

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-4404-R

Appeal PA21-00031

Order PO-4383

Seneca College of Applied Arts and Technology

June 13, 2023

Summary: The appellant submitted a request for reconsideration of Order PO-4383, claiming that there was a fundamental defect in the adjudication process. The appellant's position is that, on the issue of reasonable search, the adjudicator did not require all of the individual staff members of Seneca College of Applied Arts and Technology (the college) to submit sworn affidavits as evidence. Instead, the adjudicator accepted one affidavit, sworn by the college's Privacy Officer on behalf of the staff. In this reconsideration order, the adjudicator finds that the appellant has not established the ground for reconsideration in section 18.01(a) of the IPC's *Code of Procedure* and she denies the reconsideration request.

Statutes Considered: IPC *Code of Procedure*, section 18.01(a).

OVERVIEW:

[1] This decision addresses the appellant's request for a reconsideration of Order PO-4383, which disposed of an appeal to the Information and Privacy Commissioner of Ontario (the IPC) of an access decision made by Seneca College of Applied Arts and Technology (the college). The college received the appellant's request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records referencing terms related to a ridesharing service provided by or to the college.

[2] The college located records responsive to the request and granted partial access

to the records. The college withheld other information from the appellant, claiming the application of the mandatory exemptions in sections 17(1) (third party information) and 21(1) (personal privacy), as well as the discretionary exemption in section 18(1) (economic and other interests). The appellant filed an appeal of the college's access decision to the IPC. During the mediation of the appeal, the appellant stated that he believed further records exist. As a result, the reasonableness of the college's search for records responsive to the access request was added as an issue in the appeal.

[3] In Order PO-4383, I upheld the exemption in section 21(1), but not in sections 17(1) and 18(1) of the *Act*. I also upheld the college's search for records.

[4] The appellant subsequently submitted a reconsideration request to the IPC solely on the issue of the college's search for records, claiming that the ground for reconsideration under section 18.01(a) of the IPC's *Code of Procedure* (the *Code*) applies because there was a fundamental defect in the adjudication process. The appellant submits that I improperly accepted certain evidence with respect to the college's search for records in making my finding that its search for records was reasonable.

[5] For the reasons that follow, I find that the appellant has not established the ground in section 18.01(a) of the *Code* for reconsidering Order PO-4383, and I deny the reconsideration request.

DISCUSSION:

[6] The sole issue in this reconsideration order is whether the ground under section 18.01(a) of the IPC's *Code* has been established to reconsider my finding in Order PO-4383 that the college's search for records responsive to the access request was reasonable. The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code* which states, in part:

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;

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.

[7] Ordinarily, under the common-law principle of *functus officio*, once a decision-maker has determined a matter, he or she does not have jurisdiction to consider it

further.¹ I am *functus* unless the party requesting the reconsideration – in this case, the appellant – establishes one of the grounds in section 18.01 of the *Code*. The provisions in section 18.01 of the *Code* summarize the common law position acknowledging that a decision-maker has the ability to re-open a matter to reconsider it in certain circumstances.²

The appellant's reconsideration request

[8] The appellant cites the ground for reconsideration in section 18.01(a) – that there was a fundamental defect in the adjudication process in that I improperly accepted certain evidence with respect to the college's search for records. In particular, the appellant's position is that it was improper for me to find that it was sufficient for the college to provide evidence to the IPC on the search issue by way of one affidavit sworn by the college's Privacy Officer on behalf of the staff members who undertook the search for records. The appellant submits that I should have required each staff member who conducted the search to provide a signed and sworn affidavit to the IPC. The appellant further submits that the Notice of Inquiry that I sent both the appellant and the college during the inquiry of the appeal stipulates that evidence regarding an institution's search for records should be by way of a sworn affidavit signed by the person or persons who conducted the actual search, and that this requirement should not be left at the discretion of the adjudicator.

Analysis and findings

[9] The issue that is the subject matter of this reconsideration request is my finding in Order PO-4383 regarding the college's search for records. As set out at paragraphs 90 to 91 of that order, an adjudicator may order an institution to search for further responsive records if 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. I concluded that, based on the evidence provided by the parties, the college had conducted a reasonable search for records, stating:

The *Act* does not require the college to prove with absolute certainty that further records do not exist. However, the college must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In this case, I find that at least six employees knowledgeable in the subject matter of the request expended a reasonable effort to locate approximately 325 records that were responsive to the request. I also find that it was sufficient for the college to provide its evidence to the IPC by way of one affidavit sworn by the college's Privacy Officer on its behalf, as opposed to the appellant's

¹ *Functus officio* is a common law principle which means that, once a decision-maker has determined a matter, he or she has no jurisdiction to consider it further.

² Order PO-2839-R.

position which is that each staff member who conducted searches should have sworn separate affidavits and provided them to the IPC.

[10] The appellant claims that section 18.01(a) of the *Code* applies. Section 18.01(a) specifies that the IPC may reconsider an order where it is established that there is a fundamental defect in the adjudication process. Past orders have found that various breaches of the rules of natural justice respecting procedural fairness will qualify as a fundamental defect in the adjudication process for the purpose of section 18.01(a).³ Examples of such breaches would include a failure to notify an affected party,⁴ or to invite sur-reply representations where new issues or evidence are provided in reply.⁵ The appellant has not suggested that the above scenarios, or other procedural failures similar in nature to them, occurred during the inquiry that culminated in Order PO-4383, and I am not satisfied that there were any such defects in the process.

[11] The appellant argues that there was a fundamental defect in the adjudication process because I did not require all of the college staff who conducted the search for records to provide affidavit evidence and instead accepted the affidavit evidence of the Privacy Officer on the staff members' behalf.

[12] As part of the inquiry, I asked the college to provide affidavit evidence describing its effort to search for records that would be responsive to the appellant's request. The college elected to have its Privacy Officer swear the requested affidavit. The Privacy Officer was involved in responding to the appellant's request, coordinated the steps taken in the college's search effort, and could explain the scope of the search based on their own knowledge of responding to freedom of information requests and belief of the steps taken and by whom in the search for records. I accepted then, as I do now, that the college was in the best position to choose the appropriate person to provide evidence regarding its search.⁶ In this regard, in Order PO-4383, I stated:

In this case, I find that at least six employees knowledgeable in the subject matter of the request expended a reasonable effort to locate approximately 325 records that were responsive to the request. I also find that it was sufficient for the college to provide its evidence to the IPC by way of one affidavit sworn by the college's Privacy Officer on its behalf, as opposed to the appellant's position which is that each staff member who conducted searches should have sworn separate affidavits and provided them to the IPC.

[13] I am not persuaded that my reliance on the Privacy Officer's affidavit as evidence

³ Order PO-4134-I.

⁴ Orders M-774, R-980023, PO-2879-R and PO-3062-R.

⁵ Orders PO-2602-R and PO-2590.

⁶ See, for example, PHIPA Decision 119 in which the adjudicator denied a reconsideration request where the complainant had a similar argument regarding who should have submitted affidavit evidence to the IPC.

of the college's search, rather than requiring an affidavit from each college staff member who conducted a search for records, amounts to a fundamental defect in the adjudication process for the purpose of section 18.01(a) of the *Code*. Further, in my view, the issue the appellant raises regarding the affidavit evidence is not a breach of the rules of natural justice respecting procedural fairness and does not constitute a fundamental defect in the adjudication process, given that the adjudicator has the authority to control the inquiry process.

[14] For these reasons, I find that the appellant has not established that there was a fundamental defect in the adjudication process under section 18.01(a) of the *Code*, and I therefore deny the appellant's request that I reconsider Order PO-4383.

ORDER:

I deny the appellant's reconsideration request.

Original Signed By: _____

Cathy Hamilton
Adjudicator

June 13, 2023