

Information and Privacy Commissioner,  
Ontario, Canada



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

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## RECONSIDERATION ORDER PO-4441-R

Appeal PA21-00525

Ontario Lottery and Gaming Corporation (OLG)

Order PO-4417

September 22, 2023

**Summary:** The appellant submitted a request for reconsideration of Order PO-4417, which upheld the OLG's search for responsive records. In his reconsideration request, the appellant claimed that there was an error in the order. In this reconsideration order, the adjudicator denies the reconsideration request because the appellant has not established any of the grounds for reconsideration under section 18.01 of the IPC's *Code of Procedure*.

**Statutes Considered:** IPC *Code of Procedure*, sections 18.01(a), (b) and (c).

**Orders Considered:** Orders PO-2358-R, PO-3062-R, MO-4260.

**Cases Considered:** *Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4<sup>th</sup>) 577 SCC.

### OVERVIEW:

[1] This reconsideration order arises from a request to reconsider Order PO-4417. Order PO-4417 resolves an appeal from an access decision made by the Ontario Lottery and Gaming Corporation (the OLG) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to audio recordings between the appellant and the OLG between 2013 and 2021 from two specified phone numbers. The request also included copies of all letters and emails for the same time period.

[2] The OLG issued a decision granting full access to 27 Lotus Notes, 2 Outlook emails and 5 of the 7 audio recordings. Portions of two audio recordings were not responsive to the request and were severed. Subsequently, the appellant appealed the OLG's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[3] In Order PO-4417, I found that the OLG conducted a reasonable search for responsive records.

[4] After Order PO-4417 was issued, the appellant contacted the IPC to convey that he was now aware, due to the order, that the OLG has 14 audio recordings originating from him, which could not be retrieved as they are not from the specified phone numbers he provided in his request. Instead the calls had been placed from either private or blocked phone numbers. The appellant seeks a reconsideration of Order PO-4417 to gain access to these 14 audio recordings.

[5] For the reasons that follow, I find that the appellant has not established grounds in section 18.01 of the *Code of Procedure* for reconsidering Order PO-4417 and I deny the reconsideration request.

## **DISCUSSION:**

### **Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4417?**

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

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.

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.

[7] *Functus officio* is a common law principle, which states that once a matter has been determined by a decision-maker, generally speaking, he or she has no jurisdiction to further consider the issue. However, the *Code* provisions 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.<sup>1</sup> In other words, I am *functus* and unable to further consider the issues that were under appeal unless the party requesting the reconsideration establishes one of the grounds in section 18.01.

### ***Representations, analysis and findings***

[8] The appellant did not specify under which ground of section 18.01 of the *Code* he is making his reconsideration request. However, the appellant submits that I erred in Order PO-4417 because I did not order the OLG to provide him with a copy of the 14 audio recordings originating from him. The appellant seeks a reconsideration of Order PO-4417 to gain access to these audio recordings.

[9] For me to reconsider Order PO-4417, the appellant's request must fit within one of the three grounds for reconsideration in section 18.01 of the *Code*. Since the appellant did not specify under which ground in section 18.01 he is making his reconsideration request, I will consider all three grounds.

[10] Section 18.01(a) of the *Code* specifies that the IPC may reconsider an order where it is established that there is a fundamental defect in the adjudication process. Past orders have found that various breaches of the rules of natural justice respecting procedural fairness will qualify as a fundamental defect in the adjudication process for the purpose of section 18.01(a).<sup>2</sup> Examples of such breaches would include a failure to notify an affected party,<sup>3</sup> or to invite sur-reply representations where new issues or evidence are provided in reply.<sup>4</sup>

[11] Section 18.01(b) relates to whether an adjudicator has the jurisdiction under the *Act* to make the order in question. An example of a jurisdictional defect would be if an adjudicator ordered a body that is not an institution under the *Act* to disclose records. Section 18.01(c), meanwhile, allows for reconsideration of an order that contains clerical or other similar errors or omissions. Previous IPC orders have held that an error under section 18.01(c) may include:

- a misidentification of the "head" or the correct ministry;<sup>5</sup>
- a mistake that does not reflect the Adjudicator's intent in the decision;<sup>6</sup>
- information that is subsequently discovered to be incorrect;<sup>7</sup> and

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<sup>1</sup> Order PO-2879-R.

<sup>2</sup> Order PO-4134-I.

<sup>3</sup> Orders M-774, R-980023, PO-2879-R and PO-3062-R.

<sup>4</sup> Orders PO-2602-R and PO-2590.

<sup>5</sup> Orders P-1636 and R-990001.

<sup>6</sup> Order M-938.

<sup>7</sup> Orders M-938 and MO-1200-R.

- an omission to include a reference to and instructions for the institution's right to charge a fee.<sup>8</sup>

[12] The reconsideration process in section 18 of the IPC's *Code of Procedure* is not intended to provide parties who disagree with a decision a forum to re-argue their case.

[13] 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 Association of Architects*.<sup>9</sup> Regarding the reconsideration request before him, he 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.*].<sup>10</sup>

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.

[14] This approach has been adopted and applied in subsequent IPC orders.<sup>11</sup> 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 *Freedom of Information and Protection of Privacy Act* did not apply to information in records at issue in that appeal. In determining 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*, Adjudicator Loukidelis wrote that:

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...

[15] I accept and adopt this reasoning here.

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<sup>8</sup> MO-2835-R.

<sup>9</sup> [1989] 2 SCR 848 (SCC).

<sup>10</sup> 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).

<sup>11</sup> See, for example, Orders PO-3062-R, PO-3558-R and MO-4004-R.

[16] The appellant has not specifically addressed my findings in Order PO-4417 in his reconsideration request. His representations do not describe or address whether there has been a fundamental defect in the adjudication of his appeal or a jurisdictional defect. His request also did not describe or address a clerical or similar error. Rather, the appellant's reconsideration request states that due to Order PO-4417 he is now aware that the OLG has 14 audio recordings originating from him. As such, he wants access to these audio recordings.

[17] I find that the appellant's reconsideration request is an attempt to re-argue the appeal. He was provided with the OLG's representations and the affidavit during the inquiry. At paragraph 30 of the affidavit, the affiant states that the OLG has 14 calls which were identified as having originated from the appellant but they could not be retrieved as they were made from blocked or private numbers. The appellant did not raise this issue in his representations.

[18] In Order PO-4417, I accepted the OLG's explanation that its call platform system can only be searched using a telephone number.<sup>12</sup> As such, these 14 phone calls could not be retrieved using the phone numbers provided by the appellant in his request.

[19] In summary, I am not satisfied that the appellant's reconsideration request establishes a relevant ground for reconsideration under section 18.01 of the *Code*. I therefore deny the appellant's reconsideration request.

**ORDER:**

I deny the appellant's reconsideration request.

Original Signed By: \_\_\_\_\_  
Lan An  
Adjudicator

September 22, 2023  
\_\_\_\_\_  
DATE

<sup>12</sup> Paragraph 19 of the OLG's representations.