6(2) as requiring it to refuse to disclose the records responsive to this request. It is clearly inaccurate to state that s. 6(2) grants TransLink the authority to refuse to disclose records. Section 6(2) imposes additional obligations on public bodies to create certain types of records that do not already exist. I have found above that the requested records do already exist. There is no need for TransLink to create records. Therefore, as I will explain in greater detail below, s. 6(2) does not apply.

[30] There is no other provision in FIPPA, except s. 43, that permits a public body to refuse to respond to a request or group of requests on the grounds that responding would cause a disruption to the public body's operations. As I noted above, adjudicators have refused to provide TransLink with relief under s. 43 from responding to the complainant's requests. Moreover, there is no provision in FIPPA that authorizes a public body to refuse to process more than a certain number of requests from an applicant over a certain period.

[31] Therefore, I find that the responses of TransLink to the complainant's requests were not accurate in accordance with s. 6(1).

[32] As I have found that responsive records existed and the justification for denying access was incorrect, I find that TransLink should have provided the complainant with access to the records. As it failed to provide any records, I find that its responses were not complete in accordance with s. 6(1).

[33] Therefore, I find that TransLink's responses to the requests at issue contravened s. 6(1).

3. *Would giving the complainant's access to the requested video footage require creating a record under s. 6(2) of FIPPA, and if it does, whether the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and whether creating the record would unreasonably interfere with the operations of the public body?*

[35] Section 6(2) provides further requirements that builds on the obligations imposed by s. 6(1) and reads as follows:

- 6(2) Moreover, the head of a public body must create for an applicant a record to which section 4 gives a right of access if

- (a) the record can be created from a machine readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise, and
- (b) creating the record would not unreasonably interfere with the operations of the public body.

[36] TransLink takes the following approach to interpreting ss. 6(1) and 6(2). It argues:

TransLink accepts that any video footage that is captured on TransLink's buses, SkyTrains or in or around the Seabus terminals is a "record" as defined by Schedule 1. It also accepts that the time-limited video footage is a "machine readable record" for purposes of section 6(2)(a)

What TransLink does not accept is that the video footage itself (the raw data), absent the types of manipulations and collation of information as described above, constitutes a record that is responsive to the Complainant's video access requests. In other words, the fact that video footage from multiple cameras or multiple vantage points inside and/or outside a vehicle or on or around a platform exists for seven days does not exclude the idea that a responsive record can be created from a machine-readable record (the video footage) such that section 6(2) and its application is triggered, which is what TransLink says occurred here.⁷

[37] TransLink's argument is correct to the extent that it is true that a record can be in existence but also be produced from a machine-readable record. Nevertheless, the provisions in s. 6(2) only apply in cases where the requested record does not already exist. TransLink is incorrect to conflate the collating of multiple videos images and severing them with having to create a new record. In this case, the video images from multiple cameras already exist, and the complainant has a right of access under s. 4, subject to TransLink severing them in accordance with the exceptions to disclosure in Part 2. Section 9(2) requires that TransLink provide the complainant with a copy that can reasonably be produced. TransLink has not persuaded me that it must create a completely different type of record altogether to respond to the complainant's request.

[38] Moreover, the purpose of s. 6(2) is not to grant public bodies an authority to refuse access to requested records or parts of records. Rather it imposes an obligation to create a record that does not already exist but can be created from a machine-readable record using normal hardware, software and technical expertise. The only other qualification is that this obligation applies only when complying with it would not interfere unreasonably with the operations of the public body.

[39] For instance, s. 6(2) would be engaged where an applicant requests a list of things but there is no record in the form of a list. If the information required to

⁷ TransLink's initial submission, paras. 64 and 66.

create the list exists and the public body could create the list from a machine-readable record in its custody or under its control using its normal computer hardware and software and technical expertise, s. 6(2) would require the public body to create the requested list. The only circumstance where this obligation would not apply would be if the resources involved in creating the list would interfere unreasonably with the operations of the public body.

[40] In this case, the requested records clearly exist. Therefore, none of the provisions in s. 6(2) apply. Consequently, TransLink cannot refuse access to the existing records based on any provision in s. 6(2).

[41] As I have found that s. 6(2) does not apply in this case, there is no need for me to address the issues regarding the resources required to create the record or whether doing so would interfere unreasonably in TransLink's operations.

4. Did TransLink respond to the complainant's requests in accordance with s. 8?

[42] Section 8 reads as follows:

- 8(1) In a response under section 7, the head of the public body must tell the applicant
- (a) whether or not the applicant is entitled to access to the record or to part of the record,
 - (b) if the applicant is entitled to access, where, when and how access will be given, and
 - (c) if access to the record or to part of the record is refused,
 - (i) the reasons for the refusal and the provision of this Act on which the refusal is based,
 - (ii) the contact information of an officer or employee of the public body who can answer the applicant's questions about the refusal, and
 - (iii) that the applicant may ask for a review under section 53 or 63.

[43] TransLink acknowledges that the Investigator's Fact Report frames the issues as including whether it complied with its duties under ss. 8 and 9. Nevertheless, it states "TransLink would frame the issue more simply to determining whether TransLink complied with its duty to assist access requesters under section 6 of FIPPA."⁸ Consequently, it has made no submissions with respect to ss. 8(1) or 9. The complainant has not made any submissions with respect to these sections either.

⁸ TransLink's initial submission, para. 61.

[44] It is clear from the Investigator's Fact Report that TransLink has provided a response to all the complainant's requests. Each of these responses inform the complainant that he is not entitled to the information at issue and cite s. 6(2) as the justification under FIPPA for refusing access.

[45] I have found above that TransLink's citing s. 6(2) is not a proper justification for refusing access and the details of the response were inaccurate. Nevertheless, the response of TransLink to each of the 13 requests contained all the requirements of s. 8(1).

[46] Therefore, I find that TransLink's responses complied with s. 8(1).

5. Did TransLink respond to the complainant's requests in accordance with s. 9?

[47] Section 9 reads as follows:

- 9(1) If an applicant is told under section 8 (1) that access will be given, the head of the public body must comply with subsection (2), (2.1) or (3) of this section.
- (2) If the applicant has asked for a copy under section 5 (2) and the record can reasonably be reproduced, a copy of the record or part of the record must be provided with the response.
- (2.1) If the applicant has asked for a copy under section 5 (2) in electronic form and it is reasonable to provide the record in that form, a copy of the record or part of the record must be provided in that form with the response.

[48] Neither TransLink nor the complainant have provided submissions on the application of s. 9.

[49] It is clear from a plain reading of the provision that s. 9 applies only in cases where a public body has told an applicant under s. 8(1) that it will be giving them access to the requested records. In this case, TransLink denied the complainant access. Therefore, I find that s. 9 does not apply in this case.

6. Whether FIPPA requires TransLink to retain a requested record, including video footage, until TransLink has fulfilled all its duties under Part 2 of FIPPA and any request for review or complaint has concluded under Part 5?

[50] Neither TransLink nor the complainant have provided submissions on the issue of the requirement to retain a requested record.

[51] There is no explicit requirement in FIPPA for public bodies to retain copies of records for a certain period once an applicant has requested them under s. 5. The only reference to the concept of retaining records is a provision in s. 65.3 that makes it an offence to willfully destroy records to avoid complying with an access request. FIPPA does not directly stipulate that public bodies must retain responsive records until an applicant has exhausted their rights of review.

[52] Despite this lack of specificity with respect to preserving responsive records, I conclude that, to fulfill the purposes of FIPPA, it is necessary to interpret the law as imposing an implicit obligation on public bodies. Otherwise, public bodies could be able avoid accountability by destroying any records as soon as they have responded to a request. This would frustrate the review purposes of FIPPA.

[52] Part 5 Section 52 gives applicants a right to request a review of any decision, including a decision to deny access to information. In most cases, it is not possible to review a decision to deny access to information without being able to review the records. Section 44 gives the Commissioner the authority to compel public bodies to produce records. Similarly, the freedom to destroy requested records would frustrate the ability of the Commissioner to exercise his authority under this provision.

[53] In her Investigation Report IR15-03, former Commissioner Denham declared that “Deliberately destroying records in response to an access request would be a violation of s. 6(1) and an offence under s. 74 of FIPPA.”⁹ She also found that by deleting the responsive records, the ministry at issue had contravened s. 6(1) of FIPPA.¹⁰

[54] In this case, TransLink did not actively destroy records responsive to a request. Nevertheless, TransLink officials knew that the requested records would remain in existence only for seven days, unless they took the necessary actions to preserve copies of those records. With respect to the records responsive to the 13 requests at issue, TransLink deliberately refrained from preserving the records in the full knowledge that its CCTV systems would overwrite the records within seven days. In its initial submission, TransLink acknowledged the necessity of taking prompt action to preserve responsive records: “There is ... some urgency around taking these steps because the video footage or audio recordings are automatically overridden after seven days.”¹¹

[55] In summary, TransLink erroneously denied the complainant access on the grounds that it was already processing other requests of his and its assertion that responding to any more than two per month would interfere unreasonably with its

⁹ Investigation Report IR15-03: Access Denied: Records Retention and Disposal Practices of the Government of British Columbia, 2015 BCIPCD 63 (CanLII), p. 37.

¹⁰ IR15-03, p. 40.

¹¹ TransLink’s initial submission, para. 71.

operations. It then took no action to prevent the CCTV system from destroying the records, in full knowledge that the complainant had a statutory avenue of review, and that the destruction of the records would deprive the complainant of his statutory rights. This also meant that, in the event the Commissioner or the courts determined that its initial responses to the 13 requests contravened FIPPA and that FIPPA required TransLink to disclose the records, the complainant would never receive the records.

[56] I agree with what former Commissioner Denham said in Investigation Report IR15-03, specifically that destroying records responsive to requests contravenes s. 6(1) of FIPPA. I find that it is implicit in FIPPA that public bodies must retain copies of requested records until the applicant has exhausted all legal avenues of review. Any other conclusion would lead to an absurd result that would frustrate the statutory purposes of FIPPA.

[57] Therefore, I find that FIPPA required TransLink to retain the requested records until the complainant had exhausted all avenues of review and that TransLink failed to meet this obligation. Consequently, TransLink has permanently denied the complainant his statutory rights and deprived him of any meaningful opportunity for redress.

Summary of Findings:

[58] First, I have found that the video recordings captured on TransLink's CCTV system that the complainant requested are records for the purposes of Schedule 1 of FIPPA and that they respond to the applicant's requests.

[59] Second, I have found that TransLink failed to respond accurately and completely to the complainant in accordance with s. 6(1) when it denied the complainant access to the requested records citing s. 6(2).

[60] Third, I have found that giving the complainant access to the requested records does not require creating a record in accordance with s. 6(2) and that s. 6(2) does not apply in this case.

[61] Fourth, I have found that TransLink's response to the complainant did not contravene s. 8(1) of FIPPA.

[62] Fifth, I have found that s. 9 of FIPPA does not apply.

[63] Sixth, I have found that FIPPA requires TransLink to take every reasonable measure to preserve requested records until an applicant has exhausted all legal avenues of review and that TransLink failed to comply with that obligation.

[64] The cumulative result of the contraventions by TransLink has been to permanently deprive the complainant of his statutory right of access and his avenue of review. It has also prevented the Commissioner from exercising some of his powers to address the consequences of TransLink's contraventions of FIPPA. Had TransLink preserved the requested records in accordance with its obligations under FIPPA, I would have had the ability to issue an order compelling it to respond to the complainant's requests. My findings that TransLink contravened FIPPA in several respects do nothing to redress the loss of the complainant's statutory right under s. 4 to have access to his own personal information.

[65] The powers of the Commissioner are remedial not punitive. It is the courts that have the powers to punish offences, including the wilful destruction of records, as stipulated in s. 65.3. This would involve prosecution by the Attorney General of British Columbia and a decision by the courts. I have no jurisdiction to determine whether a contravention of s. 65.3 occurred in this case. With respect to my remedial powers, the actions of TransLink and its deliberate failures to prevent the destruction of the responsive records have obstructed me from exercising them.

[66] TransLink has twice requested and twice failed to receive s. 43 relief from the Commissioner in responding to the requests of the complainant for his own personal information. In both cases, TransLink sought permission to decline to process more than two requests per month. Having been unsuccessful in its first request for relief (Order F17-36), and while awaiting the decision in response to its second (Order F23-37), TransLink lacked any authority under FIPPA to impose its own limit of processing only two of the complainant's requests at a time. It also allowed the CCTV system to destroy all the records responsive to the complainant's other requests. It misconstrued s. 6(2) as an authority to deny access to existing records, and in the process contravened s. 6(1).

[67] I accept from TransLink's submissions that its decision to adopt CCTV surveillance and the way it has implemented its equipment has made responding to FIPPA requests administratively challenging and resource intensive. Nevertheless, this does not justify denying individuals their statutory right to access their personal information that TransLink has collected.

[68] Given that the requested records no longer exist, it would serve no purpose to order TransLink to perform its duty to process the complainant's past access requests under Part 2 of FIPPA. While I am unable to remedy TransLink's failure to properly perform its duties regarding the complainant's past access requests, I have the authority under s. 58(3)(a) to require TransLink to perform its duties under FIPPA with respect to any future access requests the complainant may make.

CONCLUSION

[69] For the reasons given above, under s. 58(3)(a) of FIPPA, I make the following orders:

1. I require TransLink to fulfill its duties under s. 6(1) by responding accurately and completely to any applicant's requests for access to video images of themselves in the custody or under the control of TransLink.
2. I require TransLink to fulfill its duties under s. 6(1) and FIPPA generally by taking every reasonable measure to preserve records responsive to all access requests until the respective applicants have exhausted all avenues of review.

July 20, 2023

ORIGINAL SIGNED BY

Jay Fedorak, Adjudicator

OIPC File No.: F22-88744