

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4521-R

Appeals MA19-00513 and MA19-00514

Order MO-4199

The Regional Municipality of Durham

May 15, 2024

Summary: The appellant requested a reconsideration of the adjudicator's decision in Order MO-4199 to uphold, in part, the reasonableness of a search conducted by the Regional Municipality of Durham (the region) for records about environmental testing at a waste management facility.

In this decision, the adjudicator finds that the appellant has not established any of the grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure*.

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

Order Considered: Order MO-4199.

OVERVIEW:

[1] This decision addresses the appellant's reconsideration request of part of Order MO-4199. That order considered access to records related to environmental testing at a waste management facility, which is an incinerator site, owned by the Regional Municipalities of Durham and York.

[2] As set out in Order MO-4199 (the order), the appellant submitted two access requests to the Region of Durham (Durham or the region) under the *Municipal Freedom*

of Information and Protection of Privacy Act (the Act).

[3] The first request (Appeal MA19-00513) was for lab analysis reports and correspondence about the Adsorption Method for Sampling Dioxins and Furans (AMESA) system.

[4] The second request (Appeal MA19-00514) was for the AMESA work plans and other specific records from start-up to 2019.¹

[5] The region issued two separate decisions granting partial access to the records responsive to the appellant's two requests. The region withheld some of the information in the responsive records pursuant to several exemptions under the *Act*.²

[6] The appellant appealed the region's decisions to the Information and Privacy Commissioner of Ontario (the IPC).

[7] In addition to wanting to pursue access to some of the withheld information, the appellant advised that she continued to believe that further records existed that were responsive to both of her requests.

[8] Following an inquiry, I issued Order MO-4199 to resolve both appeals. In the order, I did not uphold the region's exemption claim for one record and I ordered the region to disclose this record. I also upheld the region's search as reasonable, other than ordering the region to conduct an additional search of the record holdings of four specified individuals.

[9] The appellant seeks a reconsideration of my decision to uphold in part the region's search for responsive records, as reasonable.

[10] In this reconsideration order, I do not allow the appellant's reconsideration request.

DISCUSSION

[11] The appellant's reconsideration request must meet one of the grounds for reconsideration set out in section 18.01 of the *Code*, which reads:

The IPC may reconsider an order or other decision where it is established that there is:

¹ Both requests are more particularly described in Order MO-4199.

² For the decision responding to the first request, the region advised that access to the withheld information was denied pursuant to sections 7(1) (advice or recommendations), 10(1) (third party information) and 12 (solicitor-client privilege) of the *Act*. For the decision responding to the second request, the region advised that access to the withheld information was denied pursuant to section 10(1) of the *Act*.

- (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.

[12] The reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their cases.

[13] *Functus officio* is a common law principle, which states that once the matter has been determined by a decision-maker, generally speaking, the decision-maker has no jurisdiction to further consider the issue. However, the *Code's* provisions acknowledge the ability of a decision-maker to re-open a matter to reconsider it in certain circumstances.³ In other words, I am *functus* and unable to further consider the issues that were under appeal unless the party requesting the reconsideration establishes one of the grounds in section 18.01.

[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.⁴

[15] A jurisdictional defect in the decision under section 18.01(b) of the *Code* goes to whether the adjudicator had jurisdiction to make the decision under the *Act*. It is not about a disagreement with the assessment of the evidence in the decision.⁵

[16] Section 18.01(c) of the *Code* contemplates "clerical or accidental error, omission or other similar error in the decision."

[17] Section 18.02 of the *Code* is also relevant in my determination as to whether to grant a reconsideration request. It 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.

[18] The reconsideration process set out in the IPC'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*

³ Order PO-2879-R.

⁴ For an example, see Order PO-3960-R.

⁵ Reconsideration Order MO-3917-R.

Assn. of Architects.⁶ 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.*⁷

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.

[19] Adjudicator Higgins' approach has been adopted and applied in subsequent IPC orders.⁸ 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.

[20] I agree with these statements and adopt them in the circumstances of this reconsideration request.

[21] The appellant asks that I reconsider my findings in paragraphs 60 to 64, 65, 71, and 87 of Order MO-4199, that she submits resulted in my decision to uphold the region's search for responsive records, in part. She refers to the grounds in section 18.01 of the *Code* only in relation to the findings in paragraph 60 of the Order MO- 4199, where she submits that there has been a fundamental defect in the adjudication process (section 18.01(a)) and/or there has been a clerical error, accidental error or omission or other similar error in the decision (section 18.01(c)).

⁶ (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).

⁷ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

⁸ See, for example, Orders PO-3062-R and PO-3558-R.

Findings

Paragraphs 60 to 64

[22] Paragraphs 60 to 64 set out the basis on which I upheld the region's search for the Environmental Compliance Approval (ECA) lab results at the region's incinerator site and/or by the third party. They read:

[60] I am satisfied that the region has conducted a reasonable search for the ECA lab results of the third party.

[61] As set out by the region in its representations, the ECA testing results are a provincial requirement, not a regional requirement. The province is the recipient of any ECA lab tests conducted by the third party. The region does not have a contractual obligation, nor a regulatory obligation under the ECA, to obtain a copy of these test results.

[62] I accept that these lab results flow from the third party (a separate corporate entity that holds a contract to build and run the facility) to the Province directly and the region is not a recipient of these lab results.

[63] I also accept the region's explanation that it was not necessary to obtain a copy of the lab results to prepare its annual reports, as any information in the annual reports related to the lab reports is provided to the region by an outside consultant.

[64] Therefore, I am satisfied that the region's search for the ECA lab results of the third party was reasonable.

[23] The appellant disagrees with my analysis of the evidence before me and submits that I should not have accepted the region's evidence that it did not have the requested ECA lab results. She submits that I should have found that these lab results would have been located at the region's incinerator site and not uphold its search for these records.

[24] Several sets of representations were exchanged between the parties during the inquiry addressing the ECA lab results. After reviewing all the evidence, I concluded in Order MO-4199 that the responsive ECA lab results were not located at the region's incinerator site.

[25] In her reconsideration request, the appellant reiterates representations that she submitted during the inquiry and disagrees with my analysis of the evidence. She submits that that I should have looked at the evidence and decided differently.

[26] As explained above, arguments about my interpretation of the facts and the resulting legal conclusions, do not fit within any of the criteria enunciated in section 18.01 of the *Code*.

[27] Therefore, I do not accept the appellant's position that my assessment of the evidence as to the location of the ECA lab results constitutes a fundamental defect in the adjudication process (section 18.01(a)) and/or there has been a clerical error, accidental error or omission or other similar error in the decision (section 18.01(c)). I also do not accept that this demonstrates a jurisdictional defect in the decision (section 18.01(b)).

Paragraph 65

[28] In paragraph 65 of Order MO-4199 I stated:

The only searches for records in response to the appellant's requests are contained in the affidavit of the region's FOIC,⁹ where he states that:

To the best of my knowledge and belief, all current Regional employees known to be associated with the project were contacted and requested to go through all of their records. This included Works Department employees.

[29] The appellant claims that I should have recognized that the region's FOIC was incorrect in saying that all searches performed were referenced in the affidavit.

[30] The appellant is concerned that an additional search at mediation was not done prior to the region's letter to her, dated October 16, 2019.

[31] The appellant refers to a letter from the region, dated October 8, 2019, received during the mediation of her appeal. This letter states that, "our review of the records requested indicates that there are no documents pertaining to the monthly lab results as stated in the email dated September 30, 2019."

[32] The appellant submits that, as the region's affidavit and this letter does not state that there was a further review, it could be interpreted that no further search was conducted at mediation. She asks that the IPC confirm and require evidence that an additional search after the original May 2019 searches was actually conducted. She further asks that the region be required to provide an affidavit confirming and describing the details of this search.

[33] In Order MO-4199, based on the evidence before me I was satisfied that the region conducted a reasonable search with the exception of its search for four specifically identified individuals.

[34] I ordered the region to conduct further searches in the records holdings of those four individuals and to issue an access decision with respect to any further responsive records located as a result of these searches. The region did so and its decision on the

⁹ Freedom of Information Coordinator.

records is currently the subject of a separate appeal.

[35] The appellant's disagreement with my finding does not establish any of the grounds for reconsideration set out in section 18.01 of the *Code* and I decline to reconsider my finding in paragraph 65 of Order MO-4199.

Paragraph 71

[36] In paragraph 71 of the order, I stated:

I find that the appellant has provided a reasonable basis for me to conclude that additional responsive records may exist in the record holdings of the region's former Works Commissioner, the retired Chief Administrative Officer, the late Regional Chairman, and the current Commissioner of Works. Accordingly, I will order the region to conduct another search of these individuals' record holdings

[37] As indicated above, in Order MO-4199, I ordered the region to conduct a search of four identified individuals' record holdings. The appellant wants me to expand this finding to order the region to search the record holdings of all former and current employees known to be associated with the ECA testing. Her position is that I had recognized that former employees record holdings had not been searched and that in providing her representations, she had put forward the names of those individuals that were the most obvious to most familiar with the ECA testing.

[38] The appellant would like me to reconsider my decision and order the region to search the record holdings of all current and/or former employees who were involved in the ECA testing.

[39] In Order MO-4199, I reviewed the evidence and determined the individuals who may have had responsive records that had not yet been located. I did not order the region to search the record holdings of all the region's current or former employees but to search only the record holdings of those employees about whom the appellant provided specific representations about that demonstrated their involvement in the ECA testing.

[40] In Order MO-4199, I found that the appellant had not provided a reasonable basis for me to conclude that additional responsive records exist.

[41] I find that the appellant has not established that any of the grounds set out in section 18.01 of the *Code* apply to support a reconsideration of my finding in paragraph 71 to order the region to search the record holdings of all former and current employees known to be associated with the ECA testing.

Paragraph 87

[42] In paragraph 87 of Order MO-4199, I stated:

I find that the appellant has not provided a reasonable basis for me to conclude that the region has not located all responsive communications between the external counsel and the environmental consultant.

[43] Therefore, I upheld the region's search for responsive records exchanged between these individuals.

[44] Based on the record I ordered disclosed in Order MO-4199, which is an email chain, the appellant now submits that she has evidence to support a reasonable basis to conclude that there are additional responsive records. The appellant submits that the record that was disclosed to her references a chain of emails that she was not provided.

[45] Even if the email chain that was disclosed to her as a result of Order MO-4199 suggests that there are additional responsive records exchanged between the region's external counsel and the environmental consultant, that evidence was not before me during the inquiry leading up to Order MO-4199. As explained above, in accordance with section 18.02 of the *Code*, 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.¹⁰

[46] As noted above, in Order MO-4199, relying on the evidence provided to me by the parties, I found that the appellant had not provided a reasonable basis for me to conclude that additional responsive records existed.

[47] I find that the appellant has not established that any of the grounds in section 18.01 of the *Code* apply to support a reconsideration of my finding in paragraph 87 to order the region to conduct another search for records exchanged between the external counsel and the environmental consultant

Conclusion

[48] In conclusion, the appellant's reconsideration request appears to be a disagreement of my assessment of the evidence and the ultimate decision upholding the region's search in order provision 3. However, this is not a ground for reconsideration.

[49] For the reasons set out above, I find that the appellant has not established that there is a fundamental defect in the adjudication process under section 18.01(a), a jurisdictional defect in the decision under section 18.01(b), or a clerical error, accidental error or omission or other similar error in the decision under 18.01(c) of the *Code*.

[50] Accordingly, as the appellant has not established any of the grounds of reconsideration under the *Code*, I therefore deny her reconsideration request.

¹⁰ The appellant is free to make a new request for any records arising from the information in the record that was disclosed to her as a result of Order MO-4199.

ORDER:

I deny the appellant's reconsideration request.

Original Signed by: _____
Diane Smith
Adjudicator

_____ May 15, 2024