Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-4003-R

Appeal MA20-00465

Toronto Police Services Board

January 27, 2021

Summary: The appellant requested a reconsideration of Order MO-3960. In that order, the adjudicator found that the records at issue did not fall within the scope of the access request at issue in the appeal and were also the subject of the previous proceedings of this office. The doctrine of issue estoppel was found to apply and the appeal was dismissed. The appellant requested reconsideration of the adjudicator's finding on the basis that there were fundamental defects in the adjudication process, other jurisdictional defects and other errors in the decision. He also alleges bias. In this Reconsideration Order, the adjudicator finds that the appellant has not established bias or a reasonable apprehension of bias and that the appellant's arguments amount to a re-arguing of the appeal. He denies the reconsideration request.

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

Cases Considered: *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC).

Orders Considered: Orders MO-2227, MO-3960, PO-2538-R and PO-3062-R.

BACKGROUND:

[1] The Toronto Police Services Board (the police) received the following access request from the appellant on December 1, 2010 (the 2010 request), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*):

> I am requesting access to and copies of all personal records through [*MFIPPA*] as an UPDATE from my request received 17 October 2003

> [specified request] of copies of all written and electronic records, including all log books, flipbooks, notebooks, files, telephone messages, inter and intra office emails and Outlook Express records, or any similar proprietary internal or external communication system used by [the police] in whatever format, of Officer #[specified badge number] or "[named police officer]". This will include all internal or external records, of any and all sorts and formats of communication between "[named police officer]" and Officers of the Hamilton Wentworth Police Service, Correctional Service of Canada and the National Parole Board, and all revised and altered "police occurrence" reports relative to me alleged to have been authored by "[named police officer]". My request will also include all personal references and documentation in Internal Investigation File [specified number].

[2] As set out in the body of the access request, the 2010 request was an update of a request the appellant made in 2003.

[3] The 2010 request and other matters raised by the appellant, including reasonable search, were the subject of my Orders MO-2841-I, MO-3107-F, MO-3467 and my Reconsideration Order MO-3651-R.

[4] In Order MO-3960, I found that the records located by the police did not fall within the scope of the 2010 request. Moreover, I found that these records were actually the subject of the previous proceedings of this office. Accordingly, I found that the doctrine of issue estoppel applied to them and dismissed the appeal. In addition, I wrote the following at the end of my order:

> [62] To the extent that the concerns the appellant sets out in the materials he provided relate to the determinations in my previous orders, including the adequacy of the search for records responsive to the 2010 request and the conduct of the police with respect to the 2010 request, those matters have been previously decided. I will not allow a collateral attack on my Orders MO-2841-I, MO-3107-F, MO-3467 and my Reconsideration Order MO-3651-R in this appeal, and will not revisit them here.
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> [63] To the extent that the appellant raises any new arguments regarding the possible application of sections 7, 11(a), 11(b) and 11(d) of the *Canadian Charter of Rights and Freedoms*[1], in support of his position that he should be provided with further records or be granted access to the withheld portions of the records at issue before me, because my orders have already addressed the 2010 request, and the issue of access to the

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[1] *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11. Section 7 reads: Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

> records that were the subject of the 2003 request has been previously decided in Order MO-1908-I and Reconsideration Orders MO-1968-R and MO-2953-R, I will also not address them here.

[5] After I issued Order MO-3960, the appellant sought a reconsideration of that decision on a number of grounds. The appellant also alleges that in deciding Order MO-3960 I was biased.

[6] In this order, I find that the appellant has not established bias or a reasonable apprehension of bias nor any other grounds for reconsidering my order. The request for reconsideration is denied.

RECORDS:

[7] At issue in the appeal were records identified in the police's index of records as Steno Notes, Interview Notes, Court Notes, Bank Summaries and an email.

DISCUSSION:

[8] The appellant asks that I recuse my-self from adjudicating this matter on the basis that I am biased, and that Order MO-3860 be reconsidered on the basis of bias or on one of the grounds set out in section 18.01 of the IPC's *Code of Procedure*.

Reconsideration criteria and procedure

[9] This office's reconsideration criteria and procedure are set out in section 18 of the *Code of Procedure*. Section 18 reads in part as follows:

> 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
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> (c) a clerical error, accidental error or omission or other similar error in the decision.
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> 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.
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> 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.

[10] 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*.[2] 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 such as [*Grier v. Metro Toronto International Trucks Ltd*.[3]].
>
> 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.

[11] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.[4] 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…

Analysis and finding

Allegation of a reasonable apprehension of bias

[12] As I discuss in more detail below, the law is clear that an allegation of bias or reasonable apprehension of bias is to be raised before the decision-maker in question.

[13] That said, bias, or any reasonable apprehension of bias, would be a ground for

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[2] 1989 CanLII 41 (SCC).
[3] 1996 CanLII 11795 (Div. Ct.).
[4] See, for example, Orders PO-3062-R and PO-3558-R.

reconsidering Order MO-3960. It would also be a ground for my recusing myself and the reconsideration request being assigned to another adjudicator.

[14] In administrative law, there is a presumption, in the absence of evidence to the contrary, that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.

[15] 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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> > 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:
> >
> > > …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.]

[16] The appellant provides voluminous submissions in support of his allegation that I, along with another named adjudicator of this office, are biased against him. I will only be addressing the allegations he has made against me.

[17] The appellant seeks a determination that Order MO-3960, along with any other order I have made in any appeal involving him, be reconsidered and that I recuse myself from dealing with any matters involving the appellant. He specifically asks that I recuse myself from addressing his request to reconsider Order MO-3960, and to have it referred to another adjudicator for a determination.

[18] In support of his allegation of bias, amongst other things, the appellant asserts that before I became involved in his appeals all previous orders had been issued in his favour and that I was not procedurally fair. He also submits that I unduly preferred the police by asking for and accepting clarification from them, improperly accepting hearsay evidence, making procedural determinations in their favour and ultimately deciding against him on a number of issues he raised in this appeal and in his previous appeals before me. He also points to an email communication he received from this office as further evidence of my "animus" (ill will) against him.

[19] Proceedings before the IPC are inquisitorial in nature[5]. On occasion further clarification is needed from a party, which occurred in this case. In all the proceedings before me involving the appellant to date, including the appeal that resulted in Order MO-3960, the appellant was provided ample opportunity to argue all the matters at issue in the appeal, to provide any materials he wished to rely upon and to respond to any matter raised by the police or any clarification the police provided. The appellant has also had the opportunity to challenge my previous orders and has done so. The fact that the appellant disagrees with my findings in Order MO-3960 is not evidence of a reasonable apprehension of bias on my part. Furthermore, neither procedural rulings "against" a party, nor an order dismissing an appeal, are, in and of themselves, evidence of bias.[6]

[20] With respect to the arguments regarding hearsay evidence, I note that the IPC as a tribunal is not bound by the traditional rules of evidence. Rather, it is open to adjudicators to rely on unsworn evidence, hearsay evidence, and opinions.[7] In fact, it is well established that hearsay evidence is generally admissible in tribunal proceedings,[8] so long as the adjudicator is alive to the "inherent unreliability"[9] of such evidence and accords it the appropriate weight.[10] Accordingly, I am not satisfied that my reliance on any unsworn evidence that I received in the appeal that gave rise to Order MO-3960, which would include the materials filed by the appellant, supports an allegation of bias.

[21] As set out above, section 18.08 of this office's *Code of Procedure* provides that 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. I made the decision in question and I am able to respond to the reconsideration request. I am also not satisfied that the appellant has established sufficient grounds for me to vary that process under section 2.04 of the *Code of Procedure* by recusing myself from considering his request for reconsideration.

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[5] See in this regard PO-1940.
[6] *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at paragraph 164, affirmed 2018 BCCA 264.
[7] *Cooper v. Canada (Human Rights Commission)*, 1996 CanLII 152 (SCC) at paragraph 60.
[8] Orders PO-2242 and MO-3404.
[9] *Dayday v. MacEwan*, 1987 CanLII 4325 (Dist. Ct.).
[10] *Krabi et al. v. Ministry of Housing*, 1989 CanLII 2079 (Div. Ct.).

[22] In that regard, the email that was sent to the appellant in response to his preliminary request that I not hear and decide the bias allegation, which he says also demonstrates bias on my part, provided as follows:

> It is generally established that a complaint of bias must be made to the adjudicator so the adjudicator may decide whether or not to disqualify himself or herself. If the adjudicator declines to do so it is to be presumed he or she will give a reason and in that event the question of bias may come before a Court, if necessary. See in this regard the discussion at paragraph 15 of *Mary-Helen Wright Law Corporation v British Columbia (Human Rights Tribunal)*, 2018 BCSC 912; *Envirocon Environmental Services, ULC v Suen,* 2018 BCSC 1367 at paragraph 87 and *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC). All these decisions are available on Canlii.

[23] In my view, this is and was an accurate statement of the law provided to the appellant to help him understand the procedure with respect to a bias allegation. My informing the appellant of the law is not evidence of bias or a reasonable apprehension of bias on my part.

[24] I find, therefore, that the appellant has fallen well short of demonstrating a reasonable apprehension of bias.

The request to reconsider Order MO-3960 on the basis of section 18 of the IPC Code of procedure

[25] The appellant provided lengthy representations in support of his reconsideration request, a great deal of which challenge my previous orders or relate to orders made on appeals adjudicated upon by other adjudicators. I have reviewed them but will not set them out in detail here and, except for the bias allegation which I addressed above, I find that the appellant's arguments related to my Order MO-3960 are a clear attempt to re-argue the appeal. The substance of the arguments the appellant makes on this reconsideration request are ones that he made, or could have made to me in the adjudication of the appeal. To the extent that the appellant has provided new information, this also is not a basis for reconsidering my decision. 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. In any event, I am not satisfied that any of the material provided would alter my determinations in Order MO-3960, or otherwise be a ground for reconsidering my order.

[26] While the appellant may disagree with my findings in Order MO-3960, he has not established that there is a fundamental defect in the adjudication process; some other jurisdictional defect in the decision; or a clerical error, accidental error or omission or other similar error in the decision. I find that the appellant has not established any of the grounds upon which I may reconsider Order MO-3960.

[27] Accordingly, the appellant's reconsideration request is denied.

ORDER:

The appellant's request to reconsider Order MO-3960 is denied.

Original Signed by: January 27, 2021

Steven Faughnan
Adjudicator