

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-3751-R

Appeal MA16-83

Final Order MO-3532-F

The Corporation of the City of Oshawa

April 11, 2019

Summary: The appellant made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the materials contained on the F: drive of a city computer provided to a named investigator retained by the city. The city issued a decision stating that it has no records that respond to the request. The appellant appealed, claiming that the city had not conducted a reasonable search for records. In Interim Order MO-3493-I, the adjudicator ordered the city to conduct a further search for records. In Final Order MO-3532-F, based on information provided by the city, the adjudicator found that no further search should be ordered because the F: drive had been deleted and no backup had been made.

The appellant then made a request for reconsideration of Final Order MO-3532-F on the basis that the city had provided incorrect information about the existence of a backup of the F: drive. In this order, the adjudicator finds that in the inquiry leading to Final Order MO-3532-F, the city failed to provide information central to the issue to be decided, and that this constitutes a fundamental defect in the adjudication process. She allows the reconsideration request.

BACKGROUND:

[1] The appellant submitted a request to the City of Oshawa (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All materials contained on the F drive of the city owned computer provided to [a named investigator] during his investigation of [a particular matter].

[2] The city issued a decision stating that it has no available records that respond to the request. The appellant appealed the city's decision to this office.

[3] In Interim Order MO-3493-I, I found that the city had not conducted a reasonable search for records and I ordered it to conduct a further search. Specifically, I stated the following:

The city provided some information to the effect that the F: drive was never accessed or used by the investigator. While this is useful background information, I note that the appellant's request was for all materials on the F: drive. His request was not restricted to records on the F: drive that the investigator accessed or used.

According to the [city's Records and Information Analyst's] affidavit, she asked the city's IT branch for all records responsive to the appellant's request, and the IT branch advised her that it had no relevant records in its possession.

In my view, experienced personnel in the IT branch would be expected to be knowledgeable in the subject matter of the request, since the request was for records on a computer drive. However, nowhere in the analyst's affidavit does it state the experience or qualifications of the individual or individuals in the IT branch who informed her that no responsive records exist. More importantly, nowhere does the affidavit state that anyone in the IT branch actually conducted a search and if such a search was, in fact, conducted, who in the IT branch conducted the search and the steps involved in the search. The affidavit simply states that the IT branch advised that it had no responsive records.

In the Reply Notice of Inquiry sent to the city, I specifically asked the city to advise whether the city searched the F: drive. In response, the city referred back to the analyst's affidavit and stated that "therefore, the [IT branch] conducted a search of the F: drive and communicated its results that it had no relevant records". With respect, I do not read the analyst's affidavit as stating that the IT branch did, in fact, conduct a search. The affidavit states only that [the] IT branch advised that it had no responsive records. Moreover, the statement in the city's reply that "the [IT branch] confirmed no records existed on the F: drive" also does not indicate that the IT branch, in fact, searched the F: drive. It is, therefore, not clear that anyone in the IT branch actually conducted a search and if such a search was conducted, I have not been provided with the particulars of the search.

I acknowledge that, from the other evidence provided by the city, it is possible that no records exist. While the appellant points to the city clerk's May 30, 2013 email to the investigator as evidence that documents were placed on the F: drive, the city states that the reference to the F: drive in that email relates to the investigator's email account, not the F: drive. However, the city's explanation on this point lacks detail and is provided third hand, with the analyst having been provided this explanation by the clerk who was in turn informed of it by the IT branch. In any event, I am not satisfied, based on the information provided to me by the city, that a reasonable search has been conducted. I will, therefore, order the city to carry out a further search for responsive records and to provide information to this office regarding the results of its search.

[4] As a result of these findings, I ordered as follows:

1. I order the city to conduct a further search in response to the appellant's request. The search should be conducted by an experienced individual or individuals in the city's IT branch. I further order the city to provide me with an affidavit sworn by an individual in the IT branch who has direct knowledge of the search, including the following information:
 - The name(s) and position(s) of the individual(s) who conducted the search
 - The steps taken in conducting the search
 - The results of the search
 - If no records are located, a detailed explanation for why no records are located, given the contents of the city clerk's May 30, 2013 email.
2. I order the city to provide me with the affidavit by **October 5, 2017**.
3. If the city locates records as a result of its search, I order it to provide the appellant with an access decision in accordance with the requirements of the Act, treating the date of this order as the date of the request.
4. I remain seized of this appeal in order to deal with any outstanding issues arising from provisions 1 and 2 of this order.

[5] The city then provided me with two affidavits outlining the additional search: one sworn by the city's Records Information System Manager for City Clerk Services, and one sworn by the Systems and Security Operations Manager for Information Technology Services (the IT manager).

[6] The affidavits were brief. The IT manager stated as follows:

Regarding [the investigator's] account at the City of Oshawa, the account, mailbox, and (F:) drive were terminated upon completion of his work for the City.

There are no tapes which have a copy of his (F:) drive.

[7] The Records Information System Manager's affidavit stated:

The records provided to City Clerks Services by the Information Technology Services Department have been reviewed, and there is no way to determine which records were stored on [the investigator's] drive or elsewhere on his City issued computer or drives.

[8] In Final Order MO-3532-F, I upheld the city's further search, stating:

The affidavit provided by the IT manager states that the investigator's F: drive was "terminated" upon completion of the investigator's work for the city, and that no tapes exist that contain a copy of the F: drive. I understand this to mean that the F: drive was deleted and that no backup exists. I also understand the affidavit of the Records Information System Manager to mean that there is no other way to determine what the contents of the F: drive were before the F: drive was deleted.

Given this latest information, and without commenting on the propriety of the city having deleted the F: drive with no backup, I am satisfied that the city has made a reasonable effort to identify and locate responsive records. In light of the recent information, I am not satisfied that there is any reasonable basis for concluding that any responsive records exist. While the appellant submits that there is no evidence that the city searched the F: drive, I accept that the city cannot search the F: drive because it no longer exists.¹

[9] The appellant then submitted a request for reconsideration of Final Order MO-3532-F. The appellant explained that as a result of the city's response to a more recent access request, he had become aware that it appears that a backup of the investigator's F: drive was in fact made prior to the F: drive being deleted. Included in the records the city provided to the appellant in response to that access request was an internal email sent by the Records Information Systems Manager on October 1, 2013. That email states as follows:

¹ There is no suggestion in the parties' representations that the F: drive was deleted after the appellant submitted his access request. The city's affidavit states that the F: drive was deleted upon completion of the investigator's work for the city. The investigator's final report was completed in September 2013 and the appellant's access request was made in December 2015.

I have backed up the electronic content (email and F Drive) to external media.

You may proceed with whatever steps are necessary to terminate the account.

[10] I decided to invite representations from the city on the appellant's reconsideration request. The city provided representations, which were shared with the appellant in accordance with this office's *Practice Direction 7: Sharing of Representations*. The appellant provided reply representations.

[11] In this order, I find that the city failed to disclose relevant information during my inquiry and that this constituted a fundamental defect in the adjudication process. On that basis, I allow the reconsideration request.

DISCUSSION:

Reconsideration process

[12] This office's reconsideration process is 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:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or 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.

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.

Representations

The city's representations

[13] In my letter to the city inviting its representations on the reconsideration request, I asked the city three specific questions. The city responded to these questions

in its representations. The questions, and the city's responses, are as follows:

1. Was the investigator's F: drive backed up on external media as indicated in the October 1, 2013 email?

Answer: Yes, the email of October 1, 2013 accurately reflects actions undertaken by the Manager, Records Information Systems to copy files found on the F: drive and email account of the named investigator to external computer media on or about October 1, 2013. Prior to the closure of the system account, the [manager] was provided access to the investigator's email account and F: drive to secure any records relating to the investigation in fulfilment of the City's responsibilities to retain records pursuant to the *Municipal Act, 2001*, the *Municipal Freedom of Information and Protection of Privacy Act*...and the City's Records Retention Schedule defined by By-law 45-2002...

It is the City's practice, consistent with records management best practices, to retain information according to the function or project to which the information is related and not the specific individual who may have created or received it. After being copied onto removable media, the records were moved onto the City's corporate file server and integrated with other investigation-related records to ensure their continued retention pursuant to the City's Records Retention Schedule and statutory obligations under the *Municipal Act*. Following the completion of this action, the removable media was formatted and any copies on the media destroyed as permitted by Section 255(2)(b) of the *Municipal Act, 2001*. Given the actions of staff to integrate records in to a single repository, it is impossible for staff at this point in time to distinguish records found on the F: drive and email account from other records prepared or compiled by the City as part of the investigation.

2. Does the backup still exist? If so, please explain the statement in the September 29, 2017 affidavit to the effect that no tapes containing a copy of the F: drive exist.

Answer: As noted above, the removable media to which the F: drive and email records were copied was subsequently formatted following the movement of the records off the removable drive and onto the City's corporate file server. Section 255(2)(b) of the *Municipal Act, 2001* provides municipalities with the authority to destroy records, provided such records are a copy of the originals. In the circumstances the records found on the City's corporate file server – in addition to other hard copy records – serve as the official records of the investigation conducted by the named investigator and any records found on the removable media were duplicates of records retained elsewhere. Any records which were contained in the investigator's F: drive and email account have been and

continue to be retained according to the City's Records Retention Schedule along with other records related to the investigation.

The City's Information Technology Services branch maintains backup tapes of the City's infrastructure and data exclusively for disaster recovery and business continuity purposes. Tapes maintained for these purposes are reused on a 12 month basis. At the time the appellant filed their request, given the passage of time, any backup tapes which may have contained the state of the investigator's F: drive and email account prior to the termination of that account would have been overwritten. Accordingly, the affidavit sworn on September 29, 2017 by the Manager, Systems and Security Operations was an accurate statement indicating that any tapes maintained by the City no longer contained a copy of the F: drive and email account as it was prior to staff's actions to terminate the named investigator's account.

3. If the F: drive backup was made as indicated in the October 1, 2013 email, and if it no longer exists, when was the backup deleted and why?

Answer: The backup of the F: drive was likely deleted, by way of a formatting action, on or shortly after October 1, 2013; documentation of such routine actions [is] not maintained by the City. As previously noted, the media was formatted and the contents of the media deleted or destroyed in accordance with the provisions of the *Municipal Act, 2001*, specifically Section 255(2)(b), which authorizes municipalities to destroy records where they are copies of records retained elsewhere. All records which were removed from the investigator's F: drive were transferred to the City's corporate file server and integrated with other records retained by the City relating to assignment provide to the investigator by City Council. These records continue to exist; however it is impossible to determine which records originally resided on the investigator's F: drive and which records were generated by other staff within the organization.

[14] In its representations, the city also stated that it would proactively disclose (subject to applicable exemptions) all electronic records maintained by the city respecting the investigation. After the representations stage of this appeal closed, the city proactively disclosed records, along with the following description of the records on its website:

Records released include all available electronic records from 2001 to 2014 on the City Clerk Services corporate file server, including records on the former computer F: Drive of [the investigator], related to the [depot] purchase and the subsequent investigation undertaken by [the investigator]. Additionally, records related to the purchase of the [depot] previously released through F.O.I. requests are also included.

The appellant's representations

[15] The appellant provided representations in response to the city's representations. The appellant notes that in light of the city's answers, there is now proof that the F: drive existed, and no proof that it was destroyed, pointing out that the city stated that the backup was "likely" deleted on or shortly after October 1, 2013. He states that if the city had conducted a thorough search, there might have been an answer, but the city has not searched for the backup.

[16] The appellant also submits that the records that were removed from the F: drive and transferred to the city's corporate file server might be traceable by date search for a limited time period beginning October 1, 2013. The appellant suggests that the city told the Durham police that it could replicate the F: drive for the police.

[17] The appellant submits that the city misrepresented in its affidavits, and has purposely and willfully withheld information from this office.

[18] Finally, the appellant states that the city's offer to proactively disclose thousands of pages of records indicates that it has been less than forthright in its access decisions to date.

[19] The appellant sent me numerous pieces of unsolicited correspondence after filing his representations. I have not relied on any of the appellant's additional correspondence for the purpose of this reconsideration order.

Analysis

[20] To begin, I observe that 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 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 out in *Chandler* and other leading cases such as *Grier v. Metro Toronto Trucks Ltd.*³

² 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).

³ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

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.

[21] 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 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...

[22] I agree with these statements. A reconsideration request is not a forum to reargue a case by presenting new evidence, whether or not that evidence was available at the time of the initial inquiry.

[23] In this case, however, and for the following reasons, I find that there was a fundamental defect in the adjudication process leading to Final Order MO-3532-F. The defect was that I understood from the city's affidavits that no backup of the F: drive had been made. My understanding turns out to have been incorrect, and because the city's evidence on that point was key to my finding, my conclusion that the city conducted a reasonable search should be reopened.

[24] In Interim Order MO-3493-I, I directed the city to conduct a further search for the contents of the F: drive. I further directed that the city provide the following information in affidavit form:

- The name(s) and position(s) of the individual(s) who conducted the search
- The steps taken in conducting the search
- The results of the search

⁴ See, for example, Reconsideration Orders PO-3558-R, PO-3062-R and MO-3478-R.

- *If no records are located, a detailed explanation for why no records are located, given the contents of the city clerk's May 30, 2013 email⁵ (emphasis added).*

[25] As noted above, the affidavits the city provided were brief. The IT manager stated as follows:

Regarding [the investigator's] account at the City of Oshawa, the account, mailbox, and (F:) drive were terminated upon completion of his work for the City.

There are no tapes which have a copy of his (F:) drive.

[26] The Records Information System Manager's affidavit stated:

The records provided to City Clerks Services by the Information Technology Services Department have been reviewed, and there is no way to determine which records were stored on [the investigator's] drive or elsewhere on his City issued computer or drives.

[27] I understood the city to be telling me that no backup had been made of the investigator's F: drive. My understanding is evident from the following passages in Final Order MO-3532-F:

I understand [the IT manager's affidavit] to mean that the F: drive was deleted and that no backup exists...

Given this latest information, and without commenting on the propriety of the city having deleted the F: drive with no backup, I am satisfied that the city has made a reasonable effort to identify and locate responsive records.

[28] However, as is evident from the city's representations in response to the reconsideration request, the city did back up the F: drive. Moreover, the city states that it retained the contents of the F: drive on its corporate server.

[29] My misunderstanding regarding the existence of a backup could have been avoided had the city been more forthcoming and detailed in the affidavits it provided. It was only after a reconsideration request was filed that the city provided more detailed information. The city itself has publicly stated that

⁵ This email, also referenced above in paragraph 3 of this order, was sent by a city employee to the investigator and told the investigator that "IT has transferred electronic records into your f: drive on your pc here."

The IPC was advised by City staff that the F: drive of [the investigator] no longer exists which is accurate; however, City staff did not disclose that the records were copied onto a removable media (USB) drive and then copied to the City's corporate file server.⁶

[30] I conclude that there was a defect in the adjudication process, because the city did not disclose the fact that the F: drive records were backed up and then copied to its corporate file server. This defect was a fundamental one, because the facts of a backup and the existence of records on the corporate server are both central to the issue I had to decide; that is, whether it was reasonable to believe that records exist such that a further search should be ordered.

[31] I acknowledge that the city states that 1) the backup of the F: drive on removable media has been overwritten, or has likely been overwritten, and that 2) it is impossible to determine, from examining the records relating to the investigation on the city's corporate server, which records originally resided on the investigator's F: drive. However, these are statements that could be made in the affidavit initially provided to me during my inquiry. They are instead unsworn statements made in the context of a response to a request for reconsideration. In many circumstances, statements such as these, even unsworn, would be enough to establish that no further search is warranted. In this case, however, given the particular circumstances before me, including the history of this appeal⁷ and the information previously provided by the city, I am not satisfied that no further search is warranted.

[32] I also acknowledge that the city has now proactively disclosed records found on its corporate server, and that the city says this disclosure includes all records that were on the investigator's F: drive. Assuming that all documents on the F: drive are indeed included in the proactive disclosure, this still does not fully answer the issues in this appeal, because the proactive disclosure does not indicate which records came from the F: drive. My understanding of the appellant's request is that he wants to know what materials were placed on the F: drive for the investigator.

[33] As a result, I allow the reconsideration request. I will order the city to conduct a further search for records, and to provide an affidavit or affidavits regarding its search efforts. However, before doing so, I will invite representations from the appellant on what the further search should entail. The city will be provided with the opportunity to respond to the appellant's representations.

⁶ "Update on Consolidated Operations Depot records", City of Oshawa, July 16, 2018 (<https://www.oshawa.ca/Modules/News/index.aspx?keyword=&date=07/01/2018&page=3&newsId=90915619-1880-4fd5-8881-0d8e250b93a>).

⁷ See Interim Order MO-3493-I and Final Order MO-3532-F at para. 31.

ORDER:

1. The reconsideration request is allowed. A further search will be ordered following receipt of further representations.
2. I remain seized of the appeal.

Original signed by _____
Gillian Shaw
Senior Adjudicator

_____ April 11, 2019