

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4461-R

Appeal MA22-00021

Toronto District School Board

Order MO-4447

November 15, 2023

Summary: The appellant requested a reconsideration of Order MO-4447. 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: Order MO-4447.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC).

OVERVIEW:

[1] This reconsideration order addresses the appellant's request that I reconsider Order MO-4447.

[2] The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto District School Board (the board) for records relating to the board's Integrity Commissioner (the IC). Specifically, the appellant sought records relating to the IC's retainer of a lawyer at a named law firm (the investigator) to investigate the conduct of a specific board trustee (the trustee).

[3] In response, the board stated that any responsive records, if they exist, would be in the custody or control of the IC, not the board.

[4] The appellant appealed the board's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[5] During the mediation stage of the process, the appellant raised the issue of whether the board had conducted a reasonable search for any responsive records.

[6] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process where an adjudicator may conduct an inquiry under the *Act*.

[7] The adjudicator commenced the inquiry by seeking representations from the board on the custody or control and reasonable search issues. The board provided representations in response. The adjudicator then sought representations from the appellant, who also provided responding representations. The board then replied to the appellant's representations and, in turn, the appellant replied to the board's reply representations.

[8] The appeal was then transferred to me to continue the adjudication process. After reviewing the parties' representations I determined that I did not need to hear from them further before making my decision.

[9] In Order MO-4447, I found that the board does not have custody or control of the IC's records. Further, I upheld the board's search for responsive records.

[10] The appellant sought reconsideration of my decision.

[11] For the reasons that follow, I find that the appellant has not established grounds in section 18.01 of the *Code of Procedure* (the *Code*) for reconsidering Order PO-4447 and I deny the reconsideration request.

DISCUSSION:

[12] The sole issue in this decision is whether there are grounds under section 18.01(a) of the IPC's *Code of Procedure* to reconsider Order MO-4447?

[13] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code*. Given the appellant's reconsideration request, I determined that only section 18.01(a) is relevant. It reads:

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;

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.

[14] 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 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

[15] 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.

[16] 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].

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] 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

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.).

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

grounds for reconsideration set out in section 18.01 of the *Code*, Adjudicator Loukidelis wrote 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] I accept and adopt this reasoning here.

[19] For me to reconsider Order MO-4447, the appellant's request must fit within the "fundamental defect" ground for reconsideration in section 18.01(a) of the *Code*.

[20] Section 18.01(a) of the *Code* says 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 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

The appellant's reconsideration request

[21] The appellant submits that there were two fundamental defects in the adjudication process under section 18.01(a) of the *Code*, as follows:

1. The IPC erred by declining to merge the appeal that resulted in Order MO-4447 with another appeal of the appellant's involving the board, Appeal MA22-00279 (the second appeal), and I, the adjudicator, in turn erred by not taking into account the board's representations in the second appeal and "other matters relevant to the credibility of those representations, that are relevant to" the current appeal, and
2. I erred in how I dealt with evidence relating to the board's assignment of email accounts to the IC

First allegation: failure to merge the appeals and take into account representations on agency

[22] The appellant submits the following:

- during the mediation stage of the appeals, he wrote to an adjudication review officer (the ARO) explaining that he had filed an appeal of a second request he had made to the board

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.

- he advised the ARO that the issues in the second appeal overlap considerably with those in the current appeal
- the ARO replied, on behalf of the adjudicator, declining the request to merge the appeals, noting that an affected third party had also filed an appeal of the board's second decision
- the ARO, on behalf of the adjudicator, further explained that "while there is some overlap in the subject matter of both appeals, the records at issue in each appeal are different. The third party appeal adds another layer that...makes joining the appeals at the adjudication stage impracticable..."
- the IPC then assigned both appeals to Adjudicator Jennifer James, and the appellant was at that point satisfied that the risk of inconsistent decision or incomplete representations was eliminated
- the IPC then assigned the current appeal to me, leaving the second appeal with Adjudicator James

[23] The appellant submits that the IPC did not notify him of this change, and that he only learned that another adjudicator had been assigned to the current appeal when he received the order from me. The appellant's statement on this point is incorrect. The IPC advised him by email on July 7, 2023 that the matter had been re-assigned to an adjudicator other than Adjudicator James (although the IPC did not name me in this email).

[24] The appellant further submits that he did not have the opportunity to request that I also review the representations he had made in the second appeal. Again, this submission is incorrect, because the appellant had already been made aware that a different adjudicator had been assigned to his file.

[25] The appellant knew or ought to have known that the IPC had assigned the current appeal to me, and that two different adjudicators were hearing the two different appeals. The appellant had an opportunity to request that I consider his representations in the second appeal, but failed to do so. An adjudicator cannot be considered to have denied procedural fairness where a party itself fails to put material before the adjudicator, or fails to direct the adjudicator's attention to that material. As a result, I did not deny the appellant procedural fairness by not considering that material.

[26] The appellant cites IPC Practice Direction 2⁹ under the *Code*. That practice direction states that "parties are limited to submitting one set of representations in response to each invitation to do so. Unsolicited supplementary or additional representations will only be considered by the adjudicator in exceptional instances." This Practice Direction does not prohibit a party from requesting that an adjudicator

⁹ Practice Direction 2: Participating in a written *FIPPA* or *MFIPPA* inquiry

consider material other than that filed with their representations. The IPC adjudicator has discretion as to whether to accept such a request. The appellant had an opportunity to make this request, but did not do so.

[27] I am not persuaded that the appellant's argument raises a fundamental defect in the adjudication process.

[28] The appellant submits that his representations in the second appeal address two relevant, related points:

- that the IC was an agent of the board
- those agency powers extend to the ability to create a solicitor- client relationship between the board and the law firm retained by the IC

[29] The appellant's submissions on this point are an attempt to reargue the control issue that was before me in the original inquiry and in any event would not have impacted the outcome of my decision. Order MO-4447 turned on the important factor of the IC being independent from the board, a factor which I found to be "critical to the proper functioning of that office, and the public's trust in its operations." Whether or not the IC could be considered an agent of the board in some respects would not have driven a different outcome on the "custody or control" issue.

Second allegation: failure to merge the appeals and take into account evidence relating to the board's assignment of email accounts to the IC

[30] The appellant submits:

- in the current appeal, the board provided the IPC with an affidavit stating that the board did not assign an email address or telephone number to the IC
- in response, the appellant submitted to the IPC that in fact the board had previously advertised the IC's email address as containing the acronym "tdsb"
- in the second appeal, the board submitted a supplementary affidavit correcting this information, which stated that the board did assign two email addresses to the IC containing the acronym "tdsb"
- the appellant submits that "this was not merely a minor or inadvertent slip; it was a gross misstatement of obvious and critical facts that had a bearing on the reliability on all of the other factual assertions of the [board] in both appeals
- there is no evidence I considered this information in issuing Order MO-4447

[31] For the reasons cited above, I find that there was no fundamental defect in the adjudication process by failing to merge the current appeal with the second appeal.

[32] I note that, during the inquiry, there was material before me indicating that the board had assigned a "tdsb" email address to the IC. This material included an excerpt from an annual report of the IC, as well as the appellant's representations. I acknowledged evidence on this point, and I did not make a finding to the contrary. Therefore, the fact that I did not consider the additional, consistent evidence on the email assignment point had no bearing on the outcome of the appeal.

[33] In addition, I considered this board's submission on this point to be an honest mistake that the board ended up correcting once it realized it had made an error. I see no reasonable basis to believe the board intentionally submitted false or misleading evidence on any of the matters in this appeal.

[34] For all of the reasons stated above, I find that there has been no fundamental defect in the adjudication process under s. 18.01(a) of the *Code*.

ORDER:

I deny the appellant's reconsideration request.

Original Signed By: _____
David Goodis
Adjudicator

November 15, 2023

DATE