

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-4268-R

Appeal PA19-00309

Order PO-4208

Ministry of Agriculture, Food and Rural Affairs

June 23, 2022

Summary: The Ministry of Agriculture, Food and Rural Affairs submitted a request for reconsideration of Order PO-4208, seeking a reconsideration of the adjudicator's order to disclose information to the appellant that she found was not exempt under section 49(b) of the *Act*. In this Reconsideration Order, the adjudicator finds that the ministry has established that grounds exist under section 18.01(a) of the IPC's *Code of Procedure* for reconsidering Order PO-4208, and she allows the reconsideration request. As a result, she orders the ministry to sever additional information from the record before disclosing it to the appellant.

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 Order PO-4208, which was issued regarding an appeal of an access decision made by the Ministry of Agriculture, Food and Rural Affairs (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) in response to a request for "...a copy of an email that was sent to

[the Minister] regarding [me] and [an individual's] feelings towards [me]. The email was received on [specified date]."

[2] Upon receiving the request and following notification of two affected parties to seek their views on disclosure, the ministry issued a decision to the requester and the affected parties, denying access to the responsive email in its entirety under the mandatory personal privacy exemption in section 21(1) of the *Act*.

[3] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (IPC). I commenced an inquiry, and during the inquiry, the ministry issued a revised decision granting partial access to portions of the email with consent from one of the two affected parties.¹ However, the appellant continued to seek access to the withheld portions of the email. Therefore, I continued my inquiry and issued Order PO-4208, which partially upheld the ministry's decision. I found that the appropriate personal privacy exemption to consider was the discretionary exemption at section 49(b), and I ordered the ministry to disclose additional information to the appellant, because I found that the discretionary personal privacy exemption in section 49(b) did not apply to those portions.

[4] The ministry requested a reconsideration of Order PO-4208. The ministry submitted representations with its request for reconsideration as well as a confidential affidavit from the affected party in support of the request. I granted a stay of Order PO-4208, pending my determination of the ministry's reconsideration request. I also invited the appellant to submit representations in response to the ministry's request, but the appellant did not submit any.

[5] For the reasons that follow, I grant the reconsideration request, because I find that the grounds that exist in section 18.01(a) of the IPC's *Code of Procedure* for reconsidering Order PO-4208. I order the ministry to sever additional information from the record before disclosing it to the appellant.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4208?

[6] There is no express reconsideration power in the *Act*. The IPC's power to reconsider a decision is therefore limited to the grounds at common law, which are reflected in the IPC's reconsideration criteria and procedure set out in section 18 of the *Code of Procedure* (the *Code*). Sections 18.01 and 18.02 state:

¹ It appears that the ministry disclosed this additional personal information in accordance with the exception in section 21(1)(a), which states: A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except, upon the prior written request or consent of the individual, if the record is one to which the individual is entitled to have access.

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.

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 ministry's reconsideration request

[7] The ministry requests a reconsideration of Order PO-4208, claiming that my order that it disclose certain specific words (the words at issue) contained in the record at issue, an email, constitutes an error pursuant to paragraph 18.01(c) of the IPC's *Code*. Paragraph 18.01(c) allows for a reconsideration where there is "a clerical error, accidental error or omission or other similar error in the decision."

[8] The ministry submits that the error is twofold. The ministry submits that first, the information that has already been disclosed to the appellant, along with the information ordered to be disclosed (without the words at issue), would be sufficient to "assist the appellant in understanding the allegations made about him" (within the meaning of the phrase in paragraph 80 of the Order PO-4208). The ministry submits that second, the words at issue, read along with the information in the email already disclosed to the appellant prior to Order PO-4208, would reveal the personal information of the author or would allow accurate inferences to be drawn as to the identity of the author.

[9] As noted above, the ministry submitted the affidavit of the affected party in support of its reconsideration request. The ministry's representations refer to the affected party's affidavit as well as other confidential information. I have considered the confidential portions of the ministry's representations, including the affected party's affidavit, but I will not summarize them here because I accept that they are confidential according to the confidentiality criteria in section 7 of the IPC's *Code*.

[10] As noted above, I sought representations from the appellant, but he did not submit any. I decided that I did not need to seek representations from the affected parties.

Analysis and findings

[11] 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,

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*.² With respect to the reconsideration request before him, he concluded that:

The 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.*³

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.

[12] This approach has been adopted and applied in subsequent orders of the IPC.⁴ 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...

[13] As established by section 18.02 of the *Code*, 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.

[14] I agree with and have followed the IPC's approach to reconsideration, as set out above, in making my decision on the ministry's reconsideration request.

[15] The ministry submits that its request for reconsideration of Order PO-4208 should be granted because I made two errors that fit within section 18.01(c) of the *Code*. Previous IPC orders have held that an error under section 18.01(c) may include,

² [1989] 2 SCR 848 (*Chandler*).

³ 1996 CanLII 11795 (ON SC).

⁴ See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

for example:

- a misidentification of the “head” or the correct ministry,⁵ or
- a mistake that does not reflect the adjudicator's intent in the decision,⁶ or
- information that is subsequently discovered to be incorrect.⁷

[16] In Order PO-4208, I found that disclosure of certain information, including the words at issue, which contained the personal information of the appellant, would not reveal the identity of the affected parties; and I ordered the ministry to disclose additional portions of the email at issue to the appellant. The ministry argues that I made two errors when I made that finding. The first is that the information already disclosed to the appellant in this appeal along with the information I ordered to be disclosed, without the words at issue, is sufficient for the appellant to understand the allegations made about him. The second is that the words at issue, when read along with the information in the email that has been disclosed to the appellant, would reveal the personal information of the affected party or would allow accurate inferences to be drawn as to their identity.

[17] Upon review of the ministry’s reconsideration request and the information at issue, I find that I made an error in Order PO-4208, and I find that this error was a fundamental defect in the adjudication process within the meaning of paragraph (a) of section 18.01 of the *Code* (rather than paragraph (c) as the ministry argues.)

[18] In Order PO-4208, I had ordered the disclosure of information that, in my view, would not serve to identify the affected party.

[19] Based on the representations of the ministry, the confidential affidavit of the affected party, and my review of the record that was before me, I find that disclosure of the information that I ordered the ministry to disclose in Order PO-4208, with the words at issue, could, in fact, reasonably be expected to permit the appellant to infer the identity of the affected party when combined with the other information that has already been disclosed. I make this finding based on the fact that the appellant and the affected parties are all part of a small Northern Ontario community and they are familiar with the agricultural industries in the region. This evidence was available and provided to me during the inquiry in Order PO-4208, but I overlooked its significance and I did not recognize that disclosure of the words at issue could lead to the identification of the affected party. As such, I made an order that did not reflect my intent, which was to protect the affected party’s identity.

[20] I also agree with the ministry’s submission that the information that has already

⁵ Orders P-1636 and R-990001.

⁶ Order M-938.

⁷ Orders M-938 and MO-1200-R.

been disclosed to the appellant, with the addition of the information that I ordered the ministry to disclose in Order PO-4208, without the words at issue, is sufficient for the appellant to understand the allegations made against him in the email at issue.

[21] Previous IPC orders have found that there is a fundamental defect in the adjudication process when an adjudicator overlooks the material evidence of the parties on a highly relevant fact.⁸ I find that a similar error has occurred here. I find that by ordering the disclosure of the words at issue in Order PO-4208 and not recognizing that the affected party could be identified by disclosure of these words, I failed to fully consider highly material evidence. I find that this failure constitutes a fundamental defect in the adjudication process. Therefore, I find that the ministry has established grounds under section 18.01(a) of the *Code*, and I allow the ministry's reconsideration request to reconsider Order PO-4208.

ORDER:

1. I allow the ministry's reconsideration request.
2. I lift the interim stay with respect to Order PO-4208 and rescind Order Provision 2 of Order PO-4208, replacing it with provision 3 of this reconsideration order
3. I order the ministry to disclose the portions of the record that I found was not exempt under section 49(b) in Order PO-4208, without the words at issue, to the appellant by **July 29, 2022** but not before **July 25, 2022**.
4. In order to verify compliance with order provision 3, I reserve the right to require the ministry to provide me with a copy of the record disclosed to the appellant.

Original Signed By: _____

Anna Truong
Adjudicator

_____ June 23, 2022

⁸ Orders PO-4044-R and MO-4004-R.