Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-4525-R

Appeal MA20-00024

Toronto Police Services Board

Order MO-4478-F

May 24, 2024

Summary: The appellant requested a reconsideration of Order MO-4478-F. In that order, the adjudicator found that the police's search, following Interim Order 4266-I, was reasonable and dismissed the appeal.

In his reconsideration request, the appellant claimed fundamental defects in the adjudication process, a lack of procedural fairness, jurisdictional defects, serious errors and omissions, and reasonable grounds to presume bias. In this reconsideration order, 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* and denies the reconsideration request. He also finds that the appellant has not established bias or a reasonable apprehension of bias.

Statutes Considered: IPC *Code of Procedure*, sections 18.01(a), (b) and (c).

Orders and Investigation Reports Considered: Orders PO-2538-R, PO-3062-R and MO-4260.

Cases Considered: *Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4th) 577 SCC and *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673.

OVERVIEW:

[1] This order follows Final Order MO-4478-F, in which I upheld the police's search following Interim Order MO-4266-I.

[2] As described in Orders MO-4266-I and MO-4478-F, following disclosure from an earlier access request, the appellant became aware of a bulletin prepared by the Toronto Police Services Board (the police or TPS) which had been created by acquiring his photo from his driver's license issued by the Ministry of Transportation (MTO). As a result, the appellant submitted a new access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) to the police, as follows:

> Under the powers of the *MFIPPA*, I am requesting copies [of] Institutional documentation related to the protocols of the service-wide application related to the supervision, authorization, production and filing procedures established by the Toronto Police Service though its Administration and Corporate Communications Unit or other Units related to the preparation by Constables of "Wanted Posters", including those using photographs obtained from the Ontario Ministry of Transportation Drivers License electronic data base as part of the graphic design. The general records requested under this access request further relate specifically to records to the procedural authorization, ITO warrant applications, preparation, printing, publishing, and distribution of multiple copies of the attached "Wanted in Canada" poster created by personnel of the Toronto Police Service using the personal employment ad contact information of the requestor, prepared between 01 August 2000 and its issuance nationally and internationally on or about 06 April 2001 by a member of the Toronto Police Service, [specified badge number], assigned to 53 division and as reported by the Constable in the Toronto Globe and Mail as part of "extradition efforts". [reference IPC Order MO-5841-I, PP 63-65].

[3] After conducting their search and providing the appellant with access to some records, the appellant was of the view that the police's search for responsive records was not reasonable and that further responsive information should exist.

[4] In Interim Order MO-4266-I, at paragraph 47, I summarized the appellant's request as follows:

> Part 1: General records of protocols and procedures of the police related to the creation of "Wanted Posters"
>
> Part 2: Specific records pursuant to the protocols and procedures concerning the "Wanted in Canada" poster created by the police and containing the appellant's personal information prepared and issued on specified dates by a specified member of the police.

[5] Ultimately, I found that the police's search for responsive records was not reasonable because they did not complete a search for records relating to the second part of the request. With regard to the first part of the request, although I found that the police's search was reasonable, after reviewing the representations, it was apparent that they had not searched for records relating to the *MTO Inquiry Services System Oversight Framework Audit* and I ordered them to do so.[1]

[6] Following the police's search resulting from Order MO-4266-I, representations were received and in Order MO-4478-F, I found that the police's subsequent search, although not locating any further responsive records, was reasonable.

[7] After I issued Order MO-4478-F, the appellant sought a reconsideration of that decision on a number of grounds. The appellant also alleges that I am biased or that there is a reasonable apprehension of bias.

[8] In this order, I find that the appellant has not established bias or a reasonable apprehension of bias nor any other grounds for reconsidering my order. The request for reconsideration is denied.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Final Order MO-4478-F?

[9] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code*. Section 18 reads, in part, that:

> 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 other similar error in the decision.
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> 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.

[10] Ordinarily, under the common-law principle of *functus officio*, once a decision-maker has determined a matter, he or she does not have jurisdiction to consider it

[1] Despite the appellant's suggestion, in his reconsideration request, that I ordered the police to provide him with records in MO-4266-I, no such order was made.

further.[2] I am *functus* unless the party requesting the reconsideration – in this case, the appellant – establishes one of the grounds in section 18.01 of the *Code*. The provisions in section 18.01 of the *Code* summarize the common law position acknowledging that a decision-maker has the ability to re-open a matter to reconsider it in certain circumstances.[3]

The appellant's reconsideration request

[11] The appellant submits that his request for reconsideration addresses a serious matter, being the repetitive refusal of the police to comply with IPC orders and directions.

[12] The appellant submits that there were two issues to be adjudicated in this appeal, whether the police's search was reasonable and whether the police contravened section 48(1), the offence provision of the *Act*. The appellant suggests that I completely redacted his representations on section 48(1) before sharing them with the police. He refers to a letter sent to him during the inquiry ensuring that the parties would receive an opportunity to address any outstanding issues once the police's ordered search was complete.[4] The appellant submits that Order MO-4478-F represents a misunderstanding of the nature of the two discrete issues and is an omission and, therefore, the appeal should be reconsidered so that the section 48(1) issue can be correctly and completely adjudicated.

[13] The appellant submits that even though ordered to do so, the police did not provide an explanation about why certain records are not able to be located. He also notes that in Order MO-4478-F there was no declaration by way of an order provision to the police concerning their duty under the *Act*, which requires them to comply with IPC orders when issued.

[14] The appellant submits that Order MO-4478-F was prematurely written as the police's analyst had not provided copies of the records from 2010 alleged to have been located on the ordered search in their affidavit. He notes that there was no decision letter relating to this record representing an omission significant enough to compromise a full and fair hearing. The appellant submits that I accepted the existence of this document as indication of a reasonable search and that this was a breach of procedural fairness under the criteria at section 18.01 of the *Code*. Also, he states that addressing this record in a footnote, with language that would usually be found in an order provision was deferential to the police and against the authority of the *Act* to "suggest as an option" that the police comply and issue an access decision.

[15] The appellant submits that the IPC proceedings between 2016 and 2022 were ignored and Order MO-4478-F makes no reference of the prior considerations of the

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[2] *Functus officio* is a common law principle which means that, once a decision-maker has determined a matter, they have no jurisdiction to consider it further.
[3] Order PO-2839-R.
[4] The appellant refers to this letter as one sent by the IPC Commissioner. It was a letter from myself to the appellant addressing his submissions to the Commissioner.

mediator or the three prior adjudicators.

[16] The appellant submits that the above errors and omissions may be classified by the criteria of section 18.01(c) and are also connected to the type of jurisdictional defect represented by section 18.01(a) in that the parties were not provided with procedural fairness, being prevented from responding to shared submissions. The appellant refers to my severing of his representations on section 48(1) stating that the police were prevented from reading his submissions by the "unjustified and unreasonable redactions." He suggests that this prevented the police from responding fully to his argument. He also indicates that the police's affidavit was redacted preventing him from fully responding.[5]

[17] The appellant also suggests that I redacted information from his representations that addressed the issue of a reasonable search including the adequacy of the police's affidavit and failure to disclose records from 2001 and 2010.

[18] The appellant refers to past IPC decisions where an adjudicator reconsidered a decision based on the institution failing to address whether records were destroyed despite being ordered to do so. The appellant submits that the reconsideration order should address the provision in the interim order where the police were to provide details if records were destroyed along with any relevant record maintenance policy and retentions schedules.

Allegation of a reasonable apprehension of bias

[19] The appellant submits that the evidence in this appeal meets the high bar set in *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)* regarding a reasonable apprehension of bias.[6]

[20] He refers to the severing of his representations following his review of the police's decision letter and affidavit after the ordered search. The appellant suggests that my severing his introductory sentence that the police "willfully failed to comply with any elements of the Order, bringing the operation of the *MFIPPA* into disrepute," was a conscious redaction of the sentence defining the core issue. The appellant suggests that it is obvious to any reasonable person that this redaction was not an accidental error or an inadvertent omission but was intentional to cover over the issue in favour of the police, rather than hold them to account.

[21] The appellant contrasts this with Order MO-4406-R where the adjudicator allowed the appellant's reconsideration request because she found there was an error or omission in the final order as she had not recognized that the police had not addressed their retention of records in their affidavit.

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[5] The police's affidavit was provided to the appellant without severances.
[6] 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673 citing *Martin v. Martin* (2015), 2015 ONCA 596.

[22] The appellant also submits that a demonstration of a reasonable apprehension of bias is revealed when examining the divergent actions taken in Order MO-4436, an appeal not involving the appellant and dealing with the issues of deemed refusals or failure to comply. He submits that in that order the police are held to account on the issue of their "deemed refusals," by the adjudicator who addressed their strategy of refusing to comply with IPC orders. The appellant states that no such compliance order was issued in the course of this appeal, or the related appeal, to address "deemed refusals" or "failure to comply."

[23] The appellant states that another example of bias is shown when he requested the emails associated with his request on a CD, which was denied. He refers to Order MO-4411 where the police claimed that 1177 emails associated with a request, as well as a procedure document, were exempt under sections 7(1) (advice or recommendations) and 8(1)(c) (law enforcement – reveal investigative techniques or procedures) of the *Act*. In that order, the adjudicator found that the exemptions claimed for the procedure document did not apply and the police were ordered to disclose the record. The appellant submits that although it was the same institution and the same scope and scale of records were requested, the outcome under a different adjudicator was markedly different. He suggests that the results of the adjudication in Order MO-4411 clearly demonstrated that the responsive records existed, and the adjudicator ordered the police to disclose the procedure document.

[24] The appellant also notes that the adjudicator in Order MO-4411 worked positively with the requester to reformulate the request. He suggests that in this appeal, I unilaterally reformulated his request without his consent or involvement when I addressed the two parts of his request in the interim order. The appellant suggests that in unilaterally altering his request, I allowed the police to reduce the scope and scale of their search.

Findings

[25] The reconsideration process in section 18 of the IPC's *Code of Procedure* is not intended to provide parties who disagree with a decision a forum to re-argue their case.

[26] In Order PO-2538-R, Senior 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 Association of Architects*.[7] Regarding 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

[7] [1989] 2 SCR 848 (SCC).

> out in *Chandler* and other leading cases such as [*Grier v Metro Toronto Trucks Ltd.*].[8]
>
> 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.

[27] Subsequent IPC orders have adopted this approach.[9] In Order PO-3062-R, for example, the adjudicator 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 information in records at issue in that appeal. In determining 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*, the adjudicator wrote that:

> 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…

[28] I accept and adopt this reasoning here.

[29] For me to reconsider the final order in this appeal, the appellant's request must fit within one of the three grounds for reconsideration in section 18.01 of the *Code*.

[30] Section 18.01(a) of the *Code* specifies that the IPC may reconsider an order where it is established that there is a fundamental defect in the adjudication process. Past orders have found that various breaches of the rules of natural justice respecting procedural fairness will qualify as a fundamental defect in the adjudication process for the purpose of section 18.01(a).[10] Examples of such breaches would include a failure to notify an affected party,[11] or to invite sur-reply representations where new issues or evidence are provided in reply.[12]

[31] Section 18.01(b) relates to whether an adjudicator has the jurisdiction under the *Act* 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. Section 18(1)(c), meanwhile, allows for reconsideration of an order that contains clerical or other similar errors or omissions.

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[8] 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).
[9] See, for example, Orders PO-3062-R, PO-3558-R and PO-4004-R.
[10] Order PO-4134-I.
[11] Orders M-774, R-980023, PO-2879-R and PO-3062-R.
[12] Orders PO-2602-R and PO-2590.

[32] In his introductory paragraph, the appellant refers to 18.01(a), (b) and (c) as being relevant in his reconsideration request.

[33] In Final Order MO-4478-F, I considered the police's search that I ordered it to complete in the interim order (MO-4266-I).

[34] In the interim order, I dealt with the appellant's raising of section 48(1) and found that there was insufficient evidence to warrant my making a recommendation to the Commissioner that the permission of the Attorney General be sought to commence a prosecution of the police for offences against section 48(1). Following the police's search, the appellant again raised section 48(1) when the search was not conducted pursuant to my order provisions in Interim Order 4266-I. Given that I had dealt with section 48(1) in the interim order, the appellant's submission regarding the police's conduct prior to the issuance of the interim order was no longer relevant. As a result, and in the face of the appellant indicating that his representations should not be shared in their totality, I decided to share only those portions of the appellant's representations concerning the search.

[35] Although the appellant suggests that his representations concerning section 48(1) were entirely redacted, including his opening sentence and therefore the police did not have the opportunity to review a core issue, I disagree. The appellant provided significant representations on section 48(1) commenting on the behaviour of the police from 2016. The appellant's representations on section 48(1) were mostly redacted because they did not deal with the issues before me, being the police's subsequent search. However, the appellant's submission regarding section 48(1) and the police's subsequent search were shared with the police. The shared portion of the appellant's representation stated:

> It would be unreasonable to conclude that the "Decision Letter" from the Police of 26 April 2023 and the revised Affidavit of 06 May 2023 are sufficient evidence of compliance with the Order, and thus the seriousness of the breach of deadlines and the insubordination to the IPC's directions rendered moot. The narrative in the police record of explicit offenses contrary to Section 48(1) of the Act is not a trivial matter. A reasonable person viewing the Decision letter and Affidavit about the search could only conclude they are both void of meaningful pith and substance, deficient in the required integrity expected of a police service, masquerading as a statement written in haste "just to get something or other on dated letterhead paper sent to the IPC to sooth the Adjudicator and continue to frustrate the Appellant."

[36] The appellant also suggests that I redacted information from his representations that addressed the issue of a reasonable search including the adequacy of the police's affidavit and failure to disclose records from 2001 and 2010. However, none of this information was severed and the police were provided with all of the information the appellant raised regarding their ordered search so they could respond in kind.

[37] None of the arguments above establish that there has been a fundamental defect, jurisdictional defect or clerical error.

[38] The appellant submits that records ordered to be disclosed in compliance with Order MO-4266-I have not been provided. However, in Order MO-4266-I, I ordered no records to be disclosed as the appeal concerned the police's search and whether it was reasonable. The police were ordered to conduct a search for records relating to part 2 of the appellant's request as well as for records, that the police did not search for, relating to part 1 of his request.

[39] The appellant says that the police located a responsive record in their search following the interim order. The police explained that they did not locate any responsive records but provided the IPC and the appellant with information about how the search was carried out. Part of this explanation referred to the record-keeping practices in place in 2010 (see paragraph 35 of Order MO-4478-F). The appellant's arguments on this point are, in my view, attempts to re-argue points already addressed in the final order. These arguments do not establish a ground for reconsideration.

[40] The appellant submits that the police did not address possible destruction of records and its maintenance policies as ordered to do so in the interim order. He points to Order MO-4406-R where the adjudicator found that an error or omission had been made that warranted reconsideration because she recognized the police had not addressed their retention of records in the affidavit in response to the first interim order. However, this issue was addressed at paragraph 40 of MO-4478-F where I found that although the police had not provided an explanation concerning their maintenance of the records, I concluded that the lack of explanation was not a reason to order the police to conduct a further search. As such, the appellant's complaint that I failed to address the possible destruction of records has no merit and does not establish any grounds for a reconsideration under section 18.01 of the *Code*.

[41] The appellant argues that I was biased in my decision making. If established, this could constitute a ground for reconsideration under section 18.01(1)(a) of the *Code*. The Ontario Court of Appeal in *Ontario Medical Association v. Ontario (IPC)* noted that "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."[13] Based on what the appellant has provided me for this reconsideration request, he has not met that threshold.

[42] The Supreme Court of Canada articulated what is now a long-established test for establishing a reasonable apprehension of bias:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of

[13] Cited above.

> Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly." [14]

[43] From this test, it is clear that more than disagreement with my decision is needed to establish bias on my part. The fact that I found that the police's search was reasonable and dismissed the appellant's section 48(1) claim, is not enough to establish bias on my part in favour of the police and against the appellant. My decision resulted in an interim order, ordering the police to conduct further searches and a final order finding that even further searches would not locate responsive records. The fact that I did so does not establish that I was biased against the appellant in favour of the police.

[44] I have already addressed my decision to withhold a portion of the appellant's representations from the police. In my view, withholding information that did not address the main issue, the police's search and the appellant's section 48(1) claim regarding same, does not establish bias.

[45] I have reviewed the orders referenced by the appellant and find that they are not relevant to this reconsideration request or his allegation of bias. As noted, the acting adjudicator in Order MO-4436 was dealing with the issues of "deemed refusals" or "failure to comply," which is why she ordered the police to issue a final access decision. Also, in Order MO-4411, the record before the adjudicator was a procedure document and the adjudicator found that the exemptions claimed for this record did not apply and she ordered the police to disclose the record. However, in Order MO-4478-F, the issue was the police's search, no exemptions had been claimed for records that were located and deemed refusal was not an issue before me.

[46] Finally, the appellant suggests that in Interim Order MO-4266-I, I reformulated his request. In that interim order, after examining the evidence, I found that the police had not conducted a reasonable search because it only searched for one part of the request. In explaining this at paragraph 46 of the order, I set out the two categories of records that the appellant was seeking: general records of protocols and procedures relating to the creation of "wanted posters" and specific records concerning the "wanted in Canada" poster created containing the appellant's personal information. At no time was the appellant's request reformulated. The appellant's argument has no merit, and it does not establish a ground for reconsideration.

[47] In summary, having considered the appellant's reconsideration request and submissions, I find he did not establish the grounds for reconsideration in section 18.01(a), (b) or (c) of the *Code*. Accordingly, I find there is no basis upon which to reconsider Final Order MO-4478-F.

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[14] In *Committee for Justice and Liberty et al. v. National Energy Board et al*. [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

ORDER:

I deny the appellant's reconsideration request.

Original Signed by: May 24, 2024

Alec Fadel
Adjudicator