

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4062-R

Appeal MA18-00751

City of Thunder Bay

Order MO-4011-F

June 8, 2021

Summary: The appellant requested a reconsideration of Final Order MO-4011-F. In that order, the adjudicator upheld the reasonableness of the search conducted by the City of Thunder Bay (the city) for records responsive to two parts of the appellant's request, and dismissed the appeal. After the Final Order MO-4011-F was issued, the appellant communicated with the IPC and provided newly obtained evidence to the IPC. In this Reconsideration Order, the adjudicator finds that the appellant has not established that there are grounds under section 18.01 of the IPC's *Code of Procedure* in order to reconsider Final Order MO-4011-F, and denies the reconsideration request.

Orders Considered: Orders PO-2538-R, PO-3062-R, MO-3877-I, MO-4011-F, and MO-4057-R.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.); *Grier v. Metro International Trucks Ltd.*, (1996), 28 O.R. (3d) 67 (Ontario Divisional Court).

OVERVIEW:

[1] The appellant in Order MO-4011-F requests a reconsideration of that order. In Order MO-4011-F, I upheld the reasonableness of the search efforts conducted by the City of Thunder Bay (the city) to process two parts of the appellant's request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). This reconsideration order explains why I will not reconsider Final Order MO-4011-F.

[2] The relevant parts of the appellant's request were items 2 and 5:

2) All invoices/[purchase orders] [for the specified splash pad] for fixtures, mechanical, electrical for pad [specified company]

5) All invoices/[purchase orders] any extras from [the specified company named in item 2].

[3] After Order MO-4011-F was issued, the appellant communicated with the Office of the Information and Privacy Commissioner of Ontario (the IPC) about the order, and she was provided with information about the IPC's reconsideration process under section 18.01 of the IPC's *Code of Procedure* (the *Code*).

[4] The appellant asks that I reconsider my decision to dismiss her appeal. Her request and accompanying reasons were shared with the city. The city provided representations in response. I gave the appellant an opportunity to reply to the city's representations, and granted a request for an extension to do so, but the appellant did not provide further representations.

[5] For the reasons that follow, I find that the appellant has not established that any of the grounds for reconsideration under section 18.01 of the *Code* apply. Therefore, the appellant's reconsideration request is denied.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order MO-4011-F?

[6] The only issue to be decided in a reconsideration decision relating to Order MO-4011-F is whether there are grounds under section 18.01 of the *Code of Procedure* to reconsider that order. The appellant's representations explain why she would like me to reconsider my decision to dismiss her appeal. The city submits that the appellant has not established any grounds for reconsideration, and for the reasons that follow, I agree, and decline to reconsider Final Order MO-4011-F.

[7] The IPC's reconsideration process is set out in section 18.01 of the *Code*, which applies to appeals under the *Act*.

[8] Section 18.01 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] Past IPC orders have explained that an adjudicator is *functus* unless the party requesting the reconsideration (in this case, the appellant), establishes one of the grounds in section 18.01 of the *Code*.¹ *Functus officio* is a common law principle, which means that once a matter has been determined by a decision-maker, he or she generally has no jurisdiction to further consider the issue. However, the *Code* provisions in section 18.01 are a summary of the common law position acknowledging the ability of a decision-maker to re-open a matter to reconsider it in certain circumstances.²

The appellant's reconsideration request

[10] The appellant does not rely on any of the grounds of reconsideration at section 18.01 of the *Code*.

[11] Instead, she asks that I reconsider my decision to dismiss her appeal. She raises a number of the same arguments that she had made during the inquiry regarding her position that a particular record must exist. In doing so, she expresses her views about many subjects, such as: the propriety and/or credibility of the procurement process described by the city, the incompleteness of past disclosure made by the city, her access rights under the *Act*, and the custody or control of the record that she believes to exist.³ She argues that I flagged points in the interim order of her appeal (Interim Order MO-3877-I), which have still not, in her view, been satisfied. She takes the position that the city has not complied with her requests, and the interim order. The appellant offered to re-submit documents she had provided in the inquiry to substantiate her claims about the undisclosed record and the background procurement issues.

[12] In addition, the appellant points to new evidence obtained after Final Order MO-4011-F was issued, as proof that the city did not conduct a reasonable search.

Analysis/findings

[13] Before explaining why I will not reconsider Final Order MO-4011-I, I wish to be clear about the issue of "compliance" of the city. In Interim Order MO-3877-I, I ordered the city to conduct a search for records responsive to items 2 and 5 of the request, I did not order the city to disclose a record to the appellant. After Interim Order MO-3877-I was issued, the city conducted a search for responsive records and provided evidence about its search efforts. Therefore, the city complied with the interim order. In Final Order MO-4011-F, I examined that evidence and found it to be sufficient to uphold

¹ See, for example, Orders MO-2904-R, MO-4042-R, and MO-4057-R.

² Order PO-2879-R.

³ The issue of custody or control of records was not within the scope of her appeal.

the city's search as reasonable.

[14] Based on my review of the appellant's representations, I find that she has not identified any of the three grounds of reconsideration that I may consider, under section 18.01 of the *Code*. Examining her reasons for requesting a reconsideration, I also considered any possible indirect reference to the grounds for reconsideration. However, I find that none of the grounds are indicated by the appellant's representations.

[15] In my view, the appellant's reconsideration request amounts to disagreement with my finding in Final Order MO-4011-F, that the city provided sufficient evidence relating to its search, and an attempt to re-argue or further substantiate her views about why a record that she believes must exist has not been disclosed to her. However, the reconsideration process set out in the IPC's *Code* is not intended to provide parties with a forum to re-argue their cases.

[16] In Order PO-2538-R, the adjudicator reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects*.⁴ With respect to reconsideration, the adjudicator concluded that:

[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 such as [*Grier v. Metro Toronto Trucks Ltd.*]⁵

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.

[17] This approach has been adopted and applied in subsequent orders of this office.⁶ For example, in Order PO-3062-R, an adjudicator was asked to reconsider her finding that the discretionary exemption did not apply to information in records at issue. 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:

⁴ [1989] 2 SCR 848 (S.C.C.).

⁵ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

⁶ See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

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[.]

[18] Following this approach about disagreement with an order, I find that the appellant's views about the conclusion in my order does not meet the requirements for reconsideration set out in section 18.01 of the *Code*.

[19] Turning to the grounds of reconsideration themselves, under section 18.01(a) of the *Code*, the IPC may reconsider an order if it is established that there is a fundamental defect in the adjudication process. Past IPC orders have found that various breaches of the rules of natural justice regarding procedural fairness will qualify as a fundamental defect in the adjudication process for the purpose of section 18.01(a) of the *Code*.⁷ Examples of such breaches would include failure to notify an affected party⁸ or to invite sur-reply representations where new issues or evidence are provided in reply.⁹ In this reconsideration request, the appellant has not claimed, and I do not find evidence of, a fundamental defect in the adjudication process.

[20] The IPC may also reconsider an order, under section 18.01(b) of the *Code*, if it has been established that an adjudicator did not have the jurisdiction under the *Act* to make the order in question. Bias, or a reasonable apprehension of bias, would fall under a lack of jurisdiction. In requesting a reconsideration of Final Order MO-4011-F, the appellant has not provided any basis for questioning my jurisdiction to decide whether the city conducted a reasonable search under the *Act*.

[21] Under section 18.01(c) of the *Code*, the IPC may reconsider a decision if it was established that a clerical error, accidental error or omission or other similar error in the decision. The Ontario Divisional Court has said that to establish an accidental error under section 18.10(c), it must be shown that the determination of an issue "was fatally tainted by . . . reliance on a crucial fact which both parties agree is incorrect."¹⁰ In her reconsideration request, the appellant disagrees with my conclusion that the city conducted a reasonable search. However, she has not identified any clerical, accidental error, or other omission or similar error in my decision, upon which a reconsideration request may be considered. Having considered the representations of the appellant and the city, there is not "crucial fact" upon which my decision was made that both parties agree is incorrect.

[22] To the extent that the appellant raises any new arguments and has presented new evidence, these are not grounds for a reconsideration either. The fact that the

⁷ Order PO-4134-R.

⁸ Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

⁹ Orders PO-2602-R and PO-2590.

¹⁰ *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67 (Ontario Divisional Court).

appellant discovered new information after I issued the final order in her appeal does not establish that there was a fundamental defect in the adjudication process, or that I did not have jurisdiction to issue the order, or that there was a clerical or some sort of other order or omission in the order. In addition, section 18.02 of the *Code* specifically states 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." Without establishing any grounds of reconsideration, I will not reconsider Final Order MO-4011-F simply on the grounds that the appellant has provided new evidence.

[23] For these reasons, I find that the appellant's reconsideration request does not establish that there are any grounds under section 18.01 of the *Code* to reconsider Final Order MO-4011-F. Accordingly, the appellant's reconsideration request is denied.

ORDER:

The appellant's reconsideration request is denied.

Original Signed by: _____
Marian Sami
Adjudicator

_____ June 8, 2021