Office of the Information & Privacy Commissioner for British Columbia

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Order F16-45

SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY (TRANSLINK)

Celia Francis
Adjudicator

September 21, 2016

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Summary: A reporter requested access to "Project Work Defect" notices related to Translink's Compass Card project in Metro Vancouver. The adjudicator found that s. 25(1)(b) did not apply to the information in the notices. The adjudicator also found that s. 21(1) did not apply to the notices and ordered TransLink to disclose them to the reporter.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, 21(1)(a)(ii), 21(1)(b), 21(1)(c)(i), 21(1)(c)(iii), 25(1)(b).

Authorities Considered: B.C.: Order F15-58, 2015 BCIPC 61 (CanLII); Investigation Report F15-02, 2015 BCIPC 30 (CanLII); Order 02-38, 2002 CanLII 42472 (BC IPC); Order 01-20, 2001 CanLII 21574 (BC IPC); Investigation Report F16-02, 2016 BCIPC 36 (CanLII); Order 03-02, 2003 CanLII 49166 (BC IPC); Order 03-15, 2003 CanLII 49185 (BC IPC); Order 01-39, 2001 CanLII 21593 (BC IPC); Order 01-36, 2001 CanLII 21590 (BC IPC); Order F08-03, 2008 CanLII 13321 (BC IPC); Order F15-66, 2015 BCIPC 72; Order F14-28, 2014 BCIPC 31 (CanLII); Order 00-10, 2000 CanLII 11042 (BC IPC); Order F14-04, 2014 BCIPC 31 (CanLII); Order 03-20, 2003 CanLII 49194 (BC IPC); Order F05-29, 2005 CanLII 32548 (BC IPC); Order 02-50, 2002 CanLII 42486 (BC IPC).

Cases Considered: *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246, [1988] F.C.J. No. 615; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31; *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3; *British Columbia (Minister of*

Citizens' Services) v. British Columbia (Information and Privacy Commissioner), 2012 BCSC 875.

INTRODUCTION

[1] This order is about a request under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for access to records related to the Compass Card project in Vancouver. The applicant, a reporter with CTV News ("reporter"), made a request to the South Coast British Columbia Transportation Authority ("TransLink") for access to the following records:

> Any notices of "Project Work Defects", as defined in Article 10 of the Smart Card and Fare Gate Project Agreement, supplied by TransLink to Cubic Corporation from May 1, 2012 to October 30, 2014.[1]

[2] TransLink responded by denying access to the requested records under s. 17(1) of FIPPA (financial harm to public body).[2] The reporter requested a review by the Office of the Information and Privacy Commissioner ("OIPC") of TransLink's decision to deny access to the records. He also argued that disclosure of the records was in the public interest.[3]

[3] During mediation by the OIPC, TransLink clarified that it was relying on ss. 17(1)(b), (e) and (f), as well as on s. 21(1) (harm to third-party business interests), to withhold the requested records.[4] Mediation did not resolve the request for review and the applicant requested that the matter proceed to inquiry. The OIPC received submissions from the reporter, TransLink and the third party, Cubic Transportation Systems, Inc. ("Cubic").

[4] After the inquiry closed, TransLink informed the OIPC that it was no longer relying on s. 17, as the negotiations with Cubic that had formed the basis of its reliance on s. 17 had concluded. It added that "TransLink is content to release the subject records, however, there remains the Third Party's objection to the release on the basis of section 21".[5] TransLink did not, however, issue a formal decision to the applicant, abandoning s. 21(1). Its original decision to deny access to the records under s. 21(1) therefore still stands.

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[1] Email of October 30, 2014 from the reporter to TransLink.
[2] Email of December 22, 2014 from TransLink to the reporter.
[3] The fact report for this inquiry includes this argument.
[4] Email of October 1, 2015 from TransLink to the reporter.
[5] TransLink's letter of May 12, 2016 to the OIPC.

ISSUES

[5] Given that TransLink no longer relies on s. 17(1), the issues before me are as follows:

1. Whether s. 25 of FIPPA requires disclosure of the requested records.

2. Whether TransLink is required by s. 21(1) of FIPPA to refuse to disclose the requested records.

[6] Section 57 of FIPPA is silent on the burden of proof respecting the applicability of s. 25. Past orders have said that, in the absence of a statutory burden of proof regarding s. 25, it is incumbent on the parties to provide argument and evidence to support their respective positions, bearing in mind that it is ultimately the Commissioner's role to decide whether or not s. 25 applies.[6]

[7] Section 57(1) of FIPPA places the burden on TransLink of proving that the reporter is not entitled to have access to the requested records under s. 21(1).

DISCUSSION

Background

[8] TransLink is Metro Vancouver's regional transportation authority. It has responsibility for regional transit, cycling and commuting options, as well as Intelligent Transportation Systems. TransLink's transportation network includes buses, seabuses, rail services (*e.g.*, SkyTrain) and specialty services (*e.g.*, HandyDart).[7]

[9] Cubic is an American company that specializes in the development and supply of automated fare collection systems for public transport, including smart card technology. It has provided such systems to cities such as Chicago, Miami, San Francisco, London, Brisbane and Sydney.[8]

[10] In 2009, TransLink proposed to replace the existing fare collection system for its transportation network with a single automated one, which would include the installation of fare gates at over 50 stations. The Smart Card and Fare Gate Project Agreement ("Agreement"), the contract for what TransLink called the

[6] See, for example, Order F15-58, 2015 BCIPC 61 (CanLII).
[7] TransLink's initial submission, paras. 4-5; Affidavit of Lloyd Bauer, Chief Information Officer, TransLink, paras. 3-4.
[8] TransLink's initial submission, para. 6; Bauer affidavit, para. 5; Affidavit of Carl Adrignola, Vice President, Cubic Transportation Systems, para. 10.

Compass Project", was awarded to Cubic in 2010.[9] TransLink's costs under the Agreement are approximately $93,000,000.[10] Under Article 10.2 of the agreement, TransLink may give notice to Cubic of a "Project Work Defect",[11] which Cubic is then required to correct. The parties must agree on how and when the defect is to be remedied.

Records in dispute

[11] The records in dispute are notices of Project Work Defect ("Notices"), under Article 10.2 of the Agreement, from TransLink to Cubic.[12]

Section 25 — disclosure in the public interest

[12] The Notice of Inquiry stated that s. 25 is at issue in this inquiry. The parties' submissions dealt only with s. 25(1)(b) and so this is the issue I will consider. TransLink argued that s. 25(1)(b) does not apply and the reporter argued that it does.

[13] Section 25(1)(b) reads as follows:

> 25(1) Whether or not a request for access is made, the head of a public body must, without delay, disclose to the public, to an affected group of people or to an applicant, information
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> …
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> (b) the disclosure of which is, for any other reason, clearly in the public interest.
>
> (2) Subsection (1) applies despite any other provision of this Act.

[14] Former Commissioner Denham recently stated that, under s. 25(1)(b), the test is solely whether, in the circumstances, disclosure is "clearly in the public interest".[13] She explained that the "public interest" is "not merely that which the public may be interested in learning or defined by public curiosity".[14] She said that determining whether disclosure is in the "public interest" depends on the circumstances of each case and that a public body must consider whether a disinterested and reasonable observer, knowing the information and all of the circumstances, would conclude that the disclosure is plainly and obviously in the public interest. The Commissioner provided a number of non-exhaustive factors

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[9] The Agreement included the procurement and installation of fare collection equipment (*e.g.*, fare gates and fare card vending machines), a call centre and training. The reporter received a severed copy of the Agreement in response to an earlier FIPPA request; Bauer affidavit, para. 10.
[10] TransLink's initial submission, paras. 7-10; Bauer affidavit, paras. 6-9.
[11] A "project work defect" is any deficiency, defect or error in the project work or non-compliance with the Agreement's requirements.
[12] TransLink's initial response to the reporter indicates that there are 13 pages of records.
[13] Investigation Report F16-02, p. 26.
[14] Investigation Report F15-02, p. 30.

public bodies should consider in deciding whether or not to disclose information under s. 25(1)(b). These factors include:

- is the matter the subject of widespread debate in the media, the Legislature, by other Officers of the Legislature or by oversight bodies?
- does the matter relate to a systemic problem rather than to an isolated situation?
- would disclosure
  - contribute to educating the public about the matter?
  - contribute in a substantive way to the body of information that is already available about the matter?
  - enable or facilitate the expression of public opinion or enable the public to make informed political decisions?
  - contribute in a meaningful way to holding a public body accountable for its actions or decisions?[15]

[15] There is a high threshold for disclosure and, once a public body determines that the information is about a matter that may engage s. 25(1)(b), it must consider the nature of the information and weigh competing public interests to determine whether the threshold for disclosure is met.

[16] Prior to Investigation Report F15-02, the Commissioner interpreted s. 25(1)(b) as requiring not only that disclosure be clearly in the public interest but that there also be a compelling and urgent need, in a temporal sense, for disclosure.[16] Both TransLink and the reporter provided arguments that reflect, in part, this previous interpretation and the need to establish temporal urgency before s. 25(1)(b) could apply. I have considered all of their arguments regarding both interpretations.

Is disclosure "clearly in the public interest"?

[17] The reporter said that concerns about cost overruns and delays in the Compass Project arose as early as 2013. The reporter said he expected the Compass Project to be a central issue in an upcoming plebiscite on the regional transit system.[17] In his view, disclosure of the Notices was clearly in the public interest, as the Notices would shed light on the "exact problems" with the Compass Project and assist voters in making an informed decision in the plebiscite. Moreover, he argued, the project represents a $200 million

[15] Investigation Report F16-02, p. 27.
[16] See, for example, Order 02-38, 2002 CanLII 42472 (BC IPC), and Order 01-20, 2001 CanLII 21574 (BC IPC).
[17] In the plebiscite, the public were asked to approve an increase in sales tax to fund an expansion to the public transit system. They voted not to approve it.

investment of public funds and, because problems with the system continue,[18] there continues to be a clear public interest in ensuring accountability of the use of those funds. He said that due to the "secrecy" surrounding the Notices, he cannot demonstrate that the public is interested in their content.[19]

[18] TransLink acknowledged that there was, and remains, a public interest in public transit systems and in the Compass Project, including in how it is progressing and when it will be fully operational. In TransLink's view, however, there is no "extraordinary public interest" in the content of the Notices.[20]

[19] I accept that the progress of the Compass Project has been the subject of debate in the media for some years. I also agree that there was a public interest in the progress of the Compass Project at the time of the plebiscite and that the public continue to have an ongoing interest in the progress of the project. I also acknowledge the reporter's point that the public cannot demonstrate an interest in information of which they are unaware.

[20] However, the reporter's submission shows that, for some years, considerable information has been publicly available on cost overruns and reasons for the delays in making the Compass Project operational. In my view, disclosure of the Notices would not add meaningfully to the information already available to the public on these issues. I find that disclosure of the information in the Notices is not "clearly in the public interest" and that s. 25(1)(b) therefore does not apply. Given this finding, I need not also consider the parties' submissions about whether there was any temporal urgency to disclosure under s. 25(1)(b), as that provision was previously interpreted.

Section 21 – disclosure harmful to third-party business interests

[21] Cubic argued that s. 21(1) applies to the Notices in their entirety. The reporter argued that it does not. TransLink did not make a submission on s. 21(1), although it acknowledged that it has the burden of proof.[21]

[22] The relevant parts of s. 21(1) of FIPPA read as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
> (a) that would reveal

[18] For example: the system overcharges riders; fare gates remain open because some disabled individuals cannot use them, leading to continued fare evasion and loss of revenues; TransLink had to switch to one-zone fares for buses, also leading to loss of revenues. The reporter provided several media articles, dated both before and after the plebiscite, dealing with ongoing delays and issues with the Compass Project.
[19] Reporter's submission, paras. 4-35, 54-87, 89-98, 99-108.
[20] TransLink's initial submission, paras. 18-19; TransLink's reply submission, paras. 9-13.
[21] TransLink's initial submission, para. 13.

> …
> (ii) commercial, financial, labour relations, scientific or technical information of or about a third party,
> (b) that is supplied, implicitly or explicitly, in confidence, and
> (c) the disclosure of which could reasonably be expected to
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
> …
> (iii) result in undue financial loss or gain to any person or organization, …

[23] Previous orders and court decisions have established the principles for determining whether s. 21(1) applies.[22] All three parts of the s. 21(1) test must be met in order for the information in dispute to be properly withheld. First, TransLink must demonstrate that disclosing the information in issue would reveal commercial, financial, labour relations, scientific or technical information of, or about, a third party. Next, it must demonstrate that the information was supplied, implicitly or explicitly, in confidence. Finally, TransLink must demonstrate that disclosure of the information could reasonably be expected to cause one of the harms set out in s. 21(1)(c). In assessing the parties' arguments on s. 21(1), I have taken this approach, which is set out in previous orders and court decisions. I have also kept in mind that the burden of proof is on TransLink.

Is the information "commercial information"?

[24] FIPPA does not define "commercial information". However, previous orders have said that "commercial information" is information that relates to a commercial enterprise, to commerce or the buying, selling or exchange of goods (*e.g.*, in the context of a third party's commercial relationship with its customers). They have also said that the information does not need to be proprietary in nature or have an actual or potential independent market or monetary value.[23]

[25] Cubic argued that the information in the Notices is the product of an ongoing commercial relationship between Cubic and TransLink and is therefore its "commercial information" for the purposes of s. 21(1)(a)(ii).[24] The reporter acknowledged that some of the information could be Cubic's "commercial information" but suggested that some of it is likely TransLink's.[25]

[26] The Notices contain information about Cubic's performance on the Compass Project under the Agreement. The information arose out of Cubic's commercial relationship with TransLink under the Agreement. I am therefore

[22] See, for example, Order 03-02, 2003 CanLII 49166 (BC IPC), Order 03-15**,** 2003 CanLII 49185 (BC IPC), and Order 01-39, 2001 CanLII 21593 (BC IPC).
[23] See Order 01-36, 2001 CanLII 21590 (BC IPC) at para. 17, and Order F08-03, 2008 CanLII 13321 (BC IPC) at para. 62, Order F15-66, 2015 BCIPC 72, at para. 61.
[24] Cubic's initial submission, paras. 16-21; Adrignola affidavit, paras. 10-12. Most of Cubic's argument and evidence on this point was submitted *in camera*.
[25] Reporter's submission, para. 116.

satisfied that it is "commercial information" of or about Cubic as past orders have interpreted this term. I find that s. 21(1)(a)(ii) applies to it.

Was the information "supplied in confidence"?

[27] The next step is to determine whether the information in issue was supplied, implicitly or explicitly, in confidence. The information must be both "supplied" and supplied "in confidence".[26]

[28] Cubic submitted that the information was supplied in confidence to TransLink. The reporter cast doubt on this submission.

[29] **"Supplied"** — Cubic acknowledged that TransLink provided the Notices to Cubic. Cubic said, however, that it originally provided the commercial information in the Notices to TransLink.[27] Cubic also argued that disclosure of TransLink's statements in the Notices would permit the drawing of an accurate inference about information Cubic supplied in confidence to TransLink.[28]

[30] The reporter argued that the information is likely the product of TransLink's analysis of technological shortcomings in the system. He noted that Cubic said it disputes the Notices and argued it would not do so, if it had provided the information to TransLink in the first place.[29]

[31] Cubic's *in camera* evidence gave examples of information it said it had "supplied" to TransLink. However, it did not link these examples to specific information in the Notices. It also did not provide any supporting documentary evidence, for example, records containing information that it had originally provided in confidence to TransLink and which now appears in the Notices.

[32] A few sentences in the Notices refer to Cubic's responses to some of the issues TransLink raised. I accept that Cubic "supplied" these responses to TransLink in the course of their discussions of the various issues. Disclosure of this information would, in my view, directly reveal information that Cubic supplied to TransLink.

[33] Apart from this information, however, the Notices consist primarily of the following types of information:

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[26] See Order 01-39, 2001 CanLII 21593 (BC IPC), at para. 26, Order F14-28, 2014 BCIPC 31 (CanLII), at paras. 17-18.
[27] Cubic's initial submission, para. 25; Adrignola affidavit, para. 13. Most of Cubic's argument and evidence on this point was submitted *in camera*.
[28] Cubic's reply submission, paras. 6-7.
[29] Reporter's submission, paras. 119-128.

- issues TransLink raised with Cubic, including references to relevant provisions in the Agreement
- TransLink's observations and findings following its investigations of the issues
- TransLink's views on steps Cubic was taking to deal with the issues
- TransLink's views on whether or not Cubic had fulfilled its obligations under the Agreement and its reasons for these conclusions

[34] In my view, TransLink created or generated all of this information internally in order to provide it to Cubic. Cubic has also not demonstrated how disclosure of these types of information would permit the drawing of an accurate inference about information that it supplied in confidence to TransLink. Nor is this apparent from the information itself. I find this information was not "supplied" to TransLink for the purposes of s. 21(1)(b). Therefore, I find that s. 21(1)(b) does not apply to this information. This finding is consistent with previous orders and court cases which have found that information created or generated by a public body is not "supplied" within the meaning of s. 21(1)(b), unless it would disclose, directly or indirectly, underlying information that was supplied to the public body in confidence.[30]

[35] **Supplied "in confidence" —** I found above that a small amount of information (Cubic's responses to issues TransLink had raised with it) was "supplied" to TransLink for the purposes of s. 21(1)(b). I will now consider whether this information was supplied "in confidence".

[36] A number of orders have discussed the test for determining if third-party information was supplied, implicitly or explicitly, "in confidence" under s. 21(1)(b), for example, Order 01-36:[31]

> [24] An easy example of a confidential supply of information is where a business supplies sensitive confidential financial data to a public body on the public body's express agreement or promise that the information is received in confidence and will be kept confidential. A contrasting example is where a public body tells a business that information supplied to the public body will not be received or treated as confidential. The business cannot supply the information and later claim that it was supplied in confidence within the meaning of s. 21(1)(b). The supplier cannot purport to override the public body's express rejection of confidentiality.
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> …
>
> [26] The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express

[30] See, for example, Order 03-20, 2003 CanLII 49194 (BC IPC). See also Order F05-29, 2005 CanLII 32548 (BC IPC), and the cases to which it refers, including *Canada Packers Inc. v. Canada (Minister of Agriculture)* (1988), 53 D.L.R. (4th) 246, [1988] F.C.J. No. 615.

[31] Order 01-36, 2001 CanLII 21590 (BC IPC).

> promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
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> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

[37] Cubic said that it was under "a genuine understanding" that all project information, particularly "sensitive information" such as the Notices, would be kept confidential between the parties. It argued that the Notices were "confidential information" as defined in the Agreement. Cubic also said the following: it has disputed the Notices with TransLink; no Notices of Work Defects have been disclosed previously; Notices of Work Defects are not available from public sources; and development of the Compass system took place under confidential circumstances between Cubic and TransLink.[32]

[38] The reporter noted that the Agreement provides for the disclosure of "confidential information" under FIPPA and that Cubic explicitly acknowledged in the Agreement that it was aware that FIPPA applies to the Agreement and associated records. He argued that Cubic should therefore have been aware that the Notices could be disclosed under FIPPA.[33]

Analysis

[39] The Agreement states that the parties agree to keep confidential any "confidential information", with some exceptions, such as where FIPPA requires disclosure.[34] The Agreement defines "confidential information" as "any confidential or proprietary information … provided to or arising or acquired pursuant to" the Agreement.[35]

[40] In my view, the information that I found was "supplied" (*i.e.*, Cubic's responses to the issues that TransLink raised in the Notices) is information "arising out of the Agreement". I also accept Cubic's evidence that it originally provided this information to TransLink under circumstances of confidentiality.

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[32] Cubic's initial submission, paras. 30-31; Adrignola affidavit, paras. 14-15.
[33] Reporter's submission, paras. 129-136.
[34] Schedule 1 of the Agreement.
[35] Article 20.

I am satisfied that Cubic supplied this information "in confidence" to TransLink for the purposes of s. 21(1)(b).

Conclusion on s. 21(1)(b)

[41] For reasons given above, I find that most of the information in dispute was not "supplied" within the meaning of s. 21(1)(b) and that s. 21(1)(b) does not apply to this information.

[42] I find that s. 21(1)(b) applies only to those few sentences that refer to Cubic's responses to the issues that TransLink raised — information I found that Cubic supplied in confidence. I will now consider whether s. 21(1)(c) applies to this information.

Standard of proof for harms-based exceptions

[43] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*:

> This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".[36]

[44] Moreover, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner)*,[37] Bracken J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm and that the burden rests with the public body to establish that the disclosure of the information in question could reasonably be expected to result in the identified harm.

[45] I have taken these approaches in considering the arguments on harm under s. 21(1)(c).

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[36] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3, at para. 94.

[37] 2012 BCSC 875, at para. 43.

[46] **Harm to negotiating and competitive position - s. 21(1)(c)(i) —** Cubic said there has been "intense media scrutiny of the farecard system in Vancouver". It argued that media coverage following disclosure of the Notices would have negative consequences to Cubic's competitive position, by harming its existing customer relationships, impeding its ability to obtain new work around the world, and giving its competitors "commercially valuable insight" into Cubic's business.[38]

[47] Harm existing customer relationships — Cubic's argument and evidence on this point were received *in camera*, so I am limited in my ability to discuss them here.

[48] The reporter argued the anticipated harm — negative media coverage — has already happened through "widespread negative coverage of [Cubic's] transit system failures both in Vancouver" and elsewhere in the world. He provided numerous media articles to demonstrate this. He suggested that disclosure of the Notices is unlikely to make a significant difference to the publicity that already exists.

[49] Cubic did not say if existing media coverage has negatively affected its relations with its current customers. It also did not explain how disclosure of the information in the Notices might exacerbate any such negative affect. In my view, given the extensive coverage Cubic's various projects have already received, Cubic's existing customers are likely already aware of issues with the Compass project, such as inoperational fare gates and continued fare evasion. In such a case, I do not see how disclosure of the Notices would add materially to any negative effects this publicity may have had on Cubic's relations with its current customers.

[50] Impeding ability to obtain new work — Cubic said that it is a world leader in the business of fare gate systems and that it has "a very limited number of competitors". Cubic referred, *in camera*, to a number of contracts on which it is currently bidding and said that there is a high potential for it to secure at least one of them. It said that the body issuing a contract routinely closely examines a bidder's track record on past projects. Cubic submitted that negative news stories that it anticipates would flow from disclosure of the Notices would greatly impact Cubic's performance in this area. This could in turn, Cubic argued, reasonably be expected to harm its ability to obtain new contracts and thus its overall competitive position.

[51] The reporter disputed that disclosure of the Notices would cause Cubic to lose out on new customers and work. The reporter gave examples of contracts Cubic has obtained recently, despite negative media coverage of Cubic's work on other cities' transit systems. In his view, any connection between any

[38] Cubic's initial submission, paras. 38-46; Adrignola affidavit, paras. 16-23.

negative news stories flowing from disclosure of the Notices and damage to Cubic's ability to obtain new work is "more speculative than real". He also pointed out that the public could search the Internet on its own and find information on Cubic's "failures" worldwide.[39]

[52] Cubic did not say how many competitors it has. It also did not support its position on the alleged harm by, for example, referring to cases in which prospective customers had rejected its bids in current or recent competitive processes, as a result of negative publicity the Compass project has received to date. Nor did Cubic dispute the reporter's arguments that it has been successful in recent bids, despite negative media coverage on Cubic's other projects.

[53] Giving competitors "commercially valuable insight" into Cubic's business — Cubic argued that its competitors could use the information in the Notices to their advantage when competing with Cubic for future work. It gave *in camera* examples of information which it said competitors could use in this way.

[54] The reporter suggested that any insights provided by disclosure of the Notices are likely to be about TransLink's analysis and workmanship, not Cubic's business.[40]

[55] Cubic did not link its examples to specific information in the Notices. It also did not explain how disclosure of any of the information in dispute would provide commercially valuable insight into Cubic's business. Nor did Cubic explain how its competitors could use this "insight" to their advantage.

[56] **Undue financial loss or gain - s. 21(1)(c)(iii)** — Cubic argued that disclosure of the Notices would lead to media coverage which, in turn, would be based on TransLink's "subjective assessment" of the issues TransLink raised. Cubic said that under the Agreement, it is prevented from disclosing confidential information, so it could not adequately respond publicly to any media coverage. This inability to respond, it submits, would result in "undue" financial loss to Cubic.[41] The reporter disputed Cubic's arguments.[42]

[57] Previous orders have said that the ordinary meaning of "undue" financial loss or gain under s. 21(1)(c)(iii) includes excessive, disproportionate, unwarranted, inappropriate, unfair or improper, having regard for the circumstances of each case. For example, if disclosure would give a competitor

[39] Reporter's submission, paras. 158-166.
[40] Reporter's submission, paras. 168-169.
[41] Cubic's initial submission, paras. 47-50.
[42] Reporter's submission, paras. 170-173.

an advantage – usually by acquiring competitively valuable information – effectively for nothing, the gain to a competitor will be "undue".[43]

[58] Cubic did not explain how the limitations on its ability to respond publicly to the Notices would translate into financial loss to it, still less how any such loss would be "undue".

Conclusion on s. 21(1)(c)

[59] Cubic's submissions on harm are little more than assertions and do not persuade me that any of the harms under s. 21(1)(c)(i) or (iii) could reasonably be expected to result from disclosure. A party resisting disclosure must provide "cogent, case specific evidence of harm" and "detailed and convincing evidence".[44] TransLink and Cubic have provided no such evidence to support Cubic's submissions. In summary, they have not persuaded me that disclosure of the information in dispute could reasonably be expected to cause Cubic harm under s. 21(1)(c). I find that s. 21(1)(c) does not apply to the information in dispute. Therefore, Translink is not authorized to refuse the applicant access to the Notices under s. 21(1).

CONCLUSION

[60] For reasons given above, under s. 58(2)(a) of FIPPA, I require TransLink to give the reporter access to the Notices by November 3, 2016. TransLink must concurrently copy the OIPC Registrar of Inquiries on its cover letter to the reporter, together with a copy of the records.

[61] Given my finding on s. 25(1)(b), no order on this provision is necessary.

September 21, 2016

ORIGINAL SIGNED BY

Celia Francis, Adjudicator

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[43] See, for example, Order 00-10, 2000 CanLII 11042 (BC IPC) at pp. 17-19. See also Order F14-04, 2014 BCIPC 31 (CanLII) at paras. 60-63, for a discussion of undue financial loss or gain in the context of a request for a bid proposal.

[44] See Order 02-50, 2002 CanLII 42486 (BC IPC), at paras. 124-137, which discussed the standard of proof in this type of case and summarized leading decisions on the reasonable expectation of harm.