Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-3952-R

Appeal PA17-119

Order PO-3928

Royal Ottawa Mental Health Centre

May 8, 2019

Summary: The appellant submitted a request for reconsideration of Order PO-3928, seeking a reconsideration of the adjudicator's order upholding the Royal Ottawa Mental Health Centre's search for responsive records as reasonable. 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-3928, and denies the reconsideration request.

Considered: The IPC's *Code of Procedure*, sections 18.01 and 18.02.

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.).

OVERVIEW:

[1] This reconsideration order arises from an appeal of an access decision made by the Royal Ottawa Mental Health Centre (Royal Ottawa) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to records related to Electroconvulsive Therapy (ECT). After the Royal Ottawa issued a fee estimate and an interim access decision, the appellant appealed the decision to this office, and also narrowed his request, now only seeking metrics used to determine the success of ECT.

[2] The Royal Ottawa did not locate any records responsive to the narrowed request, and issued a decision informing the appellant that these records do not exist. The appellant claimed that responsive records should exist, or could be produced from existing records. An inquiry was conducted and I issued Order PO-3928, which upheld the Royal Ottawa's search as reasonable and found that the Royal Ottawa does not have an obligation to create a record.

[3] After Order PO-3928 was issued, the appellant communicated his disagreement with the decision to this office, and he was provided with information about this office's reconsideration process under section 18 of the IPC's *Code of Procedure* (the *Code*).

[4] On March 4, 2019, I received the appellant's reconsideration request seeking a reconsideration of Order PO-3928 under 18.01(a) of the *Code*, because he alleges there was a fundamental defect in the adjudication process.

[5] For the reasons that follow, I find that the appellant has not established the grounds for a reconsideration of Order PO-3928 under section 18.01(a) of the *Code*. Additionally, the appellant has not argued, nor do I find, that this reconsideration request would fit within paragraphs (b) or (c) of section 18.01. Therefore, I deny the reconsideration request.

DISCUSSION:

Are there grounds under section 18.01(a) of this office's *Code of Procedure* to reconsider Order PO-3928?

[6] This office's reconsideration process is set out in section 18.01 of the *Code* 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:
>
> (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.
>
> 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 reconsideration request

[7] The appellant argues that there has been a fundamental defect in the

adjudication process, because he believes Order PO-3928 was made based on incorrect information. The appellant argues that there is incorrect information included in the affidavit of Royal Ottawa's Clinical Lead for ECT (the Affidavit), which I specifically refer to at paragraph 18 of Order PO-3928:

> The doctor states that the Royal Ottawa has not conducted any studies into the effectiveness or success of ECT. However, the doctor states that the Royal Ottawa has been collecting data for a period of two years (from 2016 to 2018) for quality improvement and research purposes. This data includes information on the diagnosis, number of treatments, rating scale scores (if available) and side effects. However, the doctor indicates that the data does not provide information on the efficacy of ECT compared to other treatments, and has not yet been analysed.

[8] The appellant takes issue with two parts of this paragraph. First, the appellant submits that the time period for data collection is incorrect. Second, the appellant submits that the last sentence in the paragraph is false and misleading. In support of his arguments, the appellant submitted a letter he received from the Royal Ottawa dated August 28, 2018 (the Letter), and a copy of a report: "Electroconvulsive Therapy: Improving Quality and Patient Access" (the Report), dated February 28, 2018.

[9] The appellant submits that in the Letter, the Royal Ottawa identifies the correct time period for data collection as May 2015 to December 2017, instead of 2016 to 2018 as indicated in the Affidavit. Furthermore, the appellant submits that the Letter states that counsel for the Royal Ottawa would inform this office of the erroneous information contained within the Affidavit, and provide the correct dates. This office never received such a letter from the Royal Ottawa.

[10] The appellant submits that the Report is the result of the data collection outlined in the Affidavit by the Royal Ottawa's Clinical Lead for ECT, who is also the Project Lead listed in the Report. The appellant argues that despite this, her Affidavit contained the incorrect time period for data collection, and the Director of Clinical Records and Chief Privacy Officer (CPO) missed a completed report in her search. The appellant argues that based on the timelines, the Report, or at least a draft of it, should have been completed prior to the submission of initial representations and even reply representations in this appeal. The appellant argues that this calls into question the veracity of all information provided by the Royal Ottawa.

[11] With respect to the last sentence of paragraph 18 of Order PO-3928, the appellant submits that based on the Report, it is evident that the phrase "has not yet been analysed" is false. With respect to the first part of the sentence, the appellant submits that the apparent wording of his request had been "altered slightly but significantly". The appellant argues that he never requested a comparison of efficacy of ECT "to other treatments." The appellant argues that it is possible to measure efficacy without comparison to other treatments. Furthermore, the appellant argues that there has been no genuine attempt by the parties to clarify terms that he has used despite

the obvious need for clarification.

[12] The appellant points out several paragraphs in the Report, which he claims prove that the Royal Ottawa does measure the efficacy of ECT. The appellant argues that the Royal Ottawa's failure to correctly identify relevant information in a major study, which it had just completed at the time of his request, shows that it is impossible to find that its search for records responsive to his request was reasonable.

[13] The appellant argues that the Royal Ottawa provided incorrect information in a sworn affidavit, which had an impact on the decision in Order PO-3928. Therefore, the appellant argues that the decision is flawed, because it was based on incorrect information, which is the reason why he is requesting this reconsideration. The appellant requests that the Royal Ottawa be ordered to undertake a complete and reasonable search, or that Order PO-3928 be reversed.

Analysis and findings

[14] The reconsideration process set out in the IPC's *Code* is not intended to provide parties with an opportunity to re-argue an appeal. In Reconsideration 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 Assn. of Architects*.[1] 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 International Trucks Ltd.*[2]
>
> 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.

[15] This approach has been adopted and applied in subsequent orders of this office.[3]

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[1] [1989] 2 SCR 848 (*Chandler*).
[2] 1996 CanLII 11795 (ON SC).
[3] See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

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 *Act* did not apply to information in 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…

[16] As established by section 18.02 of the *Code*, this office 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. In my view, the appellant's arguments in this case represent an attempt to re-argue the appeal using new evidence, which does not provide a basis for reconsideration.

[17] Having said that, I note that the Report dated February 28, 2018 submitted by the appellant was completed after the appellant's request, which was received by the Royal Ottawa on January 30, 2017. Therefore, the Report would not be within the scope of the appellant's request or, consequently, the Royal Ottawa's search, since the search could only be expected to include records up to the date of the request. I also note that the appellant submitted a second request under the *Act* to the Royal Ottawa specifically for this Report and was granted full access to it.

[18] While correspondence submitted by the appellant does support that the time period for data collection was incorrectly stated in the Affidavit, this does not amount to a fundamental defect in the adjudication process. Previous orders have held that a fundamental defect in the adjudication process may include:

- failure to notify an affected party,[4]
- failure to invite representations on the issue of invasion of privacy,[5] or
- failure to allow for sur-reply representations where new issues or evidence are provided in reply.[6]

[19] The dates in the Royal Ottawa's Affidavit were not central to my finding. More significant is the fact that the Royal Ottawa stated it had not conducted any studies into the efficacy of ECT. In this situation, I find that the error with respect to the time period

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[4] Orders M-774, Order R-980023, Order PO-2879-R, PO-3062-R.
[5] Order M-774.
[6] Orders PO-2602-R and PO-2590.

for data collection stated in the Affidavit, which I quoted in Order PO-3928, does not fit within this office's interpretation of "fundamental defect" in section 18.01(a).

[20] The appellant has not argued that this error fits within section 18.01(c) of the *Code.* However, I note that it has been argued in previous orders that this type of error could be considered a clerical, accidental, or other similar error. Previous orders have held that an error under section 18.01(c) may include:

- a misidentification of the "head" or the correct ministry;[7]
- a mistake that does not reflect the Adjudicator's intent in the decision;[8]
- information that is subsequently discovered to be incorrect;[9] and
- an omission to include a reference to and instructions for the institution's right to charge a fee.[10]

[21] In this situation, even if the error in the dates of the Affidavit could fit within section 18.01(c) of the *Code*, this error was not material to, or determinative of, my decision in Order PO-3928. Therefore, I find that it is not a basis for reconsideration under section 18.01(c). Finally, the appellant did not raise section 18.01(b), nor do I find in this situation that there is any other jurisdictional defect in Order PO-3928.

[22] 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 in Order PO-3928*.* I also find that he has not established any other basis under section 18.01 of the *Code* upon which this office may reconsider an order. Accordingly, I decline to reconsider Order PO-3928.

ORDER:

The request for reconsideration of Order PO-3928 is denied.

Original signed by
Anna Truong
Adjudicator

May 8, 2019

[7] Orders P-1636 and R-990001.
[8] Order M-938.
[9] Order M-938 and MO-1200-R.
[10] MO-2835-R.