



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

Order 04-27

CITY OF VANCOUVER

David Loukidelis, Information and Privacy Commissioner
October 20, 2004

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Summary: The applicant requested records relating to the review by two experts of an appraisal conducted by the applicant. The City conducted an adequate search for records. It does not have control over records in the custody of the two experts. The City did not fail in its duty to assist under s. 6 as a result of not requesting that the two experts provide a copy of their records for release to the applicant.

Key Words: adequacy of search – duty to assist.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 3(1), 4(1), 6(1).

Authorities Considered: B.C.: Order 02-03, [2002] B.C.I.P.C.D. No. 3; Order No. 02-29, [2002] B.C.I.P.C.D. No. 29; Order 04-19, [2004] B.C.I.P.C.D. No. 19.

1.0 INTRODUCTION

[1] The applicant in this inquiry is the False Creek Landlease Action Committee (“FLAC”), which represents various townhouse and apartment strata development owners on land leased from the City of Vancouver (“City”). Concerned about proposed land rent increases, FLAC at its own expense commissioned an appraisal by Penny & Keenleyside Appraisals Ltd. (“PKA Appraisal”) of the value of the lands and the prepayment figures for the leases. After receiving a copy of the appraisal, the City asked four experts to review the PKA Appraisal before responding to FLAC.

[2] FLAC subsequently made a series of access requests to the City, under the *Freedom of Information and Protection of Privacy Act* (“Act”), for records pertaining to the four experts’ reviews of the PKA Appraisal. One of those requests, made on March 18, 2001, was for a copy of all records that had not been released in response to previous requests related to the PKA Appraisal. The requested records included any terms of reference, contracts, letters, memos, e-mails, notes, drafts, reports, minutes and invoices.

[3] In a letter dated April 17, 2001, the City informed the applicant that the only responsive record that it had located was a report from one of the four experts the City had retained to review the PKA Appraisal, Burgess, Austin, Cawley & Associates (“BACA Report”). The City denied access to this report under ss. 13 and 17 of the Act.

[4] On June 14 2001, the applicant requested a review by this Office of the City’s refusal to release a copy of the BACA Report. The applicant said it had learned that two of the experts, Carl Nilsen and Stan Hamilton (“Other Experts”), had provided verbal reports on the PKA appraisal to the City and suggested there should be records of the City’s communications with the Other Experts. It therefore complained about the adequacy of the City’s search for records in its own files related to the hiring of two of the experts. The applicant suggested that the City had told the experts not to submit written reports and complained about the City’s refusal to request copies of any responsive records that the Other Experts might have in their own files.

[5] As part of a separate process, the City eventually provided the applicant with a copy of the BACA Report. Mediation was not successful in resolving the issues under review by this Office, so a written inquiry was held under Part 5 of the Act.

2.0 ISSUES

[6] The issues to be considered in this inquiry are:

1. Are any records in the hands of the Other Experts related to their verbal reports to the City under the control of the City for purposes of ss. 3(1) & 4(1) of the Act?
2. Regardless of the issue in para. 1 above, does the City have a duty under s. 6(1) of the Act to request that the Other Experts provide a copy of any such records to the City for the purposes of the applicant’s access request under the Act?
3. Did the City fulfil its duty under s. 6(1) of the Act by conducting an adequate search for records in its own files related to the verbal reports made by the Other Experts to the City?

3.0 DISCUSSION

[7] **Procedural Matters** – In its reply submission, the City objected to the inclusion of three letters provided as Attachments 6, 7 and 8 to the applicant’s initial submission. The objection was based on the City’s belief that the three letters were all created by the City as a result of and in relation to the mediation process conducted by this Office. This Office’s published *Policies and Procedures* dealing with inquiries state that any mediation-related information or materials must not be provided during an inquiry without the consent of all parties.

[8] The applicant accepted the removal of Attachments 6 and 7 but objected to the removal of Attachment 8. Both parties presented submissions regarding whether Attachment 8 was part of the mediation process and thus should be removed from the material before me.

[9] After carefully considering both parties’ submissions, I conclude that Attachment 8 was created for the mediation process and discloses information created during that process. I have therefore not read the letter nor have I considered it in arriving at my findings.

[10] **3.2 Adequacy of Search** – The applicant questioned the City’s search for records related to the Other Experts’ verbal reports. It pointed out that the City engaged the Other Experts in July and September 2000 and suggested there should be records of communications between them and the City. It also expressed surprise at receiving, with the City’s initial submission, a copy of an invoice dated March 29, 2001, saying that it should have received this invoice in response to its request of April 18 or June 11, 2001.

[11] Section 6(1) of the Act places a duty on the City to make every reasonable effort to assist the applicant by conducting an adequate search for records. Numerous orders outline the standard that must be met in order for a public body’s search efforts to be considered reasonable. These orders have established that a public body’s search efforts do not have to be perfect, but that the search must be one that a fair and rational person would expect to be done or would consider to be reasonable. See, for example, Order 02-03, [2002] B.C.I.P.C.D. No. 3, where at para 14, I said the following:

...in searching for records, a public body must do that which a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. The evidence should describe all potential sources of records, identify those searched and identify any sources that are not searched, with the reasons for not doing so

[12] In its initial submission, the City said that, due to previous requests made by the applicant, the City had already undertaken two previous searches for the records and had a good idea of which employees could reasonably be expected to have such records. Its initial submission included an affidavit from Shobha Rae, a Freedom of Information Administrator with the City. She described the usual process City staff follow when conducting a records search in response to an access request and then outlined the

specific process that City staff followed in response to the applicant's requests (paras. 3-16, Rae affidavit).

[13] The material before me shows that the City located two records which the applicant believes the City should have retrieved in response to other requests. However, the City's searches in those cases are not in issue here. With respect to the records search in issue here, I have, after carefully considering the City's evidence, concluded that the City's search for records responsive to the applicant's request met the necessary standard and was adequate. The City has met its s. 6(1) duty in this respect.

[14] **3.3 Control of Records** – Section 3(1) limits the application of the Act to records that are in the custody or under the control of a public body such as the City. An individual who makes an access request under s. 5 has the right of access to any record in the custody or under the control of a public body. The parties agree that the City does not have physical custody of any records in the hands of the Other Experts and that the issue here is whether the City has control of any such records for the purposes of ss. 3(1) and 4(1). Section 3(1) and 4(1) read as follows:

Scope of this Act

3 (1) This Act applies to all records in the custody or under the control of a public body, including court administration records, ...

Information rights

4 (1) A person who makes a request under section 5 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

Applicable principles

[15] Several orders provide guidance as to the criteria that should be considered when determining the issue of control. In Order 02-29, [2002] B.C.I.P.C.D. No. 29, for example, I discussed the criteria for determining control of a society's records. Order 04-19, [2004] B.C.I.P.C.D. No. 19, which dealt with control of a contract investigator's interview notes, also provides useful guidance on the control issue. Without repeating those discussions, I have applied the principles and approach taken in Order 02-29 and Order 04-19 in this decision. In doing so, I recognize that the factors mentioned in Order 02-29 and Order 04-19 are by no means exhaustive.

Control of the Other Experts' "working materials"

[16] The applicant set out its position on p. 3 of its initial submission:

... we believe that some if not all of the records in the experts' files regarding the reviews commissioned by the city are under the city's control (or could and should be requested in any case) ...

The experts likely have records regarding their communications with the City, including some relating to their verbal reports. We expect there are records which indicate when, by whom, and why they were told not to submit written reports; to whom and when they did submit their verbal reports, and what these verbal reports said. They may also have records relating to instructions received from the City in addition to the written instructions of which we have been provided copies. The 2 experts probably also have records regarding work done and time spent on the project and potential billing. I would ask that copies of any responsive records be requested from the 2 experts Nilsen and Hamilton.

[17] In its reply, the applicant said that, according to the invoice it received, one of the Other Experts invoiced the City for 42.5 hours' work for which the City paid over \$6,000. It expressed incredulity that the City would pay such a sum for "some casual phone calls".

[18] The City suggested at paras. 23-27 of its initial submission that it would be helpful to begin by grouping a consultant's records into three potential categories:

- instructional materials (records provided by or on behalf of the City to the Other Experts, such as instruction letters and background records sent to the experts);
- work product (records created for the City by the Other Experts to fulfil contractual obligations, typically but not necessarily a report); and
- working materials (records created by the Other Experts for their own internal use, including notes, annotated documents, research materials, drafts etc).

[19] The City said that it has provided the applicant with the items captured by the first category and that no records exist which would fall into the second category. Thus, it said, only any records falling into the third category are in issue here (paras. 29-33, initial submission; paras. 7 and 9, Maitland affidavit). The applicant's submissions and request for review support this view, as noted above.

[20] In the City's view, a public body may or may not have control of records in the third category, depending on the circumstances. The City argued that there is an expectation that a consultant will provide the "work product" but rarely the "working materials". It believes something more is required to bring "working materials" under a public body's control (para. 27, initial submission).

[21] The City argued that there must be a specific statutory or contractual right to control of a consultant's records and acknowledges that contractual control may be

implicit. It pointed out that the instruction letters are silent on the nature of the work to be produced (paras. 22, 32-33, initial submission). The City supported its position with an affidavit by Bruce Maitland, Director of Real Estate Services, at para. 7, where, in reference to the Other Experts, he deposed that:

... We expected them to provide us with their opinions on the specified matters. We did not expect them to provide us with copies of their own personal notes, research materials, or any other documents they collected or produced while preparing their opinions ...

[22] The City then described the factors which in its view support the conclusion that it does not have control of any “working materials” in the hands of the Other Experts. These included: the records were not created by a City employee; the records were not created by the consultants for the City; the records do not relate to the City’s mandate or functions; the City does not have a statutory or contractual right to control the records; the City has not relied on the records (para. 34, initial submission).

[23] The City pointed out that the terms of the agreement between the City and the Other Experts were straightforward: Nilsen was to carry out a comprehensive review and evaluation of the PKA report and its conclusions while Hamilton was to review the report and prepare comments on the appropriate methodology and assumptions for prepayment options. The City does not have any express or implied power to review the Other Experts’ “working materials”, the City argued, nor does it have any right to dictate the content, use or disposal of the records or even whether they are created in the first place (paras. 35-38, initial submission).

[24] The evidence in this case shows that the City’s Real Estate Services staff frequently give oral instructions to consultants, as a supplement to a brief letter, and that they do not always find it necessary to make notes of their conversations with those consultants (paras. 3 & 8, Maitland affidavit; para. 15, reply). The instruction letters in this case asked the Other Experts to review and comment on the PKA report. They did not expressly or implicitly require the production and submission of a written report, much less “working materials” in the form of notes or similar records. Indeed, the City’s submissions show that, in this case, the Other Experts provided oral comments only and that City staff did not make any notes of conversations with the Other Experts up to the date of the request (para 16, reply). The City’s submissions suggest that it did not expect or want its consultants to create records of any kind (para. 7 Maitland affidavit). It is conceivable that the Other Experts performed their work without creating any records at all, given the history of the working relationship between the City and its consultants.

[25] Moreover, the material before me indicates that the City did not ask for the PKA report and was not required to review it, either internally or through contractors. It apparently did so only as an adjunct to its dealings with the applicant (see p. 1,

applicant's initial submission, for example). There is also no indication that the City relied on any "working materials" of the Other Experts.

[26] While the contents of the instruction letters relate, indirectly at least, to the City's functions, in that they pertain to the City's landlease prepayment program (a voluntary program), this does not mean that any of the Other Experts' "working materials" are under the City's control. Unlike the investigator in Order 04-19, the Other Experts in this case were not acting on the City's behalf in carrying out an activity statutorily or contractually required of the City but providing expert and independent comment on a report provided voluntarily by the applicant in the course of discussions on the landlease prepayment issue.

[27] After carefully considering all of material before me, for the reasons outlined above, I am not persuaded that any "working materials" that the Other Experts may have created in relation to their contracts with the City are under the City's control within the meaning of the Act.

[28] **Duty to Assist** – The applicant argued that the City has a duty under s. 6(1) of the Act to request that the Other Experts produce their "working materials" in response to the applicant's request. Section 6(1) requires the City to "make every reasonable effort" to assist applicants "openly, accurately and completely" when responding to access requests. Section 3(1) limits the Act to applying only to records that are "in the custody or under the control of a public body".

[29] The applicant said that the City had set a precedent in asking a consultant for records in the past (p. 3 initial submission). The City replied that, in that case, it had, out of convenience, requested copies of its own "instructional materials" which it had provided as attachments to an instruction letter to the consultant. The City said that the attachments came from its own files but that tracking them down would have been burdensome in this case. The City argued that this did not mean it has a duty to ask for the Other Experts' "working materials" in this case (paras. 7-12, reply). I agree with the City that there is a distinction between requesting copies of its own records which a public body provided to a consultant and being able to require a consultant to produce his "working materials" which he may have created.

[30] In any case, in light of the above finding on control, I am satisfied that, in refusing to accede to the applicant's request to ask the Other Experts for their "working materials", the City did not fail in its duty to assist the applicant under s. 6(1).

4.0 CONCLUSION

[31] For the reasons given above, under s. 58 of the Act, I confirm that the City has performed its duties to the applicant under the Act in its search. Given my finding on

control and duty to assist, no order is necessary respecting those issues.

October 20, 2004

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner