

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4191-R

Appeal MA20-00401

Toronto and Region Conservation Authority

Order MO-4185

April 27, 2022

Summary: The appellant requested a reconsideration of Order MO-4185. That order involved a decision by the Toronto and Region Conservation Authority (the TRCA) to disclose a record that was responsive to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant objected to the TRCA's decision to disclose the responsive record, and brought an appeal claiming the mandatory exemption at section 10(1) (third party information) of the *Act*. In Order MO-4185, the adjudicator found that the record does not meet the three-part test for section 10(1) and, as a result, she upheld the TRCA's decision to disclose it, and dismissed the appeal. After Order MO-4185 was issued, the appellant's representative communicated with the IPC about his disagreement with the order. In this Reconsideration Order, the adjudicator finds that the appellant has not established that there are grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order MO-4185, and denies the reconsideration request.

Orders and Investigation Reports Considered: Orders PO-2538-R, PO-3062-R, and MO-4185.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.); *Grier v. Metro International Trucks Ltd.*, (1996), 28 O.R. (3d) 67 (Ontario Divisional Court).

OVERVIEW:

[1] The appellant in Order MO-4185 requests a reconsideration of that order. This reconsideration order explains why I will not reconsider Order MO-4185.

[2] In the appeal resolved by Order MO-4185, the request was for records provided to the TRCA in relation to two files and a company that had been required to provide environmental impact assessments. In response to the request, the TRCA identified a record composed of a six-page email chain, including a 20-page attachment to one of the emails. In Order MO-4185, I upheld the decision of the Toronto and Region Conservation Authority (the TRCA) to disclose the record in response to an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), finding that the record was not exempt under the mandatory exemption at section 10(1) (third party information) of the *Act*.

[3] After Order MO-4185 was issued, the appellant communicated with the office of the Information and Privacy Commissioner of Ontario (the IPC) about the order, and was provided with information about the IPC's reconsideration process under section 18.01 of the IPC's *Code of Procedure* (the *Code*).

[4] The appellant asks that I reconsider my decision in Order MO-4185, citing section 18.01(b) of the *Code*. After reviewing the appellant's representations, I determined that it was not necessary to share them with the TRCA and the requester.

[5] For the reasons that follow, I find that the appellant has not established that any of the grounds for reconsideration under section 18.01 of the *Code* apply. Therefore, the appellant's reconsideration request is denied.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order MO-4185?

[6] The only issue to be decided in a reconsideration decision relating to Order MO-4185 is whether there are grounds under section 18.01 of the *Code of Procedure* to reconsider that order.

[7] The IPC's reconsideration process is set out in section 18.01 of the *Code*, which applies to appeals under the *Act*.

[8] Section 18.01 says:

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 omission or other similar error in the decision.

[9] Past IPC orders have explained that an adjudicator is *functus* unless the party requesting the reconsideration (in this case, the appellant), establishes one of the grounds in section 18.01 of the *Code*.¹ *Functus officio* is a common law principle, which means that once a matter has been determined by a decision-maker, he or she generally has no jurisdiction to further consider the issue. However, the *Code* provisions in section 18.01 are a summary of the common law position acknowledging the ability of a decision-maker to re-open a matter to reconsider it in certain circumstances.²

The appellant's reconsideration request

[10] In the appellant's reconsideration request, the representative of the appellant states that he "definitely disagrees with [the adjudicator]" and cites section 18.01(b) of the *Code*. He offers three reasons for doing so, which I will summarize below. I will refer to the appellant's representative as the appellant for ease of reference.

[11] First, the appellant explains why he expected TRCA to treat the record at issue as confidential. He states that a specified employee of TRCA told him verbally that the record would be treated as confidential if labeled that way. The appellant also submits that this individual should have seen that the email and attachment were confidential on receipt, and that if the TRCA was not going to treat it as confidential, or changed its mind about doing so, it should have advised the appellant and he would have proceeded differently (in a manner he described).

[12] Second, the appellant addresses whether he would share another record with TRCA and the City of Vaughan again, and his respective reasons for this. For the purpose of this reconsideration request, it is not necessary for me to set these reasons out in this public order.

[13] Third, the appellant states that "[m]ost importantly," I appeared to be ignoring the fact that the City of Vaughan, which was copied on the same email in question, treated the email confidentially (considering confidentiality and privacy, the appellant's ownership of the record, and the stated reason it was provided, for the public good), while the TRCA did not. The appellant submits that this "is clearly where [the adjudicator] has mis-adjudicated and ignored the larger context" where one institution has treated the same record confidentially, and the other has not (and has not also been clear about whether they would treat it confidentially).

¹ See, for example, Orders MO-2904-R, MO-4042-R, and MO-4057-R.

² Order PO-2879-R.

Analysis/findings

[14] Based on my review of the appellant's representations, I find that he has not established that any of the three grounds of reconsideration that I may consider exist, under section 18.01 of the *Code*.

[15] The reconsideration process set out in the IPC's *Code* is not intended to provide parties with a forum to re-argue their cases.

[16] 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 reconsideration, the adjudicator 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

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.

[17] 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[.]

[18] Following this approach about disagreement with an order, I find that the appellant's views about my findings in the order, that the record at issue is not exempt

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.

under section 10(1) of the *Act*, does not meet the requirements for reconsideration set out in section 18.01 of the *Code*. In my view, the appellant's reconsideration request amounts to disagreement with my finding in Order MO-4185 (and he explicitly states that disagreement), and an attempt to re-argue or further substantiate his views about why the mandatory exemption at section 10(1) of the *Act* applies to the record.

[19] Turning to the grounds of reconsideration themselves, under section 18.01(a) of the *Code*, the IPC may reconsider an order if it is established that there is a fundamental defect in the adjudication process. Past IPC orders have found that various breaches of the rules of natural justice regarding procedural fairness will qualify as a fundamental defect in the adjudication process for the purpose of section 18.01(a) of the *Code*.⁶ Examples of such breaches would include failure to notify an affected party⁷ or to invite sur-reply representations where new issues or evidence are provided in reply.⁸ In this reconsideration request, the appellant has not claimed, and I do not find evidence of, a fundamental defect in the adjudication process. In relation to this, I note that the appellant was given an opportunity to review and respond to the TRCA's representations containing its views about whether the three-part test for section 10(1) was satisfied or not.

[20] The IPC may also reconsider an order, under section 18.01(b) of the *Code* (the ground of reconsideration that the appellant is pursuing), if it has been established that an adjudicator did not have the jurisdiction under the *Act* to make the order in question.⁹ Here, in requesting a reconsideration of Order MO-4185, the appellant has not provided any basis for questioning my jurisdiction to decide whether to uphold the TRCA's decision to disclose the record under the *Act*. Rather, the appellant's reasons for claiming section 18.01(b) of the *Code* relate to whether the record was supplied by the appellant to the TRCA *in confidence*, and whether the appellant would share documentation with the TRCA for the public good again. These reasons for requesting a reconsideration of Order MO-4185 appear to address the second and third parts of the three-part test for section 10(1) respectively. However, providing representations about these points does not establish that I did not have the jurisdiction under the *Act* to make the order in question.

[21] Under section 18.01(c) of the *Code*, the IPC may reconsider a decision if it was established that a clerical error, accidental error or omission or other similar error in the decision. The Ontario Divisional Court has said that to establish an accidental error under section 18.10(c), it must be shown that the determination of an issue "was fatally tainted by . . . reliance on a crucial fact which both parties agree is incorrect."¹⁰ In his reconsideration request, the appellant disagrees with my conclusion that the record is not exempt under section 10(1) of the *Act*. However, he has not identified any clerical,

⁶ Order PO-4134-R.

⁷ Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

⁸ Orders PO-2602-R and PO-2590.

⁹ Bias, or a reasonable apprehension of bias, would fall under a lack of jurisdiction.

¹⁰ *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67 (Ontario Divisional Court).

accidental error, or other omission or similar error in my decision, upon which a reconsideration request may be considered. While he submits that I ignored evidence that he believes to be relevant and significant (regarding the City of Vaughan's treatment of the record, as compared to the TRCA's), this is not a clerical error, accidental error or omission or other similar error that can be considered a "crucial fact" upon which my decision was made. Rather, it is disagreement with my assessment of the weight and/or relevance of the evidence before me in the appeal resolved by Order MO-4185.

[22] To the extent that the appellant raises any point not previously made during the inquiry about why he believes section 10(1) applies (such as the reference to a verbal advice regarding confidentiality), this is not grounds for a reconsideration either. This does not establish that there was a fundamental defect in the adjudication process, or that I did not have jurisdiction to issue the order, or that there was a clerical or some sort of other order or omission in the order. In addition, section 18.02 of the *Code* specifically states that 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." Without establishing any grounds of reconsideration, I will not reconsider Order MO-4185 simply on the grounds that the appellant has provided some additional evidence.

[23] For these reasons, I find that the appellant's reconsideration request does not establish that there are any grounds under section 18.01 of the *Code* to reconsider Order MO-4185. Accordingly, the appellant's reconsideration request is denied.

ORDER:

1. The appellant's reconsideration request is denied.
2. I order the TRCA to disclose the record to the requester by **June 1, 2022** but not before **May 25, 2022**.
3. In order to verify compliance with this order, I reserve the right to require the TRCA to provide me with a copy of the record sent to the requester, under paragraph 2 of this order.

Original signed by: _____

Marian Sami
Adjudicator

April 27, 2022 _____