

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4047-R

Appeal MA18-505

Order MO-3928

City of Greater Sudbury

May 5, 2021

Summary: The appellant requested a reconsideration of Order MO-3928. That order involved a request made to the City of Greater Sudbury (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of the appellant's Ontario Works file. The only issue at adjudication was whether the city conducted a reasonable search. In Order MO-3928, the adjudicator found that the city had done so, and dismissed the appeal. In her order, the adjudicator noted that the appellant had not provided representations to the IPC.

After Order MO-3928 was issued, the appellant contacted the IPC to state that he had sent his representations by fax to the IPC. Upon investigation, it was determined that the appellant had done so the day after the IPC's physical office had closed to both the public and staff as a result of the COVID-19 pandemic. The appellant requested a reconsideration of Order MO-3928 because the IPC had not considered his representations. The city agreed that there was a ground under section 18 of the IPC's *Code of Procedure* to reconsider Order MO-3928, but argued that its search should still be upheld as reasonable.

In this reconsideration order, the adjudicator finds that the ground in section 18.01(a) of the *Code of Procedure* has been established, as there was a fundamental defect in the adjudication process due to the appellant's representations not being before her in coming to her decision in Order MO-3928. However, taking into account the representations of the appellant and the city, the adjudicator finds that the city conducted a reasonable search. The reconsideration request is denied.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

Order Considered: Order MO-3928

OVERVIEW:

[1] The appellant in Order MO-3928 requests a reconsideration of that order. In Order MO-3928, I upheld the reasonableness of the search conducted by the City of Greater Sudbury (the city) in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). Although the original request was for a copy of the requester's Ontario Works file, the appeal proceeded to adjudication on the basis of the appellant's belief that the city should have located his Ontario Disability Support Program (ODSP) records (including forms and electronic file notes related to him), as well as the records it had located and partially disclosed to him.¹

[2] In Order MO-3928, I noted that I began my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the city, that the city had provided written representations in response, that those representations were shared with the appellant, and that the appellant did not provide representations in response. I then provided my reasons for upholding the reasonableness of the city's search and dismissed the appeal (on June 12, 2020).

[3] After I issued Order MO-3928, the appellant communicated with the Office of the Information and Privacy Commissioner of Ontario (the IPC) and indicated that he had sent his representations to the IPC by fax, contrary to the statement in my order that he did not provide representations. The appellant was provided with information about this office's reconsideration process under section 18.01 of the IPC's *Code of Procedure* (or, the *Code*).

[4] The appellant then made a request for reconsideration and provided representations with that request, and asked that we put his file on hold for specified personal reasons, until a certain date.

[5] After that date had passed, I confirmed the appellant's continued interest in pursuing a reconsideration of Order MO-3928, and provided the city with an opportunity to submit representations on whether the appellant had established one of the grounds for reconsideration in section 18.01 of the *Code*. The city agreed that the ground in section 18.01(a) was established, but argued that its search should still be upheld. The appellant provided representations in response.

¹ The Revised Mediator's Report also noted that the discretionary personal privacy exemption at section 38(b) was at issue, but as discussed in greater detail in this order, the appellant confirmed that he was not interested in pursuing access to the withheld personal information of others, before I began the inquiry.

[6] For the reasons that follow, I find that the request for reconsideration meets one of the grounds for reconsideration (that is, the one under section 18.01(a) of the *Code*), but that Order MO-3928 should not be reconsidered. I deny the reconsideration request.

ISSUES:

- A. Does the request for reconsideration meet any of the grounds for reconsideration set out in section 18.01 of the *Code of Procedure*?
- B. Should Order MO-3928 be reconsidered?

DISCUSSION:

Issue A: Does the request for reconsideration meet any of the grounds for reconsideration set out in section 18.01 of the *Code of Procedure*?

[7] The IPC's reconsideration process is set out in section 18.01 of the *Code*, which applies to appeals under the *Act*. For the reasons that follow, I have varied the timeframe within which the appellant was permitted to file a reconsideration request and find that I may reconsider Order MO-3928 under one of the grounds of reconsideration.

[8] Section 18.01 of the *Code* says:

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.

[9] The appellant states that he sent representations for my consideration before the deadline to do so, and that I issued Order MO-3928 without having considered them. This appears to relate to section 18.01(a), listed above.

[10] I note that when I did not receive the appellant's representations in response to the Notice of Inquiry sent to him by the date that they were due, IPC staff made an effort to follow up with the appellant. Communications from the IPC to follow up about his representations were not returned. In July 2020, after Order MO-3928 had been issued, through various IPC staff, including myself, it was determined that the appellant did indeed send representations to the IPC. He did so by fax on March 17, 2020, which

was the day after the IPC had closed its physical office to the public and to its staff, in light of the COVID-19 pandemic. The appellant's faxed representations were stamped as "received" on July 7, 2020.

[11] Given the unprecedented circumstances surrounding the closure of the IPC's physical office, and the timing of the appellant's filing of his representations, the IPC opened a reconsideration file.

[12] As a result, I contacted the city to alert them to the circumstances and provided the city with an opportunity to provide its views about whether there were grounds for reconsidering Order MO-3928.

[13] The city noted that the timestamp on the fax showed that the appellant had submitted his representations a few days before the deadline. It submitted that it is reasonable to conclude that the submissions were submitted on time but due to the closure of the IPC's offices, they were not available for consideration. In light of the principle of natural justice that a party should have the right to be heard, the city stated that it was supportive of the appellant's request for a reconsideration. However, the city argued that its search should still be upheld as reasonable; I will discuss this aspect of the city's representations under Issue B.

[14] In light of the above timeline and evidence regarding the appellant's fax, I find the appellant submitted his representations to the IPC before the deadline, but due to the circumstances surrounding the IPC's office closure due to the COVID-19 pandemic, the IPC was unaware of the existence of the representations until after Order MO-3928 was issued. I find that this amounts to a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the *Code of Procedure*. Given that the appellant was not heard in his appeal, I will now consider his representations on the reasonableness of the city's search for responsive records and why Order MO-3928 should be reconsidered.

Issue B: Should Order MO-3928 be reconsidered?

[15] As I will explain below, I am satisfied that Order MO-3928 should not be reconsidered.

The appellant's representations

[16] The appellant's lengthy representations were accompanied by attachments regarding hearings and interactions with various government entities (including the city) in the years following an injury he suffered. A substantial portion of his representations address what he describes as inaccuracies or information that is confusing in the records that were disclosed to him from his Ontario Works (OW) file. He also provides information about the history of what happened to him after an injury.

[17] With respect to Order MO-3928, it appears the most relevant portion of the

appellant's representations indicate that I focus in the order on discussing "missing" ODSP records, and not his OW records, noting that the OW records are very important to him for the personal reasons he laid out. In addition, he appears to object to having to submit an access request to the ODSP for records because of the close proximity of the physical offices that process ODSP and OW claims.

The city's representations

[18] The city submits that despite its support of the appellant's request for a reconsideration, it conducted a reasonable search for responsive records by experienced and knowledgeable staff and requests that this appeal be dismissed.

[19] The city states that it relies on its submissions provided in response to Appeal MA18-505 (which resulted in Order MO-3928).

[20] For ease of reference, I will set out a summary of the city's representations in Order MO-3928, below. I note, as I did in that order, that the city provided a written summary of all steps taken in response to the request. This summary was prepared by the city's Legislative Compliance Coordinator, the individual who assisted the appellant with formulating his request. The city also provided an affidavit from the city's Program Manager of the Income Support Unit of the city's Ontario Works program (the program manager). The program manager performed part of the search for responsive records and reviewed all of the responsive records located by other employees.

No clarification needed

[21] The request submitted to the city was worded as follows:

"Please provide entire Ontario Works file for [specified first and last name] (D.O.B. [specified date of birth])."

[22] The city submits that the request was clear, with a sufficient number of clearly identifiable criteria for an experienced employee to identify responsive records, and as a result, no clarification from the appellant was needed. The city also states that it fairly frequently receives requests for Ontario Works client files, and that staff are knowledgeable about the type of information required to conduct a search for these files.

Experienced employees asked to search

[23] The city explained its general process of forwarding requests to employees in order to search for records responsive to requests made under the *Act*. The city's Clerk's Services Department maintains a list of contacts for each city department. The city described these contacts as knowledgeable staff members who are responsible for conducting or coordinating searches for their respective departments. Every department manager or director is responsible for designating contacts relating to requests made

under the *Act*, and determining their role in processing requests. The city further explained that typically, senior staff members or records clerks are assigned to process requests, and the Executive Leadership Team member of each department, as well as the Legal Department and Risk Office, also receive copies of requests.

[24] In this case, the wording of the request was emailed to the city's Director of Social Services, and copied to their administrative assistant and the aforementioned program manager of the city's Ontario Works Income Support Unit, for processing. Copies of the request were also sent to other specified city personnel, including a law clerk and the city's Coordinator of Insurance Risk Management, neither of whom located responsive records.

[25] The program manager provided an affidavit about her search efforts. She attests to having been in her managerial position since 2018, and having a total of 20 years of experience with the city's Ontario Works Office.

[26] The program manager attests that, upon receiving the request, she emailed three units in the Ontario Works department, requesting that a search be completed and any responsive records be provided to her. The three units were: the Eligibility Review Unit, the Finance Unit, and the Family Support Unit.

Search locations and results

[27] The Finance Unit provided copies of two forms, but the Eligibility Review Unit and the Family Support Unit reported that they did not have any responsive records.

[28] The program manager also attests to performing searches in several databases, with the assistance of another city employee, a specified case aide. They searched the Income Support Units records as well as the SAMS² and SALI³ computer databases. The program manager attests that through these search efforts, she found responsive records in the form of notes and payment lists.

[29] The program manager searched both active and inactive files in the Income Support Unit. She attests that after this search of active and inactive files, the Income Support Unit determined that there was no longer a hard copy of the appellant's file with the OW office, as it had been transferred on a specified date to the Ontario

² Based on Order MO-3921, "SAMS" appears to stand for "Social Assistance Management System." In Order MO-3921, the adjudicator stated that this was described as a database, "has been used for several years, and stores large amounts of information relating to the Employment and Social Services division's functions, including all file notes and payment information."

³ Based on Order PO-4058, "SALI database" appears to stand for "Social Assistance Legacy Information Database." In Order PO-4058, this database was described amongst other databases as "includ[ing] client information pertaining to DAU referral history, application history, related case notes, and decision outcomes."

Disability Support Program Office, in accordance with the standard business practice at the Sudbury location. The program manager attests that no copies of the appellant's hardcopy file were made and that the hardcopy file was not digitized before it was transferred to the ODSP Office.

[30] The program manager also attests to having reviewed all the responsive records, and ensuring that copies were provided to the city's Clerk's Services department. She attests that to the best of her knowledge, the city does not have any additional records belonging to the appellant's Ontario Works file.

Additional comments from the city

[31] In the context of this reconsideration request, the city also offers additional comments addressing the appellant's representations.

[32] First, it comments on seeking records from institutions other than the city, and says:

It is apparent from the Appellant's submissions that he is seeking access to a number of records from various separate institutions. Unfortunately, only the Appellant's request for his Ontario Works records submitted to the City and the subsequent access decision may be addressed in the context of this appeal. Should the Appellant be dissatisfied with the access provided by other institutions to records he requested, then appealing those access decisions would be appropriate.

[33] Second, the city addresses the issue of the physical proximity between various offices:

Although [the] Ontario Disability Support Program, [and] the Workplace Safety and Insurance Board, along with a great number of other institution[s] may have physical offices located in Sudbury, they are not part [of] the municipal corporation. As such, the City does not have the authority or the necessary access to provide the Appellant with any of the additional records he wishes to obtain.

[34] The city submits that a significant and reasonable search was done for records that the appellant requested, those being his OW records.

Analysis/findings

Preliminary matter – the scope of Order MO-3928 was confirmed with the appellant before the inquiry started

[35] As a preliminary matter, the parties appear to disagree about what issues Order MO-3928 should have addressed.

[36] The appellant's representations mainly raise issues relating to access and correction of the OW records that were disclosed to him by the city. The Mediator's Report identified the issues of reasonable search and the application of the discretionary personal privacy exemption at section 38(b) of the *Act*.

[37] However, in my review of the file before beginning the inquiry, I noted that the appellant appeared not to be seeking access to the limited information redacted under section 38(b). As a result, I sought confirmation from the appellant as to whether that was the case. Based on the communications with the appellant that followed, in which he stated his belief that there are more responsive records and that he is not seeking access to the redacted personal information about others, I was satisfied that the appeal was solely a reasonable search appeal. The Notice of Inquiry I sent seeking the parties' representations, therefore, only included the issue of reasonable search for adjudication.

[38] As my inquiry into Appeal MA18-505 addressed only the reasonable search issue, this decision about the appellant's request for reconsideration of Order MO-3928 does not review the appellant's representations relating to access to the information withheld by the city under the personal privacy exemption at section 38(b) of the *Act*. Likewise, if the appellant disputes the correctness of any of his own personal information disclosed to him, this must be addressed through a correction request to the city,⁴ and not through the requested reconsideration of Order MO-3928.

Was the city's search reasonable?

[39] In his representations, the appellant briefly addresses the issue of gaining access to additional records from the city, namely his ODSP records as well as the OW records that the city disclosed to him. Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.⁵ If the IPC is satisfied that the search carried out was reasonable in the circumstances, it will uphold the institution's decision. Otherwise, the IPC may order the institution to conduct another search for records. For the reasons that follow, I uphold the city's search for responsive records as reasonable, and will not order the city to conduct another search.

ODSP records

[40] The appellant's position is that the city should have provided his ODSP records in response to his request.

⁴ Under sections 36(2) of the *Act*. No, you don't.

⁵ Orders P-85, P-221 and PO-1954-I.

[41] In Order MO-3928, I noted that the appellant requested that the file move to adjudication on the basis of reasonable search, and that it appeared that his reasonable basis for believing that additional records should exist was the fact that he was not provided access to his ODSP file. I also noted that the city had provided an explanation about the OW and ODSP social assistance programs, and why the ODSP records are not held by, or accessible from, the city under the *Act*, as follows:

The city stated that the OW program is administered by the city following the directives of the Ministry of [Children,] Community and Social Services (the ministry), whereas the ODSP is a separate program administered by the ministry's Ontario Disability Support Program, Income and Employment Supports Offices (ODSP offices). When the appellant's OW file was transferred to the ODSP office, his complete OW file was collected by an ODSP office staff member, and was not digitized or otherwise copied by the city in accordance with the city's general business practice. In the city's experience, its OW office can no longer access a file, or a copy of a file, once it is transferred from the city to the ODSP office.

[42] In Order MO-3928, I accepted the above explanation from the city as to why it would not have the appellant's ODSP records and I stated that I would not be considering that issue further. In addition, I noted that nothing precluded the appellant from making a new access request to the ministry for his ODSP file.

[43] Now having had the chance to review the appellant's representations, I am still satisfied with the city's explanation as to why it did not have the appellant's ODSP records in its record holdings. Therefore, I will not order the city to conduct a further search in order to locate the ODSP records.

[44] Through reading the appellant's representations, I understand more about what have clearly been difficult circumstances since his injury. He also appears to be frustrated that institutions that are in close proximity to each other cannot just access each other's record holdings. However, access to information requests must be made to the right institutions (the institutions that have the custody or control of the records), even if they are physically located close to each other.

OW records

[45] 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.⁶ To

⁶ Orders P-624 and PO-2559.

be responsive, a record must be "reasonably related" to the request.⁷

[46] 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.⁸

[47] To establish that it has conducted a reasonable search, the institution is required to provide a written summary of all steps taken in response to the request. As noted, in this reconsideration appeal, the city relies on its representations submitted before I made a decision in Order MO-3928. Based on my review of both parties' representations, I am satisfied that the city has provided sufficient evidence of its search efforts.

[48] Reviewing the wording of the request and the city's evidence about its employees' expertise in processing requests for OW records, with the identifying details provided by the appellant, I am satisfied that no clarification was needed to identify records responsive to the request.

[49] I am also satisfied that the city's search was conducted by an experienced employee knowledgeable in the subject matter of the request for the appellant's OW file. The affidavit evidence before me comes from a program manager with a total of 20 years of experience with the city's OW office. It is reasonable to conclude that an employee with that many years of experience specifically working with the requested type of records was an experienced employee for the purpose of the city carrying out its obligations under *MFIPPA* in the circumstances.

[50] Furthermore, given the nature of the request and the experience of the program manager, I accept that reasonable locations were included in the search when she emailed the Eligibility Review Unit, the Finance Unit, and the Family Support Unit of the Ontario Works department, to request that a search be completed and any responsive records be provided to her.

[51] In addition, the program manager attests to performing searches in several databases, with the assistance of another city employee, which I accept were relevant: the Income Support Unit's records, and the SAMS and SALI computer databases. The program manager attests that, as a result of these search efforts, she found responsive records in the form of notes and payment lists. The city fully disclosed to the appellant his OW file (through a record described as record 1) and "SAMS/SALI Payment Lists" (a record described as record 3). It also provided partial disclosure to "SALI/SAMI Notes" (a record described as record 2).

⁷ Order PO-2554.

⁸ Orders M-909, PO-2469 and PO-2592.

[52] Because the program manager searched both active and inactive files in the Income Support Unit, I am satisfied that this step would have resulted in finding more responsive records.

[53] With respect to the search results of the Income Support Unit, the program manager attests that after searching active and inactive files, the Income Support Unit determined that there was no longer a hard copy of the appellant's file with the OW office. The file had been transferred on a specified date to the Ontario Disability Office, in accordance with the standard business practice at the Sudbury location. As I said in Order MO-3928, I accept the city's explanation of this business practice with respect to transferring OW files out to the ODSP office. Given this practice, and the expertise and experience of the program manager, I accept her attestation that no copies of the appellant's hardcopy (paper) file were made and that the hardcopy file was not digitized before it was transferred.

[54] Based on the totality of the evidence before me describing the city's search efforts, including the information relating to the disclosure that was made to the appellant, I accept the program manager's attestation that the city does not have additional records belonging to the appellant's OW file. I find that the city provided sufficient evidence of its search efforts for records relating to the appellant's OW file, and I uphold its search as reasonable.

[55] 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.⁹ In reviewing the appellant's representations, as noted, I found that they focussed on matters unrelated to the city's search efforts in responding to his access request. Accordingly, I find that he has not provided a reasonable basis for concluding that additional OW records exist.

[56] For these reasons, I uphold the reasonableness of the city's search, and the request for reconsideration of my search finding in Order MO-3928 is denied.

ORDER:

I deny the appellant's reconsideration request.

Original Signed by: _____
Marian Sami
Adjudicator

_____ May 5, 2021

⁹ Order MO-2246.