

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4406-R

Appeal MA22-00731

Order MO-4280-F

Toronto Police Services Board

July 4, 2023

Summary: The appellant submitted a request for reconsideration of Final Order MO-4280-F, which upheld the police's search for records.

In his reconsideration request, the appellant claimed fundamental defects in the adjudication process, a lack of procedural fairness, jurisdictional defects, serious errors and omissions, and reasonable grounds to presume bias. In this reconsideration order, the adjudicator finds that the appellant has not established any of the grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure* and 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 17; *IPC Code of Procedure*, sections 18.01(a), (b) and (c).

Orders Considered: Orders MO-3841-I, MO-3956-F, MO-4065-R, MO-4196-I, MO-4280-F, MO-4260, PO-2358-R and PO-3062-R.

Cases Considered: *Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4th) 577 SCC.

OVERVIEW:

[1] This order follows Final Order MO-4280-F (the second final order), in which I upheld the police's search following Interim Order MO-4196-I (the second interim order). The second interim order was issued further to Reconsideration Order MO-4065-

R (the first reconsideration order).

[2] The first reconsideration order dealt with the appellant's request for a reconsideration Final Order MO-3956-F (the first final order). This was preceded by Interim Order MO-3841-I (the first interim order), which I determined had been the subject of a reconsideration request that resulted in a reconsideration decision letter order (the letter order).

[3] These five previous orders and the letter order concern the Toronto Police Services Board's (the police) search for certain records responsive to the appellant's request for records related to meetings held between the Toronto Police Service - Detective Bureau, the Combined Forces Asian Investigation Unit, and the Shanghai Municipal Public Security Bureau.

[4] Specifically, the appellant had 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, and 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.

[5] The police's decision letter stated that no responsive records existed. The appellant was dissatisfied with the police's decision and appealed it to the IPC. Appeal file MA17-8- 2 was opened and a mediator was appointed to attempt resolution of the issues in the appeal.

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

[7] During mediation, the police issued a revised decision letter dated September 6, 2017 to the appellant setting out the results of the further searches conducted at the mediation stage and disclosed records to the appellant.

[8] Mediation did not resolve this appeal and the appellant confirmed that he wanted to proceed to adjudication on the issues of search and access to severed information. An adjudicator decided to conduct an inquiry.

[9] After the exchange of representations, an adjudicator issued the first interim order. In that order, concerning the police's search for records, the 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 for two items (the two items) as follows:

- 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 [for March 1, 2001 until September 6, 2012].

[10] This adjudicator ordered the police to provide representations on the specific details of the searches they conducted.¹

[11] The police conducted the searches as ordered in the first interim order and additional records were located. The police issued two decisions letters, as they had conducted the searches separately for service-wide email and for network accounts. (The appellant also sought a reconsideration of the first interim order, which the adjudicator denied by letter order.)

[12] The appeal was then assigned to me to continue the inquiry. After reviewing all the file material and representations, I issued the first final order, in which I upheld the police's search in response to the first interim order as reasonable, and dismissed the appeal.

[13] The appellant then filed a request to have both Interim Order MO-3841-I (the

¹ The adjudicator also upheld the police's decision to withhold one discrete portion of a one-page note under the discretionary personal privacy exemption at section 38(b) of the *Act* and upheld the police's decision to withhold portions of a memorandum notebook page on the basis they are not responsive to the appellant's request.

first interim order) and Order MO-3956-F (the first final order) reconsidered. Appeal file MA20- 00444 was opened for this purpose.

[14] After review of the appellant's reconsideration request representations, I issued Reconsideration Order MO-4065-R (the first reconsideration order), in which I denied the appellant's reconsideration request of the first interim order on the basis that the appellant had already sought a reconsideration of the interim order and the previous adjudicator had denied this request by letter order dated October 16, 2019.²

[15] I did, however, allow the appellant's reconsideration request of the first final order (MO-3956-F), in part. I found that there was an error or omission in the first final order, as I had not recognized that the police had not addressed their retention of records in their affidavit made in response to the first interim order. I found that this finding constituted an omission or other similar error under section 18.01(c) of the IPC's *Code of Procedure* (the *Code*).³ I ordered the police to provide affidavit evidence to the IPC and the appellant about their retention of responsive records.

[16] In response, the police provided affidavit evidence on their retention of responsive records.

[17] I then invited the appellant to respond to the police's affidavit. The appellant provided representations challenging the information in the police's affidavit, disputing that the police had provided the requisite affidavit evidence as to whether further responsive records possibly existed but no longer exist.

[18] In Interim Order MO-4196-I (the second interim order), I found that the police had not complied with the relevant order provision in Reconsideration Order MO-4065-R (the first reconsideration order), as they had not adequately explained whether it was possible that records responsive to the two items existed but no longer existed. I ordered the police to provide additional evidence on their retention of records responsive to the two items ordered to be searched for in the first interim order (Interim Order MO-3841- I).

[19] The police then provided a letter explaining, clarifying and detailing their retention of the responsive records at issue with reference to the attached affidavit they had provided previously.

[20] In response, the appellant provided a lengthy 67-page response, in which he claimed that the police had not complied with the terms of the second interim order,

² I also found in the first reconsideration order that, in any event, the appellant's reconsideration request did not address the actual terms of the first interim order as they relate to the reconsideration grounds set out in section 18.01 of the *Code*.

³ Section 18.01(c) of the *Code* reads:

The IPC may reconsider an order or other decision where it is established that there is:
a clerical error, accidental error or omission or other similar error in the decision.

Interim Order MO-4196-I, and also appeared to challenge all of the previous orders issued in this appeal.

[21] I then issued the second final order, MO-4280-F, in which I found that the police had complied with the order provisions of the first reconsideration order, as directed in the second interim order, and I upheld the police's search for responsive records and dismissed the appeal.

[22] Following the issuance of the second final order, the appellant filed another reconsideration request and this appeal, Appeal file MA22-00731, was then opened. The second final order (MO-4280-F) is the only order that is properly the subject of this reconsideration request, as the appellant has already provided representations on the earlier orders and has made reconsideration requests of the other orders issued as to the any errors or omissions or jurisdictional or other defects in the prior orders, all of which is described above or in more detail in the orders themselves.

[23] In this order, I deny the appellant's reconsideration request of the second final order.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Final Order MO-4280-F?

[24] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code*. Section 18 reads, in part, that:

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 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.

[25] 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.⁴ 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.⁵

The appellant's reconsideration request

[26] The appellant provided 27 pages of argument in his reconsideration request, which I summarize below.

[27] The appellant cites all three grounds for reconsideration in section 18.01, claiming that:

... there were fundamental defects in the adjudication process, a lack of procedural fairness, jurisdictional defects, there were serious errors and omissions, and there are reasonable grounds to presume bias.

[28] The appellant claims that the second final order should have dealt with more than the reasonable search issue but should have dealt with access to information withheld from the records that were originally located by the police.

[29] He challenges all of the findings in the previous five orders that upheld the searches conducted by the police, starting with those made in the first interim order. He provided extensive submissions as to why the first interim order in particular was erroneous.

[30] He submits that the second final order failed to recognize that the second interim order was not complied with as the police did not provide an affidavit as ordered in the second interim order.

[31] He challenges the assignment of me as the adjudicator who adjudicated the last 4 orders and claims that the adjudicator who issued the first interim order (followed by a letter order dismissing his reconsideration request of the first interim order) should have done the last 4 orders. He indicates it was not fair to the processing of his appeal that multiple individuals (from Intake, Mediation and Adjudication) dealt with his appeal at the IPC.

[32] He also challenges my finding that the previous adjudicator considered his reconsideration request of the first interim order by issuing a letter order to him dismissing this request. He also disputes the characterization of his letter to the previous adjudicator disputing the findings in the first interim order as a reconsideration

⁴ *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.

⁵ Order PO-2839-R.

request.

[33] He further indicates that the police should have provided the IPC with an index of records even when their searches yielded no responsive records.

[34] He submits that neither myself, nor the previous adjudicator that issued the first interim order, read the entirety of his representations.

[35] Regarding his claim of bias, which appears to pertain to the second final order, he states:

Order MO 4280-F consists of 17 pages and 53 paragraphs, the majority of which are either self-reflective by the Adjudicator on the prior orders issued (As reported above in "jurisdictional errors", these include improper reporting of the decisions of former Adjudicator [name] as at paragraph 11, 14 and 49), or are multi-page repetitions of past police Decision letters and affidavits which are reproduced in full, taking up most of the 17 pages.

...there is nothing in the text of the Order recording a position of the Appellant that is not adversely filtered and tainted...

[T]here is no independent voice of the Appellant. The Adjudicator dismisses the submission peremptorily as "a rehash of grievances against the Police". Even if it was a "rehash", the reasonable bystander could be asked "OK, but what are the positions that are being "rehashed" and what are "the grievances against the Police?" ...

Findings

[36] The reconsideration process in section 18 of the IPC's *Code of Procedure* is not intended to provide parties who disagree with a decision a forum to re-argue their case.

[37] 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*.⁶ Regarding the reconsideration request before him, he 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

⁶ [1989] 2 SCR 848 (SCC).

out in *Chandler* and other leading cases such as [*Grier v Metro Toronto Trucks Ltd.*].⁷

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.

[38] Subsequent IPC orders have adopted this approach.⁸ 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 information in records at issue in that appeal. In determining 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*, Adjudicator Loukidelis wrote that:

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...

[39] I accept and adopt this reasoning here.

[40] For me to reconsider the second final order, the appellant's request must fit within one of the three grounds for reconsideration in section 18.01 of the *Code*.

[41] Section 18.01(a) of the *Code* 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).⁹ Examples of such breaches would include a failure to notify an affected party,¹⁰ or to invite sur-reply representations where new issues or evidence are provided in reply.¹¹

[42] Section 18.01(b) relates to whether an adjudicator has the jurisdiction under the Act to make the order in question. An example of a jurisdictional defect would be if an adjudicator ordered a body that is not an institution under the Act to disclose records.

⁷ 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).

⁸ See, for example, Orders PO-3062-R, PO-3558-R and PO-4004-R.

⁹ Order PO-4134-I.

¹⁰ Orders M-774, R-980023, PO-2879-R and PO-3062-R.

¹¹ Orders PO-2602-R and PO-2590.

Section 18(1)(c), meanwhile, allows for reconsideration of an order that contains clerical or other similar errors or omissions.

Context

[43] As summarized above, this reconsideration request arises from the police's revised decision letter dated September 6, 2017, which was appealed to the IPC. As set out in the first interim order, at issue in the appeal were:

- The police's severances to one page of a note authored by a named police officer, and to a memorandum notebook of the same officer; and,
- The police's search for responsive records as the appellant believed that there exist additional responsive records not located by the police.

[44] As noted above, in the first interim order, the adjudicator upheld the police's decision to withhold one discrete portion of a one-page note under section 38(b) of the *Act*. She also upheld the police's decision to withhold portions of a memorandum notebook page on the basis they were not responsive to the appellant's request.

[45] In that order, the adjudicator also upheld the police's search for records reasonably related to the appellant's request, with the exception of their search of police email and network accounts, and of the Office of the Chief. She ordered the police to conduct another search for responsive records in:

- the 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.

[46] The adjudicator in the first interim order ordered the police to provide representations in the form of an affidavit that included the following information:

- the names and positions of the person(s) who conduct the searches (or who are contacted in the course of the searches);
- 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.

[47] In the first final order, after considering the police's evidence on the searches they conducted in response to the first interim order, I upheld the police's searches for records responsive to the first interim order provisions as reasonable.

[48] As a result of the appellant's reconsideration request to reconsider the first final order, in the first reconsideration order, I did not reconsider my decision in the first final order that the police's searches for the records set out in the order provisions of the first interim order was reasonable, other than finding that the police had not provided the requisite evidence as to:

- 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.

[49] In the second interim order, I was not satisfied that the police had provided this evidence as to their retention of responsive records as ordered to do so in the first interim order. However, in the second final order, I found that the police had provided the evidence required by the first interim order as to their retention of responsive records.

Discussion

[50] I disagree with the appellant that he is entitled to reconsideration of the findings made in all of the orders previous to this one. This current reconsideration request follows my determination in the second final order and, for the following reasons, pertains only to the second final order and not the prior orders described above.

[51] The appellant was fully aware of the issues being adjudicated upon prior to each of the five orders and one reconsideration decision letter order being issued and had ample opportunity to advance his arguments in each case. The appellant's concerns about the prior orders have been raised and addressed. As described above, each successive decision determined more issues that were the subject of the appeal, resulting in narrower issues to be resolved. The sole issue that remained to be adjudicated in the second final order was the police's compliance with the second interim order. Now, the sole issue remaining to be decided is whether the appellant has established grounds to reconsider the second final order.

[52] Regarding the appellant's complaint that multiple IPC staff were involved in his appeal at different stages of the appeal process, the appellant has not indicated clearly how that fits within the grounds set out in section 18.01 of the Code as they relate to the second interim order such that I should reconsider my finding in the second final order that the police have complied with the terms of the first reconsideration order.

[53] Concerning the only order that is the subject of this reconsideration request, the second final order (being the last order issued in this appeal), the appellant has raised two specific issues that he says support his request: the lack of an affidavit in response to the second interim order; and, my perceived bias as reflected in the second final order. I will deal with each in turn.

[54] In the second final order, I dealt extensively with the affidavit evidence provided by the police. I discussed in detail their affidavit and supporting evidence provided in response to the second interim order (which is the order that followed the first reconsideration order). This affidavit (which was also provided in response to the first reconsideration order) and supporting evidence (a detailed letter explaining the affidavit and their compliance with the first reconsideration order) were provided to the appellant when I sought his representations prior to issuing the second final order.

[55] In the second final order, I found that the police had complied with the terms of the first reconsideration order and I dismissed the appeal. I reject the appellant's suggestion that I failed to consider that the police had not provided affidavit evidence as required by the second interim order and in any event find that this submission about a lack of an affidavit is not grounds to reconsider the second final order.

[56] The appellant also claims that I was biased based on his belief that I did not read his representations in their entirety and did not refer to them in sufficient detail in the second final order. Again, I disagree with the appellant that this constitutes grounds for a reconsideration of the second interim order.

[57] The appellant filed more than 60 pages of representations prior to the issuance of the second final order. As is clear from the second final order, I did refer to the appellant's representations when the arguments addressed the issue being adjudicated upon by me. By the time of the second final order, the very narrow issue before me was whether the police had complied with the second interim order. Only those portions of the appellant's representations that pertain to that issue were therefore included in the second final order.

[58] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, the Supreme Court of Canada reaffirmed its finding in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* that an administrative decision maker is not required to explicitly address every argument raised by the parties. Moreover, the fact that a decision maker's reasons do not address all arguments will not, on its own, impugn the validity of those reasons or the result.¹²

[59] Based on my review of the entirety of the appellant's current 27-page reconsideration request, I find that the appellant has not provided sufficient evidence of

¹² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65; and *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708.

a reasonable apprehension of bias. The basis for this concern appears to relate to his concern about why I did not refer at great length to his representations and, specifically, because the second final order was only 53 paragraphs and 17 pages in response to his 67-page representations. To the extent that the appellant's argument is that my approach to summarizing only the relevant portions of his arguments reveals a reasonable apprehension of bias, I reject it.

[60] I find that the appellant has not established any of the grounds for reconsideration on the basis that not all of his 67-page representations were read or considered by me.

[61] In the second final order, which is the subject of this reconsideration order, I determined that the police had complied with the order provisions of the first reconsideration order.

[62] In the second final order, I dismissed the appeal as I found that:

...in compliance with the order provisions in the reconsideration order, [the police] provided sufficient evidence about the possibility that records responsive to the two items at issue exist. Considering the police's evidence and their efforts to search to date, I am persuaded that further searches will not yield further records responsive to the two items.

[63] I find that the appellant has not specifically addressed my findings in the second final order in his reconsideration request. His representations do not clearly address with respect to the finding in the second final order regarding the retention of responsive records, whether there has been a fundamental defect in the adjudication of his appeal or a jurisdictional defect.

[64] As well, although his reconsideration request claims clerical or similar errors, the appellant has not identified any such errors or omissions with respect to my finding in the second final order. Rather, the appellant's representations list a series of complaints that he has about the police and the IPC that, in my view, are unrelated to the grounds in section 18.01 of the *Code* for reconsideration of the second final order.

[65] The appellant also makes extensive submissions as to there being a jurisdictional defect because of the replacement of another adjudicator in the continuation of this appeal (myself) after the first interim order, and points out that in the first interim order the previous adjudicator indicated that she was "...seized of this appeal to address matters arising from order provisions 3 and 4." As set out above, the reconsideration request before me is about the second final order, not prior decisions or issues in the multiple related orders. These arguments are an attempt to re-argue issues previously decided and I decline to consider them further.

[66] I find that the appellant's current reconsideration request is an attempt to re-argue his appeal and to repeat his complaints about the police and the IPC that were

not the subject of the second final order.

[67] Specifically, in the reconsideration request that is the subject of this reconsideration order, the appellant seeks:

... a provision that will direct the Toronto Police to comply with section 4(1) and 36(1) of the MFIPPA [access rights], fulfill the outstanding Order of [the previous adjudicator] at provision 5 of Order MO 3841-I [the first interim order] and encourage them to "play by the rules" of the MFIPPA and respect the dignity and authority of the [IPC].^[13]

[68] Provision 5 of the first interim order provided that:

If the police locate additional records as a result of these further searches, they must issue a decision to the appellant in accordance with the Act regarding access to such records. The police are to treat the date of this order as the date of the request. I direct the police to provide me with a copy of this decision.

[69] As set out in the first final order, following the first interim order, the police conducted the searches as ordered in Interim Order MO-3841-I and additional records were located by the police. All the responsive information in these records was disclosed to the appellant.

[70] The first final order upheld the police's search for records as ordered in the first interim order. The only issue in the orders subsequent to the first final order was the police's evidence as to their retention of responsive records, which I was satisfied with in the second final order.

[71] In summary, I decline to reconsider any of the previous orders made in this appeal to order the police to search for further records as requested by the appellant in his reconsideration request. Furthermore, I am not satisfied that the appellant's reconsideration request establishes a relevant ground for reconsideration in section 18.01 of the *Code*. I therefore deny the appellant's reconsideration request.

¹³ Sections 4(1) and 36(1) of MFIPPA read:

4 (1) Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

36 (1) Every individual has a right of access to,

(a) any personal information about the individual contained in a personal information bank in the custody or under the control of an institution; and

(b) any other personal information about the individual in the custody or under the control of an institution with respect to which the individual is able to provide sufficiently specific information to render it reasonably retrievable by the institution.

ORDER:

I deny the appellant's reconsideration request of the second final order.

Original Signed by: _____

Diane Smith
Adjudicator

_____ July 4, 2023