Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-3588-R

Appeals MA17-125 and MA17-137

Township of Carling

April 10, 2018

Summary: The appellant submitted two requests under the *Act* for records relating to Shore Road Allowances and an identified property. The township denied the appellant access to the responsive records, claiming his requests were frivolous or vexatious under section 4(1) of the *Act*. The appellant appealed the township's decisions. In Order MO-3570, the adjudicator did not uphold the township's decisions and ordered it to issue access decisions to any responsive records to the appellant. In this order, the adjudicator denies the township's request for a reconsideration of Order MO-3570.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 4(1), section 5.1 of Regulation 823 under the *Act*.

Orders and Investigation Reports Considered: MO-3570, PO-2538-R

Cases Considered: *Chandler v. Alberta Assn. of Architects*, [1989] 2 SCR 848

OVERVIEW:

[1] The Township of Carling (the township) asked that I reconsider my finding in Order MO-3570 that the appellant's requests are not frivolous or vexatious under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] Order MO-3570 arose from two requests to the township under the *Act* for records relating to Shore Road Allowances and an identified property. The township denied the appellant access to records responsive to his requests. The township advised the appellant that his requests were frivolous or vexatious within the meaning of section

4(1) of the *Act*. The appellant appealed the township's decisions. In Order MO-3570, I did not uphold the township's decision that the appellant's requests are frivolous or vexatious within the meaning of section 4(1). The township now seeks a reconsideration of this aspect of the order. The township claims that there "may have been a disconnect from the information provided to the mediator and what was reviewed in the adjudication process leading to an error or omission in the decision." The township submits this "disconnect" led to an improper understanding of two reasons why the township claimed the appellant's request was frivolous or vexatious: first, the appellant made his requests in bad faith and second, processing the requests will create severe hardship for the township.

[3] In the discussion that follows, I find the township did not establish any basis upon which I should reconsider Order MO-3570. Accordingly, I deny the township's reconsideration request.

DISCUSSION:

Frivolous or vexatious requests

[4] The sole issue considered in Order MO-3570 was whether the appellant's access requests were frivolous or vexatious under section 4(1)(b) of the *Act*. Section 4(1)(b) reads,

> 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,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[5] Section 5.1 of Regulation 823 of the *Act* elaborates on the meaning of the terms *frivolous* and *vexatious*. Section 5.1 states,

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[6] Section 4(1)(b) provides institutions with the summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications

on the ability of a requester to obtain information under the *Act*. Therefore, an institution should not exercise the discretionary power lightly.[1]

[7] An institution bears the burden of proof to substantiate its decision to declare a request to be frivolous or vexatious.[2]

Order MO-3570

[8] In Order MO-3570, I considered the grounds for a frivolous and vexatious claim and the township's representations. I found that the township did not establish that the appellant's requests were frivolous or vexatious.

[9] The township submitted that the appellant's requests were frivolous or vexatious for the following reasons:

- Threatening comments made by the appellant directly to the township's Chief Building Official indicating that if the township did not help the appellant there would be repercussions and hardship to the township
- The appellant's actions in trying to use the township to force another property owner into selling their property
- The requests are too broad in scope and the appellant "fully knew" this would cause hardship on the township given its size[3]

The township also summarized the appellant's involvement with the township and his application to purchase a Shore Road Allowance from the township. Finally, the township described the records it disclosed to the appellant, including zoning by-laws, links to the township's minutes and agendas and links to all township by-laws.

[10] I reviewed the township's representations and found that it did not provide sufficient evidence to demonstrate that the appellant's requests were frivolous or vexatious. The township did not provide me with sufficient evidence to support a finding that the appellant's requests fall within a pattern of conduct that amounts to an abuse of the right of access. While the township claimed the requests would create hardship on the township's resources given its small staff size, I found that it did not provide me with sufficient evidence to demonstrate that the requests give rise to a pattern of conduct that would interfere with its operations. Finally, while the township provided a history of the appellant's behaviours in relation to his application to purchase a Shore Road Allowance, I found this history was "an insufficient basis for a finding that the appellant made his request in bad faith."[4] Accordingly, I ordered the township to issue access decisions to the appellant respecting access to any responsive records.

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[1] Order M-850.
[2] *Ibid.*
[3] Order MO-3570 at para 23.
[4] *Ibid*. at para 33.

Reconsideration process

[11] The IPC's reconsideration process is set out in section 18 of the *Code of Procedure*. The relevant portions of section 18 read 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
>
> (c) a clerical error, accidental omission 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.

The township's reconsideration request

[12] While the township does not identify the specific grounds for reconsideration, it appears that the township claims the application of section 18.01(a) or (c) of the *Code of Procedure*. The township submits that there may have been a "disconnect" between the information it provided to the mediator and what I reviewed during the inquiry which may have lead to an error or omission in the decision.

[13] The township continues to assert the appellant submitted his requests in bad faith. The township submits that the appellant's motive in making his requests is for a purpose other than to obtain access and he "precisely told an official that was his objective."

[14] In addition, the township submits that complying with the order and processing the request will create severe hardship to it. The township states that it employs three administrative staff members who are responsible for "all the matters the township deals with." The township submits that a review of only the 300 Shore Road Allowance case files identified during mediation would produce more than 17,000 records. The township submits it would take a trained employee over a year to sort, review, scan, redact and disclose the records responsive to this part of the appellant's request. The township submits it would have to hire and train an employee to fulfil this part of the request at significant cost to the township and its constituents. Furthermore, the township submits that even if it charged $30 per hour for these services,[5] it would still bear significant costs in fulfilling the requests. The township submits, "this was all explained to the mediator."

[5] See section 45 of the *Act* and section 6 of Regulation 823.

Analysis and Findings

[15] First, I advise the township that mediation and adjudication are two distinct stages of the appeals process. The Notice of Inquiry I sent to the township on November 17, 2017 explained the frivolous or vexatious issue to the township and posed a number of questions for the township to respond to. The Notice of Inquiry asked the township to explain its position that there are *reasonable grounds* for its conclusion that the appellant's requests are frivolous or vexatious. Further, the township was notified that it bore the burden of proof to substantiate its decision to declare the appellant's request to be frivolous or vexatious. In addition, the cover letter to the Notice of Inquiry clearly advised the township that "the representations you provide to this office should include *all of the arguments, documents and other evidence* you rely on to support your position in these appeals" (emphasis added).[6]

[16] The inquiry documents clearly directed the township to make submissions and to provide all relevant arguments, documents and evidence to support its frivolous or vexatious claim. The inquiry documents did not indicate that I would review the information the township provided at mediation during my written inquiry. The inquiry documents also asked the township to identify whether its written representations could be shared with the appellant.[7] The township submitted representations on November 21, 2017. I reviewed the township's representations and determined it was not necessary to share them with the appellant because the township did not provide sufficient evidence to support a finding that the appellant's pattern of conduct amounted to an abuse of the right of access.

[17] If the township had wished to rely on all the information it provided to the mediator, it should have clearly stated this in its representations. In any case, I confirm that I reviewed the information the township provided to the mediator[8] when making my decision in Order MO-3570. I refer the township to paragraph 25 of Order MO-3570, in which I stated that I reviewed the chart the township provided to the mediator relating to Shore Road Allowances. However, upon review of the township's materials, I found that they did not establish that the appellant's requests were frivolous or vexatious within the meaning of the *Act*.

[18] In the circumstances, I find the township has not established a fundamental defect in the adjudication process based on its position that there was a "disconnect" between the mediation and adjudication processes.

[19] With regard to the other issues raised by the township, I confirm that the reconsideration process outlined in the IPC's *Code of Procedure* is not intended to provide a party with the opportunity to re-argue their case. In Order PO-2538-R, the adjudicator reviewed the case law regarding an administrative tribunal's power of

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[6] Cover letter to the Notice of Inquiry to the township dated November 17, 2017.
[7] Please refer to Practice Direction Number 7 of the IPC's *Code of Procedure* for the IPC's representations sharing procedure.
[8] That is, any information that was not mediation privileged information.

reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Assn. of Architects*.[9] In Order PO-2538-R, the adjudicator 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 Trucks.[10]
>
> 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 solid policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[20] The IPC adopted and applied this approach in subsequent orders[11] and I will do so in this reconsideration. The township submits I made an error or omission when I did not find that the appellant submitted his requests in bad faith. The township asserts the appellant made his requests in bad faith in its reconsideration request. Specifically, the township now states the appellant informed an official he intended to cause the township difficulties prior to submitting his access requests.

[21] As noted above, the township provided representations during the inquiry in support of its position that the appellant submitted his requests in bad faith. The township also included a history of its involvement with the appellant in its representations. However, the township did not refer me to the material it now provides about the alleged statements made by the appellant regarding his purpose in submitting these requests.

[22] I determined that "the township did not demonstrate that the appellant made his requests in bad faith" at paragraph 33 of Order MO-3570. Further, I noted, "the fact that there is some history between the township and the appellant is an insufficient basis for a finding that the appellant made his request in bad faith."[12]

[23] On my review of the township's submissions on bad faith in its reconsideration request, I find they re-argue the township's position that the appellant was acting in bad faith when he made his requests for access and now provide additional information in support of its position. As noted above, a reconsideration is *not* an opportunity for a party to re-argue its position or provide additional arguments if the first ones are

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[9] [1989] 2 SCR 848.
[10] (1996), 28 OR (3d) 67 (Div. Ct.).
[11] For examples, see Orders PO-3062-R and MO-3542-R.
[12] Order MO-3570 at paragraph 33. See Order PO-3465 for a similar analysis.

unsuccessful. In my view, the township is doing just that.

[24] In addition to bad faith, the township submits the order will create severe hardship on the township. The township now provides a number of additional details to support its claim regarding the strain fulfilling the appellant's requests would put on its staff. The township also submits that conducting the search and preparing the records will result in financial strain. However, the township did not make these submissions or provide this evidence during the inquiry, even though the Notice of Inquiry expressly asked the township, "Are there reasonable grounds to conclude that the request is part of a pattern of conduct that would interfere with the operations of the institution? Please explain."[13] In its reconsideration request, the township submits these details regarding hardship were "all explained to the mediator." I reviewed the material the township submitted during mediation and none contain this information.

[25] As noted above, section 18.02 of the IPC's *Code of Procedure* reads, "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."

[26] In deciding Order MO-3570, I reviewed the township's arguments regarding the hardship fulling the request would cause to the township and found,

> The township submits the appellant submitted his requests knowing they would create hardship on the township given the small number of staff it employs. However, the township did not provide any further details regarding the number of staff it employs or the time and/or resources that would be required to respond to the appellant's requests. Further, the township did not provide me with any information describing how the appellant's requests might affect its staff's daily activities. Therefore, I find the township did not establish that the requests give rise to a pattern of conduct that would interfere with its operations, as contemplated by the frivolous or vexatious provision in the Act.[14]

[27] I reviewed the portions of the township's reconsideration request that include more details regarding the hardship fulfilling the requests will cause to the township. The township could have made these arguments during the inquiry stage, where I asked it to provide "all of the arguments, documents and other evidence you rely on to support your position in these appeals."[15] However, the township did not make these submissions to me. In the circumstances, I find that the township is re-arguing its position that the appellant's requests are frivolous or vexatious within the meaning of the *Act*, and providing additional evidence in support of its position. I confirm, again, that the reconsideration process is not an opportunity for the township to re-argue its position.

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[13] Page 6 of the Notice of Inquiry dated November 17, 2017.
[14] Paragraph 29 of Order MO-3570.
[15] Cover letter to the Notice of Inquiry to the township dated November 17, 2017.

[28] As a result, based on my review of the township's reconsideration request, I find there was no fundamental defect in the adjudication process, per section 18.01(a) of the IPC's *Code of Procedure*. In addition, I find there is no clerical error, accidental error or omission or other similar error in Order MO-3570, per section 18.01(c). Finally, I find there is no other jurisdictional defect in the order, per section 18.01(b). Overall, I find the township is attempting to re-argue its position in these appeals by providing further evidence in support of its position. As noted, this is not a sufficient ground for reconsideration.

[29] In conclusion, I find the township's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision and I deny the reconsideration request.

[30] As a final matter, I direct the township to paragraph 30 of Order MO-3570 which states,

> I note the Act provides a number of alternative measures to relieve an institution faced with a request that may affect its operations.[16] Specifically, I refer the township to the Act's fee provisions in section 45 and the related provisions in Regulation 823, which may provide some relief. The fee provisions of the Act support a user pay principle and the township could use these provisions to lessen any possible interference in responding to the appellant's request and achieve some cost recovery.[17] In addition, a time extension under section 20 of the Act may also provide some relief and assistance to the township.

These provisions remain available to the township. The township may rely on the fee and time extension provisions of the *Act* to alleviate the hardship that may result from fulfilling the appellant's requests.

ORDER:

1. I deny the township's reconsideration request.

2. I lift the interim stay of Order MO-3570 and order the township to issue access decisions to the appellant respecting access to records responsive to his two requests, treating the date of this reconsideration order as the date of the request.

Original signed by: April 10, 2018

Justine Wai
Adjudicator

[16] Orders M-906 and M-1071.
[17] Order M-1071.