

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4065-R

Appeal MA17-8-2

Orders MO-3841-I and MO-3956-F

Toronto Police Services Board

June 24, 2021

Summary: The appellant requests a reconsideration of the interim and final orders related to the Toronto Police Services Board's (the police) search for records about him undertaken in response to his access request under the *Municipal Freedom of Information and Protection of Privacy Act*.

In this reconsideration order, the adjudicator denies the appellant's reconsideration request regarding the interim order. She grants the appellant's reconsideration request of the final order, in part, as it relates to her finding in the final order regarding the police's retention of records. She finds that this finding constitutes an omission or other similar error in the final order under section 18.01(c) of the *Code*. She orders the police to provide affidavit evidence about their retention of responsive records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17; the IPC's *Code of Procedure*, section 18.01(c).

Orders Considered: Orders MO-3841-I and MO-3956-F.

OVERVIEW:

[1] The appellant seeks a reconsideration of Interim Order MO-3841-I and Final Order MO-3956-F, which are about the Toronto Police Services Board's (the police) search for records about meetings held between the Toronto Police Service - Detective Bureau, the Combined Forces Asian Investigation Unit, and the Shanghai Municipal

Public Security Bureau.

[2] In particular, the appellant made the following request to the police under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

Under the powers of [the *Act*], I am requesting copies of all records (including transcripts) of all meetings held between the Toronto Police Service – Detective Bureau, the Combined Forces Asian Investigation Unit, and the Shanghai Municipal Public Security Bureau [PSB].

This will include records of the preparatory arrangements made by the [police] for arranging the trip of the Shanghai PSB to Canada. It will include records of airport pickup, accommodation, meeting venues, costs of hosting the event (including hotel bills and meal receipts) directly related to hosting the Shanghai PSB officials.

The request for responsive records will include copies of all presentations made to the Shanghai PSB by [three of the four police officers named in the agenda] (as they then were) and all others who made presentations at the meetings. It will also include records of these meetings as recorded in the [police] officers' official memorandum books and internal communication on the meetings between the [police] and the Shanghai PSB.

The dates of these arrangements and meetings will be from March 20, 2001 (and/or earlier) or dates prior to April 6, 2001 and records created subsequent to the meeting by way of review or follow-up responses to the meeting. This request will also include the personal information about me, in transcript, published and distributed at the official meeting.

[3] The appellant filed an appeal with the Information and Privacy Commissioner of Ontario (the IPC) based on the police's failure to respond to his request in accordance with the procedures set out in the *Act*. That appeal file was closed after the police issued a decision to the appellant.

[4] The police's decision stated that no responsive records exist. The decision letter contained details of the police's search efforts, including inquiries made with the former units of the three officers (now retired) named in the appellant's request. The police also reported that many record types are not retained permanently, and provided a link to their records retention policies.

[5] The appellant was dissatisfied with the police's decision and appealed it to the IPC, giving rise to this appeal.

[6] During the mediation stage of the appeal process, the police agreed to conduct another search for records.

[7] The appeal was then moved to the adjudication stage at the appellant's request. An IPC adjudicator decided to conduct an inquiry into this matter by first seeking representations from the police on the issue of the reasonableness of the police's search for records.

[8] In response, the police provided representations, along with a copy of a revised decision letter to the appellant setting out the results of some further searches conducted after receiving the additional information at the mediation stage.

[9] In the revised decision, the police granted full access to a meeting agenda and eight identical copies of a "Wanted" poster. The police also granted partial access to a one-page note authored by an identified police officer, and partial access to one page of the memorandum notebook of the same officer. The police made one discrete severance to the note under section 38(b) (personal privacy) of the *Act*, and made two severances to the notebook on the ground these portions are not responsive to the appellant's request.

[10] The appellant advised the adjudicator that he wished to continue the appeal on the issues of reasonable search and the police's severances to the officer's note and notebook.

[11] After the exchange of further representations, an adjudicator issued an interim order, Interim Order MO-3841-I (the interim order). In that order, this adjudicator found that the police had not expended reasonable efforts to locate certain records responsive to the appellant's request and ordered the police to conduct another search of:

- police email and network accounts for responsive records containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017 (the date of the police's revised decision to the appellant); and,
- the Office of the Chief [of Police] for records responsive to the appellant's request. Responsive records may include records that do not contain personal information of the appellant.

[12] This adjudicator also ordered the police to provide representations on the specific details of the searches it conducted.

[13] The police conducted the searches as ordered in Interim Order MO-3841-I and additional records were located. The police issued two decisions letters disclosing records after the interim order. All of the responsive information in these records was disclosed to the appellant.

[14] The police also provided an affidavit detailing the searches it performed. The appellant provided representations in response.

[15] After the issuance of the interim order, the appeal was assigned to me to continue the inquiry, as the adjudicator who issued the interim order was no longer available at that time to do so. After reviewing all the file material and representations, I issued Final Order MO-3956-F (the final order), where I upheld the police's search in response to Interim Order MO-3841-I as reasonable, and dismissed the appeal.

[16] The appellant then filed a request to have both the interim order and the final order reconsidered.

[17] In this reconsideration order, I deny the appellant's reconsideration request of the interim order. I grant the appellant's reconsideration request of the final order, in part, as it relates to my finding in the final order regarding the police's retention of records. I find that this finding constitutes an omission or other similar error in the final order under section 18.01(c) of the IPC's *Code of Procedure* (the *Code*). I order the police to provide affidavit evidence about their retention of responsive records.

DISCUSSION:

[18] Generally, the adjudicator who issues a decision in an appeal will respond to any reconsideration request. However, in the case where that adjudicator is no longer available, the reconsideration request can be assigned to another adjudicator. This scenario is anticipated by section 18.08 of the IPC's *Code of Procedure*, which reads:

The individual who made the decision in question will respond to the [reconsideration] 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.

[19] In this case, another adjudicator issued the interim order. However, this adjudicator was away from the office for an extended period of time and was not available to respond to the reconsideration request of her interim order filed by the appellant after the final order was issued. As a result, this reconsideration request of the interim order was assigned to me.

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

[20] The appellant seeks a reconsideration of Interim Order MO-3841-I ordering the police to conduct another search for responsive records, as well as seeking a reconsideration of Final Order MO-3956-F, which upheld this search by the police.

[21] 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 17.¹

[22] As a result of my finding in the final order that the police's search was reasonable, I did not order it to conduct a further search for responsive records.

[23] Past orders have established that 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.² To be responsive, a record must be "reasonably related" to the request.³

[24] 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.⁴ 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.⁵

[25] 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.⁶

[26] In the final order, I found that the appellant had not provided a reasonable basis for me to conclude that responsive records existed that had not been identified by the police.

[27] The appellant's reconsideration request must meet one of the grounds for reconsideration set out in section 18.01 of the *Code*, which reads:

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.

[28] In order to fit within section 18.01(a) of the *Code*, the party requesting

¹ Orders P-85, P-221 and PO-1954-I.

² Orders P-624 and PO-2559.

³ Order PO-2554.

⁴ Orders M-909, PO-2469 and PO-2592.

⁵ Order MO-2185.

⁶ Order MO-2246.

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.⁷

[29] 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.⁸

[30] 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.⁹ Such errors under section 18.01(c) may include:

- a misidentification of the "head";¹⁰
- a mistake that does not reflect the adjudicator's intent in the decision;¹¹
- information that is subsequently discovered to be incorrect;¹² and
- an omission to include a reference to and instructions for the institution's right to charge a fee.¹³

[31] Section 18.02 of the *Code* is relevant in my determination as to whether to grant a reconsideration request. It 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.

[32] 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, 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*.¹⁴ With respect to the reconsideration request before him, he concluded:

⁷ For an example, see Order PO-3960-R.

⁸ Reconsideration Order MO-3917-R.

⁹ See, for example, Order PO-2405, corrected in Order PO-2538-R.

¹⁰ Orders P-1636 and R-990001.

¹¹ Order M-938.

¹² Orders M-938 and MO-1200-R.

¹³ MO-2835-R.

¹⁴ (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).

[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.*¹⁵

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.

[33] Adjudicator Higgins' approach has been adopted and applied in subsequent IPC orders.¹⁶ 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 in the records 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.

[34] 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.

[35] The appellant raises a number of matters in his reconsideration request, the majority of which are unrelated to how the grounds set out in section 18.01 of the *Code* apply to the findings in the interim and final orders.

[36] The appellant's 36-page reconsideration representations are difficult to understand and for the most part contain the appellant's unsupported allegations that his representations to the police and the IPC were either ignored or deliberately not considered. He suggests that the IPC, and in particular the adjudicators that adjudicated his appeal, are biased in favour of the police. As an example, he states:

¹⁵ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

¹⁶ See, for example, Orders PO-3062-R and PO-3558-R.

[T]he adjudicators, even though failing to be impartial by improperly favouring, with bias, and unduly influenced by misrepresentation and hearsay of the Toronto Police, preferring untruth and innuendo over actual fact, common sense and reason, have impermissibly allowed some members of the Toronto Police to continue to run the clock and unfairly impede due process by engaging in a vexatious and expensive pattern of obstruction, and misconduct contrary to the *MFIPPA* at Section 4.1,¹⁷ Section 48¹⁸ and other sections, as well as the *Code of Procedure*...

[37] I find that the appellant's allegation that police have been able to unduly influence the IPC against him to be completely without merit. The IPC is an independent tribunal and its decisions are presumed to have been made in an impartial manner in accordance with the law.¹⁹ I find that the appellant has provided no evidence to support a finding that the IPC has been unduly influenced by the police in the adjudication of his appeal.

[38] I will now consider whether the appellant's representations address the reconsideration grounds in section 18.01 of the *Code*.

Reconsideration of the interim order

[39] The interim order was issued on September 25, 2019. That order required the police to:

- conduct another search of police email and network accounts for responsive records containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017 (the date of the police's revised decision to the appellant).
- conduct another search of the Office of the Chief for records responsive to the appellant's request. Responsive records may include records that do not contain personal information of the appellant.
- provide representations on these searches by October 24, 2019, in the form of an affidavit that should include:
 - the names and positions of the person(s) who conduct the searches (or who are contacted in the course of the searches);

¹⁷ Section 4.1 of *MFIPPA* reads:

Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

¹⁸ Section 48 of *MFIPPA* is the offences section.

¹⁹ See Orders PO-3692 and PO-4143-R.

- details of the searches carried out, including the date(s) of the searches and nature and locations of the files searched;
- the results of the searches; and
- whether it is possible that responsive records existed but no longer exist. If so, the police must provide details of when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.

[40] The police conducted the searches as ordered in the interim order and provided the affidavit in support. I adjudicated upon these searches and upheld them in the final order, which was issued on September 22, 2020. The appellant did not submit this reconsideration request of the interim order until October 2020. This was after the final order was issued and was not before the first specified date or time period in the interim order had passed, which was October 24, 2019, as required by section 18.04(a) of the *Code*.²⁰ As a result, the police complied with the terms of the interim order and conducted the searches ordered therein.

[41] Even if I were to waive the time period set out in section 18.04(a) of the *Code* for the filing of a reconsideration request of the interim order,²¹ I find that the appellant has already submitted a reconsideration request of the interim order, which has been adjudicated upon by the adjudicator who issued the interim order.

[42] The appellant wrote to the IPC on October 3, 2019, following the issuance of the interim order and before the interim order compliance date of October 24, 2019. Although he specifically said he was not seeking a reconsideration of the interim order, in effect that is what he was seeking.

[43] In the appellant's October 3, 2019 letter, he asked for an amendment of certain portions of the interim order, based primarily on concerns that the interim order contained misinformation about his history with the police. The adjudicator who issued the interim order reviewed the appellant's October 3, 2019 letter and, by letter dated October 16, 2019, denied the appellant's request that the interim order be amended.

²⁰ Section 18.04(a) reads:

A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:

(a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed.

²¹ By section 20.01 of the *Code*, which reads:

The IPC may waive or vary any of the procedures prescribed by or under this Code, including any requirement or time period specified in any written communication from the IPC, if it is of the opinion that it would be advisable to do so in order to secure the just and expeditious determination of the issues.

[44] I find that the appellant's 10-page October 3, 2019 letter was, in essence, a reconsideration request of the interim order by the appellant. These October 3, 2019 representations contain submissions as to how the appellant disagrees with the adjudicator's findings in the interim order. The appellant's submissions as to how his history with the police was characterized in the interim order in his October 3, 2019 letter are similar in nature to those in the reconsideration request of the interim order before me. I find that the appellant is now trying to reargue these same concerns he had with the interim order that already been decided upon by the adjudicator who issued the interim order.

[45] As to the remainder of the appellant's 36-page reconsideration request, the only reference that I can find that relate to the actual terms of either the interim or the final order is that regarding paragraph 34 of the final order. I will discuss paragraph 34 of the final order below.

[46] I find that the remainder of the appellant's reconsideration request of the interim order does not address the actual terms of this order as they relate to the reconsideration grounds set out in section 18.01 of the *Code*. Instead, as set out above, they contain, in my opinion, a litany of complaints by the appellant against the police and the IPC unrelated to the actual terms of the interim order.

[47] In conclusion, I will not reconsider the interim order. The appellant's reconsideration request was made after the police complied with the interim order, contrary to section 18.04(a) of the *Code*. In any event, the appellant has already sought and has received a decision from the adjudicator who issued the interim order on his request to have the interim order corrected or reconsidered. Finally, the appellant's reconsideration request of the interim order does not meet the grounds for reconsideration set out in section 18.01 of the *Code*.

Reconsideration of the final order

[48] The appellant was advised prior to the issuance of the final order to provide submissions that responded to the police's search that had been undertaken following the interim order. I considered these post-interim order submissions provided by the appellant in deciding in the final order whether the police had complied with the order provisions in the interim order.

[49] In challenging the final order, the appellant takes issue with the police's compliance with the interim order, which he describes as a fundamental defect in adjudication. I find that the police's compliance with the interim order provisions does not form the basis for a finding that there was a breach of fairness in the adjudication process. The police's compliance with the interim order is related to the police's, not the IPC's, processes.

[50] The police's compliance with the interim order provisions is the determination that I made in the final order. The police's search following the interim order was conducted by the police, not the IPC, and was not a breach of procedural fairness in the

IPC's adjudication process.

[51] In his reconsideration request, the appellant did not specifically address my findings in the final order, other than paragraph 34. The appellant disagrees with my finding in paragraph 34 of the final order and he characterizes it as an omission. Paragraph 34 of the final order reads:

In this appeal, I do not have evidence about records being accidentally deleted, such as was the case in Interim Order PO-4054-I. Nor do I have evidence that records fitting within the order provisions in Interim Order MO-3841-I have been deleted or destroyed.

[52] The appellant notes that the police failed to include information related to record retention in its affidavit, as ordered in interim order provision 3. Therefore, he submits that the police did not provide evidence that demonstrates whether responsive records had been lost or destroyed.

[53] I agree with the appellant that the police did not provide the necessary affidavit evidence required by the interim order about:

- whether it is possible that responsive records existed but no longer exist. If so, the police must provide details of when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.

[54] I find that I failed to address in the final order that the police had not provided this evidence in the affidavit prepared in response to the interim order about whether responsive records possibly existed but no longer exist. This issue was squarely before me and I find that my failure to address this is an omission or other similar error in the decision under section 18.01(c) of the *Code*. Specifically, I find that I omitted to consider this lack of affidavit evidence in coming to my conclusion in paragraph 34 about records being deleted or destroyed.

[55] Accordingly, I will reconsider the final order and order the police to provide affidavit evidence about the possibility that the responsive records identified in the interim order no longer exist, in accordance with the original terms of provision 3 of the interim order.

[56] I find that the remainder of the appellant's reconsideration request does not establish any of the grounds under section 18.01 of the *Code* for reconsideration of the final order. Namely, the remainder of the appellant's reconsideration representations do not address whether there has been a fundamental defect in the adjudication process, a jurisdictional defect, or a clerical error, accidental error or omission or other similar error in the decision. The remainder of the appellant's representations, instead, contain a series of complaints that he has about the police and the IPC that are unrelated grounds in section 18.01 to reconsider the terms of the final order.

ORDER:

1. I allow the appellant's reconsideration request as it relates to my finding in paragraph 34 of the final order.
2. In accordance with the terms of the interim order, I order the police to provide the IPC and the appellant with an affidavit by **July 27, 2021** as to whether it is possible that responsive records existed but no longer exist in:
 - the police email and network accounts containing the key words "Shanghai" or "Combined Forces Asian Investigation Unit," and covering the time period March 1, 2001 to September 6, 2017; and,
 - the Office of the Chief of Police.

If responsive records existed but no longer exist, the police must provide details in its affidavit as to when such records were destroyed and any relevant record maintenance policies and practices, such as evidence of retention schedules.

3. The appellant is to provide me with any response he has to the police's affidavit by 30 days from the date of his receipt of the police's affidavit.
4. I remain seized of this appeal to deal with any issues arising from the police's affidavit and the appellant's response to this affidavit.

Original signed by: _____
Diane Smith
Adjudicator

_____ June 24, 2021