Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3994-R

Appeal PA18-00656

Order PO-3699

Human Rights Tribunal of Ontario

September 30, 2019

Summary: The appellant requested a reconsideration of Order PO-3699, which found that the Human Rights Tribunal of Ontario did not have custody or control of a Vice-Chair's notes made while presiding at a human rights proceeding. The appellant submitted a reconsideration request arguing that the adjudicator erred in finding that the Vice-Chair's notes were not in the tribunal's custody or control. The adjudicator finds that the appellant's submissions fail to establish grounds for reconsideration under section 18.01 of the IPC's *Code of Procedure* and she denies the request.

OVERVIEW:

[1] The appellant filed a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the Human Rights Tribunal of Ontario (the tribunal or HRTO) for copies of the notes a Vice-Chair made during a specified human rights proceeding. Specifically, the request sought access to:

> ….a copy of [named Vice Chair's] hand written and typed notes for [specified file number] including but not limited to all his typed and hand written notes for all the hearings and directives he conducted on this matter.

[2] The tribunal issued a decision letter to the appellant advising that the responsive records were not in its custody or control. The appellant appealed the tribunal's

decision to this office.

[3] In Order PO-3699, I found that the Vice-Chair's notes were not in the tribunal's custody or under its control under section 10(1) of the *Act,* and dismissed the appeal.

[4] The appellant subsequently submitted a request for reconsideration of Order PO-3699. The appellant set out the reasons for her reconsideration request in two letters sent to this office. In addition, the appellant submitted brief representations in response to my invitation for supplemental submissions.

[5] In this order, I find that the appellant has failed to establish that any of the grounds for reconsideration under section 18.01 of this office's *Code of Procedure* (the *Code*) apply and I deny her reconsideration request.

DISCUSSION:

Reconsideration process

[6] This office's reconsideration process is set out in section 18 of the *Code*. Section 18 reads, in part:

> 18.01 The IPC may reconsider an order or other decision where it is established that there is:
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> (a) a fundamental defect in the adjudication process;
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> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission or other similar error in the decision.
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> 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.

[7] This office has recognized that a fundamental defect in the adjudication process may include: a failure to notify an affected party;[1] a failure to invite representations on the issue of invasion of privacy;[2] and a failure to allow for sur-reply representations where new issues or evidence are provided in reply.[3] These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a

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

fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[8] 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*.[4]

The appellant's submissions

[9] The appellant's initial reconsideration request states that she is requesting reconsideration of Order PO-3699 on the basis that my decision:

> …was diametrically opposed to Canada Revenue Agency [CRA] regulations and the Ontario Labour Relations Act [OLRA]. Both define an employee as a worker who derives the vast majority of their income as an employee, with the OLRA definition of a "dependent contractor" as delineated in Section 1.1 of the Act, being applicable. A dependent contractor is deemed an employee. Additionally, the person in question lists his status on the Law Society of Upper Canada [Law Society of Ontario] web site as "employed".

[10] The appellant sent a supplemental letter that made the same two arguments; that is, that the Vice-Chair is a "dependent contractor" and that "at all material times," he identified his status on the Law Society of Ontario's website as "employed."

[11] As noted above, I invited the appellant to provide additional representations in support of her reconsideration request. In doing so, I wrote to the appellant and directed her to ensure that her representations identify a specific ground(s) for reconsideration under section 18.01 of the *Code*, as set out above. In response, the appellant sent in a letter, which stated in part:

> With respect to the perceived bias on your part[5], I would direct you to your ruling that the [Vice-Chair] is not an employee of the HRTO. I would advise that this ruling is diametrically opposed to the definition of a third party contractor in the Ontario Labour [Relations] Act. It is also in direct contrast to the CRA definition of an employee.

[12] The appellant goes on to state that she cannot "provide any more clear, cogent,

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[4] Orders PO-2538-R and PO-3062-R.

[5] The appellant previously alleged that I "entered into deliberations with bias". However, when provided with an opportunity to provide written submissions that explain her concerns regarding a reasonable apprehension of bias in the adjudication of this appeal, the appellant responded that she was not prepared to pursue the issue at this time.

and compelling evidence that the [Vice-Chair] is an employee of the HRTO".

Findings and Analysis

[13] I find that the appellant's reconsideration request does not establish any of the grounds set out in section 18.01 of the *Code* that would permit me to reconsider my decision. As noted above, although asked to do so, the appellant did not refer to any of the grounds for reconsideration in section 18.01 in her correspondence to this office. Section 18.05(c) of the *Code* is clear that a reconsideration request should include the reasons why the request fits within one of the ground(s) for reconsideration listed in section 18.01.

[14] Nonetheless, I have reviewed the appellant's reconsideration request to consider whether any of her arguments fit within the grounds set out in section 18.01 of the *Code*, and I am not satisfied that they do. In my view, the arguments raised by the appellant in her reconsideration request are the same arguments she made during the inquiry, which I addressed in Order PO-3699.

[15] Previous orders of this office have been clear that the reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their case.[6] In addition, this office has consistently held that the reconsideration process is not a mechanism to offer substantiating arguments that were made (or not made) during the inquiry into an appeal that was intended to address a party's disagreement with an institution's decision or legal conclusion.[7] In my view, the appellant's reconsideration request fails to raise or support the existence of a fundamental defect in the adjudication process, a jurisdictional defect in the decision or any error or omission in my decision under sections 18.01(a), (b) or (c) of the *Code*. Instead, I conclude that the appellant seeks to re-argue her position by requesting a reconsideration of Order PO-3699.

[16] In Order PO-3699, I stated:

> The appellant submits that the tribunal has custody or control over any work product created by the Vice-Chair, including any notes, given their working relationship. The appellant submits that the relationship between the tribunal and Vice-Chair is an employee-employer relationship for the following reasons:
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> > • the Vice-Chair takes direction from upper management at the tribunal;

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[6] Orders PO-2538-R, PO-3062-R, and PO-3911-R.
[7] Orders PO-3062-R and PO-3558-R at paras. 21-24.

> • the tribunal supplied the Vice-Chair with a computer and an office. In addition, the Vice-Chair is provided administrative support from tribunal employees;
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> • the Vice-Chair's business card suggests that he is a representative of the tribunal;
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> • the Vice-Chair receives his salary [and is expected to receive a pension] from the Government of Ontario; and
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> • the Vice-Chair is an "employee" as defined by the Canada Revenue Agency.

[17] After considering the submissions of the parties along with the reasoning in Orders 120, P-396, P-505 and PO-1906, I found that whether or not the Vice-Chair is an employee or an independent contractor is not a determining factor in deciding whether the tribunal exercised custody or control over his notes for the purpose of the *Act*. At paragraphs 21-23 of Order PO-3699, I stated:

> In my view, whether or not the Vice-Chair is an employee or an independent contractor is not the sole determining factor in assessing whether the tribunal exercises control or custody over his notes for the purposes of the *Act*. In Order P-396 Assistant Commissioner Mitchinson found it was not necessary to address the issue of adjudicative independence to determine whether the tribunal member's notes were in the custody or control of the Rent Review Hearings Board. In that order, Assistant Commissioner Mitchinson stated:
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> > The sole issue is whether the Board member's notes are in the custody or under the control of the Board, not whether the Board is able to demand production of the notes from its members.
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> Similarly, I find that the fact that the notes were prepared by a full-time member entitled to pension benefits as opposed to a part-time member who may have an outside law practice is not determinative of the custody and control issue in this appeal. In addition, the fact that the notes were created on tribunal property, whether it be a laptop or a legal pad paid for by the tribunal also does not determine who has custody or control of the record for the purposes of the *Act*.
>
> What is relevant is whether the tribunal has custody or control of the notes in the particular circumstances of this appeal. I have reviewed the evidence and am satisfied that the Vice-Chair's notes were created for his own use and were not provided to the tribunal. In making my decision, I accept the tribunal's evidence that the notes, if they exist, would have been stored separate from any tribunal files or electronic data

> management system. Accordingly, any notes, if they exist would be in the Vice-Chair's possession and the tribunal does not regulate the use of these types of records. In the absence of evidence that the Vice-Chair's notes became integrated with the tribunal's record keeping management system, I find that the notes are not in the control or custody of the tribunal.

[18] The appellant submits that I failed to give proper consideration to her argument that the Vice-Chair is an employee of the tribunal. However, my reasons set out in Order PO-3699 demonstrate that the appellant's submissions were considered, but not found to be determinative of the custody or control issue that was before me. In making my decision, I relied on the principle that it was not necessary to address the issue of adjudicative independence to determine whether the Vice-Chair's notes were in the custody or control of the tribunal.[8] Instead, I reviewed the particular circumstances of the appeal, the types of factors listed in Order 120 and the test set out in *Canada (Information Commissioner) v. Canada (Minister of National Defence)*[9] and was satisfied that the Vice-Chair's notes are not in the custody or under the control of the tribunal.

[19] In any event, the appellant's submissions in support of her reconsideration request fail to identify or support a fundamental defect in the adjudication process, a jurisdictional defect, or any clerical errors or omissions under section 18.01 of the *Code,* and for this reason I find that there are no grounds for reconsideration of Order PO-3699.

ORDER:

I deny the appellant's reconsideration request.

Original signed by
Jennifer James
Adjudicator

September 30, 2019

[8] Order P-396.
[9] Supra note 3.