

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3981-R

Appeal PA18-262

Order PO-3966

Ministry of Natural Resources and Forestry

August 15, 2019

Summary: The Ministry of Natural Resources and Forestry (MNRF or the ministry) received a request under the *Freedom of Information and Protection of Privacy Act* for information related to an affiliated company listed in a specific lease agreement. The ministry searched for, but did not locate, responsive records. The requester appealed. In Order PO-3966, the adjudicator found that the ministry conducted a reasonable search for responsive records and dismissed that appeal.

The appellant then filed a reconsideration request of Order PO-3966 claiming that a fundamental defect in the adjudication process occurred under section 18.01(a) of the IPC's *Code of Procedure*. In this order, the adjudicator finds that there are no grounds to reconsider the decision in Order PO-3966, and she denies the reconsideration request.

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

Orders Considered: Order PO-3966.

BACKGROUND:

[1] The subject matter of Order PO-3966, which is the order being considered in this reconsideration order, was the reasonableness of the Ministry of Natural Resources and Forestry's (MNRF or the ministry) search under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*) for certain records related to a specified agreement. The request at issue in Order PO-3966 sought the following information:

Within the Waterpower Lease Agreement No. 175 [the agreement], it states "that it will not, except to an affiliate of the company, assign or sublet..."

Please provide copies of any records which show/prove that the affiliated company was identified as a true affiliated company of [a named company (the company)], by the Crown/MNRF, and any records which support the authenticity [of] any proof claimed.

Please restrict the search for records to those in the care and/or control of the MNRF Deputy Minister or MNRF Natural Resources Conservation Policy Branch [the NRCPB].

[2] The ministry issued a decision advising the requester that no records responsive to his request exist at the NRCPB or in the office of the Deputy Minister.

[3] The requester (now the appellant) appealed the ministry's decision to this office and a mediator was appointed to explore resolution.

[4] During the course of mediation, the appellant advised the mediator that he believes that responsive records exist at the ministry and requested that the ministry conduct a further search.

[5] The mediator conveyed the appellant's position to the ministry, which advised the mediator that responsive records may exist at the ministry; however, they would be located in the Legal Services Branch, and such records would therefore fall outside the scope of the appellant's request. The ministry suggested that the appellant file a new request if he seeks records at that branch.

[6] The mediator advised the appellant of the ministry's position. The appellant advised the mediator that he wishes to proceed to the next stage of the process, on the issues of reasonable search and scope of the request. No further mediation was possible. Accordingly, this file proceeded to adjudication, where an adjudicator conducts an inquiry.

[7] During the adjudication of the appeal, representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[8] I then issued Order PO-3966, where I found that the ministry properly interpreted the scope of the appellant's request, and that the ministry conducted a reasonable search for responsive records, and I dismissed the appeal.

[9] The appellant then filed a reconsideration request, seeking a reconsideration of Order PO-3966. In this order, I deny the appellant's reconsideration request.

DISCUSSION:

Does the request for reconsideration meet any of the grounds for reconsideration set out in section 18.01 of the IPC's *Code of Procedure*?

[10] The IPC's reconsideration process is set out in section 18 of the IPC's *Code of Procedure*. The relevant portions of section 18 read as follows:

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 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.

[11] The appellant claims that section 18.01(a) applies, because he believes there was a fundamental defect in the adjudication process.

[12] The appellant provided representations and documents in support of his claim trying to demonstrate that a fundamental defect in the adjudication process occurred. However, he does not explain what this alleged defect is.

[13] Instead, the appellant in his reconsideration request appears to acknowledge that records responsive to his request do not exist, thereby agreeing with the findings in Order PO-3966. In that order, I found that the ministry conducted a reasonable search for responsive records and that no responsive records exist respecting the information requested by the appellant.

[14] The appellant's clarified request that was the subject matter of Order PO-3966 sought records that prove that the affiliated company referred to in paragraph 9 of Waterpower Lease Agreement No. 175 was identified as a true affiliated company of the specific company named in that agreement. He sought responsive records that are in the care and/or control of the MNR Deputy Minister or the NRCPB.

[15] Waterpower Lease Agreement No. 175 is dated December 19, 2002 and provides in paragraph 9 that the company named in the agreement is to lease from the Crown, as represented by the Minister of Natural Resources, land on which the company is to construct a hydroelectric generating facility.

[16] The agreement provides that the company will not, except to an affiliate of the

company, assign or sublet, sell or transfer the premises referred to in the lease without the consent of the Crown.

[17] In his reconsideration request, the appellant states:

If records do not exist, then the legal sale was contrary to law and the legal binding agreements for which they stood.

[18] In his reconsideration request, the appellant provided extensive argument and supporting documents disputing the legality of the transfer of the lease under the agreement.

[19] The appellant wants the ministry to:

Produce the documents and records, citing the reason why it is in the public's best interest or admit these dams were illegally and intent-fully transferred for the Federal / Provincial Governments best interest!

Analysis/Findings

[20] In Order PO-3966, I considered whether the ministry conducted a reasonable search for responsive records under section 24.

[21] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

(1) A person seeking access to a record shall,

(a) make a request in writing to the institution that the person believes has custody or control of the record;

(b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

(2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[22] To be considered responsive to the request, records must "reasonably relate" to

the request.¹

[23] Section 24 of the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.² To be responsive, a record must be "reasonably related" to the request.³

[24] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁴

[25] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.⁵

[26] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.⁶

[27] In Order PO-3966, I found that the appellant had not provided a reasonable basis for me to conclude that records responsive to his clarified request existed.

[28] Accordingly, in Order PO-3966, I upheld the ministry's search for responsive records in the custody or control of the MNRF Deputy Minister or the NRCPB that prove that the affiliated company referred to in paragraph 9 of the agreement was a true affiliated company.

[29] In this reconsideration order, I am considering whether Order PO-3966 should be reconsidered by reason of section 18.01 of the IPC's *Code of Procedure*, which is set out above.

[30] As noted above, the appellant submits that section 18.01(a) applies as he claims that there was a fundamental defect in the adjudication process. Based on my review of the appellant's representations, I cannot ascertain any fundamental defect in the adjudication process.

[31] Instead, the appellant is challenging the legality of the transfer under the

¹ Orders P-880 and PO-2661.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

agreement. He states that the new owners of the hydroelectric facilities have no affiliation to the company named in the agreement.

[32] The appellant appears to now seek access to reports about this transfer. However, access to any records about the transfer under the agreement was not the subject matter of the appellant's request as it was considered in Order PO-3966 for the purpose of reviewing the issue of reasonable search. The appellant's request for this new information does not fit within the scope of the request that was at issue in Order PO-3966.

[33] As what the appellant is now seeking access to was not considered in Order PO-3966, it cannot be the subject of a reconsideration of that order. As well, as set out above, section 18.02 of the IPC's *Code of Procedure* does not allow a decision to be reconsidered simply on the basis of new evidence.

[34] Therefore, having reviewed the appellant's reconsideration request, I find that there was no fundamental defect in this office's adjudication process under section 18.01(a) of the IPC's *Code of Procedure*.

[35] In addition, although not raised by the appellant, I find that there is no other jurisdictional defect or clerical error, accidental error or omission or other similar error in Order PO-3966 under sections 18.01(b) and (c) of the IPC's *Code of Procedure*.

[36] In conclusion, I find that the appellant's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision. As such, I deny the appellant's reconsideration request, and I will not reconsider Order PO-3966.

ORDER:

I deny the appellant's reconsideration request.

Original signed by _____
Diane Smith
Adjudicator

_____ August 15, 2019