

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-4155-R

Appeal PA17-170

Lambton College of Applied Arts and Technology

Order PO-4093

June 8, 2021

Summary: The appellant requested a reconsideration of Order PO-4093, claiming the adjudicator was biased or there was a reasonable apprehension of bias, and other procedural defects. In this Reconsideration Order, the adjudicator finds the appellant has not established the grounds for reconsidering Order PO-4093 under section 18.01 of the *Code*, and she denies the reconsideration request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended; *IPC Code of Procedure*, section 18.01(a).

Orders and Investigation Reports Considered: Orders PO-2538-R, PO-3062-R, and PO-4093.

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

OVERVIEW:

[1] This reconsideration order relates to Order PO-4093, which was issued in Appeal PA17-170, involving an individual, the appellant, and Lambton College of Applied Arts and Technology (the college). The appellant had submitted a five-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the college for the correction of personal information. The college issued a decision to the appellant agreeing to correct four of the errors. However, it advised the appellant it would not

correct item 5 of his request. The appellant appealed the college's decision.

[2] During mediation, the appellant asked the college to attach a statement of disagreement to the appellant's file regarding item 5. The college agreed to do so pursuant to section 47(2)(b) of the *Act*. Nonetheless, the appellant continued to take the position the college should correct item 5. No further mediation was possible and the file moved to the adjudication stage of the appeal process, in which an adjudicator may conduct a written inquiry under the *Act*. After conducting an inquiry, the adjudicator issued Order PO-4093 upholding the college's decision.

[3] Shortly after the order was issued, the appellant submitted a reconsideration request for Order PO-4093. The appellant submitted a number of other emails in which he raised his concerns regarding Order PO-4093 and the adjudicator who issued the decision and had carriage of a related file involving the same parties. The appellant was provided an opportunity to make written submissions in support of his request, with reference to the reconsideration grounds set out in section 18.01 of the IPC's *Code of Procedure* (the *Code*). These submissions were due on December 31, 2020. The appellant did not make any submissions. The appellant was advised that his emails dated December 8, 2020 and December 24, 2020 would be considered to be his reconsideration submissions. The appellant agreed with this in an email dated January 5, 2021.

[4] The reconsideration file was subsequently transferred to me to complete a review of the appellant's reconsideration request.

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

DISCUSSION:

[6] Generally, the adjudicator who issues a decision in an appeal will respond to any reconsideration request. However, in the case where that adjudicator is no longer available, the reconsideration request can be assigned to another adjudicator. I refer the parties to section 18.08 of the IPC's *Code of Procedure* which states,

The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

In this case, Adjudicator Lan An issued Order PO-4093. However, Adjudicator An is away from the office for an extended period of time and not available to respond to the reconsideration request. As a result, the reconsideration request has been assigned to me.

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4093?

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

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.

[8] The reconsideration process set out in the *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 reconsidering, including the Supreme Court of Canada's decision in *Chandler v. Alberta Association of Architects*.¹ With respect to the reconsideration request before him, the adjudicator 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 such as [*Grier v. Metro Toronto 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 [institution] 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.

[9] This approach has been adopted and applied in subsequent IPC decisions.³ For example, in Order PO-3062-R, the adjudicator was asked to reconsider her finding that the discretionary exemption in section 18 of the *Act* did not apply to the information in

¹ [1989] 2 SCR 848 (SCC).

² 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).

³ See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

the records at issue in that appeal. The adjudicator determined 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,

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...

Findings in Order PO-4093

[10] The only issue under appeal in Appeal PA17-170 was whether the college should correct personal information relating to the appellant under section 47(2)(a) of the *Act*. In her decision, the adjudicator stated that for a correction to be warranted under section 47(2)(a), the information must be inexact, incomplete or ambiguous, and the correction cannot be a substitution of opinion.⁴ The adjudicator also noted that section 47(2)(a) gives the institution the discretion to accept or reject a correction request. Therefore, even if the information is "inexact, incomplete or ambiguous," the IPC may uphold the institution's exercise of discretion if it is reasonable in the circumstances.

[11] In Appeal PA17-170, the appellant asked the college to correct the total amount of the eligible fees for his 2016 tuition from \$6,809.06 to \$7,372.00. The college denied the appellant's request based on its position that health insurance premiums should not be included in the amount of tuition for the purposes of the tax form. After reviewing the parties' representations, the adjudicator decided it was not necessary to make a conclusive determination on whether the information is "inexact, incomplete or ambiguous." The adjudicator found the college's exercise of discretion to not correct the information to be reasonable because the incorrect information reflected the college's good faith understanding at the time the record was created.

[12] Furthermore, the adjudicator found the college's attachment of a statement of disagreement to the appellant's file was a sufficient response to the dispute about the correctness of the tuition amount. The adjudicator confirmed the college emailed the appellant JPEG images demonstrating the statement of disagreement had been attached to the appellant's electronic student file. The adjudicator also confirmed the college provided the appellant with a PDF version of the images demonstrating the statement of disagreement had been attached to his electronic student file.

[13] In light of these circumstances, the adjudicator upheld the college's decision to not correct the personal information under section 47(2)(a) of the *Act*.

⁴ Orders P-186 and P-382.

The appellant's reconsideration request

[14] The appellant submitted a reconsideration request raising a number of issues regarding the decision. As discussed above, the appellant submitted a number of emails detailing his concerns with the decision. I have reviewed the appellant's emails but will not set them out in detail here. Generally, the appellant's reconsideration submissions can be summarized as follows:

- The decision to dismiss his appeal is unjust, unfair and unlawful
- The IPC failed to discharge its international and constitutional obligations to protect and uphold individual human rights and Charter rights
- The adjudicator overlooked the college's breach of the procedural requirements of fundamental justice in section 7 of the *Charter*⁵
- The IPC "tolerated" the college's failure to honour its "legal duty of procedural fairness" and provide an adequate explanation for its refusal of the appellant's request
- The adjudicator failed to meet the "standard of fairness"

The appellant also implies there is a reasonable apprehension of bias on the adjudicator's part in respect of the adjudication of his appeal.

[15] The appellant does not refer specifically to any of the grounds for reconsideration identified in section 18.01. The appellant's claims focus mainly on fairness and bias. Given the nature of the appellant's reconsideration submissions, I will consider in some detail whether the appellant has established there was a fundamental defect in the adjudication process for the purposes of section 18.01(a). The appellant's submissions do not raise any suggestion that the other grounds for reconsideration in section 18.01(b) and/or (c) could apply here.

[16] I note the adjudicator addressed a number of the appellant's concerns in the related Order PO-4128, which dealt with Appeal PA17-171.⁶ Specifically, the adjudicator found the appellant did not provide sufficient evidence to establish any reasonable apprehension of bias in her adjudication of Appeal PA17-171. The adjudicator did not address whether the appellant established a reasonable apprehension of bias in the adjudication of Appeal PA17-170.

⁵ *The Canadian Charter of Rights and Freedoms*, section 7: "Everyone has the right to life, liberty and security of the person and the right not be deprived thereof except in accordance with the principles of fundamental justice."

⁶ Appeal PA17-171 was filed by the appellant in relation to a decision of the college.

[17] In his reconsideration submissions, the appellant alleges bias or an apprehension of bias on the part of the adjudicator who issued Order PO-4093. The appellant states the adjudicator did not consider his argument that the college did not provide him with reason(s) for its decision on his correction request. I have reviewed and considered the appellant's submissions in his emails of December 8 and 24, 2020.

[18] Any reasonable apprehension of bias would be a ground for reconsideration of Order PO-4093 for the purpose of section 18.01(a) of the IPC *Code* as it would constitute a fundamental defect in the adjudication process. In administrative law, there is a presumption, in the absence of evidence to the contrary that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias lies on the person who alleges it and mere suspicion is not enough.⁷ A complaint of bias should be made to the adjudicator so that individual may decide whether or not to disqualify himself or herself.⁸ As noted above, however, the original adjudicator is not available and so I will address whether there is a reasonable apprehension of bias on the part of the adjudicator.

[19] Actual bias need not be proven. The test is whether there exists a *reasonable apprehension of bias*. The Supreme Court of Canada has described the test for finding a reasonable apprehension of bias as follows:

... the 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. ... 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."⁹

[20] Applying this test to the circumstances of this appeal, and considering the appellant's reconsideration submissions, I find that a reasonable person with knowledge of the facts would not conclude that the adjudicator would not, or did not, fairly decide the issues raised in Appeal PA17-170. Based on my review, I find the appellant's reconsideration submissions amount to no more than his disagreement and dissatisfaction with the outcome of Order PO-4093. While the appellant claims the adjudicator was biased, he does not provide any evidence to substantiate this claim. For example, the appellant does not refer to any specific portion of Order PO-4093 or

⁷ Order MO-1519, which quoted Sarah Blake, *Administrative Law in Canada*, 3rd ed. (Butterworth's, 2001) at 106.

⁸ *Mary-Helen Wright Law Corporation v British Columbia (Human Rights Tribunal)*, 2018 BCSC 912 at para 15; *Envirocon Environmental Services, ULC v Suen*, 2018 BCSC 1367 at para 87; and *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC).

⁹ *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

instances during the inquiry that would lead me to find there was a reasonable apprehension of bias. In the absence of any evidence to support the appellant's claim of bias or reasonable apprehension of bias in the inquiry of Appeal PA17-170, I find the appellant has not met his burden on this issue.

[21] Furthermore, I reviewed Order PO-4093 and find that an informed person, viewing the matter realistically and practically, and having thought the matter through, would not reasonably apprehend there was bias on the part of the adjudicator. There is no evidence before me, either in Order PO-4093 or in the appellant's reconsideration submissions, that suggests the adjudicator did not properly and fairly consider the arguments provided by both parties, that is the college and the appellant, and the circumstances surrounding the information subject to item 5 of the appellant's correction request. As such, I dismiss the appellant's bias allegation with respect to Order PO-4093 and I reject the appellant's claim that there was a fundamental defect in the adjudication process on this basis for the purpose of section 18.01(a) of the *IPC Code*.

[22] I have also considered the appellant's claims that the decision was unfair, unlawful or unjust, and the adjudicator ignored procedural fairness and failed to uphold his individual human and *Charter* rights. The appellant did not provide any evidence to substantiate these claims, such as evidence to demonstrate how his rights under the *Charter* were violated during the inquiry or in Order PO-4093. I reviewed Order PO-4093 and find there is no evidence to suggest the adjudicator did not respect the appellant's rights as an individual or under the *Charter*. The appellant was provided with an opportunity to make full submissions during the inquiry in response to the college's representations on the issues under appeal.¹⁰ There is no evidence to suggest the adjudicator acted in an unfair, unlawful or unjust manner during the inquiry or in drafting her decision. Given these circumstances, I find the appellant's assertions that the process and decision regarding Appeal PA17-170 were unfair are unsubstantiated and he did not establish a fundamental defect in the adjudication process under section 18.01(a) of the *Code*.

[23] Finally, the appellant claims the IPC "tolerated" the college's failure to honour its "legal duty of procedural fairness" and provide an adequate explanation for its refusal of the appellant's request. It appears the appellant's claim is that this constitutes a fundamental breach in the adjudication process. I reviewed Order PO-4093 and the appellant's reconsideration submissions on this issue and find the appellant did not provide sufficient evidence to substantiate his claim. I note the appellant states, in his reconsideration submissions, that it is "an undeniable fact that Lambton College failed and refused to give me all its reasons or real reasons for refusal of my correction request." It is clear the appellant was not satisfied with the college's decision to deny his correction request and this formed the basis of his appeal. Nonetheless, the

¹⁰ I refer the appellant to the Notice of Inquiry dated September 7, 2018.

appellant did not provide any evidence to demonstrate the adjudicator breached her duty to conduct a fair and impartial inquiry.

[24] It is clear from a review of Order PO-4093 the adjudicator was satisfied with the evidence provided by the college on its exercise of discretion to not correct the information identified in part 5 of the appellant's request and upheld its decision as reasonable. The adjudicator also confirmed the college had attached the statement of disagreement to the appellant's electronic file, thereby satisfying its obligations under section 47(2)(b) of the *Act*. There is no evidence before me nor did the appellant provide any in his reconsideration submissions that substantiate a finding that the adjudicator behaved in a manner that constitutes a fundamental defect in the adjudication process under section 18.01(a) of the *Code*.

[25] Therefore, having considered the appellant's reconsideration request and submissions, I find he did not establish the grounds for reconsideration under section 18.01(a) of the *Code*. In reviewing the appellant's reconsideration request, I also considered whether any of his arguments might fit within the other grounds for reconsideration under section 18.01 of the *Code*, and I find they do not. Accordingly, I find there is no basis upon which the IPC may reconsider Order PO-4093.

ORDER:

I deny the appellant's reconsideration request.

Original signed by: _____
Justine Wai
Adjudicator

_____ June 8, 2021