

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-3953-R

Appeal PA16-231

Order PO-3869-I

Health Professions Appeal and Review Board

May 10, 2019

Summary: Interim Order PO-3869-I arose from an appeal of a decision issued by the Health Professions Appeal and Review Board (the board). The appellant appealed the board's search for records taking the position that it was not reasonable and that more responsive records should exist. At adjudication, reasonable search was the sole issue in dispute. After an initial inquiry, the adjudicator issued an interim order, ordering the board to conduct a further search for certain records while finding the bulk of its search to be reasonable. In this Reconsideration Order, the adjudicator finds the appellant did not establish that grounds exist under section 18.01 of the IPC's *Code of Procedure* to reconsider Interim Order PO-3869-I and denies the appellant's reconsideration request.

Statutes Considered: The IPC's *Code of Procedure*, section 18.01 and 18.02.

OVERVIEW:

[1] This order addresses a request by the appellant that I reconsider Interim Order PO-3869-I, in which I found that the Health Professions Appeal and Review Board's (the board) search with respect to certain requested records was reasonable, while I ordered the board to conduct a further search for other records.

[2] The appellant initially submitted a 30-part request to the board pursuant to the *Freedom of Information and Protection of Privacy Act* (the *Act*) for documents pertaining to her case file with the board. The appellant asked that the records be provided to her unaltered on a CD in their original archived digital format.

[3] Initially, the board issued a decision and index of records granting full access to some of the information requested, and found the balance of the request to be frivolous and vexatious within the meaning of section 10(1)(b) and 27.1 of the *Act*. The board also advised that it would not be providing access to source code information and "unaltered" documents on a CD in its original archived digital file format because in so doing it may reveal third party and/or personal information, within the meaning of sections 17(1) and/or 21 of the *Act*.

[4] The appellant appealed the board's decision to this office. During mediation, the board issued a revised decision, providing additional records to the appellant. The board explained in the revised decision that for the two remaining responsive records that were not provided to the appellant, one was not retrievable and the other not retained. The board clarified that it was no longer relying upon the application of the frivolous and vexatious provisions of the *Act*. The board also confirmed that it was not relying upon any exemptions under the *Act*.

[5] The appellant confirmed receipt of the board's revised decision and additional disclosure but maintained her position that additional records should exist. The sole issue before me, therefore, was whether the board had conducted a reasonable search for records.

[6] In Interim Order PO-3869-I, I ordered the board to conduct a further search for specific records while I found its searches for other records to be reasonable. I ordered the board to search for a record relating to part 6 of the appellant's request (email source code confirming email with attached PDF file of application sent to the board on August 1, 2014) because the board's representations only supported that it was unable to locate source code for outgoing emails and part of part 6 related to an incoming email. The order to search for the remaining responsive records was made on the basis that the board submitted that it had located these records after a search it conducted during the adjudication stage, but upon receipt of those records, just prior to the release of my interim order, the appellant indicated that they were not responsive. Because the board provided no further representation with regard to these records, and on the basis that the appellant indicated that the records provided to her were not responsive to these parts of her request, I ordered it to conduct a further search for these records. However, I note that in the interim order, I found the bulk of the board's search to be reasonable as it had either provided a copy of the requested record or had provided evidence that it was unable to locate certain records after two separate searches.

[7] The appellant sought a reconsideration of Order PO-3869-I on August 13, 2018, which is within the time limit set out by section 18.04 of IPC's *Code of Procedure* (the *Code*).

[8] In this order, I find that the appellant has not established any of the grounds for reconsideration in section 18.01 of the *Code* and I deny her request to reconsider Interim Order PO-3869-I.

DISCUSSION:

Preliminary Issue

Missing order provision in Interim Order PO-3869-I

[9] One of the grounds for the appellant's reconsideration request is that I neglected to include an order provision in my interim order, requiring the board to search for records mentioned in parts 16, 24, 30(b) and the remaining records under part 30(ii) of the request.¹ She made this submission in both her representations concerning the board's subsequent search, following the issuing of Interim Order PO-3869-I, and in her reconsideration request.

[10] The board provided further representations; however, it did not address the appellant's submission that I neglected to order the board to conduct the further search for records responsive to parts 16, 24, 30(b) and 30(ii) of the request.

[11] Since issuing Interim Order PO-3869-I, I issued a further interim order following the board's subsequent search and ordered yet another search (Interim Order PO-3945-I). In that order, I rectified my error by ordering the board to conduct a search for parts 16, 24, 30(b) and 30(ii)² of the appellant's request.³ Since this error has already been rectified, I will not be addressing this issue further in this reconsideration order.⁴

Are there grounds under section 18.01 of the IPC's Code of Procedure to reconsider Interim Order PO-3869-I?

[12] The IPC's reconsideration process is set out in section 18 of the IPC's *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:

- (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.

¹ The remaining records under part 30(ii) include fax cover sheets dated August 28 and September 18, 2014 addressed to the College of Veterinarians.

² Except for the fax cover sheet dated August 21, 2014.

³ Section 18.01(c) of the IPC's *Code of Procedure*.

⁴ This issue was discussed in Interim Order PO-3945-I at paragraphs 13 to 16.

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 appellant's reconsideration request

[13] The appellant takes issue with Interim Order PO-3869-I in the following respects:

- That the board's search was not reasonable with regard to many records as I did not order it to seek approval from the deputy minister in order to conduct searches of the digital archives (parts 5, 6, 17, 25, 26 of the request)
- That an ex-employee of the board, who sent an email, should be invited to provide representations in this appeal and/or that her computer desktop be searched (parts 5, 26, 28 of the request)
- That I misidentified a number of records relating to various parts of her request (parts 16, 17, 24, 25 and 28 of the request)
- That I erred when I found that the search was completed by an experienced employee, knowledgeable in the subject matter of the request
- That I erred when I found that the board could rely on the advice of its IT service desk with regard to source code for outgoing emails especially since there was evidence that the board was able to provide this source code for outgoing emails, contrary to the advice of its IT professionals
- That I did not order the board to conduct a search using a different spelling of the appellant's name which she submits a case worker at the board has misspelled on several occasions
- That I did not order the board to forward her request to the College of Veterinarians
- That the board should have contacted the College of Veterinarians to obtain a copy of a "section 26" form because the copy it provided to her did not have the header information on it (part 28 of the request)
- That I should have found that her request was for continuing access to records.

[14] The appellant also raises the following additional issues:

- She takes issue with the way I organized the records in my analysis, stating that some records grouped together were significantly dissimilar
- She attributes my summary of the parties' representations as my own statements and takes issue with those statements. For example, she states "you further

erroneously state that 'it [the board] notes that the author of the email is no longer employed with the board's Secretariat and that the original email may have been deleted.'"

[15] The board was provided with a copy of the appellant's reconsideration request and provided its own representations in response. In its representations, the board submits that the appellant's request for reconsideration does not meet any of the grounds set out in section 18.01 of the *Code* and instead the appellant appears to disagree with the substance of the interim order. The board submits that the appellant's grounds for reconsideration amount to no more than a disagreement with the decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to her. The board requests that the reconsideration request be dismissed.

[16] After considering the parties' submissions, I find that the appellant has not established any of the grounds under section 18.01 for reconsideration of Interim Order PO-3869-I.

Analysis and findings

Approval of the deputy minister

[17] I do not agree that the board must seek approval from the deputy minister in order to conduct searches of the digital archives with regard to parts 5, 6, 17, 25 and 26 of the request.⁵ In each of these instances, I found that the board conducted a search for each of these parts of the request in its record holdings and provided the appellant what it located or provided a reasonable explanation for information that was not located. The appellant has not established that my failing to require the board to seek the approval of the deputy minister meets any of the grounds for reconsidering Interim Order PO-3869-I.

Representations from the ex-employee

[18] The appellant submits that the ex-employee who sent an email (part 5 of the request) and sent a fax (parts 26 and 28) should be invited to provide representations in this appeal. The appellant also submits that the board failed to search for a misspelled version of her surname. As a result, the appellant claims there was a fundamental defect in the adjudication process.

[19] A reconsideration request is not a forum to re-argue a case. The appellant had ample opportunity during the inquiry to argue that the board search a different spelling of her sur-name or that it search the desktop of a specified employee. I find the

⁵ Part 6 of the appellant's request is dealt with in Interim Order PO-3945-I at paragraphs 24 to 30 since the board was ordered to conduct a further search for the record relating to this part of the request

appellant is attempting to re-argue her case which is not proper in a reconsideration request. Therefore, I do not agree that the board is required to search for the appellant's last name as she alleges was misspelled by a board employee, search the desktop of a specified employee or that the ex-employee be given an opportunity to make representations. Accordingly, I will not reconsider my finding that the board's search with respect to these parts of the request (parts 5, 26 and 28) was reasonable.

Alleged misidentification of records

[20] The appellant takes issue with my identification of some of the records (parts 16, 17, 24, 25 and 28 of her request). With regard to parts 17 and 25 of the request, she submits that I identified them as records that were provided by the board to her lawyer when in fact they were both sent by the board to a third party lawyer. In my view, my identifying who these records were sent to is not an error that should be reconsidered. In reviewing Interim Order PO-3869-I with regard to these parts of the appellant's request, it is clear that my finding related to advice the board received about not being able to retrieve source code for its outgoing emails and the individual who would have received this email was not a relevant consideration.

[21] In addition, the appellant submits that I identified part 28 of the her request in the interim order as a fax received by the board from the College of Veterinarians of Ontario (the College) between August 21, 2014 and August 29, 2014, with fax header information clearly visible. In her reconsideration request, the appellant submits that this part of her request is actually for "a section 26 form which was faxed back and forth between the board and the College between August 21, 2014 and August 29, 2014, and as such, should bear two separate sets of fax header information which is clearly visible." While the appellant is correct that I referenced a "Word file" in the interim order with respect to this part of the record, it is clear when reviewing the interim order that I understood that the appellant was seeking a fax with header information. The actual purpose of the form⁶ is not relevant to my consideration of whether the board has conducted a reasonable search. In reviewing my interim order, I am satisfied that in dealing with this part of the request it was clear that the board had provided a responsive record, yet the appellant was not satisfied because she was looking for header information not contained in the scanned version of the record provided by the board. I concluded that the board did not have to prove with absolute certainty that further records do not exist and I was satisfied that it had met its obligations under the *Act* with regard to a search for this part of the request. The appellant's submission on the search for this part of her request does not establish a fundamental defect in the adjudication process or any other ground for reconsideration.

[22] Finally, the appellant submits that parts 16 and 24 of her request were

⁶ This form relates to section 26 of the *Veterinarians Act*, R.S.O. 1990, c. V.3.

misidentified in the interim order. With regard to part 16, which I identified as a PDF file sent to the board by the appellant's lawyer, the appellant submits it was actually a PDF file sent to the board by a third party lawyer. With regard to part 24, which I identified as a fax transmission report and corresponding document, the appellant submits it is actually a fax transmission report and corresponding document, or an email with corresponding PDF file. While I agree that I misidentified part 16 of the request as it was actually a request for a PDF file sent to the board by a third party lawyer and not from the board to the appellant's lawyer, and that I neglected to indicate that part 24 of the request could also be an email instead of just a fax transmission, because I did not make an order with regard to these parts of the request, there is nothing to reconsider with regard to these parts of the request.⁷

Experienced employee/relying on advice from IT

[23] The appellant takes issue with my finding that the board's deputy registrar/manager who conducted the search was an experienced employee, knowledgeable in the subject matter of the request. She submits that the deputy registrar worked with the OPS IT service desk and was not experienced and knowledgeable in the email subject matter. The appellant points to my finding (regarding parts 6, 17 and 25 of her request) where I indicated that the board was entitled to rely on the advice of the IT service desk. She submits that prior to the issuance of Interim Order 3869-I, the board provided further records that it located which included the source code for two outgoing emails. The appellant suggests that since the IT help desk indicated that source code for outgoing email was not available, and the board subsequently provided source code information for outgoing emails that "there is no reason to believe that the person would have been any more experienced or knowledgeable about this particular email matter."

[24] In Interim Order 3869-I, I accepted the board's submission that it relied on its IT services for advice concerning this search. When referring to Records 6, 17 and 25 in her reconsideration request, the appellant submits that I failed to acknowledge that the board had provided source code for two outgoing emails. The appellant suggests this is evidence that source code for outgoing emails is available information and that the advice of the OPS IT service desk is unreliable. However, the appellant also submits that the source code provided by the board for these two outgoing emails was incomplete as it did not include the source code for the emails' respective PDF attachments or encoding information for the PDF attachments. In my view, the appellant's assertion that the source code is incomplete suggests that the IT advice was correct. I reconfirm my finding that it is reasonable that the board rely on the advice of the OPS IT service desk. Accordingly, for this part of the request, I find the appellant

⁷ As noted, the order to search for parts 16 and 24 of the appellant's request was made in Interim Order PO-3945-I.

has not established a fundamental defect in the adjudication process or any other ground for reconsideration.

Request the College to search

[25] I do not accept the appellant's submission that the board was required to contact the college with regard to the appellant's request. There is no obligation on the part of the board to contact the college as part of its search. Section 25(1) of the *Act* sets out when an institution shall forward a request to another institution and section 25(2) sets out when an institution "may" transfer a request. In my view, this is not a situation where the board would forward or transfer the request to another institution. In any event, the college is not an institution under the *Act*.

Continuing access

[26] In Interim Order PO-3869-I, I found that the remaining records under part 30 (except 30(ii) and 30(b)) fell outside of the scope of the appellant's request. After reviewing the original request, I accepted the board's submission that the appellant's request was not for continuing access to records. I noted that many of the requested records in part 30 were for records that would post-date the request for records. I asked the appellant to reply to the board's reply representations on this issue during the inquiry. I specifically asked the appellant:

Record 30, the board states that many of the items listed in your representations under item 30, within the bullets (a) to (jj) you are already in receipt of and others the board has agreed to provide. As well, the board states that there are additional items under 30 in your representations that fall outside of the scope of your original FOI request. It is their position that this expanded request falls outside of the scope of this inquiry process.

[27] Included with my letter was a copy of the board's representations, where the board clearly stated:

Any documents and correspondence created subsequent to the original freedom of information request, or at latest, the Appellant's 30-part request submitted on March 9, 2016 to the IPC, are outside the scope of this inquiry process. The expanded request for documents is thus outside the scope of the freedom of information request. The Board does not intend to search for or provide access to such records on that ground and alternatively as the expanded request is frivolous and vexatious.

[28] The appellant did not respond and confirmed to this office that she would not be making additional representations.

[29] The appellant's submission on this issue is her attempt to re-argue the appeal.

The appellant had opportunity to make submissions on this issue and was even contacted by this office when representations were not received in order to inquire if she intended to submit representations. Instead, the appellant informed this office that she would rely on her submissions to date. The appellant has not offered a basis for me to reconsider this part of my order.

Organization of records

[30] Although the appellant takes issue with the way in which I organized the records in the interim order, each record was analysed on its own and the grouping of records was strictly for organizational purposes for the interim order. On that basis, I will not reconsider the order as the organization of the records did not impact my consideration of the board's search for these records.

Summary of the parties' representations

[31] I also do not accept the appellant's submission that my summaries of the parties' submissions establish an accidental or other error for the purposes of section 18.01(c) of the *Code*. I will not reconsider Interim Order PO-3869-I on this basis.

[32] Having reviewed the appellant's reconsideration request, I find that there was no fundamental defect in this office's adjudication process. In addition, I find that there is no other jurisdictional defect in Interim Order 3869-I. Finally, I find that there is no clerical error, accidental error or omission or other similar error in Interim Order PO-3869-I. In conclusion, I find that the appellant's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision.

ORDER:

I deny the appellant's reconsideration request.

Original Signed by: _____
Alec Fadel
Adjudicator

_____ May 10, 2019