OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order F09-15

SOUTH COAST BRITISH COLUMBIA TRANSPORTATION AUTHORITY

Michael McEvoy, Adjudicator

October 7, 2009

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Summary: The applicant requested salary and severance information concerning SkyTrain employees for the years 2002 to 2005. Section 22(4)(e) does not apply to the requested information in this case. However, TransLink, as the public body responsible for the information, is required to disclose it following consideration of all relevant factors under s. 22, including the need for public scrutiny.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 22(1), 22(2)(a) and (f), 22(3)(d) and (f), 22(4)(e); Schedule 1 definition "local government body".

Authorities Considered: B.C.: Order 01-53, [2001] B.C.I.P.C.D. No. 56; Order F05-18, [2005] B.C.I.P.C.D. No. 26; Order F07-22, [2007] B.C.I.P.C.D. No. 22; Order F06-21, [2006] B.C.I.P.C.D. No. 40; Order No. 173-1997, [1997] B.C.I.P.C.D. No. 34; Order 01-46, [2001] B.C.I.P.C.D. No. 48; Order 03-21, [2003] B.C.I.P.C.D. No. 21; Order 00-53, [2000] B.C.I.P.C.D. No. 57.

Cases Considered: *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271; *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27.

1.0 INTRODUCTION

[1] The applicant requested base salary information for all exempt employees of the British Columbia Rapid Transit Company ("SkyTrain") for the years 2003 to 2005. He also asked for release agreements concerning the severance of three former SkyTrain employees, two of which were signed in 2003 and the other in 2004.[1] The South Coast British Columbia Transportation Authority ("TransLink"), as the parent company of SkyTrain and the public body that takes responsibility

[1] The applicant originally asked for the severance agreements of five former employees but TransLink stated that only three persons identified by the applicant had received severance payments.

for its records,[2] responded that the disclosure of the records would unreasonably invade the privacy of the employees, past and present. TransLink said it was therefore required to withhold the records under s. 22(1) of the *Freedom of Information and Protection of Privacy Act* ("FIPPA").

2.0 ISSUE

[2] The issue in this case is whether TransLink is required to withhold the requested records under s. 22(1) of FIPPA.

[3] Section 57(2) of FIPPA provides that the applicant bears the burden of proving that disclosure of personal information of a third party contained in the records in question would not be an unreasonable invasion of the third party's privacy.

3.0 DISCUSSION

[4] **3.1 Background**—Prior to 1998, SkyTrain operated as part of BC Transit, a public body covered by FIPPA under Schedule 2. In 1998, SkyTrain, along with other publicly funded transportation services in the Lower Mainland, was separated from BC Transit and became a subsidiary of the newly created Greater Vancouver Transportation Authority ("GVTA"), more commonly known as TransLink.[3] From its inception, TransLink was designated a "public body" under paragraph (p) of the definition of "local government body" in Schedule 1 of FIPPA, but SkyTrain itself was not.

[5] SkyTrain was subsequently designated a public body under Schedule 2 of FIPPA, effective April 6, 2006 ("ministerial order") following a request letter from the Commissioner, who described the omission of TransLink's subsidiaries, including SkyTrain, from the 1998 FIPPA changes, as a legislative oversight.

[6] The applicant subsequently made an access request for the SkyTrain records that are in issue in this case.

[7] **3.2 Unreasonable Invasion of Personal Privacy**—The relevant portions of s. 22 of FIPPA read as follows:

> 22 (1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.
>
> (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

[2] TransLink's initial submission, para. 18.
[3] The GVTA changed its name to the South Coast British Columbia Transportation Authority in 2007. The Schedule 1 of FIPPA was amended to reflect this change of name.

> (a) the disclosure is desirable for the purpose of subjecting the activities of the government of British Columbia or a public body to public scrutiny,
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> …
>
> (f) the personal information has been supplied in confidence,
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> (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> …
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> (d) the personal information relates to employment, occupational or educational history,
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> …
>
> (f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness
>
> (4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if
>
> …
>
> (e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff,

[8] In Order 01-53,[4] the Commissioner discussed the application of s. 22 and I have applied that decision and other relevant decisions without elaboration.

[9] Most of the records contain the annual salary information for numerous employees. The other records are release agreements concerning severance payments for three former employees. FIPPA defines personal information as recorded information about an identifiable individual other than contact information. Clearly, all of these records contain personal information.

[10] **3.3 Section 22(4)**—Determining whether the disclosure of personal information leads to an unreasonable invasion of third-party personal privacy first requires asking whether any elements of s. 22(4) apply. An affirmative answer mandates the public body's release of the personal information because disclosure is deemed by s. 22(4) not to be an unreasonable invasion of personal privacy.[5] If the factors under s. 22(4) are not applicable, then I must consider all other relevant circumstances and presumptions under s. 22.

[11] The applicant submits that BC Transit and TransLink, on behalf of SkyTrain, granted his similar requests for information under s. 22(4)(e) in the past.[6] The applicant notes that TransLink continues to handle access requests sent to SkyTrain and other TransLink subsidiaries, which the applicant argues, is

[4] [2001] B.C.I.P.C.D. No. 56 at paras. 22-24.
[5] Assuming that no other exceptions of FIPPA apply.
[6] Applicant's initial submission, p. 1.

proof of TransLink's control over the information.[7] The applicant also states, that further delay in this matter would be unnecessary if this Office were to agree with his argument "that s. 22(4)(e) is retroactive…".[8]

[12] TransLink acknowledges that it "exercises a sufficient degree of high-level control over the records of SkyTrain, by virtue of the *Greater Vancouver Transportation Authority Act,* to bring it within the scope of the Act for the purposes of the period in question."[9] However, it contends that this fact alone does not mandate disclosure of the third-party personal information in this case under s. 22(4)(e). TransLink argues it is still statutorily required to apply the mandatory exception to disclosure under s. 22(1) of the Act.

[13] TransLink also submits that SkyTrain's status as one of its subsidiaries does not determine the s. 22(4)(e) matter. TransLink submits that s. 22(4)(e) "cannot be properly engaged in this case because the individual third parties were employees of a subsidiary company which was not a 'public body' in its own right from 2003 to 2005".[10] TransLink submits that to give effect to the applicant's submission would negate the effect of the ministerial order that designated SkyTrain as a public body.

[14] TransLink further adds that to accept the applicant's contention that the ministerial order should be given retroactive effect is "equally misconceived."[11] TransLink submits that it is a fundamental principle of statutory interpretation that legislation is presumed not to have retroactive or retrospective application.

[15] The meaning of s. 22(4)(e) must be derived from reading it in its entire context and grammatical and ordinary sense, harmoniously with the scheme and object of FIPPA, as well the intention of the Legislature.[12]

[16] In general terms, s. 22(4)(e) is meant to ensure that information concerning public servants' remuneration, functions or positions is available and that personal privacy considerations do not impede disclosure of this information. The provision applies when its two specific elements are satisfied. First, the requested information must be about a third party's remuneration.[13] This is the case here because the information falls within the scope of "remuneration" as determined by previous orders.[14] Second, the information must be about the third party's remuneration "as an employee of a public body", which means that the individual receiving the remuneration is or was in the employ of a public body. I include the past tense of the phrase, "in the employ", because nothing in the language or context of s. 22(4)(e), including FIPPA's legislative objectives as

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[7] Applicant's initial submission, p. 4.
[8] Applicant's email of February 26, 2008, concerning a preliminary matter in this inquiry.
[9] TransLink's initial submission, para. 18.
[10] TransLink's initial submission, para. 22.
[11] TransLink's initial submission, para. 23.
[12] On the issue of modern statutory interpretation see for example *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27, at para. 21.
[13] I need not consider whether the information relates to public servants' positions or functions.
[14] See, for example, Order No. 173-1997, [1997] B.C.I.P.C.D. No. 34.

expressed in s. 2(1), warrants interpreting s. 22(4)(e) to apply only if an individual, whose personal information is sought, is still employed by a public body at the time of the access request.

[17] Therefore, the question here is whether the 2003, 2004 and 2005 severance and salary records, constitute information that is, or was, about the third parties' remuneration as employees of a public body. The answer in my view is no because SkyTrain was not a public body in that period and the third parties were therefore not in an employment relationship with a public body when the remuneration was paid. The second s. 22(4)(e) criterion is therefore not satisfied.

[18] I also agree with TransLink that s. 22(4)(e) is not triggered on the basis that SkyTrain is its subsidiary. The definition of "local government body", under which TransLink is a named public body, did not (and does not) include TransLink's subsidiaries. Similarly, TransLink's admission that SkyTrain's records were under its control during "the period in question" does not mean that SkyTrain itself became a public body at that time.[15]

[19] The applicant also submits, as I noted above, that "s. 22(4)(e) is retroactive". The applicant asks me, in effect, to treat SkyTrain as if it were a public body from 2002 to 2005 for the purposes of the particular wording of s. 22(4)(e).[16]

[20] The general rule of statutory interpretation is that legislation does not apply retroactively unless its language expressly, or by necessary implication, requires such a construction.[17] There is no express language in the ministerial order proclaiming SkyTrain a public body that supports retroactivity for the public body designation. Further, nothing in the wording of the ministerial order, s. 22(4)(e) or the language of FIPPA as a whole implies that SkyTrain should retroactively be considered a public body for the years 2002 to 2005.

[21] As noted above, the language of s. 22(4)(e) clearly states that it applies only to information about the third party's remuneration as an employee of a public body. For this reason I find that s. 22(4)(e) does not apply to the particular facts of this case. While s. 22(4)(e) does not apply to the records, they are nonetheless now under the control and custody of a public body and therefore subject to the following analysis under the rest of s. 22, including a consideration of all relevant presumptions and circumstances.

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[15] This does not address whether the records were subject to disclosure because they were in the custody or control of TransLink. That issue was not previously determined and it is not a matter before me in this inquiry.

[16] All of SkyTrain's records, regardless of their date, of course, are covered by FIPPA pursuant to s. 3. The only issue here is whether the particular provision of s. 22(4), concerning those records, is triggered in this case.

[17] *Gustavson Drilling (1964) Ltd. v. M.N.R.*, [1977] 1 S.C.R. 271.

[22] **3.4 Presumed Unreasonable Invasion of Privacy—**TransLink argues there is a presumed unreasonable invasion of third-party privacy in this case because the requested information falls within the scope of ss. 22(3)(d) and (f). TransLink submits the severance and base salary information relates to past employment history and the income of third parties.[18] The applicant did not address these issues in his submission.

[23] I find that the presumptions under ss. 22(3)(d) and (f) do apply in this case. Employment income is part of an individual's employment history,[19] as is an employee's termination date[20] and the severance payment itself, resulting from the termination of employment.

[24] **3.5 Relevant Circumstances—**It is now necessary to consider all of the relevant circumstances in determining whether TransLink must refuse to disclose the requested information.

Public Scrutiny

[25] Though he does not specifically refer to s. 22(2)(a), the applicant's submissions focus on subjecting SkyTrain's actions to public scrutiny, in particular that the public "should be allowed to see how the public servants are paid", especially as concerns the severance payments.[21] The essence of the applicant's argument is that "these public servants are accountable to the ultimate employer the Taxpayer as TransLink receives Tax dollars, Federally, Provincially and municipally".[22] He submits that an important purpose of FIPPA is to hold public bodies accountable. The applicant also asserts that, while TransLink denied his own requests for financial information, it responded to those of others, in what he describes as "business as usual compliance" with FIPPA.[23]

[26] TransLink argues that a "qualitative assessment" of the information in dispute is necessary to determine whether it would add anything meaningful for public scrutiny. TransLink submits that the information requested by the applicant in this case is "dated" and therefore adds nothing meaningful to public scrutiny. TransLink contends that the information in question is superceded by more current salary information, information which TransLink says would fall under s. 22(4)(e) because SkyTrain is now a public body in its own right.[24]

[27] The Adjudicator in Order F05-18[25] stated:

> What lies behind s. 22(2)(a) of the Act is the notion that, where disclosure of records would foster accountability of a public body, this may in some

[18] TransLink's initial submission, paras. 27 and 28.
[19] Order 01-46, [2001] B.C.I.P.C.D. No. 48.
[20] Order 03-21, [2003] B.C.I.P.C.D. No. 21.
[21] Applicant's initial submission, p. 5.
[22] Applicant's reply, p. 2.
[23] Applicant's initial submission, p. 5.
[24] TransLink's initial submission, para. 32.
[25] [2005] B.C.I.P.C.D. No. 26.

> circumstances provide the foundation for a finding that the release of third party personal information would not constitute an unreasonable invasion of personal privacy.

[28] TransLink's argument that the requested information is "dated" or that its qualitative nature is such that it would add little to the public scrutiny of TransLink is not persuasive. Quite apart from the fact that the information is reasonably current, a consideration of some relevance, even dated information can promote public scrutiny of a public body's activities. Information disclosing patterns, trends or practices of a public body respecting remuneration of employees can assist in subjecting the public body to scrutiny even if it is in some sense 'historical' information.

[29] I find that the release of the requested information would be desirable for the purposes of subjecting TransLink to public scrutiny, and is a circumstance, in this case, significantly favouring disclosure of the requested records.

[30] Finally, on this point, TransLink submits, with reference to Order F07-22,[26] that public scrutiny "is not itself determinative under s. 22."[27] This submission misreads Order F07-22. The comments concerning public scrutiny in that order were a reminder that each case must be assessed on its individual facts and that all relevant circumstances must be accounted for in coming to a final determination.

Confidentiality

[31] TransLink argues that s. 22(2) presents a non-exhaustive list of circumstances to consider in determining whether disclosure of a record would be an unreasonable invasion of third party privacy. It contends that, although the information on the severance payments was not "supplied" in confidence within the meaning of s. 22(2)(f), two of the third parties negotiated their releases in confidence. TransLink also submits that all of the releases contain confidentiality provisions reflecting the parties' intent to maintain the confidentiality of their settlements. TransLink argues that these circumstances favour a finding that it is required to withhold the requested information. It points to Order F06-21[28] in support of its position.

[32] I agree with TransLink that s. 22(2) is not an exhaustive list of circumstances.[29] However, I give little weight to the circumstances outlined in the above paragraph and am of the view that Order F06-21 does not assist TransLink's argument. The evidence in that case was that the third parties had confidentially, and on an anonymous basis, supplied peer reviews for forestry funding proposals. This brought the third parties clearly within s. 22(2)(f), which

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[26] [2007] B.C.I.P.C.D. No. 22.
[27] TransLink's initial submission, para. 30.
[28] Order F06-21, [2006] B.C.I.P.C.D. No. 40.
[29] Other orders have noted this point; for example see the Commissioner's comments in Order 00-53, [2000] B.C.I.P.C.D. No. 57.

TransLink admits is not the case here. The adjudicator, in that case, also held that disclosing the records might unfairly damage the reputations of the third parties and expose them to professional harm. None of these factors exists here.

[33] Further, the releases the terminated employees signed have less to do with third-party privacy and more to do with TransLink's desire to protect its corporate interests by ensuring their publication does not prejudice future severance negotiations. This is, in effect, an argument under s. 17(1), an exception TransLink did not apply.

[34] I have also taken into consideration letters submitted by SkyTrain employees who believe that releasing the requested salary information is a breach of their privacy. I acknowledge the time these employees have taken to do this but I give the letters minimal weight considering, as TransLink admits, the applicant would be entitled to their current salary information under s. 22(4)(e). Indeed, another employee wrote in response to the applicant's request that his base salary "is information that can be given freely to anyone who asks," adding that he could not "logically argue" that its disclosure would be an unreasonable invasion of personal privacy.[30]

SkyTrain's History and FIPPA

[35] As I noted above, SkyTrain was designated a public body under Schedule 2 of FIPPA in 2006 following a request by the Commissioner. The Commissioner's request, in the form of a letter to the Minister responsible for FIPPA, characterized the lack of SkyTrain's specific designation under FIPPA, in 1998, as a "legislative oversight". What is also clear from the Commissioner's letter to the Minister, a record before this inquiry, is that throughout the period he describes, SkyTrain was a publicly funded institution and operated in an apparent culture of openness by responding to access requests, through TransLink, its parent body that controlled its records. While I agree with TransLink that previous disclosures of similar information cannot be the sole reason for requiring a subsequent one, the manner in which previous requests were processed can, in combination with other particulars, constitute a relevant circumstance. In addition to previous disclosures, TransLink concedes that, if the "current" salary information of excluded employees were requested, it would be disclosed under s. 22(4)(e). In my view, these circumstances, together, are relevant and require consideration in determining this matter. The essence of TransLink's argument is that even though the kinds of salary and severance records requested by the applicant were the subject of past releases and would be readily disclosed in the future, their release, covering a narrow time window in between, unreasonably invades the privacy of the third parties. A lack of cogency pervades this position, as TransLink is effectively arguing that a historical anomaly should continue to operate.

[30] SkyTrain employee's letter dated March 3, 2008.

Conclusion

[36] I have carefully considered all of the circumstances in this case, including the desirability of subjecting the public body to scrutiny, and I have concluded that the presumptions with respect to s. 22(3)(d) and (f) are rebutted and that it would not be an unreasonable invasion of third party privacy to disclose the information requested by the applicant.

4.0 CONCLUSION

[37] For the reasons given above, under s. 58 of FIPPA, I require that TransLink give the applicant access to information he has requested.

[38] I further require SkyTrain to give the applicant access to this information within 30 days of the date of this order, as FIPPA defines "day", that is, on or before November 20, 2009 and, concurrently, to copy me on its cover letter to the applicant, together with a copy of the records.

October 7, 2009

ORIGINAL SIGNED BY

Michael McEvoy
Adjudicator