OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER

British Columbia
Canada

Order 00-26

INQUIRY REGARDING CITY OF SURREY'S SEARCH FOR RECORDS

David Loukidelis, Information and Privacy Commissioner
July 24, 2000

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Summary: Public body disclosed records in response to applicant's request for records relating to a land development. Public body found to have fulfilled its s. 6(1) duties for most of request, but not regarding one class of records.

Key Words: Duty to assist – respond without delay – respond openly, accurately and completely – every reasonable effort.

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

Authorities Considered: B.C.: Order 00-15.

1.0 INTRODUCTION

On December 2, 1999, the applicants made a request for records under the *Freedom of Information and Protection of Privacy Act* ("Act") to the City of Surrey ("Surrey"). The request related to a particular property development adjacent to the applicants' home. The applicants' request was for "any and all documentation, maps and by-laws regarding the development of" a named site, as well as "any survey information regarding this site, [and] our property … regarding sewer access".

Surrey responded on December 13, 1999, indicating that it had searched for responsive records. It enclosed 63 pages with its response, some of which were severed under ss. 21 and 22 of the Act.

On January 5, 2000, the applicants submitted a request for a review, under s. 52 of the Act, of Surrey's decision. The request was made on the ground that Surrey had not disclosed all records, that proper clarification was not given when requested by the applicants and that some of the records the applicants had received had been "tampered" with.

At a February 17, 2000 meeting between the applicants and the public body, the issue of 'clarification' of the request was settled. At that meeting, the applicant reviewed the records along with Surrey representatives. This was done to focus Surrey's response efforts on records actually of interest to the applicants, so as to reduce or eliminate fees to them. Also at that meeting, the applicants expanded the original request to include a document referred to by the applicants as the "Risk Management Protocol" and to include complaints against the development project referred to above. Surrey did not object to this, although it clearly was an expansion of the original request. The applicants provided Surrey with a release form signed by one third party complainant, to allow responsive records to be disclosed to the applicants. As a result of the meeting, Surrey released nine documents to the applicants on February 28, 2000. This response, which constitutes a decision under the Act, is also in issue in this inquiry.

On April 7, 2000, the applicants asked that the matter proceed to a written inquiry, on the ground that they believed responsive records were being withheld from them. As a result of mediation by this Office, on April 25, 2000 Surrey released to the applicants records it had previously severed under ss. 21 and 22. This release did not satisfy the applicants.

2.0 ISSUE

The only issue in this inquiry is whether Surrey fulfilled its duty under s. 6(1) of the Act. This duty includes the requirement for a public body to conduct a reasonable search. Although the Act is silent on the point, previous orders have placed the burden on the public body of establishing that it complied with that duty.

3.0 DISCUSSION

3.1 Applicable Principles – Section 6(1) of the Act requires Surrey to "make every reasonable effort to assist applicants and to respond without delay to each applicant openly, accurately and completely." As I confirmed in Order 00-15, this requires a public body, in searching for records, to make such effort as a fair and rational person would find to be acceptable in all the circumstances. While s. 6(1) does not impose a standard of perfection, a public body's efforts must be thorough and comprehensive. A public body should, in an inquiry such as this, candidly describe all potential sources of records and give reasons for any decision not to look into any of those sources. It should also describe, in reasonable detail, the efforts it actually made to search for records, including by describing the sources checked, how it actually did the searches and how much time it spent on the searches.

3.2 Has Surrey Fulfilled its Duty? – Surrey's initial submission consisted of an affidavit sworn by an employee who is both its Manager of Legislation and Freedom of Information and Protection of Privacy Coordinator ("Coordinator"). She deposed, at some length, as to the steps she took to fulfill the applicants' request for records. The applicants submitted detailed argument to support their case. The applicants argue that Surrey did not release a record referred to as the "Risk Management Protocol", a memo concerning a decision not to provide sewer services to the applicants which the applicants claim they saw at the February 17, 2000 meeting between the applicants and Surrey and records dealing with complaints about the development.

I will deal with these records one at a time.

The "Risk Management Protocol"

The applicants allege that one of the participants in the February 17, 2000 meeting, a staff member from the Surrey Engineering Department, indicated that he knew of the "Risk Management Protocol" record to which the applicants referred. The applicants claim they had previously been told about this document by an unnamed employee of Surrey. No evidence, *in camera* or otherwise, was given by this unnamed source about what he or she is said to have told the applicants about such a record. Surrey says it has searched for such a record and has not found it. It says no such record exists.

The Coordinator, in her affidavit, says that in her attempts to find such a record she canvassed the offices of the General Manager and the offices of the departments of Finance, Technology and Human Resources, the City Clerk, Engineering, the manager of the Risk Management Department and one other long term employee the City Clerk suggested. The responses were negative. She also sent a written communication to the staff member from the Engineering Department, asking him to explain what he meant by his comments at the February 17, 2000 meeting. She deposed that the staff member

> … advised me he did not recall the exact context in which he made the offhand statement. He said he believed there was a Risk Management report done a couple of years ago that appeared to be quite large, and thought maybe that was the document the applicants were referring to.

In their reply submission, the applicants again referred to their anonymous source and said that the risk management report done a couple of years ago was not what they were looking for.

I am satisfied Surrey has made every reasonable effort in its search for a "Risk Management Protocol", which it says does not exist. Surrey clearly made extensive, repeated efforts to locate such a record in the files of those departments and offices in which it could reasonably be expected to exist, if such a record exists at all. It also is clear the Coordinator clarified the statement made at the February 17 meeting by the Engineering Department staff member.

Sewer Service Memorandum

The applicants say that, at the February 17, 2000 meeting, the staff member from the Engineering Department

> … mumbled to himself that a file he was reviewing was a memo regarding our property not getting sewer. He then quickly turned to the next page to avoid our seeing this file. We requested that he turn back to it and he responded with surprise asking if we wanted that. We stated that we did … .

During the review of the records, the Coordinator flagged those records which the applicants said they wanted copied. Both the City and the applicants agree on this point. However, when the applicants received the package of records, a memo regarding the applicants' property not getting sewer access was not there. In her affidavit, the Coordinator deposed that she asked the staff member from the Engineering Department to search through the department's relevant files again. She was told this search did not locate such a memo. The Coordinator then obtained the files and searched them herself. No memo was found. Upon being told that the applicants believed the memo to be towards the end of the files reviewed, she again obtained the files and searched for the memo. Again, no memo was found.

I find that Surrey has made every reasonable effort in its search for a memo concerning sewer access. Repeated searches were made of the files where a fair and rational person would expect any such record to be located.

Complaints About the Development

The issue of complaints was raised at the February 17, 2000 meeting. At that meeting, the applicants provided the Coordinator with a letter written by a neighbour, authorizing the release to the applicants of any information concerning that neighbour's property. They also informed the Coordinator that they, and others, had made a number of complaints about the project. The applicants believed there were complaints about this project in Surrey's files. In a letter to the applicants dated February 28, 2000, the Coordinator indicated she had been unable to locate any pertinent records in the Engineering Department's files. The Coordinator enclosed copies of "correspondence to and from City of Surrey council members and yourselves and neighbours'", taken from the Planning Department's files.

On March 7, 2000, the Coordinator asked the By-Law and Licensing Section of Surrey's Legal Services Department ("By-law Department"), in writing, for "any records of complaints" about several listed properties, including the development site and the applicants' property. Surrey told the applicants that five records were found, "none of which pertain to this development".

The applicants then provided the Coordinator with a complaint file number they said related to a complaint they had made. According to Surrey's initial submission, the By-law Department informed the Coordinator that the number related to a development permit. According to Surrey's initial submission, the Coordinator then concluded that there were "no complaints on file under this reference". It does not appear that a search was actually done using that reference number. The applicants, in their reply submission, provided me with a copy of a letter to them from the By-law Department, dated September 8, 1999, which they say shows that the file number was a bylaw complaint file number.

Although the material before me is not definitive on the point, it appears the Coordinator was not made aware of this letter before this inquiry. This is, to say the least, unfortunate. The applicants had the letter, it seems, but did not provide it to the Coordinator. The Coordinator apparently proceeded on the By-law Department's information directly to her, as noted above, that the number provided by the applicants was a development permit number, not a complaint number. It is not surprising, therefore, that the Coordinator believed she did not have to conduct a further search for complaint records using that number because she concluded "there are no complaints on file under this reference". If she had been given the actual letter by the applicants, she very likely would have been alerted to the need to pursue a further search. The letter, which had been sent to the applicants by the By-law Department, does bear a file number and an occurrence number. It says the department had "sent a warning letter regarding the above" (a noise complaint) and refers to an "investigation", which "may ultimately lead to legal action". In its submissions here, Surrey indicates that noise complaints do not necessarily result in creation of a file, even if a letter such as this is sent. Still, in light of the letter, and what the applicants argue were numerous complaints by them and others about the development, I have concluded that Surrey has not, in this minor respect, fulfilled its s. 6(1) duty to respond completely by searching for complaint records about the development as requested by the applicants.

This is not to say Surrey has deliberately withheld records or has acted other than in good faith at all times. To the contrary, Surrey – especially through the Coordinator – has clearly expended considerable efforts in its commendable attempts to assist the applicants, including by meeting the applicants on February 17, 2000 and going through records with them. Again, I have nonetheless concluded, in light of the uncertainty surrounding the bylaw complaint file number noted in the September 8, 1999 letter, that a further search is in order for complaint records as requested by the applicants. That search may (or may not) produce further records, but it is to be done.

4.0 CONCLUSION

For the reasons given above, under s. 58(3)(a) of the Act, I order Surrey to perform its duty under s. 6(1) of the Act to assist the applicants, by searching again in the By-law Department's records only, for complaint records as requested by the applicants. Under

s. 58(4) of the Act, I require Surrey to complete this search within 30 days after the date of this order and to deliver to me (with a copy to the applicants directly concurrently), within 10 days after completion of its search, a written description of its efforts in undertaking that search and the results of the search.

July 24, 2000

ORIGINAL SIGNED BY

David Loukidelis
Information and Privacy Commissioner
for British Columbia