Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4121-R

Appeal PA17-395-2

Interim Order PO-3976-I

Ministry of the Attorney General

March 18, 2021

Summary: The appellant seeks a reconsideration of an order provision that upheld the Ministry of the Attorney General's (the ministry) search for records responsive to one item of the appellant's request for records about him made to the ministry under the *Freedom of Information and Protection of Privacy Act*.

In this order, the adjudicator dismisses the appellant's reconsideration request, finding that it does not fit within the grounds to reconsider an order under sections 18.01(a) or 18.01(c) of the *Code of Procedure* of the Information and Privacy Commissioner (the IPC).

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, section 24; the IPC's *Code of Procedure*, sections 18.01(a) and 18.01(c).

Orders Considered: Orders M-271 and PO-3976-I.

OVERVIEW:

[1] This order addresses an individual's request for reconsideration of a single issue determined in Interim Order PO-3976-I (the interim order), namely my upholding as reasonable the search conducted by the Ministry of the Attorney General (MAG or the ministry) for specific records about the appellant.

[2] The interim order was issued in response to the appellant's three-item request made to the ministry under the *Freedom of Information and Protection of Privacy Act*

(*FIPPA* or the *Act*). At issue in this reconsideration order is my decision respecting item 3 of the appellant's request, which reads:

> All documentation pertaining to [the appellant's] Freedom of Information Request ("request") dated July 25, 2014, from any date and more specifically from July 25, 2014 to the present time, contained within or produced by the MAG, including documentation created by an MAG employee, contactor, agent, solicitor, or previous or current Minister, in any recorded format, including, more specifically, any and all documentation pertaining to the temporary loss, mishandling or misplacement of the request and of the decision not to process the fee supplied as a cheque by [the appellant], and to the drafting of the letter from [the ministry's freedom of information coordinator] to [the appellant] dated April 14, 2015…

[3] The ministry granted partial access to records responsive to item 3 of the request with severances pursuant to the discretionary solicitor-client privilege exemption in section 19 of the *Act*.

[4] The appellant appealed the ministry's decision. Mediation did not resolve the issues in the appeal. Therefore, the appeal was transferred to the adjudication stage where an adjudicator may conduct an inquiry.

[5] I decided to conduct an inquiry on the sole issue as to whether the ministry conducted a reasonable search for responsive records in response to the appellant's three-part request.

[6] I sought and received representations from the ministry and the appellant, which were exchanged between them.

[7] I then issued Interim Order PO-3976-I. In the interim order, I upheld the ministry's search for records responsive to item 3 of the appellant's request as reasonable.[1] The appellant filed a reconsideration request of my decision to uphold the ministry's search for records responsive to item 3 of the request in Interim Order PO-3976-I, the part related to his July 2014 access request.

[8] In this order, I dismiss the appellant's reconsideration request concerning my

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[1] In Interim Order PO-3976-I, I also ordered the ministry to conduct another search for items responsive to items 1 and 2 of the appellant's request. The ministry then searched again for items responsive to items 1 and 2 of the request. In Final Order PO-4018-F, I found the ministry's search for records responsive to items 1 and 2 of the request in response to Interim Order PO-3976-I was reasonable and I dismissed the appeal. The appellant filed a reconsideration request of Final Order PO-4018-F and that reconsideration request will be dealt with in a separate order.

finding that the ministry conducted a reasonable search for records responsive to item 3 of the appellant's request.

DISCUSSION:

Does the appellant's request meet any of the grounds for reconsideration in sections 18.01(a) or 18.01(c) of the *IPC Code of Procedure* (the *Code*)?

[9] The appellant seeks a reconsideration of my decision that the ministry had conducted a reasonable search under section 24 of *FIPPA* for records responsive to item 3 of his request. As a result, I upheld the ministry's search and did not order it to conduct a further search for responsive records.

[10] Past orders have established that the *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[11] A reasonable search is one in which 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.[4] A further search will be ordered if the institution does not provide 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.[5]

[12] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6] In the interim order, I found that the appellant had not provided a reasonable basis for me to conclude that responsive records related to item 3 of the request existed, but had not been identified by the ministry.

[13] The appellant's reconsideration request must meet one of the grounds for reconsideration set out in section 18.01 of the *Code*. The appellant relies on paragraphs (a) and (c) of section 18.01, which read:

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[2] Orders P-624 and PO-2559.
[3] Order PO-2554.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Order MO-2246.

> 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; …or
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> (c) a clerical error, accidental error or other similar error in the decision.

[14] In order to fit within section 18.01(a) of the *Code*, the party requesting reconsideration must establish that there has been a fundamental defect in the adjudication process. A fundamental defect would be a breach of procedural fairness, such as a party not being given notice of an appeal or not being given an opportunity to provide submissions during the inquiry.[7]

[15] Section 18.01(c) of the *Code* contemplates "clerical or accidental error, omission or other similar error in the decision," such as, for example, an order provision containing inconsistent severance terms with respect to the records.[8] Such errors under section 18.01(c) may include:

- a misidentification of the "head" or the correct ministry;[9]
- a mistake that does not reflect the adjudicator's intent in the decision;[10]
- information that is subsequently discovered to be incorrect;[11] and
- an omission to include a reference to and instructions for the institution's right to charge a fee.[12]

[16] Section 18.02 provides that:

> 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.

[17] 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*

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[7] For an example, see Order PO-3960-R.
[8] See, for example, Order PO-2405, corrected in Order PO-2538-R.
[9] Orders P-1636 and R-990001.
[10] Order M-938.
[11] Orders M-938 and MO-1200-R.
[12] MO-2835-R.

v. Alberta Assn. of Architects.[13] With respect to the reconsideration request before him, he 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 as *Grier v. Metro Toronto Trucks Ltd*.[14]
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> 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.

[18] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.[15] 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 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.

[19] I agree with these statements. A reconsideration request is not a forum to re-argue a case or to present new evidence, whether or not that evidence was available at the time of the initial inquiry.

[20] The threshold for reconsideration is high, and mere disagreement with an error in a decision is not a ground for reconsideration.

[21] As noted above, the appellant relies on sections 18.01(a) and 18.01(c) of the *Code*. In particular, the appellant provides two reasons for his reconsideration request,

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[13] (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).
[14] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).
[15] See, for example, Orders PO-3062-R and PO-3558-R.

as follows:

1. The appellant requests that order provision 1 be reconsidered under 18.01(a) and 18.01(c). The appellant submits that there was a potential misapprehension of evidence by the adjudicator and that the ministry has clearly not complied with …*FIPPA*, which should be considered under both [sections] 18.01(a) and 18.01(c).

2. The appellant requests clarification of the interim order under 18.01 (c), and/or, as this part is a request for correction and clarity in the order and not a request to change … an enforceable provision, the appellant submits that this request can be further tested outside of section 18.

[22] I will consider each reason separately.

Reason 1 - A potential misapprehension of evidence

[23] The appellant submits that:

> Paragraph 68 of the interim order indicates that the appellant was specifically asked to identify any records he believes have not been located in response to item 3 of his request, which he did not do. The appellant has identified records that have not been located in response to item 3, namely, the two faxes that the ministry apparently refuses to confirm or deny that it received.
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> The appellant refers to all of his previous submissions. Most strikingly, the ministry has not shown specific evidence for a search of the email records of the two individuals [names of two ministry staff]. These two individuals were consistently identified …throughout the request and appeal process as individuals whose records were to be searched... They are also the two individuals [along with perhaps their managers, the unidentified summer student, and a third named ministry staff] clearly, who would most likely have responsive records associated with them, given that they communicated with the appellant about the request in the context of its misplacement. The appellant asks the adjudicator to reconsider, how this search can be deemed completed without evidence of a search for the historic email records of either of these two individuals...
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> Specifically, no search was performed for the records of the (2) key individuals mentioned throughout the request and appeal process; and listed repeatedly in the request. Further, the ministry provided no explanation for the reason for not searching the records of these two individuals (except perhaps that the employees are no longer employed at the ministry, which response is inconsistent with other ministry responses, where records of no-longer employed individuals were searched)…

[24] In Reason 1 of his reconsideration request, it appears that the appellant is arguing that I misapprehended evidence in reaching my finding regarding item 3 of the request. His submits that I did not consider that the records of two ministry staff named in the request were not searched.

[25] In the interim order, I found that the ministry had provided extensive representations regarding the searches during my inquiry into Appeal PA17-395-2. These representations included evidence that the records of the two named ministry staff were searched by the ministry's freedom of information analyst in response to the request. As these two named ministry staff were no longer with the ministry, this analyst searched their records.

[26] The ministry's search included searching its shared drive, the electronic request file into which incoming requests and correspondence related to the access request are scanned and stored. In addition, the ministry conducted a search of the hard copy request file created for the request. It also searched the 2014 general enquiries folder on the shared drive.

[27] The appellant also asserts under Reason 1 that I did not consider that he sent two faxes to the ministry. He has copies of these two faxes that he sent to the ministry.

[28] In the interim order, after reviewing the ministry's extensive representations on its search for responsive records, I found that the ministry conducted a reasonable search for records responsive to item 3 of the appellant's request. The appellant is now claiming that I erred in finding the ministry conducted a reasonable search, as I did not take into consideration that the ministry did not locate two faxes he sent to it.

[29] I find that even if the two identified faxes were responsive to the request, I would not have ordered the ministry to search for records already in the appellant's possession.

[30] In Order M-271, former Assistant Commissioner Irwin Glasberg dealt with a situation in which the requester already had a copy of the responsive records. In that order, the former Assistant Commissioner made the following comments of a more general nature about situations where a requester already possesses the record at issue:

> In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose. In addition, appeals of this nature consume the scarce resources of institutions and impede the ability of the Commissioner's office to deal with the files of other appellants

[31] I adopt these findings in Order M-271. Even if the two faxes referred to by the

appellant were responsive to the request, I would not reconsider my decision respecting item 3 of the appellant's request in the interim order and order the ministry to conduct another search for these two faxes. I find that no useful purpose would be served by ordering the ministry to search for these two faxes that are already in the appellant's possession.

[32] Further, under Reason 1, the appellant submits that the ministry has not complied with *FIPPA*. He does not explain what this non-compliance is, nor how any non-compliance relates to my finding in order provision 1, that the ministry has conducted a reasonable search for records responsive to item 3 of the request. Nor does he explain how such non-compliance is a ground for reconsideration under sections 18.01(a) or 18.01(c) of the *Code*.

[33] Regarding Reason 1, I find that there has not been a fundamental defect in the adjudication process or a clerical error, accidental error or other similar error in the decision under sections 18.01(a) and 18.01(c) of the *Code*.

[34] Accordingly, I find that Reason 1 of the appellant's reconsideration request does not support a reconsideration of order provision 1 in Interim Order PO-3976-I.

Reason 2 – Clarification of the interim order

[35] As noted above, at issue is the order provision in the interim order where I upheld the ministry's search for records responsive to item 3 of the appellant's request. As such, I did not order the ministry to conduct a further search for records responsive to item 3 of the appellant's request.

[36] In his representations on Reason 2, the appellant again refers to the two faxes he sent to the ministry. In Reason 1, I determined that I would not order the ministry to search for records already in the appellant's possession. In response to the appellant's submissions in Reasons 2 about these two faxes not being located, I maintain my finding. I will not reconsider my decision on the basis that the two faxes were not provided to the appellant by the ministry as a result of the ministry's search for records responsive to item 3 of the request.

[37] The appellant then asks that my summary of the ministry's representations in the interim order be amended to distinguish that one of two letters to the ministry attributed to him in the interim order was from his lawyer, not from him. He references paragraphs 31, 41 and 54 of the interim order.

[38] Paragraphs 31, 41, and 54 all relate to my review and analysis of the ministry's search in response to items 1 and 2 of the appellant's request. They do not relate to item 3, the part of the request at issue in this reconsideration order. Therefore, this submission of the appellant does not demonstrate an error under section 18.01(c) that would give rise to a reconsideration of the finding related to item 3 in the interim order.

[39] The appellant also wants me to provide citations for paragraph 66 of the interim order to substantiate my finding in that paragraph that the ministry's search for responsive records was performed by ministry staff that had "extensive knowledge of the ministry's record holdings."

[40] In the interim order, I summarized item 3 of the appellant's request as follows:

> Item 3 of the appellant's request concerns a search for records pertaining to the temporary loss, mishandling or misplacement of the appellant's July 25, 2014 request between that date and March 17, 2015. This item also concerns a request for records related to a fee waiver granted to the appellant. In response to the searches undertaken for this item, the ministry did not locate any responsive records.

[41] In the interim order, in upholding the ministry's search for item 3 records, my findings included the following:

> Besides documents related to a fee waiver provided to the appellant by the ministry, item 3 concerns the whereabouts of the appellant's request dated July 25, 2014 up to March 17, 2015. According to the appellant, his July 25, 2014 request concerned "…the subsequent removal of the MAG letter dated September 21, 2009 from the court file, as indicated in a letter from [the] Assistant Deputy Attorney General Court Services Division, dated April 28, 2014."
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> The ministry provided extensive representations as to the extent of the search for records responsive to item 3 of the appellant's request, including details of who conducted the searches, the databases searched and the expertise of the persons who conducted the searches.
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> I find that this search was conducted by individuals with extensive knowledge of the ministry's record holdings and was focused on locating the requested records.
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> I disagree with the appellant that the ministry's search for records responsive to item 3 of the request was not reasonable. I find the appellant's expectations about the required search to be unrealistic and unreasonable. For example, he expects the ministry's search to include numerous individuals that most likely would not now have responsive records, such as individuals who may no longer work at the ministry or may have had nothing to do with his 2014 request. He also expects the ministry to search through databases that appear to have nothing to do with the alleged misplacement of his July 25, 2014 request, such as unrelated shared databases. I conclude that such efforts were not warranted to conduct a reasonable search for the purpose of section 24 of the *Act*.

> The appellant was specifically asked to identify any records he believes have not been located in response to item 3 of his request. He did not identify any records that have not yet been located.
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> I also disagree with the appellant's assertion that there is insufficient information about the ministry's search for records responsive to item 3, as well as information about the ministry's technology for recovering archived and deleted emails. I find that the ministry has provided sufficient evidence for me to find that a reasonable search has been undertaken with respect to item 3 of the request.
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> As set out above, there are a number of explanations provided by the ministry as to why records responsive to item 3 of the appellant's request may not have been located, such as the appellant's request dated July 25, 2014 not being actually submitted by the appellant until March 17, 2015 or the request having been lost at the ministry. Even if this request was temporarily lost at the ministry, the ministry has provided sufficient evidence as to the search it undertook to locate records about this loss.
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> As set out above, a reasonable search is one in which 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. The *Act* does not require the ministry to prove with absolute certainty that further records do not exist.
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> I find that with respect to item 3 of the appellant's request, experienced employees knowledgeable in the subject matter of that part of the request expended a reasonable effort to locate records reasonably related to item 3 of the request.

[42] Prior to the issuance of the interim order, the appellant received copies of the ministry's representations, which I summarized and quoted from in the interim order. He also provided representations in response to the ministry's representations.

[43] The appellant relies on section 18.01(c) of the *Code* in his reconsideration request under Reason 2 in which he seeks "clarification of the interim order."

[44] Section 18.01(c) applies if there has been a clerical error, accidental error or other similar error in the decision. I do not agree with the appellant that the interim order needs to be clarified as suggested by him. In particular, I am not satisfied that an error has occurred such that section 18.01(c) of the *Code* applies as claimed by the appellant.

[45] Therefore, I dismiss the appellant's request for clarification of the interim order under section 18.01(c) of the *Code*. I find that his request under Reason 2 does not demonstrate that there was a clerical error, accidental error or other similar error

regarding order provision 1 of the interim order.

[46] Accordingly, I find that the arguments set out in Reason 2 of the appellant's reconsideration request do not support my reconsideration of the search finding respecting item 3 of the appellant's request in Interim Order PO-3976-I.

Conclusion

[47] I find that the appellant has not established a basis for a reconsideration of my finding that the ministry conducted a reasonable search for records responsive to item 3 of the request in Interim Order PO-3976-I. Therefore, I dismiss the appellant's request for a reconsideration of my finding in the interim order that the ministry conducted a reasonable search for records responsive to item 3 of the request.

ORDER:

I dismiss the appellant's request to reconsider my finding in Interim Order PO-3976-I that the ministry conducted a reasonable search for records responsive to item 3 of the appellant's request.

Original Signed by: March 18, 2021

Diane Smith
Adjudicator