Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4001-R

Appeal PA16-460

Order PO-3914

Wilfrid Laurier University

October 28, 2019

Summary: This reconsideration order dismisses the appellant's request for reconsideration of Order PO-3914, in which the adjudicator partially granted the appellant's request for waiver of a fee estimate exceeding $10,000. In that order, the adjudicator found that a 20% waiver of the fee estimate is fair and equitable in the circumstances. In this reconsideration order, the adjudicator finds that the appellant has not established any ground for reconsideration of Order PO-3914.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* RSO 1990, c F.31, as amended, sections 52(13) and 57(4).

OVERVIEW:

[1] This order addresses the appellant's request for reconsideration of Order PO-3914, in which I partially granted the appellant's request for waiver of a fee estimate issued by Wilfred Laurier University (the university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant, the president of a registered charitable organization, had filed a request under the *Act* on the charity's behalf for access to all records relating to a named project that was the subject of an agreement between the charity and the university. After locating a representative sample of records responsive to the appellant's request, the university issued a fee estimate of $10,388.80 to process the

request. The appellant appealed the university's denial of his request for a waiver of the fee. In Order PO-3914, I took into consideration various factors, including the breadth of the request, the large number of responsive records, and the appellant's evidence of financial hardship, in concluding that a small fee waiver would be fair and equitable in the circumstances. I ordered the university to reduce its fee estimate in accordance with my assessment that a 20% fee waiver would represent a reasonable allocation of the burden of the cost of the request between the appellant and the university.

[3] The appellant now asks for reconsideration of Order PO-3914 on the grounds that it did not have the opportunity to respond to the university's initial or subsequent representations, that I relied on evidence that was obtained from sources other than the parties to the appeal, and that no rationale was provided for the decision to reduce the amount of the fee by 20 per cent. The appellant also requests that the matter be transferred to another adjudicator for a new decision.

[4] For the reasons that follow, I conclude that the appellant has not established any of the grounds for reconsideration of Order PO-3914. 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*?

[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:
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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.

[6] 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 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*.[4]

[8] I will first consider the appellant's request that the matter be transferred to another adjudicator for a new decision. The appellant submits that this is necessary in order for the appellant to have confidence in the decision and the decision-making process.

[9] Section 18.08 of the IPC's *Code of Procedure* states:

> The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

[10] The appellant has not provided a reasonable basis for departing from the IPC's usual procedure for responding to reconsideration requests. To the extent the appellant may be alleging bias in decision-making, this may be a ground for finding that there was a fundamental defect in the adjudication process, or a jurisdictional defect that voids the decision.[5] However, the appellant provides no evidence to displace the presumption that a tribunal member will act fairly and impartially.[6] The test for disqualification of a decision-maker is whether there exists a "reasonable apprehension of basis." Actual bias need not be proven. However, the apprehension of bias must be a reasonable one, and the grounds for this apprehension must be substantial.[7] The reasons given by the appellant fail to establish a reasonable apprehension of bias, or

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[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.
[4] Orders PO-2538-R and PO-3062-R.
[5] Order M-1091.
[6] Sara Blake, *Administrative Law in Canada,* (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.
[7] Adjudicator John Higgins canvassed the law in this area in Order MO-2227, and in that order applied the reasonable apprehension of bias test in considering an allegation of bias against this office. This office has applied this test in subsequent orders, including Orders MO-2464-R and MO-3642-R.

any other ground for a change of adjudicator.[8]

[11] I will go on to consider the appellant's other arguments made in support of the reconsideration request.

That the adjudicator forwarded the appellant's submissions to the university but has not provided the appellant with similar opportunities to comment on the university's initial submissions or any subsequent submissions

[12] I understand the appellant to be alleging a denial of procedural fairness in not having had an opportunity to see or to respond to the university's initial or follow-up representations in this appeal. Such a breach could qualify as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*. In this case, however, I find no basis for the appellant's claim of procedural unfairness.

[13] The record before me establishes that the adjudicator who initially had carriage of the appeal commenced an inquiry into this matter by first seeking representations from the university on the issues under appeal. The adjudicator then sought the appellant's representations on the issues by providing him with a Notice of Inquiry summarizing the facts and issues under appeal, and a complete copy of the university's representations. The appellant provided representations in response.

[14] During the inquiry process, the appeal file was transferred to me. I decided to seek reply representations from the university, and for this purpose provided the university with certain portions of the appellant's representations on consent of the appellant. I received reply representations from the university. Because the university's reply representations largely reiterated arguments made in its initial representations and did not raise new issues or evidence, I decided that it was unnecessary to share these with the appellant for a further reply.

[15] My decision not to share the university's reply representations with the appellant is not evidence of a breach of procedural fairness. While each party to an inquiry has a right to make representations to this office during the inquiry, there is no right to have access to or to comment on representations made by the other parties [section 52(13)]. Although this statutory provision must be read in the context of a common law right to procedural fairness, in this case, the appellant was given the opportunity during the inquiry process to make representations addressing both the issues under appeal and the university's evidence in support of its position on the issues, and he did. I am not satisfied that there was any prejudice to the appellant because he was not given an opportunity to see or to make further representations in response to reply

[8] The appellant also fails to establish that there was a fundamental defect in the adjudication process or some other jurisdictional defect in the decision because of bias on the part of the decision-maker.

representations that raised no new issues or evidence.

[16] I conclude that this argument does not disclose a fundamental defect in the adjudication process, or any other basis for reconsideration of Order PO-3914.

That information was used in making the decision that was obtained from sources other than the university or the appellant

[17] The appellant objects to my reference in the order to certain publicly available material without notice to the appellant. To place this reference in context, I reproduce the entirety of paragraph 44, in which the disputed sentence and footnote appears. The disputed portion of this paragraph is underlined below:

> The appellant has not specified what proportion of its grant and donation revenue is received specifically for the purposes of the project (or received without directions about its use), and so is available for project-related uses. However, its recent financial statements show that the appellant spent nearly 80% of its charitable program expense budget that year on the project (over $257,000 of its total program expenses of over $322,000), with the remaining budget allocated between six other projects. This indicates that a significant proportion of the appellant's grant and donation revenue was available that year for the purposes of the project. I also find it reasonable to expect that the appellant will continue to receive grant and donation revenue for this purpose. The appellant has not suggested that its recent financial statements reflect an atypical pattern of income or spending. Publicly available information indicates that the appellant is continuing with the project without the university's involvement, and is currently soliciting donations for that purpose [footnote states: "This information appears on the appellant's profile on an online fundraising website."].

[18] Paragraph 44 sets out my findings on the appellant's claim that the appellant's charity is impecunious for the purposes of this appeal because, among other reasons, the charity is restricted in the way in which it can use its grant and donation revenue. The appellant stated that, for example, any funds obtained through a grant may only be used for the purposes set out in the grant application, and that donations received for specific purposes, such as for a particular project, cannot be used for any other purpose, activity or project.

[19] In paragraph 44, drawing from evidence supplied by the appellant, including a statement of revenue and expenses for the fiscal year ending June 2017, I observed that a significant proportion of the charity's reported revenue appears to be available for the purposes of the project that is the subject of the appellant's access request. I also observed that the appellant had not provided evidence to suggest that this pattern of income and spending has materially changed from that time. Ultimately, I was not persuaded by the appellant's claim that it has no funds with which to pay the fee

estimate. I considered this factor, and others, in concluding that a small fee waiver (rather than a full fee waiver) would be fair and equitable in the circumstances.

[20] The appellant suggests that my decision was materially based on independently obtained information, and that my failure to notify the appellant of my independent research is a ground for reconsideration of the order. I do not agree.

[21] First, I do not agree that independent research was a material basis for my decision in Order PO-3914. The publicly available information to which I refer in paragraph 44 is taken from the profile of the appellant's charity hosted on the website of a registered public foundation that provides an online fundraising platform and other services for charities across Canada.[9] The profile includes revenue and expenses information that the charity reported to the Canada Revenue Agency as part of its obligations as a registered charity, and includes more recent financial information than that provided with the appellant's representations. Based on information from this public source, I observed that the appellant's charity continues to solicit donations for the project. This was one consideration, but not a determinative one, in my finding it reasonable to expect that the appellant's charity would continue to have available to it a comparable level of funds for project purposes as that reflected in its financial statements from 2017.

[22] I also do not agree that I was required to notify the appellant before considering this publicly available information in this context. My taking notice of publicly available information from a reputable source is not in itself evidence of a fundamental defect in the adjudication process or other jurisdictional defect in the decision, particularly in these circumstances, where the publicly available information is similar to the information the appellant provided. The appellant has not shown why in this circumstance it amounts to one of these grounds (or other ground) for reconsideration of the order.

[23] I conclude that this argument fails to establish a ground for reconsideration of Order PO-3914.

That no rationale is provided for the decision to reduce the amount by 20 per cent, as opposed to a higher percentage

[24] The appellant argues that I failed to provide a rationale for the decision to reduce the fee estimate by 20 per cent, rather than by another number, such as 90 per cent or 100 per cent. I understand the appellant to be suggesting that the amount of the fee reduction is arbitrary and may be inappropriate.

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[9] CanadaHelps.org.

[25] Section 57(4) of the *Act* makes it mandatory for the head of an institution to waive payment of "all or any part" of a fee if the head determines that it is fair and equitable to do so after consideration of certain prescribed matters.[10] The institution or this office (on review of a head's decision on a fee waiver request) may decide that only a portion of the fee or fee estimate should be waived.[11]

[26] The *Act* does not prescribe a particular formula for arriving at a determination of what part of a fee ought to be waived. However, the user-pay principle reflected in the *Act*'s fee provisions provides guidance in this exercise. The user-pay principle is founded on the premise that requesters pay the prescribed fees associated with processing a request unless it is fair and equitable that they not do so.

[27] In deciding whether it is fair and equitable in the circumstances to waive all or part of a fee (and, if part of a fee, how much), a decision-maker will have regard not only to the prescribed considerations, but also to the fairness of shifting some or all of the burden of the cost of the request from the requester to the institution—and, by extension, to the Ontario public. In every case, this is a contextual determination based on the particular facts before the decision-maker. In some cases, for example, this office has ordered a partial waiver of only certain components of the fee charged by an institution,[12] or imposed a maximum allowable cost as a component of the fee in ordering a partial fee waiver.[13] In other cases, this office has ordered a percentage reduction (of the total fee) that, in the decision-maker's view, reflects a reasonable allocation of the costs of the request in the particular circumstances under review.[14]

[28] In this case, after consideration of all relevant factors, including the prescribed factors set out in the *Act*, I concluded that a small fee waiver would be fair and equitable in the circumstances. Specifically, after finding that payment of the fee estimate would cause some financial hardship for the appellant [section 57(4)(b) of the *Act*] and that the evidence did not support a fee waiver on the ground of benefit to public health or safety [section 57(4)(c)], I stated the following:

> Any other relevant factors must also be considered when deciding whether a fee waiver is fair and equitable. I agree with the university that relevant factors in this case include the large number of responsive records and the university's efforts to respond to the appellant's broad request in a manner that would address the appellant's concerns about the large fee estimate. I also accept the university's submission that a full

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[10] Sections 57(4) and section 8 of Regulation 460 under the *Act*.
[11] Order MO-1243.
[12] See, for example, Orders PO-3602 and MO-3441 (partial fee waiver finding upheld on reconsideration in MO-3555-R).
[13] Order PO-3351.
[14] See, for example, Orders PO-3727 and MO-3627.

> fee waiver would shift an unreasonable burden of the cost from the appellant to the university. The appellant argues that the university is better placed financially to assume the costs of its broad request, but it does not follow from this that it would be fair and equitable for the university to do so. The fee provisions in the *Act* establish a user-pay principle, and the appellant has not explained to my satisfaction why the university ought to bear the full costs of processing his request while he should bear none. These considerations weigh against finding that a full fee waiver would be fair and equitable in these circumstances.
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> Taking into consideration all applicable factors, including financial hardship to the appellant, the evidence of some public interest in this matter, the breadth of the request, and the manner in which the university responded to the request, I conclude that it is fair and equitable in the circumstances to grant the appellant a small fee waiver. In my view, a 20% fee waiver represents a reasonable allocation of the burden of the cost of the request between the appellant and the institution. This results in a revised fee estimate of $8,311.04 [at paragraphs 49-50].

[29] I do not agree with the appellant that I failed to provide any rationale or evidentiary basis in my order for the decision to grant a 20% waiver of the fee estimate, or with his implied argument that my reasoning in the order could have (or should have) supported a much larger fee waiver.

[30] I conclude that this argument also fails to establish a ground for reconsideration of the order.

[31] For all the foregoing reasons, I find that the appellant has not established any of the grounds for reconsideration of Order PO-3914. I deny the request.

ORDER:

I deny the reconsideration request.

Original Signed By: October 28, 2019

Jenny Ryu
Adjudicator