Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4443-R

Appeal PA21-00261

Halton Healthcare Services

Order PO-4413

September 27, 2023

Summary: The appellant requested a reconsideration of Order PO-4413. In this reconsideration order, the adjudicator finds that the appellant has not established any of the grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure* and denies the reconsideration request.

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

Orders Considered: Orders PO-2538-R, PO-3062-R, and PO-1998.

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

OVERVIEW:

[1] This decision addresses the appellant's request for a reconsideration of Order PO-4413.

[2] Halton Healthcare Services (HHS) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). Following discussion between the requester and HHS, the scope of the request was narrowed to any agreements between HHS and a named company, as well as other related records from a specified time period.

[3] HHS notified the company named in the request (the appellant) as a third party whose interests might be affected by disclosure of the requested records. HHS notified the appellant of its intention to grant full access to the responsive records, and providing it with an opportunity to make representations. The appellant made representations asking that HHS deny access to the responsive records pursuant to the mandatory third party information exemption under section 17(1) of the *Act*.

[4] HHS issued a decision to the requester refusing access to the records citing section 17(1) of the *Act*. The requester appealed HHS's decision to the Information and Privacy Commissioner of Ontario (IPC). The requester's appeal was resolved through mediation when HHS revised its decision and decided to grant the requester full access to the responsive records. The appellant then appealed HHS's revised decision and appeal file PA21-00261 was opened.

[5] In Order PO-4413, I found that the records at issue, a portion of a Joint Venture Agreement (the agreement) and a payment record, are not exempt from disclosure.

[6] The appellant sought reconsideration of my decision.

[7] 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-4413 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-4413?

[8] 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:
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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 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.

[9] Ordinarily, under the common-law principle of *functus officio*, once a decision-maker has determined a matter, he or she does not have jurisdiction to consider it further.[1] I am *functus* unless the party requesting the reconsideration – in this case, the appellant – establishes one of the grounds in section 18.01 of the *Code*. The provisions in section 18.01 of the *Code* summarize the common law position acknowledging that a decision-maker has the ability to re-open a matter to reconsider it in certain circumstances.[2]

The appellant's reconsideration request

[10] The appellant cites two grounds for reconsideration in section 18.01.

[11] The appellant submits that there are fundamental defects in the present case as well as in the IPC's adjudication process generally. The appellant also submits that I made several accidental or similar errors.

Analysis and findings

[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*.[3] 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.* [4]].
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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.

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[1] *Functus officio* is a common law principle which means that, once a decision-maker has determined a matter, he or she has no jurisdiction to consider it further.
[2] Order PO-2879-R.
[3] [1989] 2 SCR 848 (SCC).
[4] 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).

[14] Subsequent IPC orders have adopted this approach.[5] 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.

[16] For me to reconsider Order PO-4413, the appellant's request must fit within one of the three grounds for reconsideration in section 18.01 of the *Code*.

[17] 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).[6] Examples of such breaches would include a failure to notify an affected party,[7] or to invite sur-reply representations where new issues or evidence are provided in reply.[8]

[18] 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(1)(c), meanwhile, allows for reconsideration of an order that contains clerical or other similar errors or omissions.

Section 18.01(c): Accidental or similar error

[19] The appellant submits that I made a number of accidental or similar errors in Order PO-4413.

[20] The appellant submits that I made an error in stating at paragraph 37 of Order PO-4413 when I discussed part 2 of the section 17(1) exemption – whether the information at issue was supplied in confidence. The appellant takes issue with my finding that it is not evident on the face of the records that either of the exceptions to

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[5] See, for example, Orders PO-3062-R, PO-3558-R and MO-4004-R.
[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-R.

the general rule for contracts applies.

[21] Contracts are generally treated as mutually generated, not supplied by one party to the other. One exception to this rule is the immutability exception where the contract contains non-negotiable information supplied by the third party, for instance underlying fixed costs. According to the appellant, it is possible the immutability exception applies to the agreement as it contains fixed costs that the appellant is responsible for as part of its joint venture with HHS. The appellant notes that it is responsible for a portion of the compensation of healthcare professionals working for the joint venture, as set out in the agreement.

[22] The appellant did not make representations with respect to the application of the inferred disclosure or immutability exceptions during the adjudication of the appeal. As noted above, the reconsideration process is not an opportunity to re-argue or make new arguments that could have been made during the inquiry.

[23] The appellant also submits that I erred in making the following statement at paragraph 37: ". . .in the absence of representations on the application of these exceptions in the circumstances, I find that they do not apply." According to the appellant, HHS submitted in its representations that the payment record was subject to the inferred disclosure exception.

[24] While HHS used the term "inferred disclosure exception" in its representations, it did so mistakenly. Specifically, HHS stated the following:

> . . .Halton Healthcare submits that [the payment record] meets the inferred disclosure exception because its disclosure would reveal or permit the drawing of accurate inferences with respect to the reporting provided by the appellant related to the total revenues and profitability of [the joint venture].

[25] As noted in Order PO-4413 and numerous other IPC orders, the inferred disclosure exception "applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party."[9]

[26] However, in its representations, HHS provides a different explanation of the "inferred disclosure exception," using language that describes information that may generally qualify as supplied:

> Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where *its disclosure would reveal or permit*

[9] PO-4413 at para 36.

> *the drawing of accurate inferences with respect to information supplied by a third party*.[10]
>
> [my emphasis]

[27] HHS therefore does not describe the inferred disclosure exception in its representations. The language it uses is part of a standard explanation of the "supplied" part of the section 17(1) test, and appears in Order PO-4413 and many other orders addressing the issue of third party information.

[28] The appellant makes additional arguments taking issue with my finding that the harms requirement in part three was not established, raising among other things, the purpose of the *Act* and the appropriateness of the request. I find that these arguments do not give rise to any of the section 18.01 grounds and amount to re-arguing the appeal. As explained above, the reconsideration process is not a forum for appellants to re-argue their case, or to present new evidence.

Section 18.01(a): Fundamental defect

[29] The appellant argues that there are fundamental defects both in the present case as well as in the IPC's adjudication process generally.

[30] Firstly, the appellant submits there was a fundamental defect in the adjudication of appeal as the adjudicator was changed in the middle of the appeal process, without submissions or care as to how this would affect the appellant and the institution's rights, or the detrimental effect on the ultimate decision.

[31] As noted above, past orders have established that certain breaches of procedural fairness amount to fundamental defects under section 18.01(a). The change of adjudicator during the adjudication stage of the IPC's appeal process did not give rise to any procedural fairness issues. During adjudication, the parties submit their representations in writing. These representations are part pf the file and are reviewed by the adjudicator to review and consider when making her decision. It is also open to the new adjudicator to invite further representations. The reassignment of the appeal file did not result in any breach of procedural fairness to the parties. In Order PO-4413, I explained that I reviewed the parties' representations and concluded that I did not need further representations before rendering a decision,[11] because the parties had been provided with the opportunity to respond to all issues relevant to deciding the appeal.

[32] Secondly, the appellant submits that the agreement should have been presented as two separate records, and that I "neglected to observe that pages 1 and 2 of the Agreement, are an entirely separate Record than that on page 3." The appellant

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[10] PO-4413 at para 30.
[11] Order PO-4413, footnote 1.

submits that had the agreement been broken down into two records, the appellant and the institution's arguments, and the decision, would have been different.

[33] I am not persuaded that the appellant's argument raises a fundamental defect in the adjudication process. It does not explain how the agreement presented as two records, as opposed to one, could have changed the outcome. I do not find that such an outcome is evident on the face of the record in question. Furthermore, the appellant could have raised its concerns earlier, as the records have been defined from the start of the inquiry process. As established above, it is not open to the appellant to raise new arguments at the reconsideration stage.

[34] Thirdly, the appellant submits that the IPC's *Code of Procedure* "prevent[s] appellants from making fulsome arguments. . .for fear the information or sensitive argument would be disclosed without [their] consent." While the appellant concedes that some safeguards exist, it argues that ultimately, it is the adjudicator who decides what parts of the representations are redacted or not. In its view, appellants are forced to water down their arguments for fear of inadvertent disclosure.

[35] I am also not persuaded that the IPC's procedure with regards to the sharing of representations raises a fundamental defect in the adjudication process. Parties going through the appeal process are invited to submit representations. It is up to them to decide what to include when making their case. As indicated in correspondence sent to the appellant during the inquiry, "[r]epresentations generally include comments on the facts and issues in the appeal, as well as any documents or other relevant evidence." The Notice of Inquiry shared with the appellant explains that the parties to the appeal may identify parts of their representations they believe should remain confidential, with reference to the confidentiality criteria identified in Practice Direction Number 7. The fact that adjudicators may make a final determination with regard to the sharing of representations does not render the process procedurally unfair. Parties are still provided with the opportunity to make arguments in support of keeping portions of their representations confidential.

[36] Finally, the appellant submits that the fact that appellants are not made aware of the requester's identity is a fundamental defect in the IPC's adjudication process. In the appellant's view, this is a breach of an appellant's procedural fairness rights, while a requester's position is bolstered by having full knowledge of the party and the case they have to meet. Without knowing the requester's identity, the appellant submits it is impossible for appellants to properly contemplate the totality of the case before them, and the possible risks of disclosure against them.

[37] Seeing as the identity of a requester is not, as a general rule, a relevant consideration in the request and appeal processes, I do not accept that maintaining the confidentiality of the requester's identity is a breach of an appellant's procedural fairness rights. As former Assistant Commissioner Tom Mitchinson states in Order PO-1998:

> Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the *Act* is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put.[12]

[38] Whether appellants make their representations with disclosure to the world in mind, as opposed to disclosure to an identified requester, does not affect their ability to respond to the case and issues at hand.

[39] I have considered the appellant's arguments and determine that it has not established that Order PO-4413 contained an accidental or similar error or that there was a fundamental defect in the adjudication process. Further, I do find that the appellant established any other ground for reconsideration in section 18.01 of the *Code*. I therefore deny the appellant's reconsideration request.

ORDER:

I deny the appellant's reconsideration request. I confirm that HHS is required to comply with the order provisions in Order PO-4413. As the date for compliance has now passed, I order HHS to comply with Order PO-4413 by **October 30, 2023.**

Original Signed By: September 27, 2023

Hannah Wizman-Cartier DATE
Adjudicator

[12] Order PO-1988, page 7.