

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4271-R

Appeal MA21-00409

City of Toronto

Order MO-4256

November 14, 2022

Summary: The appellant requested a reconsideration of Order MO-4256 on the basis that there is a fundamental defect in the adjudication process. In this reconsideration order, the adjudicator finds that there was no defect in the adjudication process and the appellant has not established grounds for reconsidering Order MO-4256. The adjudicator denies the reconsideration request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 41(13); *IPC Code of Procedure*, sections 7.03, 7.04, 7.05, 18.01.

Order Considered: Order PO-2538-R.

Case Considered: *Chandler v Alberta Association of Architects* [1989] 2 SCR (S.C.C.).

OVERVIEW:

[1] Order MO-4256 disposed of the issues in an appeal arising from a request made to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester sought access to information about permits issued in relation to an asphalt plant and other structures at a specified municipal address.

[2] The city issued a decision granting the requester full access to responsive records. The requester, now the appellant, believes additional responsive records exist and appealed the city's decision to the Information and Privacy Commissioner (IPC). I conducted an inquiry into the appeal and issued Order MO-4256 on September 28, 2022. In Order MO-4256, I found that the city conducted a reasonable search for responsive records and dismissed the appeal.

[3] On October 12, 2022, I received a reconsideration request from the appellant. The appellant seeks a reconsideration of Order MO-4256 on the basis that there has been a fundamental defect in the adjudication process. The appellant submits that in Order MO- 4256 I did not address questions they raised during the appeal that had previously been raised with the city. In addition, the appellant requests a reconsideration of Order MO- 4256 because I did not share with them the city's reply representations.

[4] For the reasons that follow, I deny the appellant's reconsideration request.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order MO-4256?

[5] The IPC's reconsideration process is set out in sections 18.01 and 18.02 of its *Code of Procedure* (the *Code*), which applies to appeals under the *Act*. These sections state:

18.01 The IPC may reconsider an order or other decision where it has 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 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.

[6] Previous orders of the IPC have held that a fundamental defect in the adjudication process may include a failure to notify an affected party,¹ a failure to invite

¹ Orders M-774, PO-2879-R and PO-3062-R.

representations on the issue of invasion of privacy,² or a failure to allow for sur-reply representations where new issues or evidence are provided in reply.³ These examples demonstrate that for a party to establish grounds for reconsideration under section 18.01(a) of the *Code*, there must be evidence of a breach of natural justice.

[7] The reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, Senior 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 Association of Architects*.⁴ The senior adjudicator stated that the IPC's reconsideration criteria are based on the common law principles set out in the *Chandler* decision. In the case before him, the senior adjudicator concluded that the arguments made in support of the parties' request for reconsideration did not fit within the criteria in section 18.01 but amounted to "no more than a disagreement with [the] decision and an attempt to re-litigate the issues to obtain a decision more agreeable to [the parties]."

[8] Subsequent IPC orders have adopted this approach when deciding whether a reconsideration request establishes the criteria set out in section 18.01 of the *Code*.⁵

The appellant's reconsideration request

[9] The appellant does not address the reconsideration criteria in section 18.01 of the *Code*. They submit that there was a fundamental defect in the adjudication process because the questions that they submitted to the IPC in their appeal have not been answered or explained and they have reason to believe that all records have not been disclosed.

[10] The appellant states that there is no "acceptable evidence" from the city regarding the following questions:

- i. How the building permits could be issued when the asphalt plant sitting on this site did not comply with laws?
- ii. Why the asphalt plant was a temporary asphalt plant in 1999?
- iii. Why the building permit application for the scale house was made in 2001 while the asphalt plant was already operating in late 1999 or early 2000?
- iv. How the site fence/wall was built in 2016, if the city did not find any record of a permit?

² Orders M-774 and R-980023.

³ Orders PO-2602-R and PO-2590.

⁴ [1989] 2 SCR (S.C.C.).

⁵ For example, see Orders MO-3478-R, PO-3062-R and PO-3558-R.

- v. Why the city did not find any records relating to the community's letters, meetings etc. since 1999?

[11] The appellant submits that the community has had questions about the permit process in relation to the asphalt plant and the city has not explained how a municipal government can permit land use that does not comply with laws or go through a proper legal process.

[12] The appellant also states that I did not share the city's reply representations with them so that they did not have an opportunity to read the city's response. The appellant has provided a further copy of representations they made in the course of my inquiry, including further copies of the documents attached to the original representations; the Ontario Land Use Guideline D-6 1995 that deals with compatibility between industrial facilities and sensitive land uses and 1998 Zoning Bylaw M3.

Analysis and findings

[13] For the reasons that follow, I find that the appellant's reconsideration request does not establish any of the reconsideration criteria under section 18.01 of the *Code* and accordingly, there is no basis upon which to reconsider Order MO-4256.

Failure to answer the questions submitted by the appellant

[14] I have reviewed the representations made by the appellant in support of their request for a reconsideration of Order MO-4256. The questions raised by the appellant in their representations were also raised in the appellant's submissions as part of their appeal. These questions were also raised by the appellant with the city in the course of correspondence relating to the appellant's access request.

[15] I reviewed the appellant's questions in reaching my findings in Order MO-4256 and considered that they provided context for the appellant's broader concerns regarding the asphalt plant at the address specified in the request.

[16] However, I am not persuaded that the fact that I did not provide answers to the appellant's questions in Order MO-4256 is a defect in the adjudication process nor grounds for reconsideration under the other provisions of section 18.01 of the *Code*.

[17] The sole issue to be determined in the appellant's appeal was the reasonableness of the city's search for records responsive to their request. The request sought access to information pertaining to building permits and applications for an asphalt plant and other structures at a specified municipal address. Responsive records were located by the city and disclosed to the appellant in full. The questions posed by the appellant in their representations during the appeal provided context for the request and a basis for the appellant's belief that records existed in addition to those disclosed by the city.

[18] However, as I explain in Order MO-4256, when a requester believes that records exist in addition to those disclosed by an institution, the issue to be determined is the reasonableness of the institution's search for responsive records. The questions posed by the appellant leading them to conclude that, in their view, additional records *should* exist, were of limited assistance to my determination of the reasonableness of the city's searches.

[19] In Order MO-4256 I reviewed the evidence from the city, including affidavits from city employees about its permit processes and the steps that staff had taken to explain the permit process to the appellant. These affidavits were shared with the appellant. In addition, I reviewed the explanations provided to the appellant for why additional records may not exist. I determined that the city had discharged its duty under section 17 of the *Act*.

[20] I agree with the appellant's submission that the city did not provide evidence to answer the questions they raised in their correspondence and in their representations. The issues raised by the appellant in their questions were outside the scope of their appeal to the IPC arising from their access request under the *Act*. The compliance or otherwise of the asphalt plant and other structures with building permit and/or land use regulations or of works carried out at the specified municipal address were not issues to be determined in the appeal. These matters are outside the jurisdiction of the *Act*.

[21] In my view, the appellant's reconsideration request based upon resubmission of questions that have already been raised as part of the request process and the appeal, amounts to an attempt to re-argue their broader concerns regarding the compliance with building regulation of works carried out at the asphalt plant. The IPC is not the appropriate forum for the determination of the issues raised in the appellant's concerns.

[22] I find that the appellant's submission that I failed to provide answers to their questions in Order MO-4256 does not establish a fundamental defect in the adjudication process under section 18.01(a) of the *Code* or otherwise provide grounds for reconsideration.

Decision not to share the city's reply representations

[23] The appellant does not provide any basis for submitting that they were entitled to review the city's reply representations but states that since they did not have an opportunity to read the reply representations, "the city has not disclosed all information."

[24] I have considered whether the fact that I did not provide the appellant with the city's reply representations was a defect in the adjudication process.

[25] Section 41(13) of the *Act* states that,

The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 39(3) shall be given an opportunity to make representations to the Commissioner, but *no person is entitled to have access to or to comment on representations made to the Commissioner* by any other person or to be present when such representations are made [emphasis added].

[26] The *Act* is clear that parties are not entitled to access to representations made by other parties. Section 41(13) is tempered by the parties' right to procedural fairness in an appeal and the *Code* provides adjudicators with discretion to control the process when conducting inquiries at the adjudication stage. Section 7 of the *Code* states:

7.03 The Adjudicator begins the inquiry by sending a Notice of Inquiry to the party bearing the initial onus (the first party), as determined by the Adjudicator, inviting representations on the issues in the appeal.

7.04 Upon receipt of the first party's representations, the Adjudicator may, if he or she considers it necessary, send either the same or a modified Notice of Inquiry to the second party, inviting representations on the issues in the appeal.

7.05 Upon receipt of the second party's representations, the Adjudicator may, if he or she considers it necessary, send a modified Notice to the first party, inviting further representations in reply.

7.06 In an appeal involving an affected person or persons, the Adjudicator may, if he or she considers it necessary, send a Notice of Inquiry to the affected person or person when their interests are engaged.

7.07 The Adjudicator may provide some or all of the representations received from a party to the other party or parties in accordance with *Practice Direction* number 7.

[27] *Practice Direction 7* also provides for the sharing of representations during an inquiry and circumstances when a party may request to withhold representations from other parties because they meet the confidentiality criteria set out in the practice direction. This was not the case in this appeal, the city did not request that its reply representations be withheld from the appellant.

[28] The sole issue in the appellant's appeal was the reasonableness of the city's search for responsive records. The city was required to provide information to demonstrate that it had discharged its obligations under section 17 of the *Act* and I therefore sent a Notice of Inquiry to the city in the first instance inviting representations and evidence about its searches.

[29] The city provided its initial representations and affidavits sworn by the employees who were involved in responding to the appellant's request. The city's representations and the affidavits were shared with the appellant, who was invited to submit representations on the issues set out in a Notice of Inquiry and to respond to the city's initial representations.

[30] The appellant submitted representations. In these representations, the appellant repeated the questions that they had asked of the city in correspondence and have been repeated again in their request for reconsideration and that are set out above.

[31] The appellant's position was that the records disclosed by the city did not answer their questions and therefore additional records must exist to provide the answers and the information sought regarding the plant. In their representations, the appellant suggested that applications or/permits might exist relating to properties on the "other side" of the asphalt plant and the appellant provided alternate addresses.

[32] The appellant's representations were shared with the city and the city was given an opportunity to reply. In its reply representations, the city stated that it reiterated its position as set out in its initial representations.

[33] In addition, the city provided a response to the appellant's suggestion that searches using alternate addresses might provide the information sought by the appellant. The city stated that it had entered the alternate addresses into its databases and it received messages that these addresses were invalid. The city provided screen shots of these messages.

[34] I reviewed the city's reply representations. I decided that the city's reply representations did not raise any new issues or evidence relevant to the appeal to which the appellant should be provided an opportunity to respond.

[35] Regarding the alternate addresses suggested by the appellant, I did not consider this response by the city to have raised new issues or evidence. The issue before me concerned the reasonableness of the city's searches in relation to the municipal address specified in the appellant's request.

[36] The city bore the burden of demonstrating that it had expended reasonable effort to respond to the appellant's request. The city had replied to the appellant's representations by restating its position set out in its initial representations and addressing the appellant's suggestion regarding the alternate addresses.

[37] I followed the process set out in sections 7.03, 7.04 and 7.05 of the *Code* and upon receipt of the city's reply representations, I decided that I had the information that I needed to dispose of the issues in the appeal.

[38] In Order MO-4256, I summarised the city's reply representations. While I appreciate that the appellant has not seen the reply representations, the appellant has

not identified anything in the summary that they wish to comment upon.

[39] I am satisfied that there was no procedural injustice resulting from my decision not to share the city's reply representations with the appellant or to seek the appellant's comments upon them. I had received, from the parties, the information that I needed to adjudicate the sole issue in the appeal and my decision not to share the city's reply representations or provide the appellant with an opportunity to respond to them was one that I was entitled to make under the *Code*.

[40] Accordingly, I find that there was no fundamental defect in the adjudication process under section 18.01 of the *Code* arising from my decision not to share the city's reply representations or otherwise establish grounds for reconsideration.

[41] I refuse the appellant's request for reconsideration of Order MO-4256.

ORDER:

The appellant's reconsideration request is denied.

Original signed by: _____
Katherine Ball
Adjudicator

November 14, 2022 _____