Order F24-40

BRITISH COLUMBIA RAILWAY COMPANY

Lisa Siew
Adjudicator

May 13, 2024

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Summary: Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the British Columbia Railway Company (Company) provide access to an agreement involving Tsal'álh (formerly known as Seton Lake Indian Band) and a local passenger rail service. The Company refused access citing various provisions of FIPPA, including s. 17(1) (disclosure harmful to financial or economic interests). The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Company's decision and the matter was later forwarded to inquiry. During the inquiry, the parties received approval from the OIPC to add s. 3(5)(b) (record not related to the public body's business) and s. 25(1)(b) (disclosure clearly in the public interest) to the inquiry. Tsal'álh was also invited by the OIPC to participate in the inquiry as an appropriate person and made submissions. The adjudicator found s. 3(5)(b) did not apply, therefore the requested record was subject to Part 2 of FIPPA. The adjudicator then determined the Company correctly applied s. 17(1) to the information in the requested record and, therefore, it was not necessary to consider the other FIPPA exceptions relied on by the Company. Finally, the adjudicator concluded the Company was not required under s. 25(1)(b) to disclose any information in the requested record.

Statute and sections considered in the order: *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165, ss. 3(5)(b), 4(2), 17(1), 17(1)(e), 17(1)(f), 25(1)(b).

INTRODUCTION

[1] Under the *Freedom of Information and Protection of Privacy Act* (FIPPA), an applicant requested the British Columbia Railway Company[1] (the Company) provide access to a 2002 written agreement between BC Rail Partnership and Seton Lake Indian Band (now known as Tsal'álh), regarding a local passenger rail shuttle service (hereafter referred to as the Agreement).

[1] The British Columbia Railway Company is a public body listed under Schedule 2 of FIPPA.

[2] The Company denied the applicant access to the entire Agreement under ss. 16 (disclosure harmful to intergovernmental relations), 17 (disclosure harmful to a public body's financial interests) and 21 (disclosure harmful to third party business interests) of FIPPA. The applicant requested the Office of the Information and Privacy Commissioner (OIPC) review the Company's decision to refuse access.

[3] The OIPC's mediation and investigation process did not resolve the issues between the parties but did clarify the Company was relying on ss. 16(1)(a)(iii), 16(1)(b), 16(3)(b), 17(1)(e), 17(1)(f) and 21(1)(a)(ii), 21(1)(b), and 21(1)(c)(i) of FIPPA to withhold information in the Agreement. The applicant requested the matters at issue proceed to this inquiry.

[4] Both parties provided inquiry submissions. The Company's submissions include pre-approved *in camera* materials. Where information in a public body's submission is approved *in camera*, the OIPC adjudicator considers this information privately and the applicant receives those inquiry submissions with the *in camera* material redacted.

[5] During the inquiry, the OIPC notified Tsal'álh of the applicant's request for review.[2] Tsal'álh was invited to participate in this inquiry and made submissions which also included pre-approved *in camera* materials. Tsal'álh supports the Company's decision to refuse access to the entire Agreement.

[6] Also, during the inquiry process, the Company received permission from the OIPC to include s. 3(5)(b) (record not related to the public body's business) as an issue in the inquiry. The applicant was also granted permission to add s. 25(1)(b) (disclosure clearly in the public interest) to the inquiry.

[7] I also note that as part of its inquiry submission, the Company withdrew its application of s. 16(1)(b) to withhold information in the Agreement.[3] Therefore, I conclude s. 16(1)(b) is no longer at issue in this inquiry.

ISSUES AND BURDEN OF PROOF

[8] The issues I must decide in this inquiry are the following:

1. Is the Agreement excluded from Part 2 of FIPPA under s. 3(5)(b)?

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[2] Under s. 54(b) of FIPPA, the OIPC has the authority to provide a copy of the applicant's request for review to any person the Commissioner considers appropriate. Under s. 56(3), that person must be given an opportunity to make representations to the Commissioner or their delegate during the inquiry.

[3] Company's initial submission at para. 34.

2. Is the public body authorized to refuse to disclose information in the Agreement under ss. 17(1), 17(1)(e) or 17(1)(f)?

3. Is the public body authorized to refuse to disclose information in the Agreement under ss. 16(1)(a)(iii) and 16(3)(b)?

4. Is the public body required to refuse to disclose information in the Agreement under ss. 21(1)(a)(ii), 21(1)(b), and 21(1)(c)(i)?

5. Is the public body required by s. 25(1)(b) to disclose information in the Agreement?

[9] Section 57 of FIPPA establishes the burden of proof in an inquiry. In this case, the Company decided to refuse the applicant access to the entire Agreement. Therefore, s. 57(1) of FIPPA places the burden on the public body to prove the applicant has no right of access to any of the information in the Agreement under the various provisions of ss. 16, 17 and 21 noted above.[4]

[10] However, s. 57 does not specify which party has the burden of proof for cases involving s. 3. In the absence of a statutory burden, previous OIPC orders have established that the public body or third party resisting disclosure bears the burden of establishing that the records are excluded from the scope of FIPPA under s. 3.[5] I adopt that approach here.

[11] FIPPA also does not identify which party has the burden to prove that s. 25(1)(b) applies. However, previous OIPC orders have concluded that it is in the interests of all the participating parties to provide whatever arguments and evidence they can to assist the adjudicator with the s. 25(1) determination.[6] I adopt that approach and note that all the parties have made submissions to support their positions and arguments on s. 25(1)(b).

[4] If the Company had decided to give the applicant access to all or part of the Agreement, then s. 57(3) places the burden on the third party to prove the applicant has no right of access under s. 21(1).
[5] Order F13-23, 2013 BCIPC 30 (CanLII) at para. 10. Order F17-13, 2017 BCIPC 14 (CanLII) at para. 5.
[6] For example, Order 02-38, 2002 CanLII 42472 (BCIPC) at para. 39 and Order F17-56, 2017 BCIPC 61 at para. 10.

DISCUSSION

Background

[12] In the early twentieth century, several companies sought to build a railway network that connected the BC coast to the interior of BC.[7] The Pacific Great Eastern Railway Company (Pacific Railway) eventually took over the challenging and costly endeavour. It expanded the railway to what is now Lillooet, BC.

[13] In 1916, Pacific Railway experienced financial problems. The provincial government loaned Pacific Railway a large sum of money to continue the railway expansion. In 1918, Pacific Railway defaulted on that loan and the provincial government took over the company and became its shareholder.

[14] In 1974, Pacific Railway was re-named the British Columbia Railway Company, which is the public body in this inquiry. In the years that followed, the Company provided passenger rail service to Lillooet.

[15] Tsal'álh is a community within the St'át'imc Nation that has members living on reserves primarily in and around the communities of Shalalth and Seton Portage on the north shore of Seton Lake. Lillooet is the nearest population centre with healthcare facilities, schools and other essential services such as a grocery store. Tsal'álh describes its community as dependent on passenger rail service due to geographic challenges that make daily travel by car to Lillooet risky and impractical.

[16] In or around 2002, the Company discontinued passenger rail service across the province. At the time, the Company operated the rail service through a subsidiary named BC Rail Ltd. and a partnership named BC Rail Partnership. In July 2002, Tsal'álh and BC Rail Partnership entered into the Agreement to ensure that Tsal'álh members would continue to have rail transportation to Lillooet in the form of a rail shuttle service.

[17] In or around 2004, the Company sold its shares and interests in BC Rail Ltd. and BC Rail Partnership to the Canadian National Railway Company (CN Rail). Related to that sale, CN Rail agreed to assume responsibility for the Company's operation of the rail shuttle service under the Agreement and in partnership with Tsal'álh. The Company had oversight responsibilities, though, regarding CN Rail's performance of the Agreement.

[18] In early 2021, CN Rail suspended the rail shuttle service to Lillooet, which caused transportation problems and concerns for Tsal'álh members and other rail shuttle users. The applicant made their request for access to the Agreement

[7] The information in this background section is compiled from the parties' submissions and evidence.

during this period. The applicant is seeking information "to hold the Province accountable" for failing to properly oversee and enforce CN Rail's obligations under the Agreement and to prevent future transportation problems.[8] In early 2022, a different rail shuttle service was put in place "following Tsal'álh's efforts to advance the issue of the suspended service with the Province."[9]

Record at issue

[19] The Agreement is a 17-page document that the Company withheld in its entirety. It is not in dispute that the parties to the Agreement are Tsal'álh and BC Rail Partnership, which is now owned by CN Rail.

Record not related to the business of a public body – s. 3(5)(b)

[20] Section 3 of FIPPA identifies categories of records that are excluded from all or a part of FIPPA and not subject to disclosure under FIPPA. Section 3(5)(b) is relevant in this case and I will consider it first because if s. 3(5)(b) applies, then the applicant has no right of access to the Agreement under FIPPA. In that situation, it is not necessary to consider all the other FIPPA provisions at issue in this inquiry, including s. 25(1)(b) (disclosure in the public interest).[10]

[21] In late 2021, FIPPA was amended to add s. 3(5)(b) which provides that Part 2 of FIPPA does not apply to "a record that does not relate to the business of the public body" responsible for responding to the access request.[11] I am not aware of any previous OIPC order or court decision that has interpreted s. 3(5)(b) and considered the phrase "the business of the public body", nor did the parties cite any relevant authorities. FIPPA also does not contain any definitions that may be of assistance. The question, therefore, is what the BC Legislature meant by the phrase "does not relate to the business of the public body" under s. 3(5)(b)?

Parties' positions on s. 3(5)(b)

[22] The Company interprets the phrase "the business of the public body" under s. 3(5)(b) to mean a public body's *current* business. In other words, the Company submits the applicant has no right of access under Part 2 of FIPPA to the Agreement because it is a record that relates to the Company's *former* business. The Company says the Agreement relates to the operation of the rail

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[8] Applicant's submission at para. 2(b).
[9] Tsal'álh's initial submission at para. 17.
[10] Adjudication Order No. 27 (Sep 10, 2018) at paras. 42-44 and Adjudication Order No. 19 (July 12, 2007), available on the OIPC website at: https://www.oipc.bc.ca/rulings/adjudications/.
[11] Part 2 of FIPPA contains provisions that provide an applicant with a right of access to any record in the custody or under the control of a public body, subject to any information that is excepted from disclosure under the exceptions listed in Division 2 of Part 2. Section 25 is also located under Part 2.

shuttle service and argues s. 3(5)(b) applies to the Agreement because it is no longer a party to the Agreement and is currently not in the business of offering passenger rail services. The Company says its current business relates to acquiring and holding "railway corridor and strategic port lands and to make related infrastructure investments to provide benefits to the Province."[12]

[23] Tsal'álh supports the Company's position on s. 3(5)(b). It did not provide any arguments or evidence about the applicability of s. 3(5)(b), except to say that it adopts the Company's submissions and that the inquiry should be "disposed of" or "resolved" on this basis.[13]

[24] The applicant submits FIPPA applies to any record that relates to a public body's past or current business. The applicant says the Agreement is subject to FIPPA because the Company was previously a party to the Agreement and it "continues to be a permanent record of the public body's provision of passenger rail service around the time the agreement was signed."[14] The applicant contends the Company cannot dodge its obligations under FIPPA by now arguing that it has sold any interest in the corporate entity that is currently a party to the Agreement. The applicant says the Company should not be allowed to rely on s. 3(5)(b) to "rewrite or privatize a historic factual record of the public body's brief provision of the shuttle service."[15]

Analysis and findings on s. 3(5)(b)

[25] As noted, the question at this point is what the BC Legislature meant by the phrase "does not relate to the business of the public body" under s. 3(5)(b)? In other words, when does a record relate to the business of a public body and when does it not? The necessary analysis involves statutory interpretation and the objective is to discern the intent of the Legislature by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act in which the provision appears.[16]

[26] The Company interprets s. 3(5)(b) to mean the Legislature only intended the Part 2 access rights in FIPPA to apply to records that relate to a public body's current business. In other words, the Company submits if the requested record relates to business activities that the public body *no longer engages in*, then Part 2 of FIPPA does not apply. However, the wording of s. 3(5)(b) clearly does not mention any distinction between a public body's current and past business. The provision only requires that the record "does not relate to the business of the

[12] Company's initial submission at para. 12.
[13] Tsal'álh's initial submission at para. 4 and reply submission at para. 4.
[14] Applicant's submission at para. 22.
[15] Applicant's submission at para. 22.
[16] *Rizzo & Rizzo Shoes Ltd*. *(Re)*, 1998 CanLII 837 (SCC) at para. 21.

public body." Therefore, I find the Company's interpretation of s. 3(5)(b) is not persuasive because it requires reading-in a qualification that does not appear in the language of s. 3(5)(b). If the Legislature intended to exclude records related to a public body's former business or past activities from FIPPA, as argued by the Company, then it could have drafted or amended s. 3(5)(b) to reflect that intention.

[27] Furthermore, it is a well-established principle of statutory interpretation that the Legislature does not intend to produce absurd consequences.[17] An interpretation can be considered absurd if it defeats the purpose of a statute.[18] The intent of FIPPA and its legislative purposes, as identified in s. 2(1), are to "make public bodies more accountable to the public" and to "protect personal privacy." Those purposes are achieved, in part, by "giving the public a right of access to records" and by "specifying limited exceptions to the right of access."[19]

[28] If the Company's interpretation of s. 3(5)(b) is correct, then it could produce the absurd consequence of allowing a public body to change its "business" and then take the position that any records dated before the change are no longer accessible to the public under FIPPA. The effect of the Company's interpretation would be to deprive the public of a right of access to records about the public body's past decisions, activities, policies or programs. Therefore, I find the Company's interpretation is absurd because it would defeat the public accountability goals of FIPPA and shield a variety of government decisions, information and actions from public scrutiny.

[29] The Company's interpretation is also inconsistent with statements made by the then Minister of Citizens' Services when they responded to questions about s. 3(5)(b) as part of legislative debate on the 2021 amendments to FIPPA. The Minister was asked to provide an example of a record that would be excluded by s. 3(5)(b) and gave the following examples:

> I think the most recent and the most pertinent example we could give at the moment would be the recent request for the Premier's Scrabble score on his government-issued smartphone. During a press conference, the Premier held up his phone and outlined all of the apps he has on it, including Scrabble, and there was a subsequent media request for the Premier's Scrabble score, which obviously does not relate to any government business.
> …
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> Another good example I could give the member would be the multiple requests for lists of minister office staff who have taken a leave of absence

[17] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 27.
[18] *Ibid*.
[19] Sections 2(1)(a) and (c).

> during a specific time frame. That would be personal information. That's not pertaining to a government body.[20]

[30] The Minister also described the purpose of adding s. 3(5)(b) to FIPPA as follows:

> When this legislation was introduced initially, it did not — nor could it ever have — contemplate the use of technology that we have today. It couldn't possibly have contemplated the use of smartphones and applications that are not connected to government business or government decisions. Freedom of information is being used as a tool for broader investigation, rather than for government decisions. Perfect examples, as I just gave the member previously, are the Scrabble FOI score and personal leaves that staff may have been requesting for.[21]

[31] I find the Minister's comments a useful interpretive aid in understanding the legislative intention behind s. 3(5)(b). The Supreme Court of Canada has recognized that transcripts of legislative debates can play a limited role in the interpretation of legislation and, although it should be admitted with some caution, it can be relevant to understanding both the background and the purpose of the legislation.[22]

[32] With that in mind, I find the Minister's comments indicate s. 3(5)(b) was intended to distinguish between records that relate to a public body's business and records that are personal in nature. Therefore, the relevant distinction is not between a public body's current and past business, as argued by the Company, but between records related to a public body's business and records related to personal matters that have nothing to do with a public body's business. I also find this interpretation is consistent with the twin purposes of FIPPA which, as previously noted, are to make public bodies more accountable to the public and to protect personal privacy.[23]

[33] The obvious question then is how do we determine when a record relates to the business of a public body? Returning to the legislative debate regarding s. 3(5)(b), the Minister explained that this determination should be made by considering and applying the definition of "government information" under the *Information Management Act*:

> B. Banman: …what oversight, if any, will exist? Who gets to decide what is considered a record that does not relate to the business of the public body?

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[20] *Legislature of BC Debates*, 2nd sess., 42nd Parl., November 1, 2021, at time stamp 2:35pm of the Hansard transcript. Available online at: <https://www.leg.bc.ca/documents-data/debate-transcripts/42nd-parliament/2nd-session/20211101pm-Hansard-n121#121B:1430>.
[21] *Ibid*.
[22] *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC) at para. 35.
[23] Section 2(1).

> Hon. L. Beare: "Government information" is a defined term under the Information Management Act. Our trusted public service, who have faithfully been managing our FOI system since its inception, would make the decision based on the definition outlined in that Information Management Act.[24]

[34] Under the *Information Management Act*, the term "government information" is partly defined as:

> "government information" means recorded information created or received by a government body in connection with government business, including
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> (a) information that must be held by the government body by law,
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> (b) information that documents a decision by a government body respecting a course of action that directly affects a person or the operations of the government body,
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> (c) information that documents or supports the government body's organization, policies, procedures, transactions or operations,
>
> (d) information created or received by a government body that has archival value, and
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> (e) information relating to matters of court administration assigned to the Attorney General or government by law,[25]

[35] While the *Information Management Act* only applies to certain public bodies under FIPPA, including government ministries, I find the definition of "government information" is a useful interpretative aid for all public bodies regarding what types of records the BC Legislature intended s. 3(5)(b) to cover.

[36] Therefore, considering this definition and the purpose of s. 3(5)(b) which I have found is to exclude records related to personal, non-governmental matters, I find a record does not relate to the business of a public body when it has nothing to do with a public body's mandate, purpose, transactions, operations, programs, policies, procedures, decisions or obligations. I offer this definition as a starting point in applying s. 3(5)(b) and not as a final or closed statement regarding the types of records that may fall under s. 3(5)(b). I have no doubt this definition will evolve as public bodies, applicants and future decision-makers grapple with the application of s. 3(5)(b) to their specific circumstances.

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[24] *Legislature of BC Debates*, 2nd sess., 42nd Parl., November 1, 2021, at time stamp 2:40pm of the Hansard transcript.
[25] *Information Management Act*, SBC 2015, c. 27 at s. 1.

[37] Applying that definition to the facts of this case, I find the Agreement relates to the Company's former passenger rail operations with Tsal'álh and is connected to the sale of the Company's shares and interests in BC Rail Ltd. and in BC Rail Partnership to CN Rail. As previously noted, arising out of that sale, CN Rail agreed to assume the Company's operation of the rail shuttle service under the Agreement and in partnership with Tsal'álh.[26] These matters are related to the Company's mandate, purpose, operational decisions and transactions and are not about unrelated personal matters. Therefore, I find the Agreement clearly relates to the business of the Company.

[38] Accordingly, for all those reasons, I conclude s. 3(5)(b) does not apply and the Agreement is subject to Part 2 of FIPPA.[27] Having found Part 2 of FIPPA applies to the Agreement, the next step is to consider whether the various FIPPA exceptions relied on by the Ministry apply to the Agreement. I will first consider s. 17(1).

Harm to financial or economic interest - s. 17(1)

[39] 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 or the ability of that government to manage the economy. The Company withheld the entire Agreement under ss. 17(1), 17(1)(e) and 17(1)(f) which reads 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:
> …
>
> (e) information about negotiations carried on by or for a public body or the government of British Columbia;
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> (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.

[40] Subsections 17(1)(a) to (f) are examples of the types of information that, if disclosed, could reasonably be expected to cause harm under s. 17(1). Earlier OIPC decisions have determined, however, that subsections 17(1)(a) to (f) are not stand-alone provisions and that it is not enough for a public body to meet a subsection's requirements. Even if the information at issue fits under

[26] Company's initial submission at paras. 11-12.
[27] The Company also argued s. 3(5)(b) applies retroactively. Given my findings about s. 3(5)(b), it is not necessary to consider whether the Legislature intended s. 3(5)(b) to apply retroactively because, even if it did, I found that it does not apply here.

ss. 17(1)(a) to (f), a public body must also demonstrate that disclosure could reasonably be expected to result in the harms specified under s. 17(1).[28]

[41] However, information that does not fit under subsections 17(1)(a) to (f) may still fall under the opening language 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.[29]

[42] In terms of the standard of proof for s. 17(1), it is well-established that the language "could reasonably be expected to" in access to information statutes means that in order to rely on the exception, a public body must establish that there is a "reasonable expectation of probable harm."[30] The Supreme Court of Canada has described this standard as "a middle ground between that which is probable and that which is merely possible."[31]

[43] The public body does not need to show on a balance of probabilities that harm will occur if the information is disclosed, but it must demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative.[32] There needs to be a reasonable basis for believing the harm will result, but the standard does not require a demonstration that harm is probable.[33]

[44] The determination of whether a reasonable expectation of probable harm has been established is contextual, and the amount and quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and the "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[34] Previous OIPC orders have said general speculative or subjective evidence will not suffice.[35]

[45] Furthermore, it is the release of the information itself which must give rise to a reasonable expectation of harm.[36] The public body must provide evidence

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[28] Order F19-03, 2019 BCIPC 4 (CanLII) at para. 22.
[29] Order F14-31, 2014 BCIPC 34 (CanLII) at para. 41.
[30] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at para. 54.
[31] *Ibid*.
[32] *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at para. 206.
[33] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 59 and *British Columbia Hydro and Power Authority v. British Columbia (Information and Privacy Commissioner)*, 2019 BCSC 2128 (CanLII) at para. 93.
[34] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)***,** 2014 SCC 31 at para. 54.
[35] For example, Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 27.
[36] *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875 at para. 43.

establishing "a direct link between the disclosure and the apprehended harm and that the harm could reasonably be expected to ensue from disclosure."[37]

Parties' positions on ss. 17(1), 17(1)(e) and 17(1)(f)

[46] The Company submits disclosure of the Agreement could reasonably be expected to result in the harms identified in ss. 17(1)(e) and 17(1)(f), thereby harming "the financial or economic interests of the Province."[38] The Company provided an affidavit from an individual identified as the Company's Administration Manager and Corporate Secretary (Manager) to support its position. The Manager submits disclosing the Agreement risks breaching trust and confidence between the "Crown and the Tsal'álh" and that the terms of the Agreement have never been made public.[39]

[47] Both the Company and the Manager describe most of the anticipated harms *in camera*, so I am limited in what I can say about those submissions and that evidence. However, I can say the Company argues disclosing the Agreement would likely result in a certain outcome related to ss. 17(1)(e) and 17(1)(f), which are about negotiations carried on by or for a public body or the BC government or harm to a public body's or the BC government's negotiating position.

[48] Tsal'álh's submissions, some of which are also *in camera*, focus on establishing how disclosing the entire Agreement could reasonably be expected to harm Tsal'álh, the relations between Tsal'álh and the BC government and efforts toward reconciliation.[40] Tsal'álh also provided an example, *in camera*, to show how disclosing the Agreement could reasonably be expected to harm the BC government's financial interests.[41] In support of its position, Tsal'álh provided an affidavit from its current Chief. The Chief describes, *in camera*, past and current events related to the Agreement, the impact on certain matters if the entire Agreement is disclosed and the anticipated harm that may occur.[42]

[49] The Applicant submits they are unable to make arguments about the applicability of s. 17(1) because they cannot see the other parties' arguments and evidence and relies on my review of this *in camera* information to determine whether the standard of proof has been met. The Applicant also submits withholding the entire Agreement is "excessive, unjustified and counter to the parties' cited values" of "trust, reconciliation and intergovernmental relations."[43]

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[37] *Merck Frosst Canada Ltd. v Canada (Health),* 2012 SCC 3 at para. 219.
[38] Manager's affidavit at para. 5.
[39] Manager's affidavit at paras. 21 and 18.
[40] Tsal'álh's initial submission at paras. 35-36 and 43-47 and reply submission at paras. 6-9.
[41] Tsal'álh's initial submission at paras. 36 and 47. Tsal'álh's submissions focus on the various provisions at issue under ss. 16 and 21, but I also find them applicable to s. 17(1).
[42] Chief's affidavit, for example, at para. 33.
[43] Applicant's submission at paras. 34 and 32.

The applicant cites ss. 4(2) and 57 of FIPPA to argue the Company should be withholding only the relevant parts of the Agreement that could reasonably be expected to result in harm under s. 17(1).

[50] The Applicant further contends that the parties' cited values must be balanced against the "affected public's hardships and disempowerment" that the applicant says has been "exacerbated by the opacity" of the Agreement.[44] Both the Company and Tsal'álh interpret this statement to mean the applicant is advocating for a balancing exercise in determining whether the various FIPPA exceptions to disclosure may apply.[45] The Company and Tsal'álh oppose such an interpretation for various reasons, including the express language of some provisions and the established legal tests which they submit does not require a balancing of interests. Tsal'álh also submits withholding the entire Agreement is not excessive or overbroad given the circumstances and the reasonable risk of harm to its interests which it argues should be protected under the various FIPPA exceptions at issue.

Analysis and findings on ss. 17(1), 17(1)(e) and 17(1)(f)

[51] The Company submits s. 17(1)(e) applies to all the information in the Agreement. Section 17(1)(e) protects information about negotiations carried on by or for a public body or the BC government that if disclosed could reasonably be expected to harm the financial or economic interests of a public body or the BC government. The Manager says the Agreement is "the product of negotiations."[46] However, previous OIPC orders have interpreted the phrase "information about negotiations" under s. 17(1)(e) as referring to information that reveals negotiating analysis, methodology, strategies, positions, criteria or other similar information.[47] I find the information withheld in the Agreement does not reveal that kind of information. Rather, I find the Agreement is a contract and it reveals what terms the parties agreed on after negotiations were completed.[48] Therefore, I find the information in the Agreement is not about negotiations under s. 17(1)(e).

[52] The Company also submits s. 17(1)(f) applies to all the information in the Agreement. Section 17(1)(f) relates to the disclosure of information that could reasonably be expected to harm the negotiating position of a public body or the government of British Columbia. Previous OIPC 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

[44] Applicant's submission at para. 32.
[45] Company's reply submission at para. 9 and Tsal'álh's reply submission at para. 5.
[46] Manager's affidavit at para. 18.
[47] Order 02-56, 2002 CanLII 42493 (BCIPC) at paras. 43-44 and 51, citing Order 00-39.
[48] For a similar conclusion, see Order F10-24, 2010 BCIPC 35 (CanLII) at para. 60.

advantage to the financial detriment of the public body or otherwise harm a public body's financial interests.[49]

[53] In this case, the Company and Tsal'álh's *in camera* evidence indicates the Agreement is relevant to a certain matter involving several parties.[50] However, based on the materials before me such as the affidavit evidence, I can clearly determine that all the parties who are or will be participating in that matter have already read and likely have a copy of the Agreement. Therefore, it is unclear to me, and the Company does not sufficiently explain, how disclosing the Agreement would give any of those parties a negotiating advantage that could reasonably be expected to result in the specified harm under s. 17(1)(f). Accordingly, I am not satisfied s. 17(1)(f) applies in this case.

[54] For the reasons discussed above, I find ss. 17(1)(e) and 17(1)(f) do not apply to the Agreement. However, as previously noted, information that does not fit under subsections 17(1)(a) to (f) may still fall under the opening language of s. 17(1) as information that, if disclosed, could reasonably be expected to harm the BC government's financial interests.[51] As I will explain, I find s. 17(1) applies to the Agreement on that basis.

[55] I am unable to describe my analysis of the application of s. 17(1) to the Agreement as I would fully wish because a large portion of the Company and Tsal'álh's submissions and evidence on s. 17(1) were provided *in camera*. What I can say is that the Agreement is a contract and contains provisions that one would normally expect to find in a contract. I am aware of previous OIPC orders that have found s. 17(1) does not apply to concluded contracts.[52] However, I find the Company and Tsal'álh's evidence shows how the information in the Agreement is connected to an ongoing confidential matter.[53] I can also say the Company and Tsal'álh's arguments about harm are tied to Tsal'álh's "relationship with the Province" and the impact of the alleged harm on "the progress being made toward reconciliation."[54]

[56] Tsal'álh also provided an example, *in camera*, that explains how disclosing the Agreement could reasonably be expected to harm the BC government's financial interests.[55] All this evidence persuades me there is a logical connection between disclosure of the Agreement and the contemplated

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[49] Order F20-38, 2020 BCIPC 44 (CanLII) at paras. 62-63 and Order F17-10, 2017 BCIPC 11 (CanLII) at para. 19 and the cases cited there.
[50] For example, Manager's affidavit at paras. 17 and 20 and Chief's affidavit at paras. 11, 28 and 29.
[51] Order F14-31, 2014 BCIPC 34 (CanLII) at para. 41.
[52] Order F10-34, 2010 BCIPC 50 (CanLII) at para. 21, and the cases cited there.
[53] For example, Manager's affidavit at paras. 17 and 20 and Chief's affidavit at paras. 11, 28 and 29.
[54] Chief's affidavit at para. 33.
[55] Tsal'álh's initial submission at paras. 36 and 47 and Chief's affidavit at para. 33.

harm under s. 17(1). Furthermore, s. 17(1) does not require a balancing of interests, as argued by the applicant. The analysis under s. 17(1) only requires evidence to show how the disclosure of the information at issue could be reasonably expected to cause the harm that s. 17(1) contemplates. I find that standard is met here.

[57] I considered whether some of the information in the Agreement must be severed and disclosed to the applicant in accordance with s. 4(2) of FIPPA. Section 4(2) of FIPPA states:

> The right of access to a record does not extend to information excepted from disclosure under Division 2 of this Part, but if that information can reasonably be severed from a record an applicant has the right of access to the remainder of the record.

[58] Previous OIPC orders have clarified that the phrase "can reasonably be severed" under s. 4(2) means the remaining information after a record is severed should be intelligible, responsive and meaningful, and if it is not, then that information cannot be reasonably severed under s. 4(2).[56]

[59] The applicant submits s. 17(1) should not apply to the entire Agreement and it should be severed in accordance with s. 4(2). In this case, it is possible to redact significant portions of the Agreement and then disclose the remainder, which consists of snippets of information, to the applicant. However, it would result in the disclosure of words or information that, in my view, would be meaningless without their surrounding context. I, therefore, find this information cannot reasonably be severed from the Agreement within the meaning of s. 4(2) of FIPPA.

[60] Having found s. 17(1) applies to the Agreement, it is not necessary for me to consider whether the various provisions at issue under ss. 16 and 21 also apply to information in the Agreement. However, I will consider next whether s. 25(1)(b) requires the Company to disclose any information in the Agreement to the applicant even though s. 17(1) applies.

Disclosure clearly in the public interest – s. 25(1)(b)

[61] The applicant submits the Company must disclose the Agreement under s. 25(1)(b) since it relates to a matter of public interest. Section 25(1)(b) requires a public body to proactively disclose information when the disclosure is clearly in the public interest. This provision states:

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[56] Order F16-12, 2016 BCIPC 14 (CanLII) at paras. 38-39, Order F10-08, 2010 BCIPC 12 (CanLII) at para. 45 and Order 03-16, 2003 CanLII 49186 (BC IPC) at paras. 53-54.

> 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
> …
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

[62] This section overrides all of FIPPA's discretionary and mandatory exceptions to disclosure.[57] As a result, there is a high threshold before disclosure will be considered in the public interest under s. 25(1)(b).[58] Previous OIPC orders have determined that the duty to disclose under s. 25(1)(b) "only exists in the clearest and most serious of situations" where the disclosure is "clearly (i.e. unmistakably) in the public interest."[59]

[63] Analyzing the application of s. 25(1)(b) in a specific situation begins by considering whether the information at issue concerns a subject, circumstance, matter or event justifying mandatory disclosure.[60] One should consider whether the matter is the subject of widespread public debate or discussion by the media or the Legislature, for example, or if the matter relates to a systemic problem rather than an isolated situation.[61] There may also be situations "where there is a clear public interest in disclosure of information about a topic that is not currently the object of public concern or is not known to the public."[62]

[64] Once it is determined that the information is about a matter that may engage s. 25(1)(b), the nature of the information itself should be considered to determine whether it meets the high threshold for disclosure.[63] Disclosure will be required under s. 25(1)(b) where a disinterested and reasonable observer, knowing the information and knowing all the circumstances, would conclude that disclosure is plainly and obviously in the public interest.[64]

[65] Several, non-exhaustive factors that may be considered in making this determination include whether disclosure would:

- contribute to educating the public about the matter;

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[57] *Tromp v. Privacy Commissioner*, 2000 BCSC 598 at paras. 16 and 19.
[58] Investigation Report F15-02, 2015 BCIPC 30, at pp. 28-29; Order F15-64, 2015 BCIPC 70 at para. 12.
[59] Order 02-38, 2002 CanLII 42472 (BC IPC) at paras. 45-46, citing Order No. 165-1997, [1997] BCIPD No. 22 at p. 3.
[60] Investigation Report F16-02, 2016 CanLIIDocs 4591 at p. 27.
[61] Order F20-51, 2020 BCIPC 60 (CanLII) at para. 18. Investigation Report F16-02, *ibid* at p. 27.
[62] Investigation Report F16-02, *supra* note 60 at p. 27.
[63] *Ibid* at p. 27.
[64] *Ibid* at p. 26.

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

- 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.[65]

[66] When determining whether disclosure is in the public interest, there may be competing public interests that weigh against disclosure and those interests may "be found in the exceptions to disclosure set out in ss. 12 to 21 of FIPPA."[66] Former Commissioner Denham clarified that the importance of considering the exceptions under Part 2 of FIPPA as part of the s. 25(1)(b) determination is "because the exceptions themselves are indicators of classes of information that in the appropriate circumstances may weigh against the disclosure of information."[67]

Does the matter engage the public interest under s. 25(1)(b)?

[67] The applicant's position on s. 25(1)(b) is related to the suspension of the rail shuttle service to Lillooet in 2021, which caused transportation problems and concerns for Tsal'álh members and other rail shuttle users. The applicant attributes the problems with ensuring a reliable passenger rail service to several factors, including the Company's failure "to monitor for compliance and enforce the [Agreement]" and Tsal'álh's "reluctance to engage the enforcement powers of [the Company]" under the Agreement.[68]

[68] The applicant submits the Company should disclose all or part of the Agreement under s. 25(1)(b) because it is in the public interest to uncover why there were problems with the passenger rail service, who was responsible and how to prevent similar problems in the future. The applicant theorizes there is information in the Agreement that would explain an alleged "gap between what is publicly promised and what actually gets delivered on the ground" or that will "confirm some 'challenges' in the performance of duty of care on the part of some party."[69]

[69] The applicant submits the affected group of people in this case, who would benefit from disclosure of the Agreement under s. 25(1)(b), are the communities that are dependent on passenger rail service. The applicant also

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[65] *Ibid* at p. 27.
[66] *Ibid* at p. 38.
[67] *Ibid*.
[68] Applicant's submission at para. 7.
[69] Applicant's submission at para. 7.

argues there is a broader public interest in the Province's decision in 2002 to discontinue passenger rail service from "North Vancouver to Prince George" and the restructuring and selling of "public railway assets in 2004."[70] The applicant cites numerous news articles and other documents in support of their position, most of which focus on the termination of a passenger rail service known as the Cariboo Prospector, as well as interest in passenger rail options for tourists and the Province's alleged mismanagement of BC Rail.

[70] The Company submits the applicant's evidence about other historic transportation issues in the region, such as the termination of the North Vancouver to Prince George passenger rail service, does not satisfy the first part of the s. 25(1)(b) test. The Company argues there is no evidence of widespread debate in the media, the Legislature or by oversight bodies about the passenger rail service at issue here or the Company's obligations regarding that service. It says this matter is an isolated situation, involving "private actors" and a "private transportation option" for Tsal'álh members, and not a systematic issue.[71] It contends any public interest in the matter is limited to the applicant and a few other community members.[72]

[71] The Company also submits s. 25(1)(b) is "not an investigative tool for those who seek to look into the affairs of a public body" and "cannot be so broad as to encompass anything that the public may be interested in learning."[73] The Company argues the applicant is using s. 25(1)(b) to investigate "the operational conditions" of the rail shuttle service.[74] The Company says these type of arguments have been rejected by past decision-makers and should not support an order for disclosure under s. 25(1)(b).[75]

[72] Tsal'álh supports the Company's position that the Agreement does not contain information which is a matter of public interest. Tsal'álh contends the applicant's reference to events in 2002 and 2004 does not satisfy the first part of the s. 25(1)(b) test. It says there is no current debate, review or media coverage about the passenger rail service that is the subject of the Agreement. Tsal'álh acknowledges that some of the applicant's evidence may demonstrate some local interest in 2002, but that there is currently no widespread public interest in the matter.[76]

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[70] Applicant's submission at para. 15.
[71] Company's initial submission at para. 63.
[72] Company's reply submission at para. 13.
[73] Company's initial submission at paras. 58-59, citing Order 00-16, 2000 CanLII 7714 (BCIPC) and *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC) at para. 33.
[74] Company's reply submission at para. 14.
[75] Company's reply submission at paras. 16 and 14, citing Order 00-16, 2000 CanLII 7714 (BCIPC).
[76] Tsal'álh's reply submission at para. 16.

[73] Tsal'álh also echoes the Company's position that the applicant is using s. 25(1)(b) as an investigative tool to review the Agreement. Tsal'álh submits previous OIPC decisions have been clear that "the public's interest in scrutinizing the work of public bodies, while important, does not in and of itself trigger the application of section 25."[77]

[74] It is clear to me that the applicant is personally interested in the Agreement and wants to hold any responsible parties accountable for failing to ensure a reliable passenger rail service for the affected communities. Among other things, the applicant argues it is in the public interest to obtain information that would hold the Company accountable for failing to properly oversee and enforce CN Rail's obligations under the Agreement. However, the applicant's personal interest and objectives, while important, are not enough to meet the threshold for disclosure under s. 25(1)(b). As noted by the Company, the BC Supreme Court has said that the term "public interest' in s. 25(1)(b) "cannot be so broad as to encompass anything that the public may be interested in learning."[78] I agree that this is an accurate statement regarding the scope of s. 25(1)(b).

[75] Furthermore, as noted by former Commissioner Denham in Investigation Report F16-02, the duty to disclose under s. 25(1)(b) will not be triggered every time someone suspects that a public body is not adequately carrying out its functions.[79] Instead, she noted "there must be an issue of objectively material, even significant, public importance, and in many cases it will have been the subject of public discussion."[80] In this case, I find the applicant's supporting evidence shows there is public interest in the termination of the passenger rail service known as the Cariboo Prospector, which ran from North Vancouver to Prince George, and the lack of a replacement option. However, I am not persuaded that there is widespread public concern or interest in the operation, management and oversight of the passenger rail shuttle service that is the subject of the Agreement. The applicant provided some evidence that shows there was local interest about that rail shuttle service in 2002, but there is no evidence before me of any recent widespread public interest in this matter.

[76] Therefore, considering all the materials before me, I am not satisfied that the information in the Agreement is about a matter that may engage s. 25(1)(b). Given this finding, it is not necessary for me to consider the second part of the s. 25(1)(b) test since both parts of the test must be satisfied. Ultimately, I find s. 25(1)(b) does not apply in this case.

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[77] Tsal'álh's reply submission at para. 17.
[78] *Clubb v. Saanich (Corporation of The District)*, 1996 CanLII 8417 (BCSC) at para. 33.
[79] Investigation Report F16-02, *supra* note 60 at p. 36.
[80] *Ibid*.

CONCLUSION

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

1. I confirm the Company's decision to refuse access to all the information in the Agreement under s. 17(1).

2. I confirm the Company's decision that it is not required under s. 25(1)(b) to disclose any of the information in the Agreement.

May 13, 2024

ORIGINAL SIGNED BY

Lisa Siew, Adjudicator

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