

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-4214-R

Appeal PA17-494

Ministry of the Environment, Conservation and Parks

Order PO-4178

November 26, 2021

Summary: This is an IPC-initiated reconsideration to address issues raised by the Ministry of the Environment (the ministry) regarding the exchange of representations to the adjudicator during the inquiry leading to Order PO-4178. In Order PO-4178, the adjudicator found that the public interest override provision at section 23 of the *Act* applied to some information. After Order PO-4178 was issued, the ministry informed the IPC that it was never provided with the opportunity to respond to the appellant's representations on the matter of the application of the public interest override. In this reconsideration order, the adjudicator finds that there was a breach of natural justice as the ministry was not given an opportunity to respond to the appellant's representations and determines that the inquiry should be reopened.

Considered: IPC's *Code of Procedure*, section 18.01.

OVERVIEW:

[1] On August 20, 2021, I issued Order PO-4178 where I upheld the Ministry of Environment, Conservation and Parks' (the ministry) decision where the ministry withheld certain information as exempt under section 13(1). However, I also found that the public interest override provision in section 23 of the *Freedom of Information and Protection of Privacy Act* (the *Act*) applied to that same information and ordered the ministry to disclose it to the appellant.

[2] After Order PO-4178 was issued, the ministry contacted the IPC and it became apparent that the ministry had not been provided with an opportunity to respond to the appellant's representations on the application of the public interest override during the inquiry.

[3] I then wrote to the parties, pursuant to section 18.09 of the IPC's *Code of Procedure*, to invite representations on the issue of whether the Information and Privacy Commissioner of Ontario (IPC) should reconsider Order PO-4178 on its own motion. The ministry and the appellant provided representations on this issue. These representations were not shared.

[4] In this order, I find that there was a breach of natural justice and that the ministry should be provided the opportunity to respond to the appellant's representations on possible application of the public interest override.

DISCUSSION:

[5] The sole issue in this order is whether Order PO-4178 should be reconsidered on the basis there was a breach in natural justice that occurred during the inquiry that led to that order.

[6] In reviewing the procedural history of this appeal, I note that the original adjudicator first approached the ministry and invited it to provide representations in response to a Notice of Inquiry dated September 10, 2018. The ministry provided its representations which were dated June 5, 2019, approximately eight months after they were originally due. In the interim, prior to receiving the ministry's representations, the original adjudicator approached the appellant and invited it to provide representations in response to a Notice of Inquiry dated April 5, 2019. The appellant provided its representations dated April 29, 2019. Upon receiving the ministry's representations dated June 5, 2019, the original adjudicator sent them to the appellant and invited it to reply which it did with representations dated July 3, 2019.

[7] The file was subsequently transferred to myself. I did not invite further representations from the parties and proceeded to write the order. In my review of the parties' representations, based on the date of receipt, I mistook the ministry's initial representations as its reply representation assuming that the adjudicator has shared the appellant's first representation with the ministry.

[8] The rules governing a reconsideration of a decision issued by the IPC are set out in section 18 of the IPC's *Code of Procedure* (the *Code*). Under section 18.03 of the *Code*, the IPC may reconsider a decision at the request of a person who has an interest in the appeal or on the IPC's own initiative.

[9] Section 18.01 of the *Code* sets out the grounds for reconsideration. It states:

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 omission or other similar error in the decision.

[10] As noted, I invited the parties to submit representations on whether I should reconsider Order PO-4178 in the circumstances.

[11] The ministry submits that there was a fundamental defect in the adjudication process as it was not given an opportunity to make representations addressing the appellant's evidence in support of its position concerning section 23 (public interest override). The ministry submits that despite the significant delay on its part in responding to the initial Notice of Inquiry, this delay should not affect the IPC's consideration as to whether there was a fundamental defect in the adjudication process when it was not provided an opportunity to reply to the appellant's representations.

[12] The ministry notes that section 52(3) of the *Act* indicates that while each party to an inquiry has a right to make representations to the IPC during the inquiry, there is no right to have access to or to comment on representations made by the other parties. It submits, however, that this statutory provision must be read in the context of a common law right to procedural fairness.¹

[13] The ministry submits that two important aspects of procedural fairness in administrative decision-making are: 1) that the parties must be advised of the case to be met; and, 2) they must be given a reasonable opportunity to address the issues. It submits that the IPC, in deciding whether to provide some or all of the representations to the other party, must make that decision in keeping with the principles of procedural fairness which require some degree of mutual disclosure of the arguments and evidence of all parties.²

[14] The ministry submits that the IPC's *Code of Procedure* expressly contemplates an exchange of representations and the possibility of seeking reply representations. While the ministry acknowledges that the IPC has discretion to seek reply representations, and that it may decide that it is not necessary, the ministry notes that the IPC's usual procedure was not followed in this case as the ministry was not given an opportunity to

¹ The ministry refers to Reconsideration Order PO-4001-R.

² Orders P-164 and MO-2555.

reply to the appellant's representations.

[15] The ministry refers to Reconsideration Order PO-2899-R, where the adjudicator found that there was no fundamental defect in the adjudication process when the institution was not given an opportunity to reply to submissions of the appellant. The ministry submits that in that case, the adjudicator decided that the appellant had not made any submissions to which the institution should be given an opportunity to reply, such as by raising new issues, or citing new statutory provisions or case law which would warrant a reply from the ministry.

[16] However, the ministry submits that in this appeal, the appellant made detailed representations on the public interest override, including citing case law and representations on its intended use of the records, which the ministry should have had the opportunity to respond to. It submits that by not having been provided the appellant's representations and an opportunity to reply to them, the ministry did not have a full opportunity to know the case it had to meet and to make representations on all the issues.

[17] The appellant also provided representations and submits that the ministry, in its initial representations, addressed all the key issues in the appeal including the public interest override. The appellant notes that it gave the adjudicator³ permission to share its representations with the ministry but was unaware if they ever were shared.

Finding

[18] As mentioned above, as a result of delay, the ministry provided its initial representations to the adjudicator after the appellant's representations were received. The appellant's representations are dated April 29, 2019 and the ministry's representations are dated June 5, 2019. Upon receiving the ministry's representations, the adjudicator sent them to the appellant inviting it to provide reply representations. Once the appellant provided its reply representations, the adjudicator determined she did not need to hear further from the parties.

[19] The file was then transferred to me, and upon reviewing the file to prepare the order, I decided that there was no need to solicit further representations from the parties as I incorrectly assumed that the ministry's representations on the public interest issue had been shared with the ministry prior to the ministry making its own representations. In Order PO-4178, I referred to the ministry's representations as reply representations and was under the impression that it had had an opportunity to review the appellant's representations before providing its own. This assumption was incorrect as the appellant's representations had in fact not been shared with the ministry.

³ The appellant refers to the adjudicator previously assigned to this appeal.

[20] As a result of this error, I find in the circumstances that there has been a breach of natural justice because the ministry was not afforded an opportunity to respond to the representations of the appellant which were relied upon in Order PO-4178. I agree with the ministry that procedural fairness requires that the parties be advised of the case to be met and requires some degree of mutual disclosure of the arguments and evidence of all parties. I also agree with the ministry that in its representations, the appellant raised certain arguments, including citing case law which the ministry should have had the opportunity to respond to. Since the ministry was not provided with the representations of the appellant nor invited to respond to them, I find that there was a fundamental defect in the adjudication process and that reconsideration is warranted.

[21] As a result, I will re-open the inquiry in order to provide the appellant's representations to the ministry and invite it to provide reply representations, and to invite any further representations I deem necessary.

ORDER:

I reconsider Order PO-4178 to the extent of re-opening the inquiry to invite further representations on the application of the public interest override at section 23 of the *Act*.

Original Signed By: _____
Alec Fadel
Adjudicator

November 26, 2021