

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3901-R

Appeal PA16-139

Ministry of Health and Long-Term Care

November 19, 2018

Summary: The Ministry of Health and Long-Term Care (the ministry) requested a reconsideration of Interim Order PO-3872-I, in which the adjudicator found that the appellants had established a basis for believing that further records exist in the office of the former Minister of Health and Long-Term Care. The ministry was ordered to conduct a further search for records in the record-holdings of the former Minister. In this Reconsideration Order, the adjudicator finds that the grounds for reconsideration are met under section 18.01 and the reconsideration request is granted. As a result, the adjudicator finds that the ministry's search for records was reasonable, no further search is required, and the appeal is dismissed.

Statutes Considered: The IPC's *Code of Procedure*, sections 18.01 and 18.02.

OVERVIEW:

[1] This reconsideration order arises as a result of an appeal of an access decision made by the Ministry of Health and Long-Term Care (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request, made by two requesters,¹ was for all records relating to one of the requesters during a specified period of time, as well as all records relating to, prepared or gathered in the course of a specified inspection. The request also listed the names of individuals the search should

¹ One of the requesters has the Power of Attorney for personal care, financial and legal matters of the other requester.

include. The inspection in question had been conducted by the ministry in response to a complaint it received regarding the actions of a Community Care Access Centre in relation to the admission of the requester to a long-term care facility.

[2] The ministry located records that were responsive to the request and issued a decision letter, granting partial access to the records. The ministry denied access to other records, claiming a number of exemptions.

[3] The requestors, now the appellants, appealed the ministry's decision to this office. Prior to the commencement of mediation, the ministry issued a letter to the appellants, advising that it had conducted a further search for records, located two more records, and disclosed them, in full, to the appellants.

[4] During the mediation of the appeal, the appellants raised the issue of reasonable search. In response, the ministry conducted another search for records identified by the appellants. In the first of two responding letters, the ministry advised that it had searched for records with its Communications and Marketing Division and the Deputy Minister's Office. The ministry identified six responsive records, which were provided to the appellants. Concerning the search of the Minister of Health's records, the ministry stated:

I understand that you also contacted your local Member of provincial parliament's (MPP) constituency office on this matter; and that the MPP is also the current Minister of Health. Please note the Freedom of Information and Protection of Privacy Act applies only to records in the custody and control of the institution, the Ministry of Health and Long-Term Care. The Act does not provide a right of access to constituency records held by a member of the Legislative Assembly.

[5] The ministry subsequently issued a second letter to the appellants. The ministry advised that it had conducted a further search of the email account of a departed employee, and that, as a result, it identified 189 responsive records. The ministry provided an index of records as well as partial access to the records it located as a result of this search.

[6] The appellants informed the mediator that they were not satisfied with the ministry's response, and asserted that additional responsive records should exist.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I conducted an inquiry and on August 14, 2018 I issued Interim Order PO-3872-I. In that order, with respect to the issue of reasonable search, I found that the appellants had established a reasonable basis for believing that further records exist. In particular, I was persuaded that there may be further records in the record-holdings of the Minister of Health and Long-term Care, and in making that finding I stated:

The ministry indicated in one of the supplementary decision letters it issued to the appellants during the mediation of the appeal that the records belonging to the appellants' MPP, who was also the Minister of Health, are constituency records that are not in the ministry's custody or control.² The appellants argue that the Minister was not their MPP, and that any records with the Minister were not constituency records but related to his capacity as the Minister.

Whether records in a Minister's office are in the custody or control of the ministry depends on a number of factors, including whether the record relates to a ministry matter or whether they are more properly characterized as constituency or political records.³

Based on the information before me, including the fact that the ministry has identified one record in the Minister's office as responsive to the request, and in the ministry's custody or control, I am unable to accept that the remainder of the records relating to the appellants' request are necessarily outside of the ministry's custody or control.

In addition, given that the Minister has provided a public apology regarding the individual who is the subject matter of the request, it is reasonable to conclude that further records may exist in the Minister's office in relation to that individual, other than the sole record that was located in the Minister's office, as described by the Ministry. I will, therefore, order the ministry to conduct a further search for all responsive records sent to and from the Minister in relation to the individual specified in the access request over the time period specified in the request, focusing the search on correspondence, emails, text messages and notes.

[8] I then ordered the ministry to conduct a further search for records in order provisions two through five, as follows:

2. I do not uphold the ministry's search for records responsive to the request. I order the ministry to conduct a further search for records, within 30 days of the date of this order, in the office of the Minister of Health and Long-term Care in relation to the individual specified in the request over the time period specified in the request, focusing the search on correspondence, emails, text messages and notes.

² I note that the ministry did not advance this position in its representations.

³ See *Canada (Information Commissioner) v. Canada (Minister of National Defence)* 2011 SCC 25, [2011] 2 SCR 306 and Orders MO-2821, Mo-3287 and MO-3281.

3. I order the ministry to provide representations to the appellants and this office, within 30 days of this order, detailing the further search for records responsive to the request.

4. Should the ministry locate further records responsive to the request, I order it to issue an access decision to the appellants, within 30 days of the completion of the search.

5. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 2 and 3 of this order.

[9] On September 13, 2018 I received a reconsideration request from the ministry, seeking a reconsideration of my findings regarding the issue of reasonable search. A portion of the ministry's submissions meet this office's confidentiality criteria and will not be referred to in this reconsideration order, but were taken into consideration. The non-confidential portions of the ministry's reconsideration request was provided to the appellants, who provided representations in response.

[10] For the reasons that follow, in this reconsideration order I find that the ministry did establish the grounds for reconsideration under section 18.01 of the IPC's *Code of Procedure* (the *Code*). The reconsideration is granted and, as a result, I find that the ministry's search for records was reasonable, no further search is required and the appeal is dismissed.

DISCUSSION:

Are there grounds under section 18.01 of this office's *Code of Procedure* to reconsider Interim Order PO-3872-I?

[11] This office's reconsideration process is set out in section 18.01 of the *Code of Procedure* (the *Code*) which applies to appeals under the *Act*. Sections 18.01 and 18.02 state:

18.01 The IPC 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 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 ministry's submissions

[12] The ministry submits that I drew two conclusions based on a misapprehension of the facts, constituting a fundamental defect in the adjudication process under section 18.01 of the *Code*. The ministry argues that the two conclusions are the following: there may be further records in the record-holdings of the Minister of Health and Long-Term Care based on the unfounded assumption that the ministry characterized those records as constituency or political records; and that the custody or control of those further records is an issue in this appeal.

Constituency or political records

[13] The ministry states:

The Ministry respectfully submits that during its search of the Minister's Office it found no responsive records that were or could be characterized as constituency or political records. In other words, the Ministry did not conclude that any Minister's Office records responsive to the Appellant's request were constituency or political records, since the Ministry found only one responsive record. No records were triaged on the basis that they might be constituency records and therefore not within the Ministry's custody or control.

The Ministry respectfully submits that there are no "remaining records" that fit this description because the Ministry did not find any other records in the Minister's Office "relating to the appellant's request" that are "outside the ministry's custody or control" due to their being characterized by the Ministry as constituency records. Whatever records may be located in the former Minister's Constituency Office, however, are certainly not in the Ministry's custody or control.

[14] With respect to the supplementary decision letter the ministry issued to the appellants, the ministry submits that the letter set out the Ministry's general position that records located in an MPP's Constituency Office are not in the ministry's custody or control, and was not stating that records actually found in the Minister's office were not in the ministry's custody or control because they are constituency records, and not ministry records.

[15] The ministry reiterates that it submitted in its reply representations during the inquiry that a search was conducted in the Minister's Office and one record was located.

Custody or control

[16] The ministry submits I improperly conflated the issue of reasonable search with the custody or control of constituency records, which constitutes a fundamental defect in the adjudication process, stating:

Instead of ordering another search based on a conclusion that the Ministry's search was *inadequate*, the Order is based on your conclusion that the Ministry's determination about its custody and control of "remaining records" is incorrect. For this reason, the Ministry respectfully submits that your "further search" order is based on the wrong considerations. Furthermore, if custody or control is an issue in this appeal, the Ministry should be given an opportunity to make representations about its custody or control of records in the former Minister's MPP Constituency Office.

The Minister of Health

[17] The ministry submits that there is some confusion about the former Minister of Health and Long-Term Care's role in relation to the appellants. This confusion, the ministry argues, stems from the fact that the appellants' first contact with him was as an MPP and, at that time, he was not the Minister of Health and Long-Term Care, but rather was the Minister of Economic Development, Trade and Employment.

[18] The ministry further submits that the appellants requested records for the time period between August 1, 2013 and October 28, 2015. The Minister, it states, became the Minister of Health and Long-Term Care on June 24, 2014.

[19] The ministry goes on to state:

In addition, the Ministry submits that whether the former Minister was the Appellants' *local* MPP or simply an MPP from whom they requested assistance, is an irrelevant distinction, since constituency records of any MPP are not subject to FIPPA, as the IPC itself has determined in several orders. What is relevant is that any communications the Appellants would have had with former Minister Hoskins between August 1, 2013 and June 23, 2014 would have necessarily been in his capacity as an MPP – and not as the Minister of Health and Long-Term Care.

The appellants' submissions

[20] The appellants submit that the order to conduct an additional search was based on the conclusion that the appellants established a reasonable basis for believing that further records exist. The appellants go on to argue that the order for an additional search was not based on the possibility that some or any of the unreleased records were related to constituency office business. The appellants further submit that my

assumption based on incorrect fact, as described by the ministry, is the result of the ministry's mischaracterization of the order, and an attempt to discredit the validity of the order.

Analysis and findings

[21] In assessing the merits of the ministry'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 submitted by the ministry and the appellants during both the inquiry process, and the reconsideration process. In reviewing this information, together with my findings in Interim Order PO-3872-I, I am persuaded that I erred in ordering the ministry to conduct a further search for records held by the former Minister. I find that this error constitutes a fundamental defect in the adjudication process, thereby meeting the ground for reconsideration outlined in section 18.01(1) of the *Code*.

[22] In Interim Order PO-3872-I, I found that the appellants had established a reasonable basis for believing that further records exist in the former Minister's record-holdings, on the basis that the Minister had issued a public apology to the appellants. I found that given the fact that the Minister had issued a public apology to the appellants, it was reasonable to conclude that there would be more than the sole record that was located in the Minister's office.

[23] My conclusion and findings regarding the ministry's search for responsive records were not based on the issues of custody or control (which was not at issue in the appeal), or whether the responsive records were constituency records.

[24] In any event, however, I find that I erred in ordering the ministry to conduct a further search for records held by the former Minister. In Interim Order PO-3872-I, I overlooked the time period of the appellants' request, as it relates to the timing of the former Minister's apology. The appellants' access request was for a specified time period, and the former Minister's apology took place approximately nine months after the end date of the time period specified in the access request. On that basis, I find that it is reasonable to conclude that there would not be responsive records relating to the individual that is the subject matter of the request in the Minister's record-holdings during the time period specified in the request. As a result, I find that the error constitutes a fundamental defect in the adjudication process under section 18.01(a) of the *Code*.

[25] While the appellants may understandably find this conclusion frustrating, I remind them that they may make a new access request under the *Act* for records in the former Minister's record-holdings, including, but not limited to, the nine months leading up to date of the apology.

ORDER:

I grant the ministry's reconsideration request. I find that the ministry's search for records was reasonable and that no further search is required. The appeal is dismissed.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ November 19, 2018