

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2022-64

December 21, 2022

CITY OF CALGARY

Case File Number 019943

Office URL: www.oipc.ab.ca

Summary: On October 16, 2020 an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act* (the Act) to the City of Calgary (the Public Body) for a study/report for Hillhurst/Sunnyside, prepared by Coriolis Consulting Corp. (the Consultant) for the Public Body.

The Public Body provided the Applicant with a copy of the report marked “draft”. The Applicant advised the Public Body that she was seeking the final version of the report.

The Public Body conducted additional searches and informed the Applicant that the draft report was the only version of the report that it had.

The Applicant was not satisfied. The Applicant asked for a review and subsequently an inquiry into the adequacy of the Public Body’s search for the final version of the report.

The Adjudicator found that the Public Body did not conduct an adequate search for a final version of the report under section 10(1) of the Act.

The Adjudicator ordered the Public Body to conduct a further search.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 6, 10, 72 and 74.

Authorities Cited: AB: Orders 98-002, F2015-21 and F2020-15.

I. BACKGROUND

[para 1] On October 16, 2020, an individual (the Applicant) made an access request under the *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25 (the Act) to the City of Calgary (the Public Body) for the following record:

The report or study referred to in the attached May 22, 2020 letter to Community Planning (North Team) page 2 of 3, last paragraph: “the City/Coriolis report” as regards Hillhurst/Sunnyside. The so-called “Coriolis Study” pertaining to Inglewood is part of the public record & see attached Distribution Public Item 7.2.1 (June 4, 2020)

[para 2] The Applicant specified the following keywords in her access request to assist the Public Body in its search for the record:

Study/Report

Coriolis

Hillhurst/Sunnyside Community Amenity Fund

[para 3] The date range specified by the Applicant for the search was “[p]rior to 2020”.

[para 4] The Applicant attached the following two documents, as referenced in her access request:

1. A letter dated May 22, 2020 from the Hillhurst Sunnyside Planning Committee and the Hillhurst Sunnyside Community Association, to the Senior Planner, Community Planning (North Team), City of Calgary, which contained the following statement on the second page:¹

- At the time of writing, the Hillhurst Sunnyside Community Amenity Fund contribution is set at \$18.14, which was recognized in the City/Coriolis report to be lower than other areas experiencing significant redevelopment.

2. An email dated June 3, 2020 from the Inglewood Community Association (the ICA) President to various individuals, which referred to the subject of the email as “[EXT] Coriolis Study – impact on LOC2019-0188/CPC2020-0587, 1230 & 1234 – 9 Avenue SE”, and indicated that a document titled “Coriolis Heritage Designation Incentive study case against RNDSQR.docx” was attached. The email was stamped “City of Calgary Received In Council Chamber June 4, 2020, Item 7.2.1, Distribution Public”. In the email, the ICA President stated:

Please find attached an important and relevant study commission [sic] by the City of Calgary that will help us all decide the best way forward in building the best possible heritage future for Inglewood and for all Calgarians who love our community.

¹ The Senior Planner to whom the letter was sent to is not the same Senior Planner that the Analyst and the FOIP Program Administrator corresponded with as part of the Public Body’s search for responsive records to the Applicant’s access request, and is a different person than the Senior Planner who provided an Affidavit for this inquiry.

[para 5] In an undated letter, an Analyst, Access and Privacy, with the Public Body, (the Analyst) responded to the Applicant and stated:

55 records were received and identified to be responsive from the Business Unit(s) of Community Planning, and all are released to you without exception. This office will not provide additional copies of these records.

[para 6] The attachment to the letter was described as “1 report (55 pages)”.

[para 7] On November 18, 2020, the Applicant emailed the Public Body’s Deputy City Clerk, Information and Privacy (the Deputy City Clerk), and informed the Deputy City Clerk that the Public Body had provided her with the wrong report. She stated in part:

Once again, your staff have provided a non-responsive response to my FOIP request. As shown in the attached scanned copy of my request and supporting material, I requested a copy of the Coriolis Report regarding Hillhurst/Sunnyside, not Inglewood/Ramsay. Yesterday I received a copy of the Inglewood/Ramsay report (see scan of 1st page attached). While my request does refer to the Inglewood/Ramsey report (as further evidence that Coriolis reports are public, in addition to the Hillhurst/Sunnyside Community Association letter referring to the Coriolis report regarding that community) my request was clearly for the Coriolis report as regards Hillhurst/Sunnyside. On receiving the wrong report yesterday afternoon, I immediately called your Analyst [name, phone number] and left him a detailed voice mail complaining of the error. I have yet to hear back from him. Kindly instruct your staff to provide the report requested. I look forward to your response and thank you for looking into the matter.

[para 8] By way of email dated November 19, 2020, the Deputy City Clerk responded to the Applicant and apologized for the oversight and any inconvenience it may have caused. The Deputy City Clerk stated:

We are currently conducting a subsequent search for the Coriolis report regarding Hillhurst/Sunnyside. [Analyst’s name] will provide you with an anticipated date of completion when we receive a copy of the requested report in our Access and Privacy section.

[para 9] On November 20, 2020, the Analyst provided a response to the Applicant which included the following:

14 records were received and identified to be responsive from the Business Unit(s) of Community Planning, and are all released to you without exception. This office will not provide additional copies of these records. This is the 2nd release as concerns this file. Apologies for the error in providing you non-responsive records in the previous release.

NOTE: The numbering of these records includes the numbering of the previously provided non-responsive records. This is to ensure proper identification of/reference to each record, in case of Review or any other query you may have concerning this file moving forward.

The report provided herein does state ‘draft’ on the bottom. I inquired with the Business Unit, and they assured me this was the only copy of which they were aware.

[para 10] On December 1, 2020, the Applicant emailed the Deputy City Clerk and stated in part:

By email dated last November 19th, you kindly informed me that your FOIP team was “conducting a subsequent search for the Coriolis report regarding Hillhurst/Sunnyside.” The records that I received one day later, 2020-G-0253, pages 0056-0069, however, turned out to be only a “draft” version of what appears to be just a portion of the report sought. No title page and no table of contents were provided. In comparison, the report initially released (the wrong report, it turns out because concerning Inglewood/Ramsay) included both a title page (2020-G-0253, page 001) and a table of contents (2020-G-0253, page 002), and none of the pages were stamped “draft”. In support of my FOIP request, I provided a copy of the May 22, 2020 letter from the Hillhurst/Sunnyside Community Association Planning Committee that refers to the Coriolis report, not some draft version of that report. Once again, I count on you to ensure that the response provided thus far is updated with a copy of the final version of the report requested, including title page and table of contents. I look forward to your response and thank you for taking the time to look into this matter again.

[para 11] On December 1, 2020, the Deputy City Clerk responded to the Applicant and stated:

I can confirm that we conducted a subsequent search for the Coriolis report regarding Hillhurst/Sunnyside on November 19th. The result of that subsequent search was the draft document you received on November 20th from [Analyst].

After you contacted [Analyst] on November 23rd, he again reached out to the Business Unit on November 24th to inquire if there was another version, given that the report we received was marked “draft”. We have been advised by the Business Unit that there is no other version of the Coriolis report regarding Hillhurst/Sunnyside, only the draft report that has been provided.

Given that the two searches have not resulted in a different version, the draft report is the only version we are aware of that is within The City’s custody or control.

As we have spoken about in the past, you have the right to contact the Information and Privacy Commissioner of Alberta (information on the process is available [here](#)).

[para 12] By way of email dated December 2, 2020, the Applicant responded to the Deputy City Clerk, and stated in part:

Your response suggests that the City would have spent hard-earned property tax payers’ money to pay the BC firm Coriolis for a draft report. That is simply not true. I ask that you reconsider your response accordingly.

[para 13] On December 4, 2020, the Deputy City Clerk emailed the Applicant and stated in part:

Today, I placed additional inquiries at The City regarding the May 22, 2020 HSCA Planning Committee letter, citing a “City/Coriolis report” (page 2). I will provide you with an update early next week.

[para 14] On December 10, 2020, the Deputy City Clerk emailed the Applicant and stated in part:

The City connected with the Community Association this week. Our additional inquiries did not result in a different version of the Coriolis report. The draft report remains the only version of the requested report that we have been able to locate.

[para 15] On February 9, 2021, this Office received a request from the Applicant to review the Public Body's search for the report, as the Applicant was seeking the final Coriolis report or study for Hillhurst/Sunnyside, not a draft of the report or study, and believed the Public Body should either have a copy of the final report or study, or should obtain the final report from Coriolis Consulting Corp. (the Consultant).²

[para 16] The Commissioner authorized a Senior Information and Privacy Manager (SIPM) to investigate and attempt to settle the matter; however, the matter was not resolved and on October 19, 2021, the Applicant requested an inquiry into the search conducted by the Public Body for the final report or study for Hillhurst/Sunnyside created by the Consultant for the Public Body.³

[para 17] The Commissioner agreed to conduct an inquiry and delegated her authority to conduct it to me.

II. ISSUE

Preliminary Matter – Scope of Inquiry

[para 18] In her Request for Inquiry, the Applicant alleged that the Consultant did not meet its contractual obligations to the Public Body if it did not provide a final report, and that the Public Body had a duty to act in the interests of the citizens which it breached if it only received a draft of the report or study for Hillhurst/Sunnyside from the Consultant, and not a final version of the report or study. These allegations are beyond the jurisdiction of this Office to investigate or address. Accordingly, these allegations will not be considered in this inquiry. Likewise, the Applicant's question as to why the report sought is not publicly available is outside the scope of this inquiry. The only issue in this inquiry is the issue set out below.

[para 19] The Notice of Inquiry states the issue for this inquiry as follows:⁴

1. Did the Public Body meet its obligations required by section 10(1) of the Act (duty to assist applicants)?

In this case, the Adjudicator will consider whether the Public Body conducted an adequate search for the City/Coriolis report/study for Hillhurst/Sunnyside.

III. DISCUSSION OF ISSUE

[para 20] Section 10(1) of the Act states:

² Applicant's Request for Review/Complaint received February 9, 2021 (Request for Review/Complaint).

³ Applicant's Request for Inquiry received October 19, 2021 (Request for Inquiry).

⁴ Notice of Inquiry dated December 22, 2021.

10(1) The head of a public body must make every reasonable effort to assist applicants and to respond to each applicant openly, accurately and completely.

[para 21] As stated in Order F2020-15 at paragraph 9, prior orders of this Office have established the following principles with respect to a public body's duty to assist an applicant under section 10(1):

1. The public body has the onus to establish that it has made every reasonable effort to assist the applicant, as it is in the best position to explain the steps it has taken to assist the applicant within the meaning of section 10(1) (see, for example, Orders F2007-029 at para. 46, F2014-08 at para. 4, and F2019-39 at para. 8).
2. The duty to make every reasonable effort to assist applicants includes the duty to conduct an adequate search for responsive records (see, for example, Orders F2007-029 at para. 50, F2014-08 at para. 5, F2019-37 at para. 6, and F2019-39 at para. 8).
3. An adequate search has two components: (1) every reasonable effort must be made to search for the actual record requested and (2) the applicant must be informed in a timely fashion about what has been done (see, for example, Orders F2007-029 at para. 50, and F2014-08 at para. 5).
4. In general, evidence as to the adequacy of search should cover the following points:
 - The specific steps taken by the public body to identify and locate records responsive to the applicant's access request
 - The scope of the search conducted – for example: physical sites, program areas, specific databases, off-site storage areas, etc.
 - The steps taken to identify and locate all possible repositories of records relevant to the access request: keyword searches, record retention and disposition schedules, etc.
 - Who did the search
 - Why the public body believes no more responsive records exist than what has been found or produced(see, for example, Orders F2007-029 at para. 66, F2019-37 at para. 6, and F2019-39 at para. 9).
5. An adequate search does not require perfection; a public body is required only to make every reasonable effort (see, for example, Orders F2003-001 at para. 40, F2009-009 at para. 48, and H2015-01/F2015-24 at para. 8).
6. Failing to find records during an initial search does not preclude a finding that a public body made every reasonable effort (see, for example, Orders F2003-001 at para. 40 and F2009-009 at para. 48).

[para 22] The Applicant requested “The report or study referred to in the attached May 22, 2020 letter to Community Planning (North Team) page 2 of 3, last paragraph: “the City/Coriolis report” as regards Hillhurst/Sunnyside.” The Public Body provided the Applicant with a copy of the Coriolis report for Hillhurst/Sunnyside; however, it was stamped “draft”. The Applicant does not want a copy of the draft report, she wants a copy of the final report.

[para 23] Accordingly, the question for this inquiry is whether the Public Body conducted an adequate search for a final report for Hillhurst/Sunnyside. Central to this determination is whether the record the Applicant is seeking, exists.

[para 24] In her Request for Inquiry, the Applicant set out the following reasons why she believed a final version of the report must exist:

Is the public body (City of Calgary) authorized to effectively deny its citizens the right to access records under its control by providing records other than those requested and / or providing only a draft and incomplete version of the records requested? As a local tax payer, why am I being denied the right to access a report that I have indirectly financed and that deal with issues impacting my interests?

About seven years ago, the public body hired and paid an outside consulting firm (Coriolis Consulting Corp.) to prepare reports to guide decision-making on the use of so-called density bonusing in inner city neighbourhoods. In support of my request for a copy of the Coriolis report about the neighbourhood of Hillhurst/Sunnyside Community, I provided a copy of a letter from the Hillhurst/Sunnyside Community Association referring to the City/Coriolis report. I also provided a letter part of the record of proceedings of the Calgary Planning Commission showing that the Coriolis report about the community of Inglewood/Ramsay was accessible to the public.

The public body has acknowledged that it initially provided me non-responsive records (November 20, 2020 letter from public body FOIP office). The public body initially provided me a copy of the Coriolis report about Inglewood/Ramsay. Subsequently, the public body sent me fourteen pages of records that appear to be but an excerpt of the report that I requested in the first place and all of which are stamped “DRAFT”. The records so received include neither a title page nor a table of contents.

For the public body to suggest that the report requested only exists in draft form is not a credible response. Having paid an outside consultant to prepare the subject report, the public body was entitled to receive the final and complete version of that report. Likewise, citizens exercising their statutory right to access the subject report under the public body’s control are entitled to receive the final and complete version of the report, subject to the limits spelled out in the Act.

Coriolis Consulting Corp. would not have met its obligations under the retainer from the public body for the provision of the subject report if it had only provided a draft version of that report. And the public body would not have met its obligations owed to its citizens had it settled for a draft version of the subject report, in return for the amount paid under the retainer. In retaining the services of Coriolis Consulting Corp., public body employees were exercising delegated authority on behalf of the public body as a corporate entity. In the exercise of that delegated authority, public body employees were bound by the duty to act in the interests of the citizens of the public body and could not just settle for less than what the citizens of the public body indirectly paid for.

The context in which, on November 20, 2020, I received the fourteen pages of records stamped “DRAFT” is key to understanding the disclosure avoidance tactic the public body has used in this case.

. . .

[para 25] The balance of the Applicant’s comments in her Request for Inquiry dealt with why she required the final report, and why she believed the Public Body had deliberately provided her with only a draft of the report and not the final version.

[para 26] As part of her initial submission, the Applicant also provided a letter which she had sent to this Office and the Public Body dated December 3, 2021, in which she raised a concern about a statement made in a letter dated November 29, 2021 to the parties from the SIPM. The Applicant stated:

I am writing to object to the suggestion made, by [the SIPM], in her November 29th letter, that “[t]he Public Body also reached out to the consultant who worked on the report and confirmed a final copy was never issued.”

The cited assertion is not supported by the material already on file. Had the Public Body in fact reached out to the consultant, it would have said so in its September 23, 2021 account of the actions taken in its file 2020-G-0253 (see copy attached). And [the SIPM] would have noted it in her September 30, 2021 Letter of Findings (see copy attached).

[para 27] I have not reviewed the SIPM’s letter of findings dated September 30, 2021 and I do not know on what evidence the SIPM based this statement in her letter dated November 29, 2021. I will not be relying on this statement made by the SIPM in her November 29, 2021 letter. I will be relying on the submissions and evidence of the Public Body in this inquiry regarding the scope of the search it conducted for a final copy of the report, as well as the submissions and evidence of the Applicant in this inquiry.

The Applicant’s Arguments

[para 28] In her Request for Inquiry the Applicant argues that because the Public Body provided her (albeit in error), a final report for another community (Inglewood/Ramsey), prepared by the Consultant, it stands to follow that the Consultant must have also prepared and provided a final Report for Hillhurst/Sunnyside to the Public Body.

[para 29] The Applicant points to a letter dated May 22, 2020, which she provided with her access request to the Public Body and attached to her Request for Review, from the Hillhurst Sunnyside Community Association, to the Senior Planner, Community Planning (North Team), City of Calgary, to support her argument that a final Report must have been received by the Public Body. The letter contains the following sentence:

- At the time of writing, the Hillhurst Sunnyside Community Amenity Fund contribution is set at \$18.14, which was recognized in the City/Coriolis report to be lower than other areas experiencing significant redevelopment.

[para 30] I understand the Applicant to be arguing that because the final Coriolis study for Ingelwood/Ramsey was publically available and was in fact provided to her (albeit mistakenly) in response to her access request for the Coriolis report for Hillhurst/Sunnyside, the final Coriolis report for Hillhurst/Sunnyside should also be provided to her.⁵

[para 31] The Applicant submitted that the Public Body's search was not reasonable because the Public Body did not contact the Consultant to get the full and final version of the report sought, but only contacted the relevant Community Association.⁶

The Public Body's Arguments

[para 32] In its initial submission, the Public Body explained the steps it took to locate the Consultant's report for Hillhurst/Sunnyside.⁷ It provided affidavits from the Analyst, the FOIP Program Administrator, Planning and Development (the FOIP Program Administrator) and a Senior Planner with the Planning and Development Section (the Senior Planner) in support of its submission.

[para 33] The Public Body advised that its initial search resulted in the Inglewood Report being provided to the Applicant.

[para 34] Upon being notified by the Applicant that this was the wrong report, the Public Body conducted a second search - this time for the record the Applicant had actually requested: the Hillhurst/Sunnyside report prepared by the Consultant.

[para 35] The Public Body provided details about the second search. At paragraphs 39 and 40 of its initial submission, the Public Body stated:

39. **Search 2** took place on November 19, 2020, once the Public Body was advised that the incorrect report was sent and that it was the Sunnyside Report the Applicant sought. This search initially utilized the contacts that assisted with Search 1, resulting in the request expeditiously being referred from the "South" team, who provided the Inglewood report, to the Manager of the "North" team who directed the request to those who could locate the Sunnyside Report. The Sunnyside report was provided to the Analyst by 10:02 AM the same day.
40. Once the Sunnyside Report was provided, the Analyst noted the draft mark on the Sunnyside Report and contacted the FOIP Program Administrator to confirm that no other versions exist. The FOIP Program Administrator contacted the individual that provided the Sunnyside Report, who in turn contacted a Senior Planner that worked on the project that utilized the Sunnyside Report. These additional inquiries did not produce any other version of the Sunnyside Report, which was communicated to the Analyst.

⁵ Applicant's access request, Applicant's e-mail dated November 18, 2020 to the Public Body's Deputy City Clerk and Applicant's Request for Inquiry.

⁶ Applicant's initial submission at para. 3.

⁷ Public Body's initial submission dated February 22, 2022 (initial submission).

[para 36] The Public Body provided the draft Hillhurst/Sunnyside report prepared by the Consultant to the Applicant with its letter dated November 20, 2020. The Analyst stated in this letter:

The report provided herein does state “draft” on the bottom. I inquired with the Business Unit, and they assured me this was the only copy of which they were aware.

[para 37] Upon being informed by the Applicant that she was seeking a copy of the *final* Hillhurst/Sunnyside report prepared by the Consultant, and not a draft, the Public Body advised in its initial submission that it conducted a third search, this time for the final Hillhurst/Sunnyside report prepared by the Consultant.

[para 38] At paragraph 41 of its initial submission, the Public Body stated:

41. **Search 3** took place from November 24, 2021 to November 25, 2021 prompted by the Applicant contacting the Analyst expressing concern over the draft notation on the Sunnyside Report. The Analyst understood the Applicant to be adamant that they had seen a final version.

[para 39] At paragraph 42, the Public Body advised that it further undertook a fourth search for the final report as follows:

42. **Search 4** took place from December 2, 2021 to December 4, 2021 and was essentially a double-check initiated by the Deputy Clerk and executed by the Leader of the Access and Privacy unit. This escalation sought to determine (1) whether a final version of the report was created, as alleged by the Applicant, and (2) the reason why a “final” report did not seem to have been produced.

[para 40] At paragraph 60 of its initial submission, the Public Body provided the following additional information about the fourth search:

60. Search 4 also included an inquiry made to the Hillhurst Sunnyside Community Association, asking if they had a different copy of the Sunnyside Report. They did not.

[para 41] The Public Body submitted that:

44. Given that searches 1 and 2 were undertaken in response to the Applicant’s request and were those searches that lead to the production of the Sunnyside Report, the Public Body takes the position that these two searches should be considered as a continuum in the adjudicator’s examination of whether the public body met its duty to the Applicant under Section 10(1). This approach of considering more than one search effort has been utilized in other OIPC Orders [Tab 7, Order F2021-23, para 19] [Tab 9, Order F2021-49, para 27]
45. The efforts of Searches 3 and 4 represent additional steps being taken by the Public Body in responding to the Applicant. The Public Body submits that these searches should also be considered by the Adjudicator as part of the overall effort to assist the Applicant.

46. The Public Body submits that the steps taken to locate the Sunnyside Report met or exceeded the standard required by the Act. The Analyst contacted the correct business unit and the FOIP program Administrator coordinated an effective search locating the Sunnyside Report, as further described below.

[para 42] The Public Body then provided details regarding the scope of the four searches it conducted, the steps taken to identify and locate all possible repositories, and who conducted the searches.

[para 43] The Public Body also made submissions with respect to why it believed that no more responsive records existed other than what had been found or produced. The relevant portions of the submissions are as follows:

63. The Public Body believes that no other versions of the Sunnyside Report are in its custody or control on the basis that an adequate search was conducted making every reasonable effort to search for records in accordance with the Applicant's access request. This search located the Sunnyside Report and no other versions of the report were located. Searches were conducted by knowledgeable staff and the efforts included searches of business unit's folders and the electronic mail system where responsive records would typically be held. The City has found no other version of the Sunnyside Report.
64. The adjudicator specifically requested that the Public Body have regard to the reasons provided by the Applicant for believing more records exist than what was provided. The primary reason expressed by the Applicant on the Request Form is that the Sunnyside Report has a draft mark and does not include a cover page or table of contents, unlike the Inglewood Report or a similar report by Coriolis for the City of Halifax.
65. The Applicant's comparison of the Inglewood Report and the Hillhurst/Sunnyside report, as well as the Halifax report, is the only evidence provided in the context of the Inquiry in support of there being other records that were not located in the Public Body's search. Specifically, the absence of a cover page and table of contents on the Sunnyside Report. The applicant has not provided any further evidence that a "final" version of the Sunnyside Report exists or is in the custody or control of the Public Body.
66. The Public Body considers the Applicant's question regarding the difference between the reports and the draft mark to be reasonable. However, the Public Body submits that it has completely, accurately, and openly answered the Applicant's questions and communicated to the Applicant following multiple inquiries.
67. The draft mark on the Sunnyside Report was dutifully noted by the Analyst, during Search 2, prompting the Analyst to contact the FOIP Program Administrator to further inquire whether any other versions of the report exist before contacting the Applicant and providing the Sunnyside Report.
68. The Analyst was assured by knowledgeable staff that no other version exists, and this information was communicated to the Applicant at the time that the Sunnyside Report was provided.

...

71. The Public Body submits that no other versions of the Sunnyside Report are in its custody or control based on the completion (multiple times) of an adequate search for records.

The Applicant's Rebuttal Arguments

[para 44] In her rebuttal submission, the Applicant argued that the Public Body failed to conduct an adequate search, and therefore failed to meet its duty to assist her under section 10(1) of the Act, because “the Respondent has not even attempted to get the consultant’s copy of the final version of the report sought.”⁸

[para 45] At paragraph 6 of her rebuttal submission, the Applicant further stated:

... Nor has the Respondent followed its own example in the case of Calgary (City) (Re), 2020 CanLII 45228 (AB OIPC), Order F2020-15, para. 35, para. 36, where affidavit evidence by the consultant in that case was provided to establish the relevant facts on which the Respondent relied. (Copy of relevant excerpt of cited Order attached – **TAB 5**)

[para 46] The Applicant argued that a record created by an outside consultant for a public body is a record which is in the custody or under the control of the public body under the Act. She stated (emphasis in submission):

5. Authorities interpreting comparable provisions of the BC FOIPP Act giving “a right of access to a record in the custody or under the control of a public body” have consistently held that the fact that the record was created by an outside consultant for the public body is a factor indicating that the public body has control of the record.
[1999 CanLII 6922 (BCSC) , para. 48; 2015 BCIPC 71 (CanLII), para. 17 – 20, copies of relevant excerpts attached – **TAB 4**]

[para 47] The Applicant pointed out that both the Manager – North Area, and the Senior Planner emailed the FOIP Program Administrator and asked whether the Consultant should be contacted in this matter. The Manager – North Area stated “... can we contact the consultant to receive a final copy?” and the Senior Planner stated “Would contacting the consultant be something we should do considering this request? If so, I’m not sure if this should come from someone that was on the project, like [Employee A], or myself.”⁹

[para 48] The Applicant noted that the FOIP Program Administrator put this question to the Analyst, who responded via email dated November 24, 2020 to the FOIP Program Administrator as follows:¹⁰

Good question. But the answer is no. We are required to respond to requests for records in our possession (whether City or 3rd party). If we don’t have the record, it is not expected for us to attempt to get it from an external party.

⁸ Applicant’s rebuttal submission dated March 10, 2022 (rebuttal submission) at paras. 1 and 6.

⁹ Applicant’s rebuttal submission at paras. 18 – 23.

¹⁰ Applicant’s rebuttal submission at paras. 22 – 23.

[para 49] The FOIP Administrator communicated the Analyst's response to the Manager – North Area and the Senior Planner via email dated November 25, 2020.

[para 50] The Applicant noted the FOIP Program Administrator subsequently emailed the Senior Planner on December 2, 2020 about obtaining the final draft from the consultant.¹¹ The FOIP Program Administrator stated "I got a question from the Access and Privacy office regarding the Hillhurst/Sunnyside "Coriolis" report. Are you able to get a copy of the final draft from the consultant and how long it is [sic] going to take to receive it?" The email was copied to Employee A, the Manager – North Area, and the Leader, Access and Privacy.

[para 51] The Applicant noted that the Respondent's evidence did not include any written record of the Senior Planner's answer to that question; however, the Senior Planner's Affidavit contained an email, also dated December 2, 2020, to the Senior Planner from the Leader, Access and Privacy in which the Leader, Access and Privacy stated:¹²

Maybe before asking the consultant for the final copy of their report, we would like to clarify with you and the project team the following:

- Was the Project Team aware if a final version of this report was created/completed by the consultant?
- Did the project work to which the report was created for stopped [sic], thus the reason why The City didn't asked [sic] for the final report?

[para 52] The Applicant noted the Senior Planner's response to the Leader, Access Privacy:¹³

I have this response from a member of the project team that worked on this.

- The Project Team was not aware of a final version of this report, only draft 2014 April
- The scope of the project shifted and the original intent of the report did not align with the final project recommendations to Council, thus the City did not ask for the final report.

[para 53] The Applicant submitted:

28. The question first asked by Senior Planner [name]'s boss, the Community Planning Manager – North (can we contact the consultant to receive a final copy?) should not have been dismissed on the basis of what [Senior Planner] has reported in his affidavit to have heard from an unnamed "member of the project team". TAB 3, para. 7 – 8.

[para 54] The Applicant's position is that the Consultant prepared a final version of the report, and the Public Body must ask the Consultant to search for and provide the Public Body with a copy of the final version of the report, and the Public Body must provide the final version of the report to her, in order to meet its duty to assist her under section 10(1) of the Act.

¹¹ Applicant's rebuttal submission at para. 24 and Senior Planner's Affidavit at Exhibit "E".

¹² Applicant's rebuttal submission at para. 25.

¹³ Applicant's rebuttal submission at para. 26 and Senior Planner's Affidavit at Exhibit "E".

[para 55] The Applicant further argued that the Public Body had not proven that it had conducted an adequate search for the final report because it did not provide direct evidence from any individual with the Public Body who was actually involved with the report. The Applicant also pointed out that it did not appear that the Senior Planner logged the details of the search he conducted, or who he asked to conduct a search and when and where they searched, or provided the log to the FOIP Program Administrator as she requested in her email dated November 24, 2020 to the Senior Manager.

[para 56] In particular, the Applicant submitted (emphasis in submission):

12. Because he was not directly involved in the “project” for which the subject report was commissioned, Senior Planner [name] is not the right person to be giving evidence about whether there is a final version of that report [TAB 3, para. 5, Exh. “C”, p.1]

...
32. Despite being asked by P&D FOIP Administrator [name] to log the details of the search and to send the log to her, Senior Planner [name] makes no mention of any log. “If other people helped as well, please record their names, the date, and where they searched.” [TAB 3, Exh. “E”, p. 4/ TAB 2, Exhibit “J”, p. 4]

...
35. In the Affidavit sworn in the meantime, Senior Planner [name] refers to his conversation with P&D FOIP Administrator [name] about the report released being in draft and what he said at the time, as noted by [FOIP Program Administrator] in her email to Analyst [name]:

“the only version we have as far as I know”; “I would guess this is the first version sent to us from the consultant and that we never asked him to revise it at all,” “I was not involved with this directly [...]” [TAB 3, para. 5, Exh. “C”, p.1]
36. The Respondent has failed to provide direct evidence from Senior Planner [names’] colleague, [Employee A], who would have worked on the so-called project regarding the Hillhurst/Sunnyside report by Coriolis.
37. Instead, we have the evidence of Senior Planner [name] reporting what his colleague would have said: “[Name], who worked on this project, does not think there was another document either.” [TAB 3, para. 6, Exh. “D”]
38. The Respondent has not even provided the name of the other colleague that, according to an email that Senior Planner [name] sent on 25-Nov-20, 8:29, the Senior Planner would have contacted to ask whether there was a final report: “I have reached out to one more colleague who may have been involved with this. If he isn’t aware of a different version then what we have is all we have.” Senior Planner [name] makes no mention of this email in his Affidavit [TAB 3], but it is included in Exhibit “J”, p. 2 of P&D FOIP Administrator [name]’s Affidavit [TAB 2].

[para 57] In conclusion, the Applicant stated:

57. In light of all of the above, the Commissioner has good reason to:

- A. deny the Respondent's request to disregard the material previously submitted by the applicant in support of the applicant's initial submission;
- B. find that the Commissioner does have jurisdiction to determine whether the Respondent has control of the consultant's copy of the report at issue;
- C. find that the Respondent has not met its onus of establishing that it made every reasonable effort to assist the applicant in this case; and, accordingly,
- D. require the Respondent to obtain from the consultant the final version of the report at issue and to provide the applicant access to the said final version in accordance with the Respondent's duty under s. 10(1) of the *Act*.

Public Body's Rebuttal Arguments

[para 58] In its rebuttal submission, the Public Body stated:¹⁴

- 8. The Applicant has made substantial efforts to carefully examine the preponderance of evidence the Public Body has provided to make numerous critiques. The underlying basis for the critique has not been articulated, other than to point out alleged deficiencies to any reasons in support of a finding that the Public Body did not meet its duty under Section 10(1).
- 9. The Public Body submits that its evidence is sufficient and reliable in terms of demonstrating the information requested by the Adjudicator in the Notice of Inquiry and establishes on a balance of probabilities that all reasonable efforts were made in conducting the search.
- 10. Despite the many perceived gaps (in the Applicant's view), the Public Body submits that this evidence should be preferred over the evidence provided by the Applicant. The Applicant's evidence consists of a mere speculation that a "final" version of the report exists based on the reference made by the HSCA Planning Committee (who confirmed they had no other version), and the absence of a cover page, table of contents, and the "draft" mark.

[para 59] The Public Body then made submissions as to how the searches it conducted for the record responsive to the Applicant's access request met the standard of reasonableness set out by former Commissioner Work in Order 98-002 (emphasis in submission):

- 12. The requirement under Section 10(1) is that every reasonable effort be made to assist an applicant. In Order 98-002 Commissioner Work accepted the Black's Law definition of "reasonable", in the context of interpreting "every reasonable effort" in relation to Section 34 of the Act (now Section 35). [Tab 1] The Black's Law definition states:

Fair, proper, just, moderate, suitable under the circumstances. Fit and appropriate to the end in view . . . Not immoderate or excessive, being synonymous with rational, honest, equitable, fair, suitable, moderate, tolerable.

[para 60] The Public Body stated (emphasis in submission):

¹⁴ Public Body's rebuttal submission, undated, received March 24, 2022 (rebuttal submission).

14. The Public Body submits that the “every reasonable effort” standard was met or exceeded in this circumstance on the basis that five separate efforts were made to identify whether a different version of the Sunnyside Report existed, including consulting the source relied on by the Applicant, the HSCA Planning Committee.

...
 21. These efforts established that there was no other version of the Sunnyside Report, other than the version provided to the Applicant. The Public Body submits that in this circumstance these inquiries constituted making every reasonable effort in conducting its search. In particular (1) confirming that no “final” version was requested from the consultant as shown in communications that included the Manager of Community Planning North, [The City’s Initial Submission, Tab 3, Exhibits D and E] and (2) establishing that the HSCA, as the most likely source where the Applicant would have seen a “final” version, did not have a different version. [The City’s Initial Submission, Tab 3, Exhibit H].
 22. The Public Body submits that following these steps meet or exceed the requirement to make every reasonable effort. The additional effort of contacting the consultant, absent any indication in the evidence that the report was lost, would be excessive, not reasonable. At no time has any employee of the Public Body suggested that the final report was lost, which could reasonably lead the Public Body to contact the consultant to obtain a replacement copy.

...
 24. The Public Body acknowledges that in different circumstances it may be required to contact a third party who has produced a record for the Public Body under contract. For example, in OIPC Order F2002-014, the discharge of the duty to search required the public body to take steps to contact a third party. In this circumstance the third party had informed the applicant that they had responsive records and this information was relayed to the public body.
 25. In the present circumstance, no evidence has been proffered by the Applicant that Coriolis Consulting Corp. has indicated that they have a copy of the “final” report. Instead, the evidence the Applicant relies on is a reference to the report made in the letter from the HSCA Planning Committee. Accordingly, the step of contacting the HSCA was reasonable in these circumstance.
- [para 61] I further note the following statements of the Public Body in its rebuttal submission (emphasis in submission):
30. The City has not taken the position that the Sunnyside Report or the alleged “final” version is outside its control.
 31. The Applicant cites paragraph 70 of The City’s Initial Submission to suggest that The City takes the position that the Adjudicator does not have jurisdiction to take into consideration that the report was prepared by Coriolis Consulting Corp. pursuant to its contract with The City.

32. The position expressed in paragraph 70 is provided in the context of the quotation from the Applicant provided in the Notice of Inquiry, reproduced at paragraph 69 of The City's Initial Submission:

"For the public body to suggest that the report requested only exists in draft form is not a credible response. Having paid an outside consultant to prepare the subject report, the public body was entitled to receive the final and complete version of that report. Likewise, citizens exercising their statutory right to access the subject report under the public body's control are entitled to receive the final and complete version of the report subject to limits spelled out in the Act." (underline added)"

33. The Public Body commented on this paragraph responding to a direct request in the Notice on [sic] Inquiry that the Public Body's submission "should have regard to the reasons the Applicant gave for believing more records exist than were located/provided to them, and/or the Applicant's description of the records/kinds or [sic] records they believe should have been located and provided."
34. What the City negotiated for [and] what it "was entitled to receive", with respect, is outside the jurisdiction of the OIPC. The City has not made any statement suggesting any limitations to Section 69 of the Act.

Analysis

[para 62] The Public Body is correct that this Office does not have the jurisdiction to determine whether the Consultant met its contractual obligations to the Public Body with respect to the Hillhurst/Sunnyside report. As I have noted in the *Preliminary Issues – Scope of Inquiry* section above, this issue is outside of the jurisdiction of this Office and is not included in the scope of this inquiry.

[para 63] The scope of this inquiry is limited to determining whether the Public Body conducted an adequate search for a final Hillhurst/Sunnyside report prepared by the Consultant. If the Consultant only prepared the draft report that was provided to the Applicant already, and never prepared a final report, I do not have the jurisdiction to order the Consultant to prepare a final report, nor do I have the jurisdiction to require the Public Body to request that the Consultant prepare a final report.

[para 64] The Applicant has pointed to the reference in the HSCA letter dated May 22, 2020 to a "City/Coriolis report" as evidence that the Consultant must have prepared a final report.

[para 65] The Applicant also pointed to the fact that she had received a report prepared by the Consultant for the Ingelwood/Ramsey community which contained a title page and table of contents, which were missing from the draft Hillhurst/Sunnyside report she received, as evidence that the Consultant must have prepared a final report for Hillhurst/Sunnyside.

[para 66] While one cannot simply conclude that just because HSCA letter referred to the "City/Coriolis report" for Hillhurst/Sunnyside, and the Consultant prepared a final report for the Ingelwood/Ramsey community, it *must* have also prepared a final report for the Hillhurst/Sunnyside community, this suggests that it *might* have done so.

[para 67] The Public Body's position is that it has rebutted this suggestion because it has provided sufficient evidence that the Public Body did not request the Consultant provide a final report. The Public Body's position is that because it determined that it did not request the Consultant prepare a final report, a final report must not exist, and it did not need to contact the Consultant to find out if the Consultant had prepared a final report.

[para 68] In other words, if the Public Body didn't ask the Consultant to prepare a final report, it must not exist, and there is no need for it to contact the Consultant to ask it to search for something that does not exist.

[para 69] The Public Body further submitted that the steps it took to locate responsive records to the Applicant's access request, including the enquiries it made as to whether a final version of the report existed, met or exceeded the requirement to make every reasonable effort. It stated that "The additional effort of contacting the consultant, absent any indication in the evidence that the report was lost, would be excessive, not reasonable."¹⁵

[para 70] I have reviewed the Affidavits of the Analyst, the FOIP Program Administrator and the Senior Planner. Neither the Analyst nor the FOIP Program Administrator actually searched any locations or depositories for the draft or final Hillhurst/Sunnyside report prepared by the Consultant; rather, the Analyst requested the FOIP Program Administrator to search for the report and the FOIP Program Administrator asked various employees of the Public Body, including the Manager – North Area, to search for the report. The Manager – North Area then cc'd the Senior Planner and another employee, to search for the report.

[para 71] It was the Senior Planner who located the draft report and provided it to the FOIP Program Administrator on November 19, 2020, and it was the Senior Planner who searched various locations and made various enquiries with other Public Body employees about the existence of a final report.

[para 72] I note the following email exchange between the Senior Planner and the FOIP Program Administrator attached as Exhibit "D" to the Affidavit of the Senior Planner (my emphasis):

1. Email dated November 19, 2020 at 10:24 AM from FOIP Program Administrator to Senior Planner:

Thank you [Senior Planner] for sending it so quickly to me!
I have only one question. Is it ok to release this report to the public or there are [sic]
some concerns if it gets released.

2. Email dated November 19, 2020 at 10:31 AM from Senior Planner to FOIP Program Administrator:

I am assuming it is ok to release, but I'm not 100% sure. It was commissioned based on a review of density bonusing that we were doing, but it was never attached to any reports that went forward to council. I was not involved with this directly, so that is why I am

¹⁵ Public Body's rebuttal submission at para. 22.

not sure if it should be released or not. I would defer to your expertise in terms of what is considered okay for release. If it helps I think it may have been seen by the community association, but I can't confirm this for sure.

3. Email dated November 19, 2020 at 11:16 AM from FOIP Program Administrator to Senior Planner:

I got a question from the FOIP office. The report you've provided says "DRAFT" on the bottom. Are we certain this is the final report?

4. Email dated November 19, 2020 at 11:18 AM from Senior Planner to FOIP Program Administrator:

This is the only version we have as far as I know. I would guess this is the first version sent to us from the consultant and that we never asked him to revise it at all.

5. Email dated November 24, 2020 at 7:57 AM from FOIP Program Administrator to Senior Planner:

... Today I received another email from the FOIP office asking for a final draft of the report.

Here is what they say:

"The Applicant has contacted me again, concerned with the 'draft' notation in the corner and the fact there was no title page nor table of contents. They are adamant they had seen a final version. Are you able to find out?"

Could you please do another search for this one and try to find what they are asking for?

6. Email dated November 24, 2020 at 9:00 AM from Senior Planner to FOIP Program Administrator:

I checked with my colleague who worked on the project and looked through all our folders that I could think of and could not find any other documents. [Employee A], who worked on this project, does not think there was another document either.

[para 73] I also note the following email exchange between the Senior Planner and Leader, Access and Privacy attached as Exhibit "E" to the Affidavit of the Senior Planner:

1. Email dated December 2, 2020 at 1:59 PM from Leader, Access and Privacy to Senior Planner:

... We are trying to ensure that The City has done its part in providing [a] response to the FOIP applicant's request.

Maybe before asking the consultant for the final copy of their report, we would like to clarify with you and the project team the following:

- Was the Project Team aware if a final version of this report was created/completed by the consultant?
- Did the project work to which the report was created for stopped [sic], thus the reason why The City didn't ask [sic] for the final report?

2. Email dated December 2, 2020 at 2:13 from Senior Planner to Leader, Access and Privacy:

I have this response from a member of the project team that worked on this.

- The Project Team was not aware of a final version of this report, only draft 2014 April
- The scope of the project shifted and the original intent of the report did not align with the final project recommendations to Council, thus the City did not ask for the final report.

[para 74] I note that Order F2020-15, dealt with a similar situation involving the Public Body.

[para 75] In that case, the applicant requested a copy of a workplace review prepared by a consultant for the Public Body. The Public Body only located a slideshow prepared by the consultant, and not a written report. The applicant sought a review of the Public Body's search, and pointed to references in other documents to a "review" or "report" to support his assertion that the consultant *must* have prepared a report.

[para 76] The issue in this inquiry is similar to the issue set out in paragraph 22 of Order F2020-15:

[para 22] The issue in this inquiry is whether the Public Body conducted an adequate search for records responsive to the Applicant's access request. Central to this determination is whether the record the Applicant is seeking, exists.

[para 77] In that case, the Public Body provided an affidavit sworn by the Access & Privacy Leader (the Leader), attesting to the search that was conducted by the Public Body for records responsive to the applicant's access request.¹⁶ In particular, I note at paragraph 31 of Order F2020-15:

[para 31] The Leader further attested that she reviewed an email dated October 23, 2017 from the Deputy Fire Chief with the CFD, which indicated that the Consultant was contracted to complete a workplace review in CFD, that the Consultant did not create or publish a report, and that the Consultant's final results and recommendations were presented verbally.

[para 78] The Public Body *also* provided an affidavit sworn by the consultant. The content of the consultant's affidavit is found at paragraph 35 of Order F2020-15. At paragraph 5 of the consultant's affidavit, the consultant stated:¹⁷

5. Other than the Slideshow, I was not requested to nor did I prepare or provide a written report of my findings or recommendations to anyone at The City of Calgary or the Calgary Fire Department.

¹⁶ Order F2020-15 at para. 23.

¹⁷ Order F2020-15 at para. 35.

[para 79] Based on the Public Body’s submissions *and* the consultant’s affidavit, the Public Body was found to have conducted an adequate search for responsive records:¹⁸

[para 63] The Public Body’s submissions, and in particular the Consultant’s affidavit, wherein she swore that other than the Slideshow, she was not requested to, nor did she prepare or provide a written report of her findings or recommendations to anyone at The City of Calgary or the Calgary Fire Department, persuade me that the record the Applicant seeks, does not exist.

[para 64] The Public Body located the PowerPoint Slideshow, and has provided evidence which satisfies me that, other than the PowerPoint Slideshow, the Consultant was not requested to, and did not prepare or provide a written report of her findings and recommendations to the Calgary Fire Department or the Public Body.

...

[para 66] Based on the submissions and evidence provided by the Public Body, I find that the Public Body has conducted an adequate search for responsive records and has met its duty to assist the Applicant under section 10(1) of the FOIP Act.

[para 80] In this case, the Public Body submitted that contacting the Consultant to ask if it had a final version of the report would have been excessive and unreasonable.

[para 81] Having reviewed the Public Body’s submissions and evidence in this case, I find that the internal emails between the Public Body’s employees conducting the search for the final Coriolis report for Hillhurst/Sunnyside reveal uncertainty as to whether the Consultant was asked to, and did in fact prepare a final report.

[para 82] The Senior Planner who swore the Affidavit, was not involved in the project. The Public Body did not provide any direct evidence from anyone who was on the Project Team. The fact that the Public Body contacted the Community Association, which confirmed it only had a draft of the report, is not conclusive of whether a final report exists. The Consultant, who could have dispelled the uncertainty as to whether it had been asked to, and did in fact prepare a final report, was not contacted by the Public Body.

[para 83] In light of the foregoing, I find that the Public Body did not conduct an adequate search for a final version of the report.

[para 84] Section 6(1) of the Act provides that “An applicant 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”. The right is not absolute and is subject to the exceptions set out in the Act.

[para 85] In Order F2015-21, the adjudicator discussed whether records in the possession of an agency were within the custody or control of the public body. The adjudicator concluded that based on the contract between the agency and the public body, the public body had control over the agency’s creation of a record and what the agency does with it.¹⁹

¹⁸ Order F2020-15 at paras. 63, 64 and 66.

¹⁹ Order F2015-21 at paras. 29 – 52.

[para 86] At paragraph 30 of its rebuttal submission, the Public Body stated that it had not taken the position that the Sunnyside Report or the alleged “final version” was outside its control. The Public Body also stated at paragraph 22 that if the final report was lost (and there is no evidence to indicate this), it could contact the Consultant to obtain a replacement copy. The Public Body acknowledges in these statements that the report prepared by the Consultant for the Public Body is within its control.

[para 87] Accordingly, it is not necessary for me to review the agreement between the Public Body and the Consultant in order to determine whether the Public Body could require the Consultant provide it with a final version of the report, *if the Consultant had in fact been requested to prepare a final version of the report, and did in fact prepare a final version of the report.*

[para 88] As the Public Body has not established on the balance of probabilities that it conducted an adequate search as required under section 10(1) of the Act, I will order the Public Body to conduct a further search by asking the Consultant to inform the Public Body:

- (1) whether it was asked to prepare a final version of the Hillhurst/Sunnyside report;
- (2) whether it prepared a final version of the Hillhurst/Sunnyside report, and
- (3) if it prepared a final version of the Hillhurst/Sunnyside report, whether it has a copy of the final version of the report or can reproduce a copy.

[para 89] I will order the Public Body to inform the Applicant in writing of the Consultant’s responses to the above questions.

[para 90] If the Consultant prepared a final version of the report, and it is still in existence or can be reproduced, I will further order the Public Body to inform the Applicant in writing whether it will provide her with a copy of the final report, and to include the information set out in section 12 of the Act in its response.

[para 91] Once again, if the Consultant did not prepare a final version of the report, I have no jurisdiction to determine whether this is a breach of its agreement with the Public Body. Nor do I have any authority to order the Consultant to prepare a final version of the report, or to order that the Public Body require the Consultant to prepare a final version of the report.

[para 92] I note that section 74(1) of the Act states that “Subject to subsection (2), not later than 50 days after being given a copy of an order of the Commissioner, the head of a public body concerned must comply with the order.”

IV. ORDER

[para 93] I make this Order under section 72 of the Act.

[para 94] I find that the Public Body did not conduct an adequate search for responsive records in this case as required by section 10(1) of the Act.

[para 95] I order the Public Body to conduct a further search by asking the Consultant to inform the Public Body: (1) whether it was asked to prepare a final version of the Hillhurst/Sunnyside report; (2) whether it prepared a final version of the Hillhurst/Sunnyside report, and (3) if it prepared a final version of the Hillhurst/Sunnyside report, whether it has a copy of the final version of the report or can reproduce a copy. I order the Public Body to inform the Applicant in writing of the Consultant's responses to these questions. If the Consultant prepared a final version of the report, and it is still in existence or can be reproduced, I further order the Public Body to inform the Applicant in writing whether it will provide her with a copy of the final report, and to include the information set out in section 12 of the Act in its response.

[para 96] I order the Public Body to notify me and the A in writing not later than 50 days after being given a copy of this Order that it has complied with this Order.

Carmen Mann
Adjudicator