

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-3821-R

Appeal MA18-445

Order MO-3807

City of Hamilton

August 21, 2019

Summary: The appellant requested a reconsideration of Order MO-3807 on the basis of section 18.02(c) (errors or omissions) in the IPC's *Code of Procedure* (the *Code*). In Order MO-3807, the adjudicator upheld the \$298.80 fee of the City of Hamilton, but granted the appellant a 25% fee waiver. The appellant asks that the decision not to grant a full fee waiver be reconsidered. In this Reconsideration Order, the adjudicator finds that the appellant has not established that grounds exist under section 18.01 of the *Code* for reconsidering Order MO-3807, and denies the reconsideration request.

Orders Considered: Orders PO-2538-R, PO-3062-R, PO-3558-R, MO-3478-R, and MO-3807.

Case Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).

OVERVIEW:

[1] The appellant in Order MO-3807 requests a reconsideration of that order. In Order MO-3807, I upheld the \$298.80 fee issued by the City of Hamilton (the city) to process the appellant's request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), but I granted a 25% fee waiver to the appellant. The appellant's request for records under the *Act* related to the decision to restrict access to a public well that was found to contain excessive levels of arsenic. The city led the appellant to publicly available information in response to her request but withheld other records, as the fee identified by the city had not been paid; the issues of

fee and fee waiver were under appeal.

[2] After Order MO-3807 was issued, the appellant communicated with the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office). She was provided with information about this office's reconsideration process under section 18.01 of the IPC's *Code of Procedure* (or, the *Code*).

[3] The appellant then made a request for reconsideration and provided representations with that request, relying on section 18.01(c) of the *Code* (which deals with clerical or accidental errors, omissions, or other similar errors in a decision) to do so. She asks that I reconsider and grant her a full fee waiver for several reasons: that this is a public health issue, the level of disclosure anticipated by the city (about a fifth of the responsive records), and the time it has taken to get to this point without access to the records requested.

[4] For the reasons that follow, I find that the appellant has not established the grounds for reconsideration under section 18.01(c) of the *Code*. Additionally, the appellant has not argued, and I do not find, that this reconsideration request would fit within paragraphs (a) or (b) of section 18.01 of the *Code*. Therefore, the appellant's reconsideration request is denied.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order MO-3807?

[5] The appellant raises issues related to her reasons for requesting records under the *Act*, the history of communications with officials about the restrictions put on the well, and the decision to restrict access to the well itself. However, these issues are not relevant to the only issue to be decided in a reconsideration decision relating to Order MO-3807: whether there are grounds under section 18.01 of the *Code of Procedure* to reconsider Order MO-3807.¹ Therefore, the reasons for my decision set out below only cover the grounds for reconsideration and not any other issue raised by the appellant.

[6] This office's reconsideration process is set out in section 18.01 of the *Code*, which applies to appeals under the *Act*.

[7] Section 18.01 says:

¹ It is also outside of my jurisdiction to comment on the appellant's substantive disagreement with the decision to restrict access to the well, and I decline to do so.

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.

[8] Another provision of the *Code*, section 18.02, deals with evidence and the reconsideration process. Section 18.02 says:

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.

[9] The reconsideration process set out in this office's *Code* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, the adjudicator reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects*.² With respect to reconsideration, the adjudicator concluded that:

[T]he parties requesting reconsideration ... argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect... In my view, these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases such as [*Grier v. Metro Toronto Trucks Ltd.*]³

On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to the LCBO and the affected party. ... As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[10] This approach has been adopted and applied in subsequent orders of this office.⁴

² [1989] 2 SCR 848 (S.C.C.).

³ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

⁴ See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

For example, in Order PO-3062-R, an adjudicator was asked to reconsider her finding that the discretionary exemption did not apply to information in records at issue. She determined that the institution's request for reconsideration did not fit within any of the grounds for reconsideration set out in section 18.01 of the *Code*, stating as follows:

It ought to be stated up front that the reconsideration process established by this office is not intended to provide a forum for re-arguing or substantiating arguments made (or not) during the inquiry into the appeal...

[11] The appellant relies on section 18.01(c) in her reconsideration request, and states:

As per section 18.01 c) I would like to address the issue re: [f]ee waiver in whole, and the reason for my appeal regarding: paying a fee for the records I requested. There are 3 reasons for this:

1. Based on the FOIA rules because this is [m]atter of Public Health that the fees ought to be waived, and the city would not be hard pressed but I would be.
2. It appears at the end of the day, the city is withhold 4/5th of the requested documents, but asking me to pay for ALL their 900+ documents.
3. The length of time that the city has taken to get to this point. The city is in violation of the deadline, by over 450 days. Shouldn't this be considered as well?

[12] Her representations elaborate on, and repeat, these points.

[13] Recalling that section 18.01(c) says that the IPC "may" reconsider a decision "if it is established that there is . . . a clerical error, accidental error or omission or other similar error in the decision," I do not accept that the appellant's representations establish that section 18.01(c) of the *Code* applies. The appellant has not identified any clerical or accidental errors in the decision, and based on my review of MO-3807 and the information before me, I find that there were none. I also do not accept that the reasons put forward by the appellant establish an "omission" or "other similar error" in the order, either.

[14] Instead, having reviewed the appellant's representations in support of a reconsideration of Order MO-3807, I find that they essentially repeat the arguments that she had already submitted during the inquiry, and amount to disagreement with

my decision to uphold the fee in the circumstances,⁵ and my weighing of the factors in consideration of a fee waiver (regarding public health or safety⁶ and the processing delays).⁷ Following the approach taken by this office about such disagreement, I find that this does not meet the requirements for reconsideration set out in section 18.01 of the *Code*. To the extent that the appellant briefly raises a new argument (her being “pressed,” presumably financially,⁸ to pay the fee, but that the city is not), that too is not a basis for reconsideration.

[15] Furthermore, the appellant has not claimed, and I do not find evidence of, a fundamental defect in the adjudication process (under section 18.01(a) of the *Code*) or some other jurisdictional defect in the decision (under section 18.01(b) of the *Code*).

[16] In conclusion, having reviewed the appellant’s reconsideration request, and her representations provided during the inquiry of her original appeal, I find that the appellant’s reconsideration request does not establish that there any grounds for reconsideration under section 18.01(c) of the *Code*, or any other ground under section 18.01 upon which this office may reconsider a decision. Accordingly, her reconsideration request is denied.

ORDER:

The appellant’s reconsideration request is denied.

Original Signed by: _____
Marian Sami
Adjudicator

_____ August 21, 2019

⁵ Under Issue A of Order MO-3807, noting that the city had discounted its search time by half, was charging for only a small portion of the responsive records, and had charged fees within the rates allowable under the Regulation.

⁶ At paragraphs 41-66 of Order MO-3807.

⁷ At paragraphs 67-72 of Order MO-3807. The fact that the appellant has not received responsive records is not improper, given her appeal of the issues of fee and fee waiver and the user-pay principle in the *Act*.

⁸ Financial hardship is a factor that must be considered, under section 45(4)(b) of the *Act*. The appellant specifically limited her appeal of the city’s refusal to waive the fee to the issue of public health or safety, under section 45(4)(c) of the *Act*.