**Information and Privacy Commissioner,
Ontario, Canada**

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

RECONSIDERATION ORDER PO-4143-R

Appeal PA19-00512

McMaster University

Order PO-4114-I

May 4, 2021

Summary: The appellant requested a reconsideration of Interim Order PO-4114-I on the basis that the adjudicator was biased, or that there was a reasonable apprehension of bias, and because there were fundamental defects in the adjudication process. In this reconsideration order, the adjudicator finds that the appellant has not established bias, or a reasonable apprehension of bias. She also concludes that there were no fundamental defects in the adjudication process and determines that the appellant's arguments amount to a re-arguing of the appeal. As a result, the adjudicator denies the appellant's reconsideration request.

Statutes Considered: IPC *Code of Procedure,* sections 18.01, 18.02, 18.04 and 18.08.

Orders Considered: Orders MO-2227, MO-4003-R and MO-4004-R.

OVERVIEW:

[1] This order addresses a request made by the appellant for reconsideration of Interim Order PO-4114-I, in which I ordered McMaster University (the university) to conduct a further search for responsive records pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The sole issue dealt with in Interim Order PO-4114-I was whether the university had conducted a reasonable search for records that were responsive to the appellant's request. As set out at paragraphs 9 to 13 of Interim Order PO-4114-I, an adjudicator may order an institution to search for further responsive records if they find that the

institution has not provided 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.

[3] In Interim Order PO-4114-I, I concluded that, based on the evidence provided by the parties, it was reasonable to expect that there may be additional responsive records, and I ordered the university to conduct a further search. I did not, however, order the university to search for all of the records the appellant asserted were responsive to her request. Specifically, I determined that the university was not required to search for internal communications or records that post-dated the appellant's request for information.

[4] The appellant asked that Interim Order PO-4114-I be reconsidered on the basis that I exhibited a reasonable apprehension of bias and because of additional fundamental defects in the adjudication process. She has asked that I recuse myself from her request and that another adjudicator be assigned to the matter.

[5] For the reasons that follow, I conclude that the appellant has not established bias, or a reasonable apprehension of bias. I also reject the appellant's assertions that there were fundamental defects in the adjudication process. I find that her arguments amount to a re-arguing of the appeal and I deny the reconsideration request.

DISCUSSION:

[6] As noted above, the appellant asks that I recuse myself from adjudicating this reconsideration request on the basis that I am biased, or that there is a reasonable apprehension of bias. She also asks that Interim Order PO-4114-I be reconsidered on the basis that there is a reasonable apprehension of bias on my part and there were fundamental defects in the adjudication process.

Reconsideration criteria and procedure

[7] Section 18 of the IPC's *Code of Procedure* (the *Code*) 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:
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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
> >
> > 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. […]

[8] Section 18.08 sets out who responds to a request for reconsideration:

> 18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

Reasonable apprehension of bias

[9] The appellant submits that I must recuse myself from this matter because she has established that there is a reasonable apprehension of bias on my part in relation to Interim Order PO-4114-I. The appellant also asks that her recusal and reconsideration requests be assigned to a new adjudicator.

[10] As previous orders of this office have stated, the law is clear that an allegation of bias, or reasonable apprehension of bias, is to be raised before the decision-maker in question.[1] If the appellant establishes that there is a reasonable apprehension of bias, it would be a ground for reconsidering Interim Order PO-4114-I. It would also be a ground for my recusal and for the appellant's reconsideration request to be assigned to another adjudicator. However, for the reasons that follow below, I find that the appellant has not established that there is a reasonable apprehension of bias on my part and I decline to recuse myself from this matter.

[11] In administrative law, there is a presumption that, in the absence of evidence to the contrary, an administrative decision-maker will act fairly and impartially.[2] The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.[3] However, actual bias need not be proven. The test is whether there exists a "reasonable apprehension of bias". In Order MO-2227, Senior Adjudicator John Higgins, in addressing an allegation of bias against this office, explained the test as follows:

> A recent statement of the law by the Supreme Court of Canada concerning allegations of bias against an adjudicator is found in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In that decision, the court stated:

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[1] Orders PO-4128 at paragraph 40 and MO-4003-R.

[2] Orders MO-3513-I, MO-3642-R and MO-4003-R.

[3] See, for example, Blake, S., *Administrative Law in Canada*, (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.

> In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:
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> > …the 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 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.
> >
> > …
> >
> > *The grounds for this apprehension must, however, be substantial,* and I … refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

[12] The appellant provides detailed representations in support of her allegation that I was biased in my decision-making process, or that there is a reasonable apprehension of bias. She includes copies of her email correspondence with this office and asserts that I provided untruthful information and delayed the inquiry process, and that as a result, it reasonably follows that I would likely "act in such a manner as to limit" her access to the records she seeks.

[13] Specifically, she says the following:

1. I provided her information about the timelines for issuing an order in this appeal that was not truthful;
2. I initially intended to unnecessarily delay issuing an order by many months; and
3. The adjudication process was unnecessarily prolonged because 11 business days passed between the date the appellant submitted her representations and the date I sought a reply from the university.

[14] I have reviewed all the information the appellant provided in support of these assertions. For the following reasons, I disagree with her conclusions.

[15] First, the IPC has general information and timelines that it typically provides parties to appeals that explains how inquiries are conducted and specifies how long it usually takes for an order to be issued once all of the parties' representations are received and the appeal is moved to "order stage." In this case, the Adjudication

Review Officer provided the appellant accurate information about the typical process and the general timeline for which she could expect an order by. For case management reasons, however, I ultimately issued Interim Order PO-4114-I ahead of the typical timeline. I disagree that the appellant was provided untruthful information about the timeline in which she could expect an order or that I initially intended to unnecessarily delay issuing an order on her appeal by many months.

[16] I also do not accept the appellant's assertion that there was an unreasonable delay of 11 business days between when she submitted her representations and when a reply was sought from the university. I see nothing amiss in this timeline in the circumstances and in any event, I am not satisfied that any of these circumstances establish bias or a reasonable apprehension of bias on my part.

[17] The appellant also notes that she submitted a complaint regarding what she saw as unreasonable delays to the IPC Complaints Coordinator and that subsequent to making that complaint, I issued an order. The appellant says that the fact that she made a complaint may have compromised my impartiality. However, I am not satisfied in the circumstances that the appellant's complaint to the Complaints Coordinator about this appeal is a basis to conclude that an informed person, viewing this matter realistically and practically, would conclude that I would not decide fairly.

[18] Finally, the appellant also submits that I took a selective approach in not considering sections of the *Act* and portions of the parties' submissions that supported her position. She says that this supports her assertion that I lacked impartiality and that there were fundamental defects in the adjudication process. I address, and ultimately dismiss, these assertions below. All of the evidence the appellant provided was considered and the fact that I did not view the evidence in the same way as the appellant does not support a conclusion of a reasonable apprehension of bias.[4]

[19] I conclude, therefore, that there was no bias or reasonable apprehension of bias on my part. As a result, bias is not a basis for reconsidering Order PO-4114-I, nor it is a bias for my recusing myself from this reconsideration request. I will now proceed to the other stated grounds for the appellant's reconsideration request.

Fundamental defects in the adjudication process

[20] As stated above, the appellant asserts that there were fundamental defects in the adjudication process and asks that Interim Order PO-4114-I be reconsidered on that basis. Specifically, the appellant submits that I failed to consider certain portions of the parties' representations and specific sections of the *Act* she referred to in her

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[4] *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at paragraph 164, affirmed 2018 BCCA 264. See also, *Gichuru v. Vancouver Swing Society (No. 4)*, 2020 BCHRT 145 (CanLII) at para. 39.

representations.

[21] As set out above, paragraph (a) of section 18.01 of the IPC's *Code* specifies that the IPC may reconsider an order where it is established that there is a fundamental defect in the adjudication process.

[22] This office has recognized that a fundamental defect in the adjudication process may include: a failure to notify an affected party;[5] a failure to invite representations on the issue of invasion of privacy;[6] or a failure to allow for sur-reply representations where new issues or evidence are provided in reply.[7] These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[23] While it is possible that overlooking material evidence may be a basis for a finding of a fundamental defect in the adjudication process in some specific circumstances, previous orders have made it clear that the reconsideration process is not a forum for parties to re-argue their cases in an attempt to obtain a more favourable decision.[8] Those orders have stated that the reconsideration process is not a mechanism to offer substantiating arguments that were made (or not made) during the inquiry into an appeal intended to address a party's disagreement with a decision or legal conclusion.[9]

[24] Previous orders are also clear that mere disagreement with a decision is not a ground for reconsideration under section 18.01 of the *Code*.[10] Furthermore, adjudicators are not required to expressly refer to each piece of evidence put forth by parties in their decisions.[11]

[25] For the reasons that follow, I find that the types of issues the appellant raises are not a breach of the rules of natural justice respecting procedural fairness and do not otherwise constitute fundamental defects in the adjudication process. I find the majority of the points raised by the appellant in her reconsideration request were also raised in her representations, and considered by me, during the inquiry process. The appellant has also provided new information in an attempt to bolster previous arguments she made during the inquiry process and I note again that reconsideration is

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[5] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.
[6] Orders M-774 and R-980023.
[7] Orders PO-2602-R and PO-2590.
[8] See, for example, MO-4004-R. See also: *Chandler v. Alberta Assn. of Architects,* 1989 CanLII 41 (SCC); PO-2538-R; PO-3062-R.
[9] Orders PO-3062-R and PO-3558-R at paras. 21-24.
[10] Orders PO-2538-R and PO-3062-R.
[11] Order MO-4004-R.

not a forum to consider new arguments and evidence.

[26] The appellant argues that any points she made in her representations that were not specifically addressed in Interim Order PO-4114-I were not considered. I note again that the duty of fairness in providing reasons does not require that I repeat and address each and every submission made by a party in an inquiry. Reasons must be sufficiently comprehensive for the parties to understand the basis for the decision. I considered all of the evidence submitted by the parties, including the evidence not specifically referred to in my decision. Having reviewed the appellant's reconsideration request and supporting information and Interim Order PO-4114-I, I am satisfied that my reasons were sufficient.

[27] As noted above, the majority of the appellant's submissions either address why she disagrees with my decision or explain why she believes information she provided should have been viewed differently.[12] My reasons for specific findings with which the appellant takes issue are found at paragraphs 56, 57 and 58 of Interim Order PO-4114-I. The evidence provided by the appellant in support of her reconsideration request demonstrates that she disagrees with those findings. However, as stated above, disagreement with a decision does not amount to a fundamental defect in the adjudication process, nor is it a basis for a decision to be reconsidered.

[28] Finally, with regard to the appellant's assertion that I omitted to consider specific sections of the *Act* and IPC orders referenced in her representations and her reply representations, I confirm once again that all of her representations and the evidence she referred me to were considered.

[29] I will now address briefly the appellant's assertion that I erred in omitting to consider sections 24(2) and 30(2) of the *Act.*

[30] First, with regard to section 24(2), the appellant asserts in her reconsideration request that she sent an "unsolicited clarification" of her access request to the university on November 13, 2019 and that as per section 24(2) of the *Act*, the university was obliged to accept that clarification. As noted in the university's response, as reproduced by the appellant in her reconsideration request, the university declined to reply to her clarification as the appellant had already submitted an appeal of the university's decision to this office. In my view, this evidence does not provide a basis

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[12] For example, the appellant's first point is that I omitted to consider portions of the university's sur-reply that supported her position the university limited its search to records that contained the appellant's name. This issue was addressed at paragraph 51 of Interim Order PO-4114-I, where I explained that I based my finding on the university's initial representations. The initial representations included an affidavit and paragraph 10 addresses the search terms the university used. In my view, the fact that the university provided additional information in its reply does not negate the information it provided in affidavit form in its initial representations.

upon which I should reconsider my findings regarding the scope of the appellant's request for records.

[31] With regard to the appellant's assertion that I failed to consider section 30(2) of the *Act,* I find that that section was not at issue before me. Section 30(2) allows a person to ask to inspect the original record:

> Where a person requests the opportunity to examine a record or a part thereof and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part thereof in accordance with the regulations.

[32] While the appellant specified in her initial representations and her reply that she believed an employee at the university should send her a copy of a specific email, she did not raise section 30(2) of the *Act* and I will not consider it at this time.

[33] Finally, the appellant submitted additional arguments in two separate addendums to her reconsideration request, both of which were received beyond the established timelines for submitting reconsideration requests in section 18.04 of the *Code*.[13] The addendums were not submitted within these timelines and I am not satisfied that the appellant has established that there is a basis for me to depart from the usual deadline in the *Code* for submitting reconsideration materials.

[34] In any event, I have reviewed both addendums and am satisfied that neither establish a ground for reconsideration of Interim Order PO-4114-I. Briefly, in the first addendum the appellant says that I made a determination in Interim Order PO-4114-I that is inconsistent with a previous reconsideration order I issued in an unrelated appeal. To the extent that this may be a ground for reconsideration, I confirm that there is no inconsistency. The portion of the reconsideration order the appellant is referring to was the institution's representations and was not a finding on my part. As such, I will not consider the appellant's arguments set out in the addendum further.

[35] In the second addendum, the appellant raises concerns about the timeline for issuing this reconsideration order, asserts that I have unfairly delayed her access to the university's representations on its further search for responsive records pursuant to Interim Order PO-4114-I, and offers additional new arguments in support of her reconsideration request, most of which elaborate on her earlier arguments and none of which establish a basis upon which to reconsider Interim Order PO-4114-I.

[36] For the reasons set out above, I dismiss the appellant's reconsideration request on the basis that she has not established that there was a fundamental defect in the

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[13] The appellant sent the addendums to the IPC by email on April 15, 2021 and May 3, 2021.

adjudication process. To be clear, I find that the majority of the appellant's reconsideration request is comprised of the reasons why she disagrees with my decision and her submission is primarily comprised of explanations of her original representations or additional information that is intended to bolster her original submissions.

[37] I have concluded that none of the points she raises are evidence of a fundamental defect in the adjudication process. I also find that the fact I did not agree with all of the appellant's assertions in her representations, or the fact that I did not decide fully in her favour are not, in and of themselves, evidence of bias or a reasonable apprehension of bias.[14]

[38] For all of the reasons set out above, I have determined that the appellant has not established that there was either a reasonable apprehension of bias on my part or another fundamental defect in the adjudication process, and I therefore decline to reconsider Interim Order PO-4114-I under section 18.01 of the *Code.*

ORDER:

The request for reconsideration is denied.

Original signed by: May 4, 2021

Meganne Cameron
Adjudicator

[14] See, for example, paragraph 19 of Reconsideration Order MO-4003-R.