Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

RECONSIDERATION ORDER PO-3299-R

Appeal PA11-500-2

Order PO-3219

Ontario Lottery and Gaming Corporation

January 29, 2014

Summary: This is a reconsideration of Order PO-3219, concerning a request for communications between the OLG and five identified parties relating to the OLG's self-exclusion program. The OLG granted partial access to the responsive records. In Order PO-3219, the adjudicator found that the OLG properly withheld portions of the records as not responsive to the request and pursuant to section 13(1) (advice and recommendations) of the *Act*. However, the adjudicator also found that the OLG unilaterally narrowed the scope of the request and ordered it to conduct a new search for responsive records. The OLG requested a reconsideration of Order PO-3219 with respect to the findings on the scope of the request and the order to conduct a new search. In this reconsideration order, the adjudicator finds that in Order PO-3219 she erred in addressing the issue of the scope of the request and rescinds the order provision that requires the OLG to conduct a new search. Additionally, she finds that the appellant was not permitted to raise the issue of reasonable search at a late stage of the appeal process.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 24(2) and 52(13).

Orders and Investigation Reports Considered: Orders P-789, P-1213, PO-2514 and PO-3219.

OVERVIEW:

[1] This order sets out my reconsideration of Order PO-3219.

[2] The appellant made a request to the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) that was eventually clarified as being for communications between the OLG and five identified parties relating to the OLG's self-exclusion program.

[3] The OLG issued a decision letter granting partial access to the responsive records, denying access to portions of the records pursuant to the exemptions at sections 13(1) (advice or recommendations) and 18(1) (economic and other interests) of the *Act*. Portions of the records were also withheld as not responsive to the request.

[4] The appellant appealed the OLG's decision.

[5] After an inquiry during which the OLG advised it was no longer relying on section 18(1) to deny access to portions of the records, I issued Order PO-3219 in which I found that the OLG:

- properly withheld portions of the responsive records from disclosure pursuant to section 13(1);
- properly withheld portions of the responsive records from disclosure as not responsive to the request; and
- unilaterally narrowed the scope of the request and, as a result, I ordered it to conduct a new search for responsive records based on the request as it had been clarified during the processing period.

[6] In Order PO-3219 I also addressed the issue of the appellant's raising of the public interest override in section 23 of the *Act* at the inquiry stage of the appeal process. I declined to make a determination on whether or not she was entitled to do so but found that even if she was, section 23 did not apply in the circumstances of the appeal.

[7] Following the issuance of Order PO-3219, I received a request from the OLG to reconsider the portions of my decision that relate to my finding that the OLG unilaterally narrowed the scope of the request as well as to my decision to order it to conduct a new search for responsive records.

[8] The OLG's reconsideration request was shared with the appellant, in accordance with section 7 of the IPC's *Code of Procedure* (the *Code*) and *Practice Direction 7.* The appellant provided brief representations.

[9] For the reasons that follow, I allow the OLG's reconsideration request and, by this order, reconsider Order PO-3219. Specifically, I find that there are grounds under section 18.01 of the *Code* to reconsider Order PO-3219 as I erred in considering the issue of the OLG's interpretation of the scope of the request. As a result, I rescind Order Provision 1 in Order PO-3219 that requires the OLG to conduct a new search for responsive records. Additionally, I find that, in the circumstances of this appeal, the appellant was not entitled to raise the issue of reasonable search at the inquiry stage of the appeal process.

ISSUES:

A. Are there grounds under section 18.01 of the *Code* to reconsider Order PO-3219?

B. Was the appellant, in the circumstances of this appeal, entitled to raise the issue of reasonable search during the inquiry stage of the appeal process?

DISCUSSION:

A. Are there grounds under section 18.01 of the *Code* to reconsider Order PO-3219?

The reconsideration process

[10] This office's reconsideration process is set out in section 18 of the *Code* which applies to appeals under the *Act*. In particular, sections 18.01 and 18.02 state as follows:

> 18.01 The Commissioner may reconsider an order or other decision where it is established that there is:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission or other similar error in the decision.
>
> 18.02 The IPC will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was available at the time of the decision.

The reconsideration request

[11] The OLG's request for reconsideration states that in making my decision in Order PO-3219, I erred in the following ways:

> (a) by deciding that the OLG breached section 24(2) of the *Act* without giving the OLG fair notice and a fair hearing of that issue;
>
> (b) by deciding a search issue and ordering the OLG to conduct a new search without hearing a preliminary objection the OLG had made to the late raising of the search issue; and
>
> (c) by failing to consider the meaning of the OLG's clarification statement and by failing to consider relevant evidence of the requester's intent.

[12] The OLG takes the position that each of these errors falls within section 18.01(a) (fundamental defect in the adjudication process) and 18.01(b) (some other jurisdictional defect in the decision).

[13] In assessing the merits of the OLG's reconsideration request, I have taken into account the provisions of sections 18.01 and 18.02 of the *Code*, I have reviewed the original representations filed by the OLG and the appellant during the inquiry process, as well as the representations made by the OLG in its reconsideration request and the representations submitted by the appellant in response to that request. In reviewing this information, together with my findings in Order PO-3219, I am persuaded that I erred in finding that the OLG unilaterally narrowed the scope of the appeal and, subsequently, ordering it to conduct a new search for responsive records based on the request as it had been clarified during the processing period. While I do not agree that this error amounts to a jurisdictional defect in the decision (section 18.01(b)), I accept that the error amounts to a fundamental defect in the adjudication process as set out in section 18.01(a). Accordingly, I will allow the reconsideration.

Representations and analysis

[14] As set out above, the OLG's reconsideration request outlines three ways in which I erred when I determined that the OLG unilaterally narrowed the scope of the appeal and I ordered it to conduct a new search for responsive records. The appellant was provided with an opportunity to address the OLG's reconsideration request and provided very general representations stating that, in her view, the OLG had not established sufficient grounds upon which to seek a reconsideration of Order PO-3219.

[15] In this analysis, I will address the OLG's representations on each of the three ways that it alleges I erred, separately.

(a) The IPC erred by deciding that the OLG breached section 24(2) of the Act without giving the OLG fair notice and a fair hearing of that issue.

[16] The OLG submits it was "never given an opportunity to make submissions on the reasonableness of its interpretation." It states that although it described its interpretation of the request in an affidavit provided with its reply representations, it did so to provide a "factual basis for addressing the requester's assertion that its search was inadequate" rather than for the purpose of arguing in support of its interpretation. It submits:

> OLG's full argument on the search issue is as follows (at para 7 of its reply):
>
> > For the reasons set out in [the Freedom of Information Coordinator's (the FOIC's)] affidavit, OLG's search was reasonable. At paragraphs 9 to 13, [the FOIC] gives evidence of OLG's search. At paragraphs 16 and 17, [the FOIC] rebuts the requester's challenge to the search, which is based on a flawed understanding about [the] amount of funding that OLG directs to its self-exclusion program.
>
> OLG did not argue in support of its interpretation of the request had no reasonable basis for understanding that its interpretation of the request was at issue [*sic*].
>
> Although responsiveness was identified as an issue in the Notice of Inquiry it *was raised only in relation to a redaction decision.* OLG defended its redaction decision in its initial representations to *no response from the requester*. It was reasonable for OLG to conclude that the hearing of the responsiveness issues, as raised in the Notice of Inquiry, was complete.
>
> The requester *could have raised* a new and separate question about OLG's interpretation of the request as part of her newly-raised search issue, but she did not. The requester stated:
>
> > I seek to have the responsive records from the OLG, that include, but are not limited to, the communications dealing with PREVENTION and RESEARCH on Self-Exclusion.
>
> OLG interpreted the request as *including* "communications dealing with prevention and research on self-exclusion" and did not interpret the request to *exclude* "communications dealing with prevention and research

> on self-exclusion." It *only* limited its search to focus on the planning and administration of the program and exclude records of individual exclusions. There was nothing in the requester's response that could reasonably be interpreted to mean she was interested in records of individual exclusions, so OLG understood its interpretation to be correct. It therefore merely *described* its interpretation in the Eeles Affidavit and *argued* that its search was adequate. This was a reasonable approach in light of the record. [Emphasis in original]

[17] The OLG submits it is clear that in reviewing the FOIC's affidavit, I developed my own concerns about the OLG's interpretation of the request and questions whether it was appropriate for me to raise this concern on my own accord given that the OLG had already objected to the requester's late raising of another search-related issue. The OLG submits that "[a]t the very least it was incumbent on the IPC to raise such a concern in a manner that allowed OLG to be heard."[1]

Analysis

[18] The issue of scope of the request/responsiveness can arise in appeals in two different circumstances. The first circumstance is where an institution withholds some of, or portions of the responsive records from disclosure, on the basis that they are not responsive to the request. In this type of circumstance, the scope of the request is considered in order to determine whether the information that has been withheld is responsive to the information sought by the requester. This office will either uphold the institution's decision to withhold the non-responsive information or determine that it is responsive, in which case, it will order the institution to disclose it to the appellant, unless an exemption applies. Therefore, in this type of circumstance, the issue is whether information caught within located responsive records falls within the scope of the information sought by the request. It is an issue primarily related to the institution's decision regarding disclosure.

[19] The second circumstance in which a scope of the request/responsiveness issue can arise is where an appellant takes the position that additional records responsive to the request should exist but that the institution interpreted the scope of the request too narrowly to capture all of the records sought. In this type of circumstance, the issue of scope of the request/responsiveness is closely related to the issue of reasonable search. If this office determines that the scope of the request was interpreted too narrowly to

---

[1] *Economical Mutual Insurance Company v British Columbia (Information and Privacy Commissioner)*, 2013 BCSC 903 (CanLII) at para 87, *Gavriklo v. The College of Dental Surgeons of British Columbia,* 2004 BCSC 1506 at para 20, *Religious Hospitaliers of Saint Joseph of the Htel Dieu Hospital of Kingston v. Ontario Public Service Employees Union, Local 465*, 2009 Can LII 60407 (ON SCDC) at para 46, *Professional Standards and Competence Committee of the Certified General Accountants Association of Ontario v. Appeal Tribunal of the Certified General Accountants Association of Ontario,* 2007 CanLII 46920 (ON SCDC) at para 8, *MacNeil v. Nova Scotia (Workers' Compensation Appeal Tribunal),* 2001 NSCA 3 (CanLII) at para 17.

capture all of the records sought by the requester, the remedy is to order the institution to conduct a new search interpreting the request in a broader fashion. Therefore, in this type of circumstance, the issue is whether the scope of the request was interpreted appropriately to capture all of the records responsive to the request. It is an issue primarily related to the institution's search.

[20] In the circumstances of the appeal that gave rise to Order PO-3219 and this reconsideration, the issue of scope of the request/responsiveness was raised in mediation in relation to the first type of circumstance as described above. The OLG withheld portions of one record on the basis that the information was not responsive to the request. Following my review of that information, I agreed with the OLG's assessment and upheld its decision to sever the information as non-responsive. I have not been asked to, nor will I, reconsider this aspect of my decision.

[21] However, where I erred was in continuing my analysis with respect to my application of the issue of scope of the appeal/responsiveness in a more general fashion, creating a circumstance of the second type described above. This was an issue that was neither raised at mediation nor specifically raised by the appellant in her representations. Based on my review of the OLG's initial representations and reply representations, I accept that I independently drew the conclusion that it had interpreted the scope of the request too narrowly to encompass all of the responsive records sought by the appellant. This was not an issue that was before me in the appeal. Accordingly, this specific issue was never put before the parties and they were not given the opportunity to make representations on it as contemplated by section 52(13) of the *Act*. Therefore, I accept that I erred in finding that the OLG unilaterally narrowed the scope of the request as I did not provide them with either fair notice or fair hearing of the issue of their interpretation of the scope of the request in general.

[22] As a result of my finding with respect to the OLG's interpretation of the scope of the request, I ordered it to conduct another search for additional responsive records based on an expanded interpretation of the request. Given that I have found that I erred in making a finding on the OLG's interpretation of the scope of the request, I will rescind the provision of Order PO-3219 that orders the OLG to conduct a new search for additional responsive records.

(b) The IPC erred by deciding a search issue and ordering OLG to conduct a new search without hearing a preliminary objection OLG had made to the late raising of the search issue.

[23] The OLG submits that the IPC considered a search issue raised by the appellant for the first time in her representations during the inquiry process, without first deciding the OLG's preliminary objection to the late-raising of that issue. The OLG submits:

There is no question that OLG's objection was not heard. At paragraph 38 of the order, the IPC stated:

> As I have found that the OLG interpreted the scope of the request too narrowly and, as a result will order them to conduct a new search for responsive records, it is not necessary for me to determine whether the appellant is entitled to raise the issue of reasonable search during the course of the inquiry, or, whether the OLG's search for responsive records was reasonable.

OLG was entitled to have its preliminary objection heard because the IPC issued a decision about OLG's interpretation of the request that only became an issue because of the newly (and lately) raised search issue. This is clear from the following:

- the Eeles Affidavit, which became the basis for the IPC's interpretation finding, was only filed in response to the newly raised search issue. It would not have been part of the record if the new issue had not been raised.

- The IPC ordered OLG to conduct a supplementary search, which is not the remedy invited by the responsiveness issue identified in the Notice of Inquiry. If the IPC found that OLG had improperly redacted information from page 8 of the responsive records, it would have ordered OLG to release the information subject to any exemption claims. It would not have ordered a new search.

[24] The OLG submits that had the requester not raised the search issue the inquiry would have ended with the determination made in the OLG's favour at paragraph 28 of the order. It submits: "Carrying on without hearing the OLG's preliminary objection, the IPC breached section 52(13) of the *Act* and its duty of procedural fairness."

[25] Finally, the OLG submits that although "the right to procedural fairness serves a very real *function* and is not satisfied by *mere technical compliance*,"[2] my decision is premised on notification purported to be given in the Notice of Inquiry but that Notice did not provide reasonable notice because it was reasonable for the OLG to conclude that the hearing of the responsiveness issue was complete. It submits that there was nothing that related the wording contained in the Notice to the real issue raised by the

[2] *Petro-Canada v. British Columbia (Workers' Compensation Board),* 2009 BCCA 396 at para 65.

requester's responding submission. The OLG argues that by relying on the formal Notice of Inquiry I breached section 52(13) of the *Act* and my duty of procedural fairness which had a significant prejudicial effect on the OLG.

Analysis

[26] In her representations, submitted during my inquiry in the appeal that gave rise to Order PO-3219, the appellant raised the issue of reasonable search. This issue was not raised during the course of mediation. In its reply representations, the OLG objected to the appellant's late-raising of this issue.

[27] In its reconsideration request, the OLG argues that I erred by deciding the reasonable search issue and ordering it to conduct a new search without hearing its preliminary objection to the late-raising of that issue. I do not accept that I erred in this manner.

[28] In Order PO-3219, given that I found that the OLG unilaterally narrowed the scope of the request, to remedy the fact that not all responsive records would have been caught by the narrowed scope, I ordered that the OLG conduct a new search for responsive records based on an interpretation of the request that was broader in nature than the one that it took. The new search that I ordered in Order PO-3219 was therefore a remedy related to my finding with respect to the issue of the OLG's interpretation of the scope of the request and not the result of a finding that I made regarding the reasonableness of the OLG's search for responsive records based on the interpretation that it took. I made no such finding. On the contrary, I specifically did not address the issue of reasonable search or its late-raising. I stated:

> As I have found that the OLG interpreted the scope of the request too narrowly and, as a result, will order it to conduct a new search for responsive records, it is not necessary for me to determine whether the appellant is entitled to raise the issue of reasonable search during the course of the inquiry, or, whether the OLG's search for responsive records was reasonable.

[29] As a result, I do not accept the OLG's position that I erred in deciding a search issue and ordering the OLG to conduct a new search without hearing a preliminary objection that it made with respect to the late-raising of that issue.

[30] However, given that I have found that I did err in addressing the issue of the scope of the request and will, by this order, rescind the order provision requiring the OLG to conduct a search for additional records based on expanded parameters, my reasoning for not addressing the appellant's late-raising of the reasonable search issue no longer applies. Accordingly, I will address that issue later in this order.

(c) The IPC erred by failing to consider the meaning of OLG's clarification statement and by failing to consider relevant evidence of the requester's intent.

[31] The OLG submits despite the fact that I had a duty to consider and understand all relevant matters and evidence in making my section 24(2) decision,[3] I failed to consider relevant matters and evidence that was before me. It submits:

> Without the benefit of the OLG's submission, the IPC concluded:
>
> > Although the Senior Manager provides the rationale behind her interpretation of the request in the manner that she did, I have not been provided with any evidence to suggest that this interpretation of the request, limiting the records to policies and procedures regarding the planning and the administration of the self-exclusion program, was communicated to the appellant. Moreover, at no point did the appellant indicate that she was only interested in only policies and procedures about the planning and administration of the self-exclusion program in general.

[32] The OLG states that this portion of the order is inconsistent with:

- Clear evidence that OLG sent a communication statement to the requester;
- The requester's agreement with the statement (as adduced through the Eeles Affidavit and also recognized at page two of the Notice of Inquiry); and
- The meaning of the clarification statement, which identified the request as being "about OLG's self-exclusion program."

[33] The OLG submits that the portion of Order PO-3219 that it has quoted above, in light of the record, demonstrates that the IPC failed to consider relevant matters and evidence or, alternatively, fundamentally misapprehended the evidence.

---

[3] *Dunsmuir v. New Brunswick,* [2008] 1 SCR 190 at para 141, *Shooters Sports Bar Inc. v. Alcohol and Gaming Commission,* 2008 Can LII 25052 (ON SCDC) at para 39.

[34] The OLG also submits:

> In the statement quoted above, the IPC also reasons that it had received no evidence that the requester's intent was limited. This evidences a failure to consider:
>
> - the requester's responding submissions, which demonstrate that the requester had an intent that is consistent with the OLG's stated interpretation of the request; and
>
> - the provision of the Eeles Affidavit (which clearly stated OLG's interpretation) to the requester, the IPC's invitation to make sur-reply and the requester's failure to make sur-reply.
>
> There is nothing in the requester's responding submissions or her actions that suggests she had or has an interest in receiving records about specific individuals who have participated in the self-exclusion program. To the contrary, the requester's responding submissions and her failure to make sur-reply confirm that OLG's interpretation of the request is correct. The statement quoted above makes clear that the IPC failed to consider this evidence or, alternatively fundamentally misapprehended the evidence in a manner rendering its decision unintelligible.

Analysis

[35] This portion of the OLG's reconsideration request also relates to my determination in Order PO-3219 that it narrowly construed the scope of the request. As I have already determined that I erred in addressing the issue of, and making a determination on, the OLG's interpretation of the scope of the request, it is not necessary for me to address the OLG's representations on this issue.

B. Was the appellant, in the circumstances of this appeal, entitled to raise the issue of reasonable search during the inquiry stage of the appeal process?

[36] In the inquiry into the appeal that gave rise to Order PO-3219, the appellant raised in her representations, for the first time, the issue of the reasonableness of the OLG's search for responsive records. She submitted that additional records responsive to her request should exist and, therefore, the OLG did not conduct a reasonable search.

[37] In its reply representations, the OLG took the position that the appellant's late-raising of the issue of reasonable search should not be allowed as it was a new issue that was raised after the conclusion of mediation. As a result, it stated that it had been "deprived of the opportunity to discuss and deal with the now-raised challenges in mediation" and argued that I should decline to address the issue.

[38] As noted above, in Order PO-3219 I stated:

> As I have found that the OLG interpreted the scope of the request too narrowly and, as a result will order them to conduct a new search for responsive records, it is not necessary for me to determine whether the appellant is entitled to raise the issue of reasonable search during the course of the inquiry, or, whether the OLG's search for responsive records was reasonable.

[39] I have now determined that I erred in making a determination on the OLG's interpretation of the scope of the request and have rescinded the order provision that orders the OLG to conduct a new search. Therefore, I must now address the issue of whether the appellant, in the circumstances of this appeal, should have been permitted to raise the issue of reasonable search after the conclusion of the mediation stage and during the inquiry process.

[40] In Order P-789, Adjudicator Laurel Cropley addressed a circumstance where the appellant raised during the inquiry process, for the first time, concerns she had with the first of two decision letters. In that order she stated:

> In my view, the scope of the appeal is, in most cases, determined initially by the letter of appeal and may be clarified or narrowed by any subsequent discussions during the mediation stage of the appeal. There was no indication during the mediation stage of the appellant's intention to raise the ministry's first decision letter in this appeal. The Notice of Inquiry does not address the issue and the ministry has not been notified of the issue.
>
> Had the appellant wished the first decision to be addressed in this appeal, he had opportunity during the appeals process to raise the issue. To bring the matter forward at this late stage of the appeal would, in my view, unnecessarily delay its conclusion. I will, therefore, only address the reasonableness of the ministry's search for records relating to part one of the request in this order.

[41] Additionally, in Order PO-2514, Adjudicator Colin Bhattacharjee declined to address the issue of the reasonableness of the institution's search which was raised by the appellant in his representations but not previously raised as an issue in the appeal.

[42] Moreover, in Order P-1213, former Senior Adjudicator John Higgins stated in obiter: "Generally speaking, the representation stage is too late to add issues to an appeal…."

[43] While I agree with the reasoning expressed in these prior orders based on the specific circumstances of those appeals, in my view, an appellant should not be categorically barred from raising issues during the adjudication stage of the appeal process that were not addressed during mediation. Not having access to the records that form the subject of an appeal, an appellant is at a disadvantage in the appeal process. From time to time, evidence may be revealed through the institution's representations that may raise issues that the appellant should be permitted to request be considered in the appeal. In such circumstances, in my view, it is for the adjudicator to determine, on a case-by-case basis, whether or not this should be allowed. However, I do not accept that those circumstances are present in the current appeal.

[44] In the current appeal, it was open to the appellant to take issue with the reasonableness of the OLG's search for records responsive to her request during mediation. At that time, the parties could have discussed, and attempted to resolve any differences in opinion with respect to nature of the search taken. If no mediated solution was reached, the issue would have been included in the mediator's report to be addressed more formally during the inquiry process. From my review of the OLG's representations, I do not accept that they contain or reveal new information that was not previously available to the appellant that might have caused her to reconsider her view with respect the OLG's search for responsive records. Accordingly, I find that the appellant was not entitled to raise the issue of reasonable search at the inquiry stage of the appeal process. In my view, including the search issue at that late stage of the appeal process would have unnecessarily delayed its conclusion.

ORDER:

1. I order the interim stay granted on July 8, 2013 with respect to Order PO-3219 be lifted.

2. I hereby rescind Order Provision 1 of Order PO-3219.

Original signed by: January 29, 2014
Catherine Corban
Adjudicator