



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

Order F09-22

**THE BOARD OF EDUCATION OF SCHOOL DISTRICT 35 (LANGLEY)**

Jay Fedorak, Adjudicator

November 12, 2009

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**Summary:** Third party contractor asked for a review of the public body's decision that s. 21(1) did not require it to refuse to give access to part of the contractors winning proposal in an RFP competition for vending machine services. Section 21(1) requires the public body to withhold part, but not all, of the proposal.

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

**Authorities Considered:** **B.C.:** Order 03-02, [2003] B.C.I.P.C.D. No. 2; Order 03-15, [2003] B.C.I.P.C.D. No. 15; Order 03-33, [2003] B.C.I.P.C.D. No. 33; Order 00-10, [2000] B.C.I.P.C.D. No. 11; Order 03-16, [2003] B.C.I.P.C.D. No. 16.

## **1.0 INTRODUCTION**

[1] This order arises from a request by an applicant, Aable Vending, for records relating to the winning proposal in a competition that resulted from the Request for Proposal RFP#97-B-07 ("RFP") for a contract for the provision of vending machine services for schools within the Board of Education of School District 35 (Langley) ("School District").

[2] The School District gave notice of the request to the winning bidder, Fraser Valley Vending, as a third party, under s. 23 of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"), requesting its views on disclosing records relating to its business. Fraser Valley Vending objected to the disclosure of any information on the grounds that revealing any part of its proposal would harm its business interests.

[3] The School District subsequently notified Fraser Valley Vending and Aable Vending, under s. 24 of FIPPA, that it intended to disclose some of the requested information and withhold the remainder under s. 21(1) of FIPPA. Fraser Valley Vending requested a review of the School District's decision to disclose some of the requested information.

[4] During mediation, Fraser Valley Vending consented to the disclosure of the contract that resulted from the RFP, but maintained that its winning proposal should be entirely withheld under s. 21(1) of FIPPA. Mediation did not resolve the matter and this Office held a written inquiry and issued a notice to the School District, Fraser Valley Vending and Aable Vending, the applicant, as an appropriate person.

## **2.0 ISSUE**

[5] The issue before me is whether the School District is required to refuse access to all or portions of the record in dispute under s. 21(1) of FIPPA.

[6] Under s. 57(1) of FIPPA, it is up to the head of the public body to prove that Aable Vending has no right of access to the information it believes must be withheld from the applicant.

[7] Under s. 57(3)(b) of FIPPA, it is up to Fraser Valley Vending to prove that Aable Vending has no right of access to the portion of records that the School District had made a decision to release.

## **3.0 DISCUSSION**

[8] **3.1 Record in Dispute**—The record consists of the complete proposal that Fraser Valley Vending submitted in response to the RFP. It includes information about the company and an explanation as to how Fraser Valley Vending would meet the requirements of the RFP. The School District and Fraser Valley Vending take the position that most of the proposal should be withheld under s. 21 of FIPPA and disagree only about six records attached to the proposal that consisted of copies of records, five of which were created by other organizations.

[9] The inquiry will encompass the entire proposal, not just the six records over which the School District and Fraser Valley Vending differ. As the notice of inquiry states, "the adjudicator will consider whether the public body is required to refuse access to the requested information under s. 21 of FIPPA". The submissions of the School District, Fraser Valley Vending and Aable Vending also speak to the application of s. 21 to the entire proposal. Therefore, I will consider the application of s. 21 of FIPPA to the entire proposal.

[10] **3.2 Harm to Business Interest**—Section 21(1) of FIPPA requires public bodies to withhold information the disclosure of which would harm the business interests of a third party. It sets out a three-part test for determining whether disclosure is prohibited, all three elements of which must be established before the exception to disclosure applies. These are the relevant FIPPA provisions in this case:

**Disclosure harmful to business interests of a third party**

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

- (a) that would reveal ...
  - (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, ...

[11] The Commissioner has considered the application of s. 21(1) in numerous orders and the principles for its application are well established.<sup>1</sup> I have applied those principles here without repeating them.

***Commercial or Financial Information***

[12] Fraser Valley Vending submits that the information in the records is commercial information consistent with the Commissioner's finding in Order 03-33.<sup>2</sup> It said that the proposal contains "information detailing the nature of the products and services they proposed to supply or perform and methods to be used in performing the proposed services".<sup>3</sup> Fraser Valley Vending claims that the proposal:

has been fine-tuned over the years to present Fraser Valley Vending's experience and first class services in the best possible light and to highlight what sets Fraser Valley Vending apart from standard vending companies. Fraser Valley Vending has invested significant time and resources in developing what it considers to be a first class, comprehensive proposal.

<sup>1</sup> See for example, Order 03-02, [2003] B.C.I.P.C.D. No. 2 and Order 03-15, [2003] B.C.I.P.C.D. No. 15.

<sup>2</sup> Order 03-33, [2003] B.C.I.P.C.D. No. 33.

<sup>3</sup> Fraser Valley Vending's submission, para 6.

This is particularly the case with respect to Fraser Valley Vending's focus on "healthy choices".<sup>4</sup>

[13] Fraser Valley Vending argues that its expertise in offering healthy choices was the result of significant investment of time and resources. This included meeting with nutritionists and experimenting with different healthy choice products. It asserts that it has also conducted research to determine effective educational campaigns to persuade individuals to make healthier choices. Its proposal contains sample documents it argues could be used as part of an educational campaign in schools.<sup>5</sup>

[14] Fraser Valley Vending believes its entire proposal is its commercial and intellectual property, which must be assessed as a whole. It believes that the proposal conveys its commitment to healthy choices in

a unique, creative and compelling way. The proposal does this as an entire visual package – one page building off of [sic] another. It is simply not possible to separate specific content from the visual impact and other compelling aspects of the proposal and claim that this part is not Fraser Valley Vending's confidential commercial information and this part is (or that disclosure of this part would harm Fraser Valley Vending's competitive position and disclosure of this part would not).<sup>6</sup>

[15] The School District largely agrees with the arguments of Fraser Valley Vending. It believes that most of the proposal meets the requirements to be considered commercial information in accordance with s. 21(1)(a)(ii) of FIPPA, citing Order 03-33 in support.<sup>7</sup>

[16] Aable Vending does not contest the claim that the proposal is the commercial information of Fraser Valley Vending.

[17] In my view, Fraser Valley Vending created the proposal to win the contract to supply vending machine services to the School District. The proposal contains information describing the nature of products and services it would supply and how it would perform those services. The information in the proposal relates to the buying or selling of goods and services. As the Commissioner found in Order 03-33 with respect to a similar proposal in an RFP competition, this is information relating to commerce.<sup>8</sup> Therefore, I am satisfied that the information in the proposal is "commercial information" in accordance with s. 21(1)(a)(ii) of FIPPA.

### ***Supplied in Confidence***

<sup>4</sup> Fraser Valley Vending's submission, para. 7.

<sup>5</sup> Fraser Valley Vending's submission, para. 7.

<sup>6</sup> Fraser Valley Vending's submission, para. 8.

<sup>7</sup> School District's submission, para. 1.

<sup>8</sup> Order 03-33, [2003] B.C.I.P.C.D. No. 33, para. 24.

[18] With respect to the second part of the test, Fraser Valley Vending and the School District argue that the proposal was supplied and received in confidence. Fraser Valley Vending quotes the following line from the RFP, “[r]esponses submitted in confidence shall be so honoured”. It claims that its proposal was labelled “In Confidence” and the School District handled it confidentially.<sup>9</sup> The School District confirms that the RFP #97-B-07 included a confidentiality clause stipulating that it would honour proposals submitted in confidence. The RFP asked proponents to submit a covering letter detailing the specifics of their request for confidentiality. “In compliance with the above request, the binder submitted to the Board ... included in the inside front sleeve a sheet of paper that clearly indicates the Proposal was submitted in confidence.” Fraser Valley Vending also included in the proposal records identified as “Confidential Product and Pricing List”.<sup>10</sup>

[19] Able Vending agrees with the other parties that the RFP stipulated that, if the vendors wished the School District to treat the proposals in confidence, it was necessary to send a cover letter to that effect. Able Vending states that it understood that Fraser Valley Vending did not supply such a letter.<sup>11</sup>

[20] My review of the records confirms that the RFP contains a paragraph stating that responses submitted in confidence would be treated as such. It further stipulates that proponents wanting their proposals treated as supplied in confidence must provide a cover letter to that effect. I also confirm that Fraser Valley Vending’s proposal contains a cover letter requesting confidentiality, in accordance with the stipulation in the RFP. Therefore, Able Vending is mistaken in claiming that Fraser Valley Vending had not provided the cover letter.

[21] The six records over which the School District and Fraser Valley Vending disagree consist of copies of records that other organizations created and contact information for staff at Fraser Valley Vending. These comprise a newspaper article, a press release issued by another organization and information downloaded from the internet sites of other businesses. These records are already in the public domain: four of the six records are available to the public over the internet and the other two are available through public libraries and local media outlets.<sup>12</sup>

[22] For these reasons, the School District believes that these records cannot be considered to have been supplied in confidence in accordance with s. 21(1)(b).

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<sup>9</sup> Fraser Valley Vending’s submission, para. 11.

<sup>10</sup> School District’s submission, para. 2.

<sup>11</sup> Able Vending’s submission, pp. 1-2. Able Vending did not number the pages of its submission, so I have numbered them on its behalf.

<sup>12</sup> School District’s submission, paras. 6-7.

[23] I disagree with the School District's view. Fraser Valley clearly supplied the records and asked for the entire proposal to be treated as confidential. The School District stated that it would treat proposals as confidential, if the proponent formally requested confidentiality. Therefore, I am satisfied that the entire proposal, including the six documents, was supplied in confidence in accordance with s. 21(1)(b) of FIPPA. Nevertheless, for the reasons below, I agree with the School District that these records do not meet the harms test in s. 21(1)(c) of FIPPA.

### ***Harm to third party interests***

[24] With respect to the third part of the test, Fraser Valley Vending submits that disclosure of the requested records would significantly harm its competitive position. It claims that the market for vending services is competitive and, as its proposal has been highly successful, it intends to use it to secure future contracts with school districts, other public bodies and private sector organizations. Fraser Valley Vending argues that if its competitors were able to obtain a copy of this proposal they could incorporate its best aspects.<sup>13</sup>

[25] Fraser Valley Vending refers to Order 00-10<sup>14</sup> in support of its argument that the harm to its interests would be significant. In that order, the Commissioner held that assets or revenues of the third party can be relevant in determining the extent of financial harm. Fraser Valley Vending says it is a small, family-operated business and argues that, unlike for larger companies, the loss of \$100,000 would be significant to its business. It estimates that a school district contract ranges in value from \$100,000 to \$750,000 per year. It argues that "[t]o lose even one contract because a competitor successfully used Fraser Valley's confidential proposal information against it, would cause significant harm to Fraser Valley Vending."<sup>15</sup> Fraser Valley Vending submits that disclosure could also harm its negotiating position with future clients:

Fraser Valley Vending's ability to successful[ly] adapt its negotiating position in [a] way that is most advantageous to its business interests will be hampered if potential clients are aware of what Fraser Valley Vending has offered other clients in the past. There may be perfectly valid reasons why Fraser Valley Vending may not offer similar services to different clients but its ability to negotiate differences may be hampered if the details of what it offered previous clients become public knowledge.<sup>16</sup>

[26] It submits that it might have appropriate reasons for not offering the same services to all clients, but that it would suffer harm to its negotiating position with future clients if its proposal became common knowledge.<sup>17</sup>

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<sup>13</sup> Fraser Valley Vending's submission, paras. 14 and 15.

<sup>14</sup> Order 00-10, [2000] B.C.I.P.C.D. No. 11.

<sup>15</sup> Fraser Valley Vending's submission, para. 16.

<sup>16</sup> Fraser Valley Vending's submission, para. 17.

<sup>17</sup> Fraser Valley Vending's submission, para. 17.

[27] Fraser Valley Vending argues further that disclosure would result in undue financial loss to itself and undue gain to its competitors. Fraser Valley Vending submits it invested extensive time and resources into developing its marketing strategy and that this included hiring a marketing and business consultant to assist in developing its proposal. It says the cost of this initiative was \$40,000 for the consultant and \$100,000 in its own staff and resources, for a total of \$140,000. Disclosure of the proposal would force Fraser Valley Vending to create a new proposal, as its competitors would copy the current one and, Fraser Valley Vending argues, this would require a similar re-investment.<sup>18</sup>

[28] The School District says it does not have sufficient knowledge to comment on the level of competitiveness in the market place. It does assert, however, that the visual presentation of the proposal was a key factor in Fraser Valley Vending winning the contract. It provides an affidavit from the chair of the selection committee that:

further attests to the fact that the format Fraser Valley Vending Ltd. used to present its services in the Proposal made an impression on the Selection Committee in a way that the other proposals did not, thus separating Fraser Valley Vending Ltd. from its competitors and placing the company at the top of the list of proponents for the snack vending contract.

[29] Consequently, the School District agrees with Fraser Valley Vending that disclosure of all but six records within the Proposal could significantly harm the company's competitive position by allowing competitors to improve the appearance of their proposals by copying the layout and other visual features of the Fraser Valley Vending proposal.<sup>19</sup>

[30] The School District disagrees with Fraser Valley Vending over the application of s. 21(1) to the six records mentioned above. It argues that s. 21(1)(c) does not apply. It does not believe

that inclusion of the disputed records in the Proposal assigns the records additional proprietary value to the benefit of Fraser Valley Vending Ltd. such that disclosure of the records could reasonably be expected to harm significantly its competitive position.<sup>20</sup>

[31] The School District denies that disclosure of these records would result in any undue financial loss or gain to any party. If that were the case, the School District believes the information would not have been posted on the internet or made public through the media.<sup>21</sup>

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<sup>18</sup> Fraser Valley Vending's submission, paras. 20-28.

<sup>19</sup> School District's submission, para. 4; Affidavit of Susanna Eppich, paras. 4-7.

<sup>20</sup> School District's submission, para. 8.

<sup>21</sup> School District's submission, para. 9.

[32] Able Vending does not address the issue of harm to Fraser Valley's business interests. Instead, it makes an argument for disclosure on the grounds of accountability for the School District. It cites references from the RFP indicating that each proposal would be considered a commitment the vendor was expected to live up to. Therefore, Able Vending concludes:

The PROPOSAL is part and parcel of the Contract. Without having access to the initial bid proposals AND the CONTRACT it is impossible for the public (and other unsuccessful bidders) to determine if the successful bidder is performing as promised.<sup>22</sup>

[33] Finally, citing alleged discrepancies between the RFP and the contract, Able Vending speculates that Fraser Valley Vending was privy to information that other vendors were not:

If the bidder knew that the requirements of the RFP would not be enforced in the contract, or changed, it is very likely that a different pricing structure and commission scale would be used. Without access to the original Proposal from Fraser Valley Vending it is impossible to determine what they knew, if anything, in advance.<sup>23</sup>

[34] Able Vending believes that Fraser Valley Vending was the successful bidder because it had access to information that the other bidders did not.<sup>24</sup>

[35] I am not in a position to determine the truth of Able Vending's allegations of impropriety with respect to the bidding process. Nor are these relevant circumstances requiring my determination.

[36] I am persuaded by the arguments of Fraser Valley Vending and the School District that the disclosure of most of the information in the proposal (with the exception of the six documents mentioned above and some other information within the proposal itself that I describe below) meets the harms test of s. 21(1)(c)(i) and (iii). In coming to this conclusion, I am guided by the Commissioner's reasoning in Orders 03-33 and 00-10 concerning what, if any harm, Fraser Valley Vending might be subject to. Some of the principles the Commissioner identified in Order 03-33 apply in this case. Both involve a competitor requesting access to the proposal of the successful bidder in an RFP competition where there is the prospect of the parties competing against each other for future RFPs. The Commissioner found in Order 03-33 that the nature of the disputed information and the evidence as to the benefits that access to the disputed information would confer on competitors, were factors that persuaded him that the necessary reasonable expectation of harm had been established in accordance with s. 21(1)(c)(i).<sup>25</sup> He also found that disclosure of the information would result in harm in accordance with s. 21(1)(c)(iii), being

<sup>22</sup> Able Vending's submission, p. 3.

<sup>23</sup> Able Vending's submission, p. 4.

<sup>24</sup> Able Vending's submission, p. 4.

<sup>25</sup> Order 03-33, [2003] B.C.I.P.C.D. No. 33, para. 48.



undue loss to the third party and undue gain for the applicant. This was because it was expected that the applicant would be able to use the “commercially valuable insight that the disputed information would give” into the third party’s “method of business, technologies and strategy”.<sup>26</sup>

[37] Based on the parties’ submissions, my review of the proposal and previous orders, I conclude that, with the exception of the information that I describe below, the disclosure of the remainder of the proposal could undermine Fraser Valley Vending’s current competitive advantage and diminish its chances of winning future contracts. This applies both to the substantive content of the proposal and also, in some respects, to the manner of its presentation. Given that Fraser Valley Vending currently holds at least twelve contracts, I accept that it has reason to fear that granting an advantage to its competitors could put more than one future contract at risk. I am persuaded by Fraser Valley Vending’s argument that, for small companies like itself, such a loss could cause it significant financial harm. As the Commissioner has noted in Order 00-10; “if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue.”<sup>27</sup> I am also persuaded on the particular facts of this case that, by acquiring competitively valuable information for nothing, Fraser Valley Vending’s competitors would receive undue financial gain. I therefore find that ss. 21(1)(c)(i) and (iii) apply to this information.

[38] The exceptions to this finding can be classed in two groups. With respect to the six records that the School District argues do not meet the three-part test of s. 21(1) of FIPPA, I agree with the School District. Fraser Valley Vending has not provided any evidence as to why disclosure of these documents in particular would harm its business interests. Fraser Valley Vending merely asserts that its proposal should be treated as whole and that the release of any part of it would prove advantageous to its competitors. I find that s. 21(1)(c) of FIPPA does not apply to this information.

[39] Second, and in addition to these six documents, the proposal contains information either identical or substantially similar to information that is already available to Able Vending through other sources. Some of the information is included in the contract between Fraser Valley Vending and the School District, which Able Vending has received. Fraser Valley Vending has disclosed other information in its submissions to this inquiry, a copy of which Able Vending has also received. Still other passages in the proposal are identical to information indicated in the RFP as being requirements for the contract. There is also a photograph of a vending machine that it has installed in public facilities and contact information for its staff. I have difficulty understanding how the disclosure of information that is otherwise publicly available, or has already been disclosed to Able Vending, would be harmful. The School District has not met its burden of proof with respect to establishing why disclosure of this information would be

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<sup>26</sup> Order 03-33, para. 51.

<sup>27</sup> Order 03-33, para. 52.

harmful to Fraser Valley Vending's business interests. Nor has Fraser Valley Vending made any arguments as to the specific harm that the disclosure of these particular records could cause. Therefore, I find that s. 21(1)(c) of FIPPA does not apply to this information either. Similarly, the proposal also includes testimonials of current customers of Fraser Valley Vending that affirm the quality of service that it provides. Some of these testimonials have appeared in press releases. This is the kind of information businesses would include in their advertisements or find other ways of disseminating to the public and potential customers because it would likely gain the business new customers. Neither the School District nor Fraser Valley Vending has provided evidence as to why the disclosure of this information would be harmful. Therefore, I find that s. 21(1)(c) of FIPPA does not apply to this information.

### **Severing**

[40] Fraser Valley Vending and the School Board have submitted that the information in the proposal is so intertwined that it is not possible to sever excepted information and disclose the remainder. In the words of the School Board, line-by-line severing "would minimize the marketing value of the Proposal and the expected harm to Fraser Valley Vending Ltd.'s competitive position if most portions of the Proposal were disclosed to the applicant".<sup>28</sup> Nevertheless, the School District and Fraser Valley Vending have not provided evidence to support this position, nor have they provided detailed arguments with respect to specific passages of text to illustrate this point. The Commissioner has dealt in previous orders with the requirement in s. 4(2) of FIPPA to sever records where reasonable.<sup>29</sup> Applying those principles to this case, I can see no logistical issues that prevent severing in this case. Moreover, it is reasonable to sever because the information to be disclosed would be meaningful and responsive to the request.

### **Conclusion on s. 21(1)**

[41] The School District and Fraser Valley Vending have established that portions of the record in dispute meet the three-part test of s. 21(1) of FIPPA. I find that ss. 21(1)(a)(ii) and (b) apply to all of the information in the proposal. I find that ss. 21(1)(c)(i) and (iii) of FIPPA apply to some but not all of the information in the requested record. Therefore, I find that the School District must sever the excepted information and disclose the remainder to Able Vending. To assist the School District, I append to this order copies of marked pages to indicate which portions I am ordering disclosed.

[42] Fraser Valley Vending requested that, in the event I determined that information should be released to Able Vending, the applicant be permitted to review the records but not receive a copy. I find that there is no relevant reason to restrict the access of Able Vending in this way. Section 9 of FIPPA gives

<sup>28</sup> School District's submission, para. 5.

<sup>29</sup> See for example Order 03-16, [2003] B.C.I.P.C.D. No. 16.

applicants a right of access to a copy of requested records. It is only in cases where the applicant has requested to view records, rather than receive copies, or where the record cannot reasonably be reproduced, that the applicant would not receive a copy. None of these applies in this case. I see no other reason to deny Able Vending a copy of records containing information to which I have determined that s. 21(1) of FIPPA does not apply.

#### **4.0 CONCLUSION**

[43] For the reasons given above, under s. 58 of FIPPA, I make the following orders:

1. Subject to paragraph #2 below, I require the School District to refuse to disclose, in accordance with s. 21(1), the information in the requested record.
2. I require the School District to disclose the information the School District originally proposed to release, specifically pp. 20-22, 46, and 105-116. I also require the School District to disclose the following pages in their entirety: pp. 1-4, 44, 62-69, 71-74, and 76. In addition, I require the School District to disclose the following pages in part, by severing the portions highlighted in yellow, as indicated in the copies provided to the School District with a copy of this order: pp. 9-10, 12-13, 17, 26, 40-43, and 49-50.
3. I further require the School District to give Able Vending access to this information within 30 days of the date of this order, as FIPPA defines "Day", that is on or before December 24, 2009, and, concurrently, to copy me on the cover letter to Able Vending together with a copy of the records.

November 12, 2009

#### **ORIGINAL SIGNED BY**

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Jay Fedorak  
Adjudicator

OIPC File No. F07-33362