

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER MO-4602-R

Appeal MA21-00010

Order MO-4560

The Corporation of the City of Kingston

December 10, 2024

**Summary:** An individual submitted a request for reconsideration of Order MO-4560, which partly upheld the city's access decision. With respect to the issue of the city's custody or control of responsive records, the adjudicator found in Order MO-4560 that the city had custody or control over communications between city staff but not over communications between elected officials (including the mayor). The requester claimed that there was a fundamental defect in the adjudication process because the order did not address any communications that may have occurred between city staff and elected officials (including the mayor).

The adjudicator allows the reconsideration of Order MO-4560. As the issue of reasonable search was not addressed in Order MO-4560, the adjudicator finds that there was a fundamental defect in the adjudication process.

Further in this order, the adjudicator finds that the city conducted a reasonable search for records of communications between city staff and elected officials (including the mayor). As no responsive records between city staff and elected officials (including the mayor) exist, the adjudicator makes no finding on the city's custody or control over such records.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 17; *IPC Code of Procedure*, sections 15.01(a), (b) and (c).

**Order Considered:** Order MO-4560.

**Cases Considered:** *Chandler v. Alberta Assn. of Architects*, 1989 Cani 41 (SCC).

## **OVERVIEW:**

[1] This reconsideration order arises from a request to reconsider Order MO-4560.

[2] Order MO-4560 resolved an appeal from an access decision made by the Corporation of the City of Kingston (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in response to a request for access to records of electronic exchanges between and amongst identified elected officials and city staff during two separate city meetings. One was a meeting of the planning committee and the other a city council meeting.

[3] In Order MO-4560, I partly upheld the city's access decision finding that the city had custody or control over communications between city staff but not over communications between elected officials (including the mayor).

[4] After Order MO-4560 was issued, the city commenced an application for judicial review of my decision. The appellant also requested a reconsideration of the order, submitting that Order MO-4560 did not say anything specifically about communications exchanged between staff and councillors at the two meetings. The Director of Adjudication conducted an initial review of the reconsideration request and found that the appellant had established a clear case that a ground for reconsideration was established and that the reconsideration request can proceed.<sup>1</sup> However, even though the appellant's reconsideration request passed the initial review, this does not mean the grounds for reconsideration are established.<sup>2</sup>

[5] The reconsideration was then assigned to me to determine if the grounds for reconsideration are established.

[6] For the reasons that follow, I allow the reconsideration request. In this order I find that the city conducted a reasonable search for records of communications between city staff and elected officials (including the mayor) and that none of the responsive records before me contained communications between city staff and elected officials (including the mayor). Accordingly, I make no finding or order on the custody or control over such records.

## **DISCUSSION:**

[7] The sole issue in this appeal is whether there are grounds under section 15.01 of the IPC's *Code of Procedure* (the *Code*) to reconsider Order MO-4560.

[8] Under the common-law principle of *functus officio*, once a decision-maker has determined a matter, they do not have jurisdiction to consider it further. However, in

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<sup>1</sup> See in this regard, section 15.08 of the *Code*.

<sup>2</sup> See in this regard, section 15.10 of the *Code*.

*Chandler v Alberta Assn. of Architects*,<sup>3</sup> the Supreme Court of Canada said that while “there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals,” an administrative decision could be reopened in certain circumstances.<sup>4</sup>

[9] On September 9, 2024, the revised *Code* came into effect. Section 15.01 of the *Code* summarizes the common law position, acknowledging that a decision-maker has the ability to re-open a matter to reconsider it in certain circumstances. It says:

15.01 IPC decisions are final. The IPC may only reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the Adjudication process;
- (b) a jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

15.02 The IPC will not reconsider a decision simply on the basis that:

- (a) new evidence is provided, whether or not that evidence was available at the time of the decision; or
- (b) a Party disagrees or is dissatisfied with the result.

[10] For me to reconsider Order MO-4560, the appellant’s request must fit within one of the three grounds for reconsideration in section 15.01 of the *Code*.

[11] Section 15.01(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.

[12] In this case, although none of responsive records before me included communications between elected officials (including the mayor) and city staff, the appellant’s request stems from my failure to make clear my determination on whether the institution conducted a reasonable search for records of communications between city staff and elected officials (including the mayor). In the submissions the parties provided during my inquiry into the appeal they addressed the issue of reasonable search. In my view, my failure to make clear my determination on reasonable search qualifies as a fundamental defect in the adjudication process.

[13] I now address the issue of whether the city conducted a reasonable search for records of communications between city staff and elected officials, (including the mayor).

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<sup>3</sup> *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC).

<sup>4</sup> *Ibid.*

## **The submissions on reasonable search**

[14] The city asserted that it conducted a reasonable search for responsive records.

[15] In support of its position the city provided an affidavit of its Corporate Records and Information Officer. He states as follows:

I have made appropriate enquiries of others to inform myself in order to make this affidavit.

At the time the request was received [the appellant's request], it was reviewed. The request was for emails and text messages between and among specific city staff members and members of council. When the request was received, I reached out to the individuals named in the request and asked that the responsive records be provided to me.

Once I had received responsive records from all parties, I began to review the responsive records so that a decision could be made with respect to the request.

[16] The city adds that during mediation the scope of the request was expanded to include records of communication created in Teams during the meetings. As set out in the body of Order MO-4560 those Teams messages were also treated as responsive records.

[17] The appellant asserts that the city did not conduct a reasonable search for responsive records. She submits that the records do not include emails and texts among staff, the Teams communications have large time gaps, only two records show the mayor's communications, there are very few texts, and the YouTube recordings of the meetings show the frequent use of mobile devices.

[18] The appellant adds that she does not intend to cast doubt on the integrity of the City's Corporate Records and Information Officer and recognizes that the mayor, councillors, and staff use portable devices to access documents and not necessarily to communicate with each other, but that:

I simply have no way of assessing the City's "reasonable effort" and therefore am left wondering whether all reasonable steps were taken to find and provide all the records with respect to the two meetings in question.

[19] In reply, the city relies on its on its initial representations and submits that the appellant's submission that the records do not include emails and texts among staff, the Teams communications have large time gaps, only two records show the mayor's communications, there are very few texts, and that the YouTube recordings of the meetings show the frequent use of mobile devices, does not provide a reasonable basis

for concluding that additional records exist.

### **Analysis and finding**

[20] If a requester claims that additional records exist beyond those found by the institution, the issue is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act*.<sup>5</sup>

[21] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, they still must provide a reasonable basis for concluding that such records exist.<sup>6</sup>

[22] The *Act* does not require the institution to prove with certainty that further records do not exist.<sup>7</sup> However, the institution must provide enough evidence to show that it has made a reasonable effort to identify and locate responsive records;<sup>8</sup> that is, records that are "reasonably related" to the request.<sup>9</sup>

[23] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request makes a reasonable effort to locate records that are reasonably related to the request.<sup>10</sup> The IPC will order a further search if the institution does not provide enough evidence to show that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.<sup>11</sup>

[24] I find that the city made a reasonable effort to conduct a reasonable search for responsive records, including team messages, from the staff and council members that the appellant listed in her request. Based on the affidavit evidence provided by the Corporate Records and Information Officer, I find that the city has demonstrated that an experienced employee, knowledgeable in the subject matter of the request made reasonable efforts to locate records reasonably related to the appellant's request.

[25] As noted above, the *Act* does not require the city to prove with certainty that further records do not exist, only that it has made a reasonable effort to identify and locate records reasonably related to the request. From my review of the evidence before me, I accept that the city has done so.

[26] Additionally, in the face of the evidence provided by the city, I do not accept that the appellant has provide a reasonable basis for concluding that additional records

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<sup>5</sup> Orders P-85, P-221 and PO-1954-I.

<sup>6</sup> Order MO-2246.

<sup>7</sup> *Youbi-Misaac v. Information and Privacy Commissioner of Ontario*, 2024 ONSC 5049 (Ont. Div. Ct.) at para 9, on the analogous requirement in the provincial equivalent of the *Act*.

<sup>8</sup> Orders P-624 and PO-2559.

<sup>9</sup> Order PO-2554.

<sup>10</sup> Orders M-909, PO-2469 and PO-2592.

<sup>11</sup> Order MO-2185.

responsive to her request exist.

[27] Based on the searches it conducted and the individuals who were tasked with conducting them, I find that the city has complied with its obligations under section 17 of the *Act* with respect to making reasonable efforts to locate responsive records.

[28] Accordingly, while I find that the appellant has established the grounds under section 15.01(a) for a reconsideration of Order MO-4560, I find that the city has conducted a reasonable search for responsive records in compliance with its obligations under section 17 of the *Act*.

[29] In result, I allow the appellant's reconsideration request, but I find that the city has conducted a reasonable search for all the responsive records in compliance with its obligations under section 17 of the *Act*, and none of them before me included communications between city staff and elected officials (including the mayor). Accordingly, I make no finding on whether the city has custody or control of records of communications between city staff and elected officials (including the mayor).

**ORDER:**

1. I allow the appellant's reconsideration request.
2. I uphold the reasonableness of the city's search for responsive records.

Original Signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

December 10, 2024 \_\_\_\_\_