

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER MO-4024-R

Appeal MA17-107

Interim Order MO-3646-I

City of Greater Sudbury

March 15, 2021

**Summary:** This is an order deciding on a third party's reconsideration request of Interim Order MO-3646-I as it pertains to one of the records at issue, a report. In the interim order, the adjudicator found that the city had custody of the report but reserved her finding on whether it is exempt from disclosure pending notification of the third party. Upon being notified, the third party sought reconsideration of the interim order on several grounds but most notably on the basis that he was denied procedural fairness. As the third party had not been provided with an opportunity to participate in the initial inquiry into the issues on appeal, he argues that there was a fundamental defect in the interim order and it should be reconsidered. In this order, the adjudicator allows the reconsideration request and determines that the third party is to be heard on the issue of custody or control of the report.

**Considered:** IPC's *Code of Procedure*, section 18.01

### OVERVIEW:

[1] This order addressed a third party's request for reconsideration of Order MO-3646-I. Interim Order MO-3646-I resolved the issues, in part, in appeal MA17-107. Appeal MA17-107 arose from the City of Greater Sudbury's (the city's) decision in response to a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for general records relating to a named organization of which the city is a member. In particular, the request was for the named organization's meeting agendas and minutes circulated to members between a specified time period.

[2] The requester also sought access to the following information:

- General records related to the named organization
- All records related to items described as a "Forestry Project" and "Forestry Strategy" in the named organization's financial reports for a specified number of years; and
- All records regarding revenue, expenditures, consulting fees, other supplies and expenses, donations, accounts receivable, other revenue and accounts receivable-other for a specified number of years.

[3] In response, the city located records responsive to the request and notified the named organization as an affected party who might have an interest in disclosure of the records. The affected party wrote to the city objecting to the disclosure of most of the records at issue, claiming the application of the third party information exemption in section 10(1). The city then issued a decision to the requester and the affected party, granting the requester full access to the responsive records.

[4] The affected party appealed the city's decision to this office claiming the application of section 10(1) to most of the records. The appeal involved a large number of records.

[5] Mediation did not resolve the appeal and the file was moved to the adjudication stage where an adjudicator may conduct an inquiry. Before the inquiry began, the affected party appellant contacted the mediator and asked that the issue of custody or control be added to the scope of the appeal. The adjudicator sought representations from both the appellant and the city. Despite being given a number of opportunities, the appellant did not make representations. The city declined to make representations stating that it continued to take the position that the records should be disclosed in full.

[6] In Interim Order MO-3646-I, the adjudicator found the following:

- The records at issue are in the custody and control of the city.
- Section 10(1) does not apply to the almost all of the records.
- Her determination on whether section 10(1) applies to the two records that were prepared by other third parties, was deferred pending notification of the third parties.

[7] Appeal MA17-107 was then reassigned to me to conduct the inquiry into the two remaining records at issue. I sent a Notice of Inquiry to the two third parties seeking their representations on the application of section 10(1) to the records relating to them. One of the third parties is the party who has asked for this reconsideration. The record in which that party has an interest is a report that it authored (the report).

[8] I then received this reconsideration request from the third party in question. During my consideration of the reconsideration request, I sought representations from the city and the original requester. The city declined to make representations. I received representations from the original requester.<sup>1</sup>

[9] In this decision, I grant the request for reconsideration of Interim Order MO-3646-I. The issue of custody or control of the report is reopened and the third party will be given the opportunity to provide submissions on that issue.

## **DISCUSSION:**

[10] The sole issue in this decision is whether I should reconsider the finding in Order MO-3646-I that the city has custody and control of the report. This office's reconsideration process is set out in sections 18.01 and 18.02 of the IPC's *Code of Procedure* which states:

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 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 of Procedure*.<sup>2</sup>

## **Representations**

[12] The third party seeks reconsideration of Interim Order MO-3646-I on the basis that there was a fundamental defect in the adjudication process leading to that order, most notably, that he was not notified and provided with an opportunity to provide

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<sup>1</sup> The original requester also indicated their continued interest in pursuing access to the remaining records at issue.

<sup>2</sup> Orders PO-2538-R and PO-3062-R.

representations in the inquiry of appeal MA17-107. The third party states, in his correspondence to his office:

I have received a Notice of Inquiry for MA17-107 but want to clarify some concerns I have. It is procedurally unfair for me to have been excluded from this Freedom of Information request until this late stage and impossible for me to fully participate...

[13] The third party further cites another defect in the adjudication process. The third party notes that he is the appellant in appeal MA17-110 that is also an appeal from an access decision of the city. The third party further notes that the sole record at issue in that appeal is the same record that is at issue in this reconsideration request.<sup>3</sup> The third party argues that he is being forced to participate in two adjudications, which is a ground to reconsider Interim Order MO-3646-I.

[14] Lastly, the third party submits that there is a reasonable apprehension of bias on my part in my adjudication of appeal MA17-107. The third party states that I communicated with him in appeal MA17-110 in my role as an adjudication team leader which he argues gave me special knowledge as the adjudicator in appeal MA17-107.

[15] As stated above, I provided the original requester in appeal MA17-107 with an opportunity to provide representations on issue of whether I should grant the third party's reconsideration request. The original requester argues that the third party has not suffered in a tangible way by not being able to participate in the initial inquiry and notes that the IPC's *Code of Procedure* does not require the third party being involved at the outset of the inquiry process.

[16] The original requester states that they do not take a particular stand on the adjudication of the same record in two appeals but notes that the matter can be addressed in appeal MA17-107.

[17] Regarding the bias argument made by the third party, the original requester submits that the third party has not provided sufficient evidence to establish bias.

### **Analysis and finding**

[18] The third party submits that Interim Order MO-2646-I should be reconsidered on the ground that he has been denied procedural fairness in not being able to participate in the initial inquiry of appeal MA17-107. Further, the third party submits that there is a fundamental defect in the adjudication process because the record at issue in appeal MA17-107 is the same record at issue in appeal MA17-110 and thus he is being forced in to participate in simultaneous adjudications. Finally, the third party submits that I am

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<sup>3</sup> I note that appeal MA17-110 is on hold pending my final determination of appeal MA17-107.

biased or that there is a reasonable apprehension of bias and again, this is a ground for reconsideration of the interim order.

***Reasonable apprehension of bias***

[19] The first ground for reconsideration I will consider is the third party's position that Interim Order MO-3646-I should be reopened because I am biased. I wish to note that I am not the adjudicator that decided Interim Order MO-3646-I. Appeal MA17-107 was transferred to me following the issuance of the interim order. I note that the third party has not alleged bias against the adjudicator who conducted the inquiry in appeal MA17-107 and issued Order MO-2646-I.

[20] Because I was not the decision-maker in Order MO-3646-I, I decline to consider bias or a reasonable apprehension of bias as a ground for reconsidering Interim Order MO-3646-I.

***Simultaneous adjudication***

[21] The third party submits that because he is the appellant in appeal MA17-110 and a third party in appeal MA17-107, I should reconsider Interim Order MO-3646-I on the basis that this is fundamental defect in the adjudication process.

[22] I agree with the third party that in the circumstances, he should not be required to participate in two separate inquiries regarding access to the same report. I note that because of the high number of records at issue in appeal MA17-107, the adjudicator did not initially identify the third party as a party to the appeal. Appeal MA17-110, in which the report is the only record at issue, was assigned to a different adjudicator.

[23] Once it was discovered that the report was the subject of two appeals, the appeal MA17-110 adjudicator put that appeal on hold pending my determination of appeal MA17-107.

[24] While I accept that these circumstances may have been trying for the third party, I find that this is not a ground to reconsider Interim Order MO-3646-I.

***Procedural fairness***

[25] The third party submits that because he was not permitted to participate in the initial inquiry into appeal MA17-107, he was denied procedural fairness and this is a fundamental defect in the adjudication process. On my review of the circumstances in appeal MA17-107, I accept this ground as a basis for reconsidering Interim Order MO-3646-I.

[26] The inquiry into appeal MA17-107 dealt with two issues. The first issue was whether the city had custody or control of the records at issue. The second issue was whether the mandatory third party information exemption in section 10(1) applied to the records at issue.

[27] Section 4(1) is the section that addresses the issue of custody or control, and it states:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless...

[28] If a record is not in the custody or control of an institution within the meaning of section 4(1), there is no right of access to it. If the record is in the institution's custody or control, one or more exemptions from that right of access may be claimed by the institution. In Order MO-3646-I, at paragraphs 23 and 24, the adjudicator states the following:

In this case, the third party appellant advised the mediator at the commencement of the inquiry that it was claiming that the records were *not* in the custody or control of the city. However, the third party appellant has not provided any evidence to support its position, despite being given the opportunity to do so by this office on more than one occasion. In addition, the city has not claimed that it does not have custody or control of the records.

I find that the records are in the city's possession, and relate to part of the city's mandate. Consequently, in the specific circumstances of this appeal, and in the absence of evidence before me by the third party appellant who claims that the records are not in the city's custody or control, I find that the records are in the custody or control of the city.

[29] It is a tenet of procedural fairness that a party must be provided with notice of the proceeding (which may affect their interests) and an opportunity to make representations and respond to any representations on the issues to be determined by the decision-maker before the matter is decided. Here, the third party, who authored the report, was not given the opportunity to make submissions on that issue. It is evident that the third party was denied procedural fairness in appeal MA17-107 and this is a ground to reconsider Interim Order MO-3646-I.

### ***Remedy***

[30] The third party submits that the outcome of the reconsideration of Interim Order MO-3646-I should be that the access issue of the record relating to him be determined in appeal MA17-110. I note that the inquiry into appeal MA17-110 is currently on hold.

[31] Based on the fact that the third party has requested a reconsideration of Interim Order MO-3646-I and I have decided to grant his request, I will reopen the inquiry in order to consider the issue of custody or control of the record relating to the third party. The third party will be provided with an opportunity to provide representations and fully participate in the inquiry of this issue.

**ORDER:**

I grant the third party's reconsideration request of Interim Order MO-3646-I.

Original Signed by: \_\_\_\_\_

Stephanie Haly  
Adjudicator

March 15, 2021 \_\_\_\_\_