Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3980-R

Appeal PA15-266

Final Order PO-3908-F

Ministry of the Attorney General

August 14, 2019

Summary: This reconsideration order dismisses the appellant's request for reconsideration of Final Order PO-3908-F, in which the adjudicator upheld the reasonableness of further searches conducted by the ministry in response to Interim Order PO-3858-I.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, as amended, section 24.

OVERVIEW:

[1] This order addresses the appellant's request for reconsideration of Final Order PO-3908-F. In that order, I disposed of the sole issue remaining in the appellant's appeal of a decision of the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). Specifically, I upheld the reasonableness of further searches conducted by the ministry in response to my Interim Order PO-3858-I, and I dismissed the appeal. (The interim order also addressed other matters that are not the subject of this reconsideration request.)

[2] The appellant now asks for reconsideration of Final Order PO-3908-F on the ground there was a fundamental defect in the adjudication process. He also claims, as a

further ground for reconsideration, that the decision is "patently unreasonable," adopting the language used by the Ministry of Government and Consumer Services in its *Freedom of Information and Protection of Privacy Manual* to describe a potential basis for seeking judicial review of an IPC decision.[1] Applications for judicial review of an IPC decision are properly made to the court. I have nonetheless considered whether the appellant's arguments about unreasonableness of the final order meet any of the grounds for reconsideration under the IPC's *Code of Procedure*.

[3] For the reasons that follow, I conclude that the appellant has not established any of the grounds for reconsideration of Final Order PO-3908-F. I deny the reconsideration request.

DISCUSSION:

Does the request for reconsideration meet any of the grounds for reconsideration in section 18.01 of the *Code of Procedure*?

[4] The appellant makes two main arguments in support of his claim of a fundamental defect in the adjudication process resulting in Final Order PO-3908-F. He describes them as follows:

1. Neither a consistent nor definite standard of reasonable search has been applied in this adjudication.

2. The adjudicator misconstrued evidence pertaining to reasonable search in a manner that reasonably affected the decision.

[5] Section 18 of the IPC's *Code of Procedure* sets out this office's reconsideration process. Sections 18.01 and 18.02 address the grounds for reconsideration of an order or decision of this office:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
>
> 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.

---

[1] Queen's Printer for Ontario (2018), at page 179. Available online here: https://www.ontario.ca/document/freedom-information-and-protection-privacy-manual.

> 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.

[6] This office has recognized that a fundamental defect in the adjudication process may include: a failure to notify an affected party;[2] a failure to invite representations on the issue of invasion of privacy;[3] and a failure to allow for sur-reply representations where new issues or evidence are provided in reply.[4] These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[7] The reconsideration process is not a forum for parties to re-argue their cases in an attempt to obtain a more favourable decision. Mere disagreement with a decision is not a ground for reconsideration under section 18.01 of the *Code*.[5]

[8] I will address each of the appellant's main arguments in turn.

Argument 1: That "neither a consistent nor definite standard of reasonable search has been applied in this adjudication"

[9] The appellant submits that I applied a different standard of reasonable search in Final Order PO-3908-F than I did in Interim Order PO-3858-I. This is because, he says, the ministry did not comply with the order provisions addressing search in the interim order, yet I still concluded, in the final order, that the ministry's further search efforts met the standard of reasonableness.

[10] Order provisions 3 and 4 in Interim Order PO-3858-I state:

> 3. I order the ministry to conduct further searches in response to the appellant's request. These searches must include the offices of the Attorney General and the Assistant Deputy Attorney General, and the Family Policy and Programs Branch and the Civil Policy and Programs Branch of the ministry.
>
> 4. I order the ministry to provide me with representations on the searches described in order provision 3. I ask the ministry to provide these representations to me, in writing, by **July 11, 2018**.

---

[2] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.
[3] Orders M-774 and R-980023.
[4] Orders PO-2602-R and PO-2590.
[5] Orders PO-2538-R and PO-3062-R.

> The ministry's representations should include an affidavit signed and sworn or affirmed by each person who conducts the searches, which describes, at a minimum:
>
> > a) the name and position of the person who conducted the search;
> >
> > b) details of the searches carried out, including: the dates of the searches; what places were searched; who was contacted in the course of the search; and what types of files were searched;
> >
> > c) the results of the searches; and
> >
> > d) whether it is possible that responsive records existed but no longer exist. If so, the ministry must provide details of when such records were destroyed, including information about record maintenance policies and practices, such as evidence of retention schedules.
>
> The ministry's representations may be shared with the appellant, unless there is an overriding confidentiality concern.

[11] In response to the interim order, the ministry conducted further searches. While the ministry did not locate additional responsive records, it provided me with representations describing those searches. The ministry's representations were accompanied by affidavits signed by the ministry lawyer who coordinated the searches, and by another individual who had additional information regarding some of the searches.

[12] I then provided the appellant with an opportunity to make representations in response to the ministry's representations, which he did. The appellant identified a number of ways in which he believed the ministry's further searches were unreasonable.

[13] After summarizing both parties' representations, I ultimately concluded in Final Order PO-3908-F that through its further searches, the ministry made a reasonable effort to locate responsive records in fulfillment of its obligations under the *Act*. I also concluded that the appellant's evidence did not raise a reasonable basis to believe that additional records may exist.

[14] In this part of his reconsideration request, I understand the appellant to be objecting to three specific findings that I made in the final order regarding the ministry's further searches.

[15] The first is my finding that there is no reasonable basis to believe that responsive records may once have existed, but have since been destroyed. The appellant quotes from portions of his responding representations to reiterate his particular objection to

the ministry's evidence that "all the individuals who participated in a further search were asked whether they believe that records responsive to the appellant's request might have been deleted or destroyed, and [...] all indicated that they do not delete or destroy records" (at paragraph 22 of the final order). He reiterates a number of his concerns about the ministry's assertion, including that it is unreasonable, vague, or merely implies a general disposition on the part of searchers not to delete or destroy records.

[16] I considered the appellant's representations on this topic in arriving at my findings in Final Order PO-3908-F. After considering the evidence of both parties, I found no reasonable basis to believe that responsive records may have been destroyed. In those circumstances, I did not require specific evidence about the ministry's records destruction practices in order to conclude that the ministry's further searches were reasonable. I reject the appellant's argument that my arriving at this conclusion without that evidence amounts to a "nullification" of order provision 4(d).

[17] I also reject the appellant's characterization of the interim order as having "already presumed this reasonable basis" to believe that responsive records may once have existed but were destroyed. In the interim order, I found that the ministry's initial search efforts were not reasonable, and I ordered it to conduct further searches, including of particular offices. I also acknowledged the possibility that responsive records may no longer exist in some of these offices, given the passage of time or for other reasons (paragraph 59 of the interim order). I do not agree with the appellant's claim that my conclusion in Final Order PO-3908-F shows that I applied a fundamentally different standard of reasonable search from the one I applied in the interim order. The appellant's disagreement with my assessment of the evidence that was before me is not a ground for reconsideration under section 18.01 of the *Code*. And to the extent the appellant makes new arguments on this topic in his reconsideration request, the provision of new evidence is also not a ground for reconsideration (section 18.02 of the *Code*).

[18] The second and third objections raised by the appellant are also claims that I applied a different standard of reasonable search by ignoring the ministry's failure to comply with some other order provisions of the interim order. Specifically, the appellant argues that the ministry did not provide certain details about its further searches (such as dates of the searches and the places searched), or provide an affidavit from each individual searcher, as required by order provision 4. He also observes that the ministry did not search the office of the Attorney General, as required by order provision 3. He describes the ministry's explanation for searching a different location in place of the office of the Attorney General as unconvincing and uncorroborated. The appellant thus argues that there was a "nullification" of those order provisions.

[19] In Final Order PO-3908-F, I explicitly addressed the appellant's arguments that the ministry had failed to comply with those order provisions (at paragraphs 26-29 and 34 of the final order). I found that the ministry had provided sufficient information

about its searches to fulfil the requirements of order provision 4. I also found reasonable the ministry's explanation for conducting a search of the minister's correspondence unit in place of the office of the Attorney General. I was satisfied, moreover, that any responsive records arising from any personal involvement by the former Attorney General in the appellant's matter would have been located through the other searches conducted by the ministry. I do not accept the appellant's claim that these findings are based on my applying a different standard of reasonable search from the one I applied in the interim order.

[20] I conclude that the appellant's first argument does not disclose a fundamental defect in the adjudication process, or any other basis for reconsideration of Final Order PO-3908-F.

Argument 2: That I "misconstrued evidence pertaining to reasonable search in a manner that reasonably affected the decision"

[21] The appellant states that in concluding that the ministry conducted a reasonable search, I misconstrued evidence, omitted consideration of relevant evidence, and considered irrelevant evidence.

[22] The appellant makes extensive submissions on this topic, which I will only summarize here. Generally speaking, these are responses to the evidence that the ministry provided during the inquiry stage about its further searches. The appellant states that I must have misconstrued or else not considered this relevant evidence or I would not have upheld the reasonableness of the ministry's searches. He also alleges that I took into account irrelevant evidence, and that this affected my decision-making.

[23] The appellant had an opportunity during the inquiry to respond to the ministry's evidence on its further searches, and he did. After consideration of the evidence of both parties, I was satisfied that the ministry had met its obligation under section 24 of the *Act* to provide sufficient evidence to show that it had made a reasonable effort to identify and locate responsive records.[6] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. The appellant's disagreement with my assessment of the evidence does not mean that I improperly considered or failed to consider relevant evidence, or took into account irrelevant evidence. To the extent his reconsideration submissions amount to a re-argument of his position, I am not required to address them here. Nonetheless, I have reviewed these submissions, and I make the following observations.

[24] The appellant cites the following as relevant evidence that I misconstrued or ignored: the ministry's failure to conduct searches of the email records of certain named

---

[6] Orders P-624 and PO-2559.

individuals; the possibility that the ministry's searches may have excluded records from relevant time periods; the ministry's failure to locate records that are known to have existed; the competence and diligence of the individuals who conducted the searches; and contextual evidence from the appellant about the history of his involvement with the ministry, including about the contentious nature of the information he seeks. He also questions the "deemed relevance" of some of the statements in my final order.

[25] In Final Order PO-3908-F, I found it reasonable for the ministry to have conducted its further searches in the manner that it did, including based on the locations that it searched. I do not agree that the ministry's failure to conduct the additional searches prescribed by the appellant (such as searches of the email records of named former office-holders) means that its search efforts were not reasonable. I also do not agree that the additional searches prescribed by the appellant could reasonably be expected to yield additional responsive records beyond those already identified by the ministry.

[26] The appellant's claim that the ministry's searches might have excluded relevant time periods appears to be based on the fact that the ministry was unable to locate email records pre-dating 2015 from the inactive email account of one former employee. The ministry provided a detailed explanation of its efforts to retrieve those records, and, in the case of another former employee, was able to retrieve emails pre-dating 2015 from an inactive email account. I do not agree that these facts raise a reasonable basis to believe that the ministry's other searches might have excluded records pre-dating 2015.

[27] The appellant devotes a considerable part of his submissions to making the case that the ministry's further searches failed to locate records that are known to have existed. This claim relates to the ministry's original disclosure to him of an email record dated May 1, 2014 that is addressed to multiple individuals. The appellant observes that although three of the email's recipients are among the individuals who conducted further searches (in response to the interim order), none of these individuals retrieved their own copies of this email record. He suggests that the failure to locate this record suggests three possibilities: that the additional searches did not include email records from that time period; that the individuals did not perform searches of their email accounts as reported; or that the individuals incorrectly performed their searches or did not know how to execute an effective search. He describes this as relevant evidence that is not compatible with a finding of reasonable search.

[28] I disagree with the appellant's conclusions. The May 1, 2014 email is a short covering email from one ministry employee to several others attaching a signed copy of a 2014 letter from the then-Assistant Deputy Attorney General to the appellant. Both records were previously disclosed to the appellant. I am satisfied that the ministry addressed these records when it reported that its further searches produced "no additional" responsive records beyond those that had already been disclosed to the appellant (paragraphs 16, 18 and 19 of the final order).

[29] The appellant takes issue with the "deemed relevance" of some statements in my final order. One is my observation (at paragraph 35 of the final order) that the ministry had located 38 pages of responsive records through its initial search efforts. He submits that this was an irrelevant consideration in determining whether the ministry had conducted a reasonable search. In that paragraph, I addressed a theory advanced by the appellant that the ministry might have used oral communications rather than written communications in dealing with the appellant's matter, in order to evade its obligations under the *Act*. In concluding that there was no reasonable basis for this claim, I observed that the ministry had in fact located a number of responsive records. I do not agree with the appellant's claim of irrelevance. Even if I did, I would not agree that this unfairly affected the decision, or that it reveals a fundamental defect in the adjudication process or raises some other ground for reconsideration.

[30] The appellant objects to my statement (at paragraph 36 of the final order) that the ministry's searches were conducted by experienced employees knowledgeable in the subject matter of the request. He submits that I ought to have made a finding regarding the specific qualifications of each of the searchers in areas such as records training, information technology training, or knowledge of all available records repositories. He states that it is unusual that the ministry lawyer who represented the ministry in the appeal is also the person who conducted the searches of the inactive email accounts of two former employees. He also submits that I improperly ignored important contextual evidence about the history of his dealings with the ministry, including the fact that his request is a request for "contentious information." These again are arguments about my assessment of the evidence, and my ultimate finding that the ministry's search efforts met the standard of reasonableness. They do not raise a basis for reconsideration of my findings.

[31] Finally, the appellant takes exception to some of my phrasing in the final order, which, he says, could misrepresent him as being confused about the purpose of the *Act* or as having raised frivolous arguments. For instance, the appellant submits that my statement that certain specified issues are not matters for adjudication under the *Act* (at paragraph 36 of the final order) incorrectly attributes to the appellant an improper purpose or confusion about the *Act*'s purposes. As another example, he objects to my summary of his representations on the ministry's use of oral communications (appearing at paragraphs 30 and 35 of the final order):

> If it is true that the 2011 and 2014 responses to him did not generate written records within the office because they were preceded by oral briefings, rather than by more formal briefings, he suggests that this method was chosen in order to limit the creation and transmission of records in the appellant's matter. He asks that I issue an order to address this type of practice.
>
> The appellant proposes that the absence of additional records in these areas, and in the ministry's Operational Support Branch, is the result of

> ministry efforts to evade its obligations under the *Act* by using oral communications rather than written communications in dealing with the appellant's matter.

[32] The appellant argues that I misapprehended or misstated the argument that appears at paragraph 54 of his responding representations, in which (the appellant says) he "at most suggested that this method may have been chosen." He argues that my paraphrase of his argument does not convey that the appellant was careful to keep his argument evidence-based, tentative, and open for reasonable determination by the adjudicator, and he requests appropriate correction or clarification.

[33] I have reviewed again the appellant's representations on this topic, which appear not only at paragraph 54 but also at paragraphs 31 to 35 of his responding representations at the inquiry stage. I do not agree that I misapprehended or misstated his position. Even if I were wrong, and the appellant's position on this issue were more equivocal than I indicated in the final order, I do not agree that such mischaracterization of his argument "reasonably affected" the decision, as the appellant claims, or that it would otherwise meet any of the grounds for reconsideration under section 18.01 of the *Code*.

[34] For all the foregoing reasons, I conclude that the appellant has not established any of the grounds for reconsideration of Final Order PO-3809-F. I deny the request.

ORDER:

I deny the reconsideration request.

Original Signed by: August 14, 2019

Jenny Ryu
Adjudicator