

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-3916-R

Appeal MA17-526

Interim Order MO-3895-I

County of Norfolk

March 13, 2020

Summary: This reconsideration order dismisses the county's request for reconsideration of Interim Order MO-3895-I, in which the adjudicator ordered the county to search for additional responsive records. In this reconsideration order, the adjudicator finds that the county has not established that any grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Interim Order MO-3895-I.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17.

OVERVIEW:

[1] This order addresses a request made by the County of Norfolk (the county) for reconsideration of Interim Order MO-3895-I, in which I ordered it to conduct a further search for responsive records pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] Interim Order MO-3895-I addressed only the issue of reasonable search, and not the county's claim that the responsive records it identified were exempt under the *Act*. I decided to defer making any determinations on the information at issue until I was satisfied that the county had identified all of the responsive records.

[3] By way of background, the appellants asked the county for access to the following information related to a particular property they owned (the "Lakeshore Property"):

1. All records pertaining to the Lakeshore Property;
2. All records pertaining to the portion of municipal land, including Lakeshore Road, adjacent to the Lakeshore Property (the "Municipal Lands") including, but not limited to, any municipal work completed on the Municipal Lands;
3. All records pertaining to all drainage and culverts currently, or historically, present on the Municipal lands;
4. All records pertaining to [a named individual]'s involvement with the Lakeshore Property and/or the Municipal Lands; and
5. All records pertaining to any communications among Town staff regarding the Lakeshore Property and/or the Municipal Lands.

[4] The appellants and the county both stated in their representations that there is ongoing litigation between the parties related to the Lakeshore Property. The county applied the solicitor-client privilege exemption at section 12 of the *Act* to the records at issue in this inquiry. The appellants disagreed with the county's decision regarding the application of section 12 of the *Act* and also asserted that additional responsive records should exist.

[5] Given the context of this matter, I concluded that it was possible that if the county located additional responsive records, it may also claim that section 12 applies to that information as well. I determined that it would be preferable to identify all of the responsive records before I assessed the county's section 12 claim.

[6] Based on the evidence provided by the county, I was not satisfied that it had taken sufficient steps to locate all of the responsive records, and in Interim Order MO-3895-I ordered the county to conduct a further search.

[7] The county has asked that I reconsider that decision on the basis that there was a fundamental defect in the adjudication process and/or some other jurisdictional defect in my decision. For the reasons that follow, I conclude that the county has not established that any of the grounds for reconsideration of Interim Order MO-3895-I are applicable and I deny the reconsideration request.

DISCUSSION:

[8] Section 18 of the IPC's *Code of Procedure* (the *Code*) sets out this office's reconsideration process. Sections 18.01 and 18.02 address the grounds for

reconsideration of an order or decision of this office:

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.

[9] The reconsideration process is not a forum for parties to re-argue their cases in an attempt to obtain a more favourable decision. Previous orders of this office have stated that the reconsideration process is not a mechanism to offer substantiating arguments that were made (or not made) during the inquiry into an appeal intended to address a party's disagreement with a decision or legal conclusion.¹

[10] Previous orders are clear that mere disagreement with a decision is not a ground for reconsideration under section 18.01 of the *Code*.²

The county's representations

[11] The county submits that there was a fundamental defect in the adjudication process and/or some other jurisdictional defect in Interim Order MO-3895-I. It says that as a result, it is seeking relief from compliance with the order provisions in Interim Order MO-3895-I.

[12] The county says that the fundamental defect in the adjudication process is that it has been ordered to search for records that are not responsive to the request, do not exist, or are not within the county's custody or under its control. Specifically, the county says the following:

- a. Records it has been ordered to search for in paragraph 48 of the Interim Order MO-3895-I relate to internal administrative processes, rather than the Lakeshore Property and are not responsive to the request;
- b. The records referred to in paragraphs 49 and 50 of the Interim Order are not responsive to the request, or are "not in the jurisdiction of the county's records holdings;" and

¹ Orders PO-3062-R and PO-3558-R at paras. 21-24.

² Orders PO-2538-R and PO-3062-R.

- c. Some of the records it was ordered to search for are attachments that were supplied to the county through its lawyer from its insurer. The county says that these records were created and held by its insurer and are not in the custody or control of the county. It says that the county does not have the jurisdiction to conduct a search for those records.

[13] The county also says there were fundamental defects in the adjudication process because it was ordered to search for records that:

- a. were not created until after the request was made;
- b. were not specifically related to municipal lands, or the Lakeshore Property; and/or
- c. do not exist, or were never received by the county.

[14] The county also asserts that there is a fundamental defect in paragraphs 51 to 53 of the Interim Order MO-3895-I. It submits that the order for a further search is based on the premise that the county's Public Works Department did not supply all records to its Legal Services Department. The county says that the Public Works Department provides all records it has regarding a topic of potential litigation to the Legal Services Department when a legal risk file is opened. The county says that any records created by the Public Works Department between March 30, 2016 and March 1, 2017 when the request was received would be incorporated into the legal risk file and would likely be directly affiliated with the litigation between the parties.

[15] It further submits that there is another fundamental adjudication defect in the adjudication process with regard to paragraphs 51 to 53 of the Interim Order MO-3895-I. It says that the additional search that was ordered does not specify which records in the Public Works Department could reasonably be expected to have been omitted from the original search through the legal risk file.

[16] Finally, the county makes the following statements:

The Supervisor accepted this agreeably open-ended access request in good faith and the spirit of the Act to allow this broad search scope to yield as much responsive information available to the appellant. Clarification was not requested as a result of this good faith even though the submitted access request could reasonably have been deemed not in accordance with section 17(1)(b) of the Act as the request does not sufficiently describe the records sought.

The fundamental adjudicative defect of not specifying the records sought in the search has enabled the appellant the opportunity to exploit the Supervisor's initial good faith through this order of an additional search for unspecified additional records in the Public Works Department.

The county continues to attempt to work together with the appellant on February 6, 2020 by offering the opportunity to submit new access requests for specific records that they are seeking which were believed not to be captured in their original access request.

Decision and analysis

[17] For all the following reasons, I find that the county has not established there is a basis for me to reconsider Interim Order MO-3895-I.

[18] The sole issue dealt with in Interim Order MO-3895-I was reasonable search. As set out at paragraphs 14 to 17 of that Interim Order, an adjudicator may order an institution to search for further responsive records if the institution has not provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control. I concluded that, based on the evidence provided by the parties, it was reasonable to expect that there may be additional responsive records, and I ordered a further search.

[19] The county asserts that there was a fundamental defect in the adjudication process because the records I ordered it to search for are either not in its custody or control, do not exist, or are not responsive to the appellants' request.

[20] This office has recognized that a fundamental defect in the adjudication process may include: a failure to notify an affected party;³ a failure to invite representations on the issue of invasion of privacy;⁴ and a failure to allow for sur-reply representations where new issues or evidence are provided in reply.⁵ These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[21] In my view, the types of issues the county raises are not a breach of the rules of natural justice respecting procedural fairness and do not constitute fundamental defects in the adjudication process. I note that in order provision three of Interim Order MO-3895-I, I stated that if, once the county conducted its further search, it did not locate further responsive records, it was to explain why in the affidavit it was ordered to submit with its representations regarding its search. Therefore, if the county, after completing the required search, believed that it either does not have, or cannot produce, any additional responsive records, it was open to the county to provide evidence and make those arguments in the affidavit and representations it was ordered to provide in Interim Order 3895-I.

[22] I also disagree with the county's assertion that there is a fundamental defect in

³ Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

⁴ Orders M-774 and R-980023.

⁵ Orders PO-2602-R and PO-2590.

paragraphs 51 to 53 of the Interim Order because I did not specify which specific records the county was to search for in the Public Works Department. The county has a duty under the *Act* to identify records that are responsive to the appellants' request. The Notice of Inquiry originally sent to the county indicated that a search will be considered reasonable when an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.⁶ At paragraphs 51 to 53 of the Interim Order, I stated that, in my view, it was not sufficient that the county relied on the records provided to the Legal Services Department by the Public Works Department, prior to the appellants' request.

[23] I specified that a search for additional responsive records held by the Public Works Department was necessary to ensure that no responsive records were missed. It is not my role to determine what specific records may be responsive. The county must task an employee who has experience with the Public Works Department and knowledge about the subject matter to conduct the search, and it must provide affidavit evidence to that effect.

[24] The county also submits that there is a jurisdictional defect in Interim Order MO-3895-I pursuant to section 18.01(b) of the *Code* because it has been ordered to search for records that it says are outside of its custody or control.

[25] Section 18.01(b) of the *Code* relates to whether an adjudicator has the jurisdiction 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.

[26] To be clear, section 18.01(b) relates to the jurisdiction of the Information and Privacy Commissioner under the *Act*, not the "jurisdiction" of an institution.

[27] In Interim Order MO-3895-I, the county was ordered to search its own record holdings for additional responsive records. There is no obligation on the county to obtain any new records that it does not have custody or control of. Furthermore, if the county believes that any responsive records it identifies through its new search are not within its custody or under its control, it should address that issue in the affidavit and representations it was ordered to provide in Interim Order MO-3895-I. However, the first step is for the county to complete the search, as ordered.

[28] Finally, I will briefly address the portions of the county's reconsideration request that I have reproduced above at paragraph 16 of this reconsideration order. The county asserts that it did not seek clarification of the original request out of good faith, even though the request did not sufficiently describe the records sought. It says that the appellant is now, somehow, exploiting the county's good faith by seeking records not

⁶ Orders M-909, PO-2469 and PO-2592.

captured by the original access request.

[29] It is not entirely clear to me what the county is referring to in this portion of their representations. However, if the county required clarification to respond to the request, it should have sought that clarification in accordance with section 17 of the *Act*, prior to issuing its decision.

[30] The county says that it “continues to attempt to work together with the appellant” by “offering the opportunity to submit new access requests for specific records they are seeking which were believed not to be captured in the original request.” To the extent that the county is referring to the records it was ordered to search for in Interim Order MO-3895-I, there is no need for the appellants to submit any new access requests for this information.

[31] For all of the reasons set out above, I have determined that the county has not established that there was either a fundamental defect in the adjudication process or some other jurisdictional defect in the decision and I therefore decline to reconsider Interim Order MO-3895-I under section 18.01 of the *Code*.

ORDER:

The request for reconsideration is denied. I confirm that the county is required to comply with the order provisions in Interim Order MO-3895-I. As the date for compliance has now passed, I order the county to comply with Interim Order MO-3895-I by **April 16, 2020**.

Original Signed by: _____
Meganne Cameron
Adjudicator

_____ March 13, 2020