Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4134-R

Appeal PA17-395-2

Order PO-4018-F

Ministry of the Attorney General

March 30, 2021

Summary: The appellant seeks a reconsideration of a final order that upheld the Ministry of the Attorney General's (the ministry) search for records responsive to two items of the appellant's request under *the Freedom of Information and Protection of Privacy Act* for records about him. The adjudicator dismisses the appellant's reconsideration request, finding that it does not fit within the grounds to reconsider an order under section 18.01 of the *Code of Procedure* of the Information and Privacy Commissioner (the IPC).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24; the IPC's *Code of Procedure*, section 18.01.

Orders Considered: Orders PO-3976-I, PO-4018-F, and PO-4121-R.

OVERVIEW:

[1] This order addresses the appellant's request for reconsideration of Final Order PO-4018-F (the final order), in which I upheld as reasonable the search conducted by the Ministry of the Attorney General (MAG or the ministry) for specific records about the appellant.

[2] The final order was issued following a search conducted by the ministry as ordered in Interim Order PO-3976-I (the interim order) regarding two items of the appellant's three-item request under the *Freedom of Information and Protection of Privacy Act* (*FIPPA* or the *Act*). At issue in the final order was the ministry's search for

items 1 and 2 of the appellant's request, which read:

1. All documentation referencing [the appellant] and contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format, of any date.

2. All documentation pertaining to the handling of communication from or directed by him, from any date and more specifically from September 21, 2009 to the present time [June 12, 2017], contained within or produced by the MAG, including documentation created by any MAG employee, contractor, agent, solicitor, or previous or current Minister, in any recorded format.[1]

[3] In response, the ministry indicated that it did not intend to conduct a search for responsive records as these items were previously addressed in Order PO-3058.

[4] The appellant appealed the ministry's decision.

[5] The appeal was not resolved at mediation and was moved to the adjudication stage, where an adjudicator conducts an inquiry. At adjudication, representations were sought and exchanged between the parties in accordance with section 7 of the *IPC's Code of Procedure* and *Practice Direction 7*.

[6] I then issued Interim Order PO-3976-I, where I did not uphold the ministry's search. I found that the ministry had not conducted a search for records responsive to items 1 and 2 of the appellant's request that were from the time-period following the request date in the appeal leading to Order PO-3058. Provisions 2 to 4 of the interim order required the ministry to conduct a search and stated:

> 2. Regarding items 1 and 2 of the appellant's request, I order the ministry to conduct a search for a separate file about the appellant related to the

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[1] In Interim Order PO-3976-I, I upheld the ministry's search for item 3 of the request, which sought:

> All documentation pertaining to [the appellant's] Freedom of Information Request ("Request") dated July 25, 2014, from any date and more specifically from July 25, 2014 to the present time, contained within or produced by the MAG, including documentation created by an MAG employee, contactor, agent, solicitor, or previous or current Minister, in any recorded format, including, more specifically, any and all documentation pertaining to the temporary loss, mishandling or misplacement of the request and of the decision not to process the fee supplied as a cheque by [the appellant], and to the drafting of the letter from [named individual] to [the appellant] dated April 14, 2015.

The appellant sought a reconsideration of my decision upholding the ministry's search for records responsive to item 3 of the request in Interim Order PO-3976-I. I issued Reconsideration Order PO-4121-R, which dismisses the appellant's reconsideration request respecting my search finding in Interim Order PO-3976-I about item 3 of the request.

existence of instructions within the ministry to coordinate responses to him for the time-period between January 2, 2011 and June 12, 2017. I order the ministry to provide me with an affidavit sworn by the individual who conducts the search within 30 days of the date of this Interim Order. At a minimum, the affidavit should include information relating to the following:

a. information about the employee(s) swearing the affidavit describing his or her qualifications and responsibilities;

b. a statement describing the employee's knowledge and understanding of the subject matter of the request;

c. the date(s) the person conducted the search and the names and positions of any individuals who were consulted;

d. information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;

e. the results of the search; and

f. if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

3. If responsive records are located as a result of the search referred to in Provision 2, I order the ministry to provide a decision letter to the appellant regarding access to those records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.

4. The affidavit referred to in Provision 2 should be forwarded to my attention and may be shared with the appellant, unless there is an overriding confidentiality concern.

[7] In response, the ministry conducted a search for responsive records. It then provided the requested affidavit, as well as a decision letter to the appellant attaching records located as a result of this search.[2] The appellant provided a response to this

[2] The ministry withheld portions of the records under the discretionary advice or recommendations exemption in section 13(1) and discretionary solicitor-client privilege exemption in section 19. The appellant did not appeal the application of these two exemptions. The ministry also identified and withheld duplicate information in the records.

affidavit and disclosure, in which he submitted that the ministry did not conduct a reasonable search for records responsive to items 1 and 2 of his request.

[8] In the final order, I upheld the ministry's search for records responsive to items 1 and 2 of the appellant's request pursuant to Interim Order PO-3976-I.

[9] The appellant then filed a reconsideration request of the final order.

[10] In this order, I find that the appellant has not established any basis upon which I should reconsider Final Order PO-4018-F, and I deny the reconsideration request.

DISCUSSION:

Does the appellant's request meet any of the grounds for reconsideration in section 18.01 of the *IPC Code of Procedure* (the *Code*)?

[11] The appellant seeks a reconsideration of my decision in Final Order PO-4018-F that the ministry had conducted a reasonable search under section 24 of *FIPPA* for records responsive to items 1 and 2 of his request. As a result, I upheld the ministry's search and did not order it to conduct a further search for responsive records.

[12] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[3] To be responsive, a record must be "reasonably related" to the request.[4]

[13] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[5]

[14] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[6]

[15] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[7] In the final order, I found that the appellant had not provided a reasonable basis for me to conclude that there existed

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[3] Orders P-624 and PO-2559.
[4] Order PO-2554.
[5] Orders M-909, PO-2469 and PO-2592.
[6] Order MO-2185.
[7] Order MO-2246.

responsive records related to items 1 and 2 of the request that had not been identified by the ministry.

[16] For a reconsideration to be granted, the appellant's reconsideration request must meet one of the grounds for reconsideration set out in section 18.01 of the *Code*, which states:

> 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 other similar error in the decision.

[17] Section 18.02 provides that:

> 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.

[18] The reconsideration process set out in this office's *Code of Procedure* is not intended to provide parties with a forum to re-argue their cases.[8]

[19] In order to fit within section 18.01(a) of the *Code*, the party requesting reconsideration must establish that there has been a fundamental defect in the adjudication process. A fundamental defect would be a breach of procedural fairness, such as a party not being given notice of an appeal or not being given an opportunity to provide submissions during the inquiry.[9]

[20] A jurisdictional defect in the decision under section 18.01(b) of the *Code* goes to whether the adjudicator had jurisdiction to make the decision under the *Act*. It is not about a disagreement with the assessment of the evidence in the decision.[10]

[21] Section 18.01(c) of the *Code* contemplates "clerical or accidental error, omission or other similar error in the decision," such as, for example, an order provision containing inconsistent severance terms with respect to the records.[11] Such errors under section 18.01(c) may include:

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[8] See, for example, Orders PO-2538-R, PO-3062-R and PO-3558-R.
[9] For an example, see Order PO-3960-R.
[10] Reconsideration Order MO-3917-R.
[11] See, for example, Order PO-2405, corrected in Reconsideration Order PO-2538-R.

- a misidentification of the "head" or the correct ministry;[12]
- a mistake that does not reflect the adjudicator's intent in the decision;[13]
- information that is subsequently discovered to be incorrect;[14] and
- the omission of a reference to and instructions for the institution's right to charge a fee.[15]

[22] Section 18.02 provides that:

> 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.

[23] The reconsideration process set out in this office's *Code of Procedure* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, Senior Adjudicator John Higgins reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Assn. of Architects*.[16] With respect to the reconsideration request before him, he concluded:

> [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 as *Grier v. Metro Toronto Trucks Ltd*.[17]
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> 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.

[24] Senior Adjudicator Higgins' approach has been adopted and applied in

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[12] Orders P-1636 and R-990001.
[13] Order M-938.
[14] Order M-938 and Reconsideration Order MO-1200-R.
[15] Reconsideration Order MO-2835-R.
[16] (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).
[17] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

subsequent orders of this office.[18] In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 of the *Freedom of Information and Protection of Privacy Act* did not apply to the information at issue in that appeal. 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.

[25] I agree with these statements. A reconsideration request is not a forum to re-argue a case or to present new evidence, whether or not that evidence was available at the time of the initial inquiry.

[26] The threshold for reconsideration is high, and mere disagreement with a decision is not a ground for reconsideration.

[27] In his reconsideration request, the appellant has not identified any of the grounds in sections 18.01(a), 18.01(b) or 18.01(c) of the *Code* as the basis of his reconsideration request.

[28] The appellant, instead, wants further searches to be undertaken, despite my finding in the final order that the ministry has conducted a reasonable search for records responsive to items 1 and 2 of his request. He also wants the final order to refer to certain information regarding the ministry's search.

[29] The appellant also indicates that following the search that gave rise to the final order, he only received 140 pages of records, not the 300 pages of records referred to in the final order.

[30] This page discrepancy appears to be attributable to the appellant receiving copies of records that had been severed, as the ministry had applied the discretionary exemptions in sections 13(1) (advice or recommendations) and 19 (solicitor-client privilege) to the records. As well, the ministry removed duplicate information from the records package sent to the appellant.

[31] The appellant also disagrees with my characterization of his evidence. For example, he disagrees with my interpretation of his representations that he would like the person who printed the responsive emails to be required to conduct his own search. He now says that this was not what he meant, because he believes that the ministry

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[18] See, for example, Orders PO-3062-R and PO-3558-R.

staff member who printed the records did search for records. He states:

> In view of the vagueness and ambiguity of the ministry's information and other factors it was reasonable for the appellant to infer that [the person who printed the records] could have been a record searcher.

[32] The appellant wants the final order provisions amended to add a provision ordering the ministry to amend and clarify its representations regarding the appellant's position as to whether the person who printed the records did conduct a search for records.

[33] The appellant also disagrees with my interpretation of his submission, referred to in the final order, that every individual listed in every record should have been required to perform their own individual search for records. Instead, he states that his position was that he "... asked the ministry to expand its search to include a search for the records of specific individuals who are contextually shown to be relevant to the underlying subject matter of the request."

[34] He then asks that the final order be amended to include the following information:

- A citation of paragraph 31 of the August 30, 2018 Representations of the ministry [its initial representations dated prior to the interim order] ..., which is relevant because it indicates what the ministry warrantied about its search effort in this appeal in terms of when it would expand the search.

- A summary finding that the affidavit of [the ministry counsel who provided the affidavit in response to the interim order] does not contain any specific statement about why any of the thirty-eight record searchers were chosen to participate in the search...

- …Explaining that the appellant, prior to final order, asked for a resumed search for the records corresponding to the redacted names of [two ministry staff]...

- A summary of ministry record pages 1372-1376 indicating that [ministry staff name] was involved with or aware of both parts of the cross coordinated communications, and that [two other ministry staff] were also involved in communications involving the appellant.

- A summary explaining that the appellant raised as an issue the cross coordination of ministry communications of two matters, first, a communication between his attorney and [name of ministry staff] and second, an email sent from himself to ministry email address "...requesting the "Court Services Division's Family Procedures Manual" which did not reference the first communication. There should be an accompanying explanation that this issue was raised as part of the appellant's originating *FIPPA* request.

- An analysis by the adjudicator rationalizing the above information with any decision to order or not order a resumed search according to the *Act*, and according to provision 2 of Interim Order PO-3976-I.

[35] The appellant also asks that the records of the ministry be searched again.

[36] Based on my consideration of the appellant's representations, I find that they do not present any grounds for reconsideration of the final order under section 18.01 of the *Code*, thereby providing no basis for me to reconsider the final order. He is asking for amendments to certain statements in the order or in the records, but has not provided submissions articulating why any of the grounds that give rise to a reconsideration under section 18.01 of the *Code* are relevant or apply. Nor are any of these grounds apparent to me from my review of the appellant's reconsideration request.

[37] In particular, I find that although the appellant challenges my characterization of the submissions of the parties in the final order, he has not demonstrated that there has been 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*; or,

- a clerical error, accidental error or other similar error in the decision under section 18.01(c) of the *Code*.

[38] I found in the final order that the ministry had conducted a reasonable search for records responsive to items 1 and 2 of the appellant's request.

[39] In making that finding, I concluded that the ministry had provided sufficient evidence to show that it made a reasonable effort to identify and locate all of the responsive records within its custody or control.

[40] I also found in the final order that the appellant has not provided a reasonable basis for concluding that such records exist.

[41] Based on my review of the appellant's reconsideration request, I find that it does not address or establish a defect in the adjudication process or an error or jurisdictional defect in the decision. Instead, the appellant generally addresses how he would like me to have summarized the evidence in the final order or what he expects the ministry should have addressed in its representations. These are not grounds for reconsideration. As I stated above, mere disagreement with a decision is not, without more, a basis for reconsidering it.

[42] Accordingly, I find that the arguments set out in the appellant's reconsideration

request do not support a reconsideration of the search finding respecting items 1 and 2 of the appellant's request in the final order.

Conclusion

[43] I find that the appellant has not established a basis for a reconsideration of my finding that the ministry conducted a reasonable search for records responsive to items 1 and 2 of the request in Final Order PO-4018-F. Therefore, I deny the appellant's request for a reconsideration.

ORDER:

I deny the appellant's request to reconsider Final Order PO-4018-F.

Original Signed by: March 30, 2021
Diane Smith
Adjudicator