Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-3735-R

Appeal MA18-167

Order MO-3696

Peterborough Police Services Board

February 22, 2019

Summary: The appellant requested a reconsideration of Order MO-3696. He alleges bias on the part of the adjudicator and disputes her consideration of the factors and presumptions at sections 14(2) and 14(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this Reconsideration Order, the adjudicator finds that the appellant has not established that grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Order PO-3696, and denies the reconsideration request.

Orders Considered: Orders PO-2538-R and PO-3062-R.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.); *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673.

OVERVIEW:

[1] This reconsideration order is issued regarding Order MO-3696, which upheld the access decision of the Peterborough Police Services Board (the police) regarding a request for information made under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA,* or the *Act*). The police had fully withheld a video statement made by a third party (an affected party) in connection with the appellant, and partially withheld a written summary of the video statement.

[2] In my inquiry, I sought representations from the police, two affected parties, and

the appellant. I received representations from the police, one affected party, and the appellant, and provided the appellant with the non-confidential portions of the representations of the police, in accordance with *Practice Direction 7* of the *Code of Conduct* of the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office). The representations of the affected party were not shared in keeping with this *Practice Direction*. I considered each party's representations and the applicable law governing the disclosure of records containing the personal information of both the appellant and affected parties (section 38(b) of the *Act*).

[3] In Order MO-3696, I found that disclosure of the withheld information would be an unjustified invasion of the personal privacy of identifiable individuals under the personal privacy exemption at section 38(b) of the *Act*, and I upheld the police's decision to withhold it.

[4] After Order MO-3696 was issued, the appellant communicated his disagreement with the decision to this office. He was provided with information about this office's reconsideration process under section 18.01 of the IPC's *Code of Procedure* (or, the *Code*).

[5] The appellant then submitted a request for reconsideration of Order MO-3696. In his request, he explicitly and implicitly alleges bias on my part in deciding his case. He also argues that I erred in my determination of whether section 38(b) applied. That analysis had considered the presumption weighing against disclosure at section 14(3)(b) (investigation into possible violation of law), and the factors at sections 14(2)(a) (public scrutiny), (d) (fair determination of rights), and (f) (highly sensitive).

[6] For the reasons that follow, I find that the appellant has not established any grounds for reconsideration under section 18.01 of the *Code*, and his reconsideration request is denied.

DISCUSSION:

[7] The only issue to be decided is whether there are grounds under section 18.01 of this office's *Code of Procedure* to reconsider Order MO-3696.

[8] This office's reconsideration process is set out in section 18.01 of the *Code of Procedure* which applies to appeals under the *Act*. Sections 18.01 and 18.02 state:

> 18.01 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;
>
> (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.

The appellant's allegation of bias

[9] The appellant's position is that his case was decided by a biased decision maker.

[10] In addition to containing an explicit claim of bias, the appellant's representations also have implicit claims of bias on my part in favour of the police and affected parties. He argues that by upholding the access decision of the police to withhold a video statement in its entirety and portions of a written summary of that video statement, I demonstrated my "support" for the police and the alleged improper conduct of certain police personnel and affected parties against him. Regarding these affected parties, the appellant indicates that I was preoccupied with their feelings, privacy, and allegedly inappropriate conduct with the police. He argues that I ignored the difficulties he and his family have been through and focused on those alleged by an affected party.

The test for establishing bias or reasonable apprehension of bias

[11] The Ontario Court of Appeal recently noted that "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."[1] Based on what the appellant has provided me for this reconsideration request, he has not met that threshold.

[12] 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 Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—

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[1] *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 71.

> conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[2]

[13] From this test, it is clear that more than disagreement with my decision is needed to establish bias on my part. The mere fact that I upheld the access decision of the police is not enough to establish bias on my part in favour of the police and against the appellant. My analysis considered and weighed factors and presumptions listed in the *Act* to determine whether disclosure of the information withheld would constitute an unjustified invasion of the personal privacy of affected parties. The fact that I did so does not establish that I was biased against the appellant in favour of those affected parties. The factors that the appellant characterizes as "highly subjective criteria" are factors and presumptions found in the applicable law, *MFIPPA*.

[14] The appellant's representations indicate that I should have considered certain aspects of the factual background related to the records differently, especially the circumstances surrounding the creation of the records. However, the circumstances surrounding the creation of the records are not relevant to the issues within my jurisdiction to decide. The fact that the appellant disagrees with my assessment of the facts relevant to deciding the issues within my jurisdiction is not evidence of bias or a reasonable apprehension of bias. Nor is the fact that my order does not address matters outside of my jurisdiction.

[15] The appellant's representations also indicate that he believes I preferred the evidence of an affected party over his on the application of a factor, specifically the one at section 14(2)(f) (highly sensitive). However, the appellant's position appears to arise out of a misunderstanding of how the factors listed at section 14(2) are considered and weighed. Section 14(2)(f) is considered from the point of view of a party resisting disclosure: that is, would disclosure be likely to result in significant personal distress to the affected party? I invite the appellant to re-examine the discussion of section 38(b) and the analysis required for it again, particularly at paragraphs 13, 14, and 16 of Order MO-3696. In any event, preferring the evidence of one party over another is not evidence of bias or a reasonable apprehension of bias.

[16] In conclusion, I find that the appellant has not provided evidence to rebut the presumption of impartiality, or demonstrate bias or a reasonable apprehension of bias on my part.

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

Alleged errors in balancing the factors and presumptions in sections 14(2) and 14(3)

[17] At the outset, it is worth highlighting that the reconsideration process set out in this office's *Code* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, the adjudicator 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*.[3] With respect to 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 out in *Chandler* and other leading cases such as [*Grier v. Metro Toronto Trucks Ltd.*][4]
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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] This approach has been adopted and applied in subsequent orders of this office.[5] For example, in Order PO-3062-R, an adjudicator was asked to reconsider her finding that the discretionary exemption did not apply to information in records at issue. 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] Having reviewed the appellant's representations in support of a reconsideration of Order MO-3696, I find that they essentially repeat the evidence that he had already submitted during the inquiry, and amount to disagreement with my decision [including my weighing of the factors and presumptions at sections 14(2) and 14(3)]. Following

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[3] [1989] 2 SCR 848 (S.C.C.).
[4] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).
[5] See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

the approach taken by this office about such disagreement, I find that this does not meet the requirements for reconsideration set out in section 18.01 of the *Code*. To the extent that the appellant raises new arguments, those too are not a basis for reconsideration.

[20] Though the function of a reconsideration order is not to re-weigh evidence or explain a decision, I wish to point out a few matters. With respect to the appellant's representations about section 14(2)(f), the points I made earlier in the bias discussion about an analysis of the section 14(2)(f) factor apply equally here. In addition, I invite the appellant to review paragraph 19 of my order, which addresses the application of the presumption at section 14(3)(b) (possible violation of law) as a factor weighing against disclosure, even when an individual is not charged. Finally, the often high cost of litigation does not supplant the test to be met in section 14(2)(d) (fair determination of rights), or serve to nullify the existence of factors that weigh against disclosure.

[21] In conclusion, having reviewed the appellant's reconsideration request, and his representations provided during the inquiry of this appeal, I find that he has not demonstrated that there was a fundamental defect in the adjudication process; another jurisdictional defect in the decision; or any clerical error, accidental error or omission, or other similar error in Order MO-3696. Therefore, I find that the appellant's reconsideration request does not establish any of the grounds under section 18.01 of the *Code* upon which this office may reconsider a decision.

ORDER:

I deny the appellant's reconsideration request.

Original signed by: February 22, 2019

Marian Sami
Adjudicator