

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-3917-R

Appeal MA19-00679

Final Order MO-3839-F

Rainbow District School Board

April 21, 2020

Summary: This reconsideration order dismisses the appellant's request for reconsideration of Final Order MO-3839-F, in which the adjudicator upheld the reasonableness of the search for responsive records conducted by the Rainbow District School Board (the board). In this reconsideration order, the adjudicator finds that the appellant has not established any ground for reconsideration of Final Order MO-3839-F, and denies his request for reconsideration.

Orders Considered: Orders PO-3062-R, PO-4001-R, MO-3839-F.

Cases Considered: *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC); *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.); *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673.

OVERVIEW:

[1] This order addresses the appellant's request for a reconsideration of Order MO-3839-F. In that order, I upheld the reasonableness of the search conducted by the Rainbow District School Board (the board) in response to a request for information made under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA*, or the *Act*).

[2] On November 16, 2018, I began an inquiry under the *Act* in relation to the

appellant's appeal (Appeal MA18-366) of the board's access decision. During mediation, the issue of reasonable search was added to the scope of the appeal.

[3] On April 11, 2019, I issued Interim Order MO-3750-I, which upheld the board's access decision, and dismissed that portion of the appellant's appeal. However, I also ordered the board to conduct a further search for two specified reasons. The board did so, and the parties exchanged representations about the board's further search.

[4] On September 24, 2019, I issued Final Order MO-3839-F upholding the reasonableness of the board's search. As that was a final order, it closed the inquiry into the appellant's appeal.

[5] After Final Order MO-3839-F was issued, the appellant communicated his disagreement with it to this office. He was provided with information about this office's reconsideration process under section 18.01 of the *Code*.

[6] On October 7, 2019, the appellant filed a request for reconsideration of Final Order MO-3839-F.

[7] For the reasons that follow, I deny the appellant's request for reconsideration.

DISCUSSION:

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

[8] The only issue to be decided is whether there are grounds under section 18.01 of this office's *Code of Procedure* (the *Code*) to reconsider Final Order MO-3839-F.

[9] 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) 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.

[10] Section 18.05 states that a reconsideration request should include all relevant information about the reconsideration request, including the reasons why the party is making the reconsideration request, the reasons why the request fits within grounds for reconsideration listed in section 18.01, the desired outcome, and a request for a stay, if necessary.

[11] The appellant states that his request for a reconsideration of Final Order MO-3839- F fits into the ground for reconsideration listed at section 18.01(b). However, his submissions also include arguments about favourable treatment towards the board, and against him. To the extent that the latter constitutes an allegation of bias, sections 18.01 (a) or 18.01(b) may be engaged.¹

[12] The appellant's desired outcome is that the allegations he had submitted about the board, and the board's responses, be reviewed "as to truth and accountability."

[13] I will address the appellant's submissions that his reconsideration request fits the criteria of section 18.01(b) first, before addressing his allegations about favourable treatment of the board.

Challenge of the basis of my decision

[14] The appellant's reconsideration request specifically cites section 18.01(b) (jurisdictional defect) because, he submits, my conclusions are based on assumptions about the reliability and integrity of the evidence from the board, which he submits are unmerited in light of a "history" of "very relevant and associated records of poor business practices." Prior to submitting his reconsideration request, he re-sent this office a copy of representations he had provided during the inquiry (before the interim order had been issued, but before the final order had), which included details of other matters in which the board has been allegedly involved, not directly relating to the appellant's request. His reconsideration request similarly included a list of twelve items which the appellant presented as examples of the board's "very relevant and associated records of poor business practices."

[15] In light of this "history," the appellant submits that his reconsideration request should be granted under section 18.01(b) because my order relied on "proof/assumptions/ and understandable expectations of integrity of" the board that were unmerited. In other words, the "history" that he provided should have undermined the reliability of the evidence of the board to me, such that I would have drawn a different conclusion.

[16] However, regardless of the appellant's allegations against the board, I find that

¹ Orders PO-4001-R and M-1091.

the “history” presented (or reiterated) by the appellant is irrelevant to his request for a reconsideration of Final Order MO-3839-F. I understand that the appellant believes that the board’s practices with him specifically in relation to the circumstances giving rise to his original request, as well as other circumstances, cast the board’s evidence about the reasonableness of its search in a questionable light. He asks that the allegations submitted be reviewed “as to truth and accountability.” As it is not the function of a reconsideration order to re-weigh evidence or explain a decision, I will not do so here.

[17] I find that raising questions about the credibility of either party’s evidence amounts to a disagreement with my assessment of that evidence, including its relevance to the issue before me in Final Order MO-3839-F. I find that a disagreement about my assessment of the evidence does not amount to a “jurisdictional defect” in the decision under any ground of reconsideration at section 18.01 of the *Code*. The IPC’s reconsideration process is not a forum for re-arguing an appeal, or providing evidence of arguments made (or not made) during the inquiry.² As the Supreme Court of Canada has recognized, “there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals.”³

Possible allegation of bias on my part, in favour of the board

[18] The appellant submits that “a common thread” in my decision is the reliance on the responses of the board, and that the board received favourable treatment as compared to him. As mentioned, to the extent the appellant may be alleging bias in decision-making on my part, this may be a ground for finding that there was a fundamental defect in the adjudication process under section 18.01 (a) of the *Code*, or a jurisdictional defect under section 18.01 (b) of the *Code*, which voids the decision.⁴

[19] The Ontario Court of Appeal has noted that in administrative law, “there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one.”⁵ Actual bias does not need to be proven. The Supreme Court of Canada has long held that the test for disqualification of a decision-maker is whether there is a “reasonable apprehension of bias” meaning:

[T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is “what would an informed person, viewing the matter realistically and practically—and

² Order PO-3062-R.

³ *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.)

⁴ Order M-1091.

⁵ *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 71.

having thought the matter through— conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.”⁶

[20] From this test, it is clear that more than disagreement with my decision is needed to establish bias on my part. The grounds for a reasonable apprehension of bias must be substantial.⁷

[21] Here, the appellant submits that:

- I relied on the board’s “responses”;
- on some occasions, the board did not comply with instructions “to the letter”;
- “in contrast,” the appellant was required “to adhere literally to requirements of the process outlined by Board Policy, IPC processes (timelines)” [emphasis added]; and
- the board “received allowances based on “perceptions of the integrity and position of the [d]efendant alone,” and that I “extended such allowances and leniency to the [b]oard when they have ‘history’” supplied [the appellant] in previous submissions, over the course of the inquiry.

[22] I will address each of these submissions, in turn.

[23] The fact that my decision in Final Order MO-3839-F relied on the evidence of the board regarding its search efforts is not evidence of bias, or a reasonable apprehension of bias. I invited both parties to provide evidence during the inquiry. The fact that I relied on the board’s evidence regarding its reasonable search, over the submissions of the appellant, is not evidence of bias or a reasonable apprehension of bias on my part.

[24] The appellant asserts that on some occasions the board did not comply with instructions “to the letter,” but did not sufficiently explain that claim. To the extent that this might be a reference to his views about whether the board complied with the interim order, those views would amount to a disagreement of my decision in Final Order MO- 3839-F, that the board had provided sufficient evidence that it had conducted a reasonable search. However, as mentioned, much more than disagreement with my findings is required to establish a reasonable apprehension of bias.

[25] As noted, the appellant made a reference to having to adhere to board policy.

⁶ *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

⁷ Orders MO-2227, MO-2464-R and MO-3642-R.

However, the inquiry process in his appeal involved adherence to IPC procedures, not board policy.

[26] The appellant also raises "IPC processes," specifically, "timelines," as a point of contrast as between him and the board. He states that I gave the board "allowances" and "leniency" on the basis of unmerited "perceptions of integrity and the position of the [d]efendant," but does not provide examples of "allowances" or "leniency" that were extended to the board but not to him. Whether what is meant by "defendant" is the board, or its director of education, whom I found not to have been in a conflict of interest in Interim Order MO-3750-I, the appellant has not established that I provided the board, or its director, "allowances" or "leniency," let alone without grounds. Furthermore, the appellant provided no examples of an IPC deadline that he asked to have extended but was not afforded an extension. During the inquiry, I invited him to provide written representations at every applicable stage, and he did so. In light of these considerations, I find that the appellant has not established that he was held to any IPC procedural requirements that were unfair to him, or that were favourable to the board at his expense. His mere assertion that the IPC processes to which he was subject can be "contrast[ed]" with the board's is not evidence of bias, or a reasonable apprehension of bias.

[27] Finally, I do not accept the appellant's argument that I relied on "perceptions" and "assumptions" about the board in coming to my decision. The mere fact that I upheld the board's search as reasonable is not enough to establish this. In Interim Order MO-3750- I, I found that there were two reasons that I could not uphold the board's search as reasonable, and I ordered the board to conduct a further search for responsive records as a result. In Final Order MO-3839-F, I explained why I found that the board had provided sufficient evidence addressing those two reasons. The conclusions I drew in Final Order MO-3839-F were based on evidence relating to the board's search, not "perceptions" or "assumptions" about the board, or its director of education. The appellant clearly disagrees with the weight I accorded that evidence, but the fact of that disagreement is not evidence of bias or a reasonable apprehension of bias.

[28] For these reasons, I find that the appellant has not provided evidence to rebut the presumption of impartiality, or demonstrate bias or a reasonable apprehension of bias on my part.

[29] In conclusion, having reviewed the appellant's reconsideration request, I find that he has not demonstrated that there was a fundamental defect in the adjudication process; another jurisdictional defect in the decision; or any clerical error, accidental error or omission, or other similar error in Order MO-3839-F. Therefore, I find that the appellant's reconsideration request does not establish any of the grounds under section 18.01 of the *Code* upon which this office may reconsider a decision.

ORDER:

I deny the appellant's reconsideration request.

Original signed by _____
Marian Sami
Adjudicator

_____ April 21, 2020