

BIDDERS BEWARE: INFORMATION SUBMITTED IN RESPONSE TO AN RFP MAY BE DISCLOSED

Under the *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 ("**FIPPA**"), members of the public may request access to records held by a public body ("**records**").

The potential disclosure of records has many implications for individuals and corporations conducting business with public bodies. For example, a bidder that has responded to a Request for Proposal ("**RFP**") from a public body may seek access to records held by a public body (for example, to see why another bidder was successful or to attempt to glean competitive pricing information of another bidder). Conversely, a bidder may seek to protect its own information from disclosure by the public body (for example, to protect trade secrets).

To balance the objectives of making records accessible and protecting privacy rights of individuals and corporations, section 21(1) of FIPPA sets out a three-part test to determine when the head of the public body must refuse to disclose requested information:

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

(a) that would reveal

(i) trade secrets of a third party, or

(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,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

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(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

All three elements of the s. 21(1) test above must be satisfied for the information to be properly withheld.¹ While this article deals with section 21(1)(b), section 21(1)(a) and section 21(1)(c) also must be satisfied. The specific considerations under those sections are significant enough warrant their own article. This article will deal exclusively with section 21(1)(b).

Given the plain meaning of the words in section 21(1)(b), a bidder that is responding to an RFP from a public body may have the mistaken belief that: (1) the information they are providing in their response to the RFP is “supplied”; and (2) the information has been supplied “implicitly or explicitly, in confidence”; however, decision-makers have taken a legalistic approach to determining whether information has been supplied in confidence.

Accordingly, determining whether information has been supplied in confidence warrants careful consideration. The two-part analysis followed by decision-makers and the application of that analysis to responses to RFPs from a public body is outlined below.

The first step of the analysis is to determine whether the information has been “supplied” to a public body. The second step is to determine whether information has been supplied “in confidence”.²

1. INFORMATION MUST BE SUPPLIED

The Office of the Information and Privacy Commissioner for British Columbia (“**BCIPC**”) and courts have held information that is susceptible to change by negotiation is not ‘supplied information’ within the meaning of section 21(1)(b).³

Typically, all information contained in a signed agreement – such as in a contract resulting from an RFP – between a public body and a third party is not considered information that has been ‘supplied’ to the public body because contracts are usually the result of negotiation. Decision-makers have considered this the case even when the ‘negotiated information’ is “information from a proposal...incorporated unchanged in a contract.”⁴

This is concerning for a bidder as information it provides when responding to an RFP may be proprietary or sensitive. If the bid is successful, then this information may then be incorporated into a contract and no longer be considered ‘supplied’ information, meaning it is no longer exempt from disclosure under section 21(1) of FIPPA.

RFP proposals themselves are generally considered supplied information.⁵ Accordingly, if the bid is not successful, and the information is therefore not incorporated into a contract, then the information will likely be considered supplied information within the meaning of section 21(1) of FIPPA.⁶

However, there are two circumstances where information in an agreement will be considered

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'supplied information' as opposed to 'negotiated information':

1. The information is 'immutable', ie. not susceptible to change, (ex. fixed costs such as labour costs set out in a collective agreement); and
2. When the disclosure of the information would allow a reasonably informed observer to draw accurate inferences about underlying confidential information that was 'supplied' by the third party, but was not expressly contained in the contract.⁷

Despite the general rule that information in an agreement is generally considered negotiated and not supplied information, the analysis can be more complicated when considering contracts that result from an RFP.

RFPs may require certain information be included in the response to an RFP. This information may then be incorporated into the agreement without the opportunity for negotiation. This information may be considered immutable and therefore considered 'supplied information'.⁸ Accordingly, this information may be exempt under section 21(1) despite being in an agreement.

It is important to note that information that is incorporated into an agreement unchanged from a response to an RFP is not 'supplied' simply because it has not changed. It is "the lack of change in the contractual terms in addition to the relative immutability or discreteness of the

information it contains that, considered in its full context, makes it immutable."⁹

For example, in *Grand Forks*, the adjudicator considered a contract where the bidder wanted an exception under section 21(1) for pricing information it provided in response to an RFP that then appeared as a schedule to the contract. The adjudicator concluded that the pricing information was negotiated information because the language of the RFP indicated that there would be negotiation with the successful proponent; however, the information the bidder supplied about past business dealings was immutable and therefore 'supplied information'.¹⁰

2. INFORMATION MUST BE SUPPLIED IN CONFIDENCE

When a public body explicitly states that it is receiving information in confidence, section 21(1)(b) of FIPPA is clearly satisfied. Conversely, when a public body explicitly states that the information will not be treated as confidential, the bidder "cannot purport to override the public body's express rejection of confidentiality."¹¹ In that case, the party opposing the release of the information will fail the second part of the test.

It is more complicated in a situation where there is alleged to be an 'implicit' duty of confidentiality. Section 26 of Order 01-36 from the Information and Privacy Commissioner

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states that, in cases when a third-party alleges that there is an implied duty of confidentiality, the courts or adjudicator will consider all circumstances of the disclosure, including whether the information was:

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 or corporation prior to the information 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.

TAKE AWAYS

In the case of an RFP from a public body, businesses should be aware when responding that if the RFP explicitly states the information will not be treated as confidential, then the business' response shall not be exempt from disclosure under section 21(1) of FIPPA.

If the RFP is silent on the matter, the bidder may increase its chances of having the information protected under section 21(1) of FIPPA if it explicitly states the information is being provided to the public body in confidence.

When submitting a response to an RFP from a public body, bidders should be aware that:

1. information included in an agreement may be considered 'negotiated' information instead of 'supplied' information, even in cases where there was little or no actual negotiation; and
2. a bidder cannot unilaterally declare that the information it is providing is 'confidential'.

If a bidder is providing sensitive information during the RFP process, it may wish to obtain legal advice to fully understand whether that information will be considered information "supplied in confidence" under section 21(1)(b) of FIPPA.

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Footnotes:

1. *Vancouver (City), Re* 2016 BCIPC 19, at para 19.
2. *British Columbia (Oil and Gas Commission), Re* 2018 BCIPC 54, at para 38.
3. *Grand Forks City, Re* 2016 BCIPC 34 at para 19.
4. *Ibid*, at para 19.
5. *Victoria (City), Re* 2013 BCIPC 22 at para 15.
6. See: *Victoria (City), Re*, 2013 BCIPC 22 at paras 15 to 17.
7. *Ibid*, at para 20, citing Order 01-39 [*Translink, Re* (August 16, 2001, Doc. 01-39 (BCIPC)
8. See: *Grand Forks* at paras 23-28.
9. *Provincial Health Authority, Re*, 2014 BCIPC 4 at para 38.
10. See: *Grand Forks* at paras 23-28.
11. *Ministry of Water, Land and Air Protection, Re*, 2001 CanLII 21590 (BCIPC) at para 24.



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Sara completed her law studies at Peter A. Allard School of Law at the University of British Columbia. She was called to the Bar of Ontario in 2018, after spending two years post-graduation working abroad in London, England as a legal advisor to a cyber security company. She hopes to use her experience and passion for local government to deliver outstanding legal advice to her clients as her practice continues to grow.

Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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