Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4241-R

Appeals PA18-00561 and PA19-00407

Ministry of the Attorney General Order PO-4217

March 2, 2022

Summary: The appellant requested a reconsideration of Order PO-4217. In this Reconsideration Order, the adjudicator finds that the appellant has not established that there is a reasonable apprehension of bias on the part of the adjudicator, or that any other grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Order PO-4217. The reconsideration request is denied.

Statutes Considered: IPC *Code of Procedure*, sections 18.01, 18.02 and 18.08.

Orders Considered: Orders MO-2227, PO-2538-R, and PO-3062-R.

Cases Considered: *Ontario* (*Children's Lawyer*) *v. Ontario (Information and Privacy Commissioner)*, 2018 ONCA 559, application for leave to appeal dismissed, 2019 CanLII 23873 (SCC); *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC).

OVERVIEW:

[1] This reconsideration order disposes of the appellant's request for reconsideration of Order PO-4127.

[2] By way of background, the appellant made a freedom of information request to the Ministry of the Attorney General (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act* or *FIPPA*). The detailed request, which is set out in full in Order PO-4127, was mainly for statistical information relating to custody

recommendations made by clinical investigators with the Office of the Children's Lawyer (OCL), in their reports filed with the court in the context of family law proceedings. The appellant also sought information about any disputes filed in respect of such reports, and any disciplinary records for a particular OCL clinical investigator.

[3] The ministry denied the bulk of the appellant's request on the basis that the ministry does not have custody or control of the records he seeks. The ministry also said that the statistical information and disciplinary information the appellant seeks do not exist.

[4] The appellant then made another request, this time directly to the OCL, for similar information. The OCL took the position that it was not itself an institution under the *Act*, and forwarded the request to the ministry. The ministry, in turn, referred the matter back to the OCL,[1] which responded that the statistics sought do not exist and that the OCL's records are not in the ministry's custody or control.

[5] The OCL did provide the appellant with some of the information he requested, including about disputes filed in respect of the OCL's custody recommendations.[2] The OCL stipulated that it was providing this information "outside of the *Act*." It did not provide the appellant with the requested statistics about the number of times the OCL, and particular clinical investigators, recommended custody to the mother versus the father. It took the position that these statistics do not exist and that its records are not in the ministry's custody or control.

[6] The appellant appealed both decisions to the Information and Privacy Commissioner of Ontario (IPC) and the appeals proceeded to the adjudication stage, where I started an inquiry in each appeal. Given the overlap in issues and the fact that the parties were the same in each, I decided to continue the inquiries into the two appeals jointly, and I issued one decision for both appeals, Order PO-4217.

[7] In Order PO-4217, I found that the OCL is not itself an institution under the *Act* in respect of the records at issue in these appeals. I further found that, applying the Court of Appeal's decision in *Ontario* (*Children's Lawyer*) *v. Ontario* (Information and Privacy Commissioner)[3] (*Children's Lawyer*), the statistical information at issue in the appeals is not under the ministry's custody or control, because such information is derived from individual child client files. I also found that additional information sought

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[1] As I noted at paragraph 53 of Order PO-4217:

> The ministry then redirected the appellant's access request back to the OCL for a response. In the circumstances, I also see no error in the OCL's then responding to the access request on behalf of the ministry. As the office whose records were being sought, the OCL was well placed to respond, and as noted in Order PO-3520, the OCL has delegated authority to respond to requests to the ministry in relation to OCL records. Given the nature of the records sought, it was reasonable in this case for the ministry to forward the request to the OCL to respond on the ministry's behalf.

[2] Some of this information was provided after the appellant started these appeals.

[3] 2018 ONCA 559, application for leave to appeal dismissed, 2019 CanLII 23873 (SCC).

by the appellant does not exist, namely, reports of OCL's clinical investigators being "overturned" or "retracted", and disciplinary information relating to a particular clinical investigator.

[8] The appellant then made this request for reconsideration of Order PO-4217, and asked that the reconsideration request be decided by another adjudicator. I did not find it necessary to seek submissions from the ministry or the OCL on the appellant's reconsideration request, nor on his request for the matter to be assigned to another adjudicator.

[9] In this order, I find that the appellant has not established any grounds for reconsidering Order PO-4217. The request for reconsideration is denied.

DISCUSSION:

Reconsideration criteria and procedure

[10] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code of Procedure*, which reads in part as follows:

> 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;
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> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or omission 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.
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> 18.08 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 the request.

Allegations of bias or a reasonable apprehension of bias

[11] I will first address the appellant's request that his reconsideration request be assigned to a different adjudicator, and his related assertion that there is a reasonable apprehension of bias on my part.

[12] The appellant took issue with the assignment of his reconsideration request to me, stating that this would result in a conflict of interest. He asked that a different

adjudicator "reassess" his appeals.

[13] Section 18.08 of the *Code of Procedure* (the *Code*) states that a reconsideration request will be responded to by the original adjudicator, unless that person is for any reason unable to do so. I see no reason to deviate from the general practice set out in section 18.08 in this instance.[4] Specifically, the appellant's assertion that there is a reasonable apprehension of bias on my part is not, on it own, a basis for reassignment of the reconsideration request to another adjudicator. The law is clear, and numerous previous orders of the IPC have stated, that an allegation of bias, or reasonable apprehension of bias, is to be raised before the decision-maker in question.[5] The decision- maker will then rule on the question of bias. If a party is dissatisfied with the ruling, the matter may be taken to court on an application for judicial review.

[14] I now turn to the substance of the appellant's claim that there was a reasonable apprehension of bias on my part in adjudicating his appeals. A finding of reasonable apprehension of bias would be a ground for reconsidering PO-4217 as a fundamental defect in the adjudication process (paragraph (a) of section 18.01 of the *Code*). However, for the reasons that follow, I find that the appellant has not established that a reasonable apprehension existed in my adjudication of his appeals.

[15] The appellant argues that my ruling in Order PO-4217 was "extremely biased, incompetent, and failed to apply reasonable logic and legal [principle] in [my] assessment of the FIPPA request. [My] approach to the issues have [sic] several significant errors both legally and ethically." He continues:

> I want to point out the obvious here. I have made strong and consistent claims that there is ongoing gender discrimination and bias by the OCL and at large in the family court system which gives significant advantage to women or mothers. This is a bias that could easily be proved with this information. The OCL heavily [employs] females and the involved decision makers were all female. *In turn through this process again, I need to deal with females assessing the case.* The theme of gender bias seems to have a consistent pattern in throwing a blanket over the hot flames that male fathers create when speaking up against this blatant and corrupt actions which have a significant impact on their lives and the lives of their children. (emphasis added)

[16] In administrative law, there is a presumption that, in the absence of evidence to

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[4] Section 20.01 of the *Code* states:

> The IPC may waive or vary any of the procedures prescribed by or under this Code, including any requirement or time period specified in any written communication from the IPC, if it is of the opinion that it would be advisable to do so in order to secure the just and expeditious determination of the issues.

[5] See orders PO-4128 and MO-4003-R.

the contrary, an administrative decision-maker will act fairly and impartially.[6] An allegation of bias should be raised at the earliest possible opportunity.[7] The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.[8] However, actual bias need not be proven. The test is whether there exists a "reasonable apprehension of bias". In Order MO-2227, Senior Adjudicator John Higgins, in addressing an allegation of bias against the IPC, explained the test as follows:

> A recent statement of the law by the Supreme Court of Canada concerning allegations of bias against an adjudicator is found in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In that decision, the court stated:
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> > In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:
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> > > …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. 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 – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly.
> >
> > > …
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> > > *The grounds for this apprehension must, however, be substantial,* and I … refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

[17] The appellant appears to be arguing bias on two separate but related bases. First, that there was a reasonable apprehension of bias in my adjudicating his appeals because I am female. And second, that a reading of my decision demonstrates bias on my part.

[18] As I stated above, an allegation of bias should be raised at the earliest possible

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[6] Orders MO-3513-I, MO-3642-R and MO-4003-R.

[7] *Benitez v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 FCR 107, 2006 FC 461 (CanLII). In this case, the Federal Court of Canada discussed bias at length.

[8] See, for example, Blake, S., *Administrative Law in Canada*, (3rd. ed.), (Butterworth's, 2001), at page 106, cited in Order MO-1519.

opportunity. In other words, the appellant could and should have raised the bias issue as soon as he became aware that I was the adjudicator for his appeals. However, it was only after receiving Order PO-4217 that he objected to having had a female adjudicator decide his appeals.

[19] The fact that the appellant did not raise his bias allegation in a timely way is sufficient for me to dismiss the argument that my being female establishes a reasonable apprehension of bias on my part. However, since the appellant also appears to claim that Order PO-4217 is itself evidence of bias on my part, and since he could not have raised that argument until the order was issued, I will consider it.

[20] The appellant says that he has to deal with "females assessing the case", and that Order PO-4217 shows my "subjective perspective". However, in order to establish a reasonable apprehension of bias, the appellant must show that "an informed person, viewing the matter realistically and practically – and having thought the matter through" would conclude that I, "more likely than not, whether consciously or unconsciously, would not decide fairly." The appellant's speculation about gender bias in my decision-making does not, in my view, meet this standard. He has not, for example, pointed to any comments I made in Order PO-4217, or during my adjudication of the appeals, in support of his allegation. On my reading of my decision, it is a dispassionate assessment of the issues before me, and not evidence of bias on my part.

[21] The appellant clearly believes that I made the wrong decision in Order PO-4217. There are options available to the appellant if he disagrees with that order.[9] However, disagreement with a decision is not sufficient to establish a reasonable apprehension of bias.

[22] I conclude that bias (or a reasonable apprehension thereof) is not a basis for reconsidering PO-4217. I will now consider the appellant's other arguments on why Order PO-4217 should be reconsidered.

The appellant's other arguments in support of his reconsideration request

[23] There is no express reconsideration power in the *Act*. Section 18 of the IPC's *Code of Procedure* reflects the common law in that there are only narrow grounds for finding that a decision can be reconsidered. As noted above, a reconsideration request can only be granted on specific grounds: if there was a fundamental defect in the adjudication process; if there is some other jurisdictional defect in the decision; or if there is a clerical error, accidental error or omission or other similar error in the decision.

[24] The reconsideration process set out in the *Code of Procedure* is not intended to provide parties with a forum to re-argue their cases. In this regard, the appellant is

[9] The IPC has informed the appellant of his option of bringing an application for judicial review of Order PO-4217.

mistaken in his belief that the reconsideration process entails a "reassessment" of his appeals. In Order PO-2538-R, Senior 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*.[10] With respect to the reconsideration request before him, he 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 International Trucks Ltd*[11]].
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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.

[25] Senior Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.[12] In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding on the applicability of one of the *Act*'s exemptions from the general right of access. 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…

[26] I agree with these statements. The case law and section 18.02 of the *Code* make it clear that a reconsideration request is not a forum to re-argue a case or to present new evidence, whether or not that evidence was available at the time of the initial inquiry.

[27] I have carefully read the appellant's submissions in support of his reconsideration request. To summarize, he argues:

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[10] 1989 CanLII 41 (SCC).
[11] 1996 CanLII 11795 (Div. Ct.).
[12] See, for example, Orders PO-3062-R and PO-3558-R.

- My adjudicating his two appeals together muddied the waters and as a result, I did not properly address his argument that the OCL is itself an institution under the *Act*,

- The Court of Appeal's decision in *Children's Lawyer* "directly added" the OCL as an institution under the *Act*, and I could have determined that the OCL is an institution whose records are subject to the *Act*,

- The facts in these appeals are different from those in the Court of Appeal's decision, where there was a risk of harm to the children, and

- I failed to take into account the transparency purposes of the *Act* in relation to the OCL's operations.

[28] With respect to the appellant's first argument, as I stated in Order PO-4217, I decided to continue the inquiries into the two appeals jointly given the overlap in issues and the fact that the parties are the same in each appeal. The appellant was aware that the appeals were being adjudicated together but did not object to this until after the decision was issued. In any event, my adjudicating the appeals together and writing one order for the two appeals did not result in my overlooking or not properly dealing with his argument that the OCL is itself an institution. In fact, an entire section of Order PO- 4217 addresses that very question.

[29] In my view, the appellant's remaining arguments in his reconsideration request are a clear attempt to re-argue the appeals. The arguments the appellant makes on this reconsideration request are ones that he made, or could have made, to me in the adjudication of the appeals.

[30] While I appreciate that the appellant does not agree with my findings in Order PO- 4217, he has not established that there is a fundamental defect in the adjudication process; some other jurisdictional defect in the decision; or a clerical error, accidental error or omission or other similar error in the decision. In other words, the appellant has not established any of the grounds upon which I may reconsider Order PO-4217.

[31] Accordingly, the appellant's reconsideration request is denied.

ORDER:

The appellant's request to reconsider Order PO-4217 is denied.

Original Signed by: March 2, 2022

Gillian Shaw
Senior Adjudicator