Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4466-R

Appeal PA23-00422

Ministry of the Solicitor General

Order PO-4411-F

December 12, 2023

Summary: The ministry submitted a request for reconsideration of Order PO-4411-F pursuant to section 18.01(a) of the IPC's *Code of Procedure*, claiming fundamental defects in the decision. In this reconsideration order, the adjudicator finds that the ministry has not established a ground under section 18.01(a) for reconsideration and denies the reconsideration request.

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. (4th) 577 SCC.

OVERVIEW:

[1] The Ministry of the Solicitor General (the ministry) requested a reconsideration of Order PO-4411-F (the order) pursuant to section 18.01(a) of the IPC's *Code of Procedure*. Section 18.01(a) allows the IPC to reconsider an order where there is a fundamental defect in the adjudication process.

[2] The order dealt with a request for access to a list of homicides involving intimate partners cleared by the Ontario Provincial Police (OPP) between January 1, 2015 and

June 30, 2020. The ministry produced a record, a chart compiled by the OPP, containing responsive information for the specified five-year period. The information at issue consisted of the names of victims and accused, the dates and locations (i.e., cities) of the homicides, the outcomes (i.e., charges, convictions, death of accused), and the existence of any peace bonds.

[3] I found that the information at issue was not exempt under section 21(1). I found that the presumption against disclosure in section 21(3)(b) did not apply, because I found that the record was not compiled, nor was it identifiable, as part of an investigation into a possible violation of law. I found that disclosure would not constitute an unjustified invasion of personal privacy. In coming to this conclusion, I found that the factor favouring privacy protection in section 21(2)(f) applied because I found that the information in the record is highly sensitive. However, I found that this factor was outweighed by the factor in section 21(2)(a), a relevant factor favouring disclosure because of the desirability for public scrutiny. As a result, I found that disclosure would not be an unjustified invasion of personal privacy pursuant to section 21(1)(f), and that the information at issue was therefore not exempt under section 21(1). I also found that, even if I had found the information at issue was exempt under section 21(1), the public interest override in section 23 would apply to require its disclosure. I ordered the ministry to disclose the information at issue to the appellant.

[4] In its reconsideration request, the ministry argues that my interpretation of the presumption against disclosure in section 21(3)(b) and of the public interest override in section 23 is defective; that the order erroneously characterizes the appellant as a "researcher" for the purposes of the *Act*; and that the order is based on an erroneous assumption that proper notice was provided to affected parties (namely, individuals who might have an interest in disclosure of the information at issue, including convicted individuals, and next-of-kin of victims and of deceased accused individuals).

[5] In this reconsideration order, I find that the ministry's claims regarding defective interpretation of sections 21(3)(b) and 23, as well as the erroneous characterization of the appellant as a "researcher," represent an attempt to re-argue the ministry's case and raise questions of law that do not establish a basis for reconsideration under section 18.01(a) of the *Code*. Finally, I find that the IPC's use of best efforts to notify affected parties by mailing notice to addresses provided by the ministry pursuant to an order to do so, does not give rise to a finding that there was procedural defect in the adjudication process. I deny the reconsideration request.

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4411-F?

[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:
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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.

[7] 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 ministry – 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 ministry's reconsideration request

[8] As noted above, the ministry's request is made pursuant to section 18.01(a). The ministry claims that the order is fundamentally defective because it:

i. errs in "failing to adopt a purposive approach to the interpretation of the exemption in section 21(3)(b) in compliance with established jurisprudence [resulting in] the Order drawing a false distinction between personal information contained in the record at issue and the very same personal information contained in other OPP investigative records;" mischaracterizes the record as not being a law enforcement record to which section 21(3)(b) should apply, and improperly relies on Order PO-2019 that the ministry says is distinguishable;

ii. errs in applying the two-part test in section 23, and specifically in finding that there is a compelling public interest in the personal information that clearly outweighs the purpose of the section 21 exemption;

iii. erroneously characterizes the appellant as a "researcher," a class of individuals which has a distinct meaning in the *Act*, and who have an enhanced right to personal information in accordance with the *Act*; and,

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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-2839-R.

iv. erroneously assumes that notification was provided to victims and other affected third-party individuals, thereby affording them an opportunity to respond to the appeal.

[9] The ministry says that the outcome of this order creates significant harm, including but not limited to the erosion or elimination of statutory protections accorded to victims and other affected parties.

Analysis and findings

[10] The ministry's grounds for reconsideration can be grouped into two categories. The first three grounds express a dissatisfaction or disagreement with my findings and raise what I find are questions of law, and which are therefore outside my jurisdiction for reconsideration as contemplated by section 18.01. The fourth ground alleges a procedural defect relating to the notification of affected parties, which I will address further below.

Section 18 and the scope of the power to reconsider

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

[12] 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.

[3] [1989] 2 SCR 848 (SCC).
[4] 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div. Ct.).

[13] 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 *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…

[14] I accept and adopt this reasoning in this reconsideration request.

[15] The *Code* restricts reconsideration requests to the three grounds set out above. The ministry's position that I misinterpreted the applicable law represents an effort to reargue the ministry's claim that the presumption against disclosure in section 21(3)(b) applies, and that the public interest override in section 23 does not. Both, in my view, also raise questions of law. Similarly, in stating that I ignored affected party concerns, the ministry is, in effect, challenging my balancing of factors (in sections 21(2)(a) and (f)) in the order to arrive at the conclusion that the information at issue is not exempt because a factor favouring disclosure outweighed one that does not. By arguing that I ignored affected party concerns, I understand the ministry's position to effectively be saying that I did not properly weigh the applicable factors in concluding that the factor in section 21(2)(a) (public scrutiny) outweighed section 21(2)(f) (highly sensitive). In my view, this is also an attempt to reargue the section 21(1) exemption claim and I find that the ministry's disagreement with my conclusion does not fit within the ground for reconsideration enunciated in section 18.01(a).

[16] The ministry also argues that I erroneously treated the appellant as a researcher for the purposes of the *Act* and thereby wrongly regarded her as having enhanced access rights.[6] The ministry cites the exception in section 21(1)(e), which provides researchers with a right to access third-party personal information without their consent where they enter into an agreement with the ministry that contains protections for the personal information of the affected individuals. The ministry states that paragraph 43 of the order contains a reference to the appellant being a researcher and describes her work as a journalist conducting research into IPV.

[17] I note that disclosure was neither considered nor ordered pursuant to the research exception in section 21(1)(e) and this exception was never claimed. As noted above, disclosure was ordered by operation of the factor in section 21(2)(a) because it was desirable for subjecting the activities of law enforcement agencies to public scrutiny

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

[6] The order identified the appellant as a member of the media conducting research into intimate partner violence and referred to the research she described in her representations.

in relation to IPV homicides. That a requester may be conducting research on a topic, however informal, was not the basis for this finding. In any event, I find that this new argument also raises a disagreement with my conclusions and interpretation of the relevant sections, and as such, does not give rise to grounds for reconsideration in section 18.01(a).

[18] For me to reconsider Order PO-4411-F pursuant to section 18.01(a), I must be satisfied that there is a fundamental error in the adjudication *process*, rather than a potential error of law in the order itself. I cannot reconsider the order to address the ministry's arguments that my interpretation of specific sections is defective, or to reconsider the ministry's arguments about the interpretation of the claimed exemptions that led to my conclusion that the information at issue is not exempt. I can only consider the ministry's allegations of defects in the adjudication process which, in this case, relate to the notification of affected parties. I will address this question next.

Notification of affected parties

[19] Section 50(3) of the *Act* requires the IPC to inform an institution of an appeal, but makes informing "any other institution or person" with an interest in the appeal discretionary. The Divisional Court considered the discretionary nature of section 50(3) in similar circumstances to this appeal. In *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*,[7] the Divisional Court found that this discretion "has to be informed having regard to the principles of natural justice."

[20] The issue of affected party notification was a central issue in the inquiry.

[21] The ministry's initial position was that all affected third party individuals must be given an opportunity to be heard before a decision could be made about disclosure of personal information.

[22] When I informed the ministry that I would be notifying affected parties and sought their contact information, the ministry then took the position that affected parties must not be notified because the information at issue should never be disclosed. I reiterated my request for contact information from the ministry for the purpose of affected party notification.

[23] The ministry maintained its revised position and declined to provide contact information. The ministry told me that it did not maintain the kind of contact information I appeared to be seeking, but that it might have contact information that was collected and is contained in records that were "created for investigative purposes,"[8] although it could not guarantee its currency or accuracy given that some of

[7] 2014 ONSC 3295 (CanLII).
[8] The ministry's January 27, 2022 letter in response to a request to provide affected party contact information.

the investigations date back to 2015.[9]

[24] As a result, I issued Interim Order PO-4317-I, requiring the ministry to produce the contact information that it has in its custody or control for the immediate next-of-kin of victims and of deceased perpetrators, for perpetrators whether incarcerated or not, and for any other affected parties I might subsequently decide to notify.[10]

[25] Interim Order PO-4137-I contains a chronology of my efforts to obtain contact information from the ministry. I wrote that the contact information was required "so that I can continue with my inquiry *by making best efforts to notify* these affected parties and given them an opportunity to make representations [*emphasis added*]"[11] and that the contact information "will assist the IPC in making *best efforts* to notify affected parties of the appeal under section 50(3) and give them an opportunity to be heard [*emphasis added*]."[12]

[26] As a result of the ministry's compliance with the interim order, the IPC sent notification letters to 86 affected parties (next-of-kin of victims and deceased accused, and perpetrators). Eight individuals (next-of-kin of victims and accused, and one incarcerated individual), responded to the notice letters. The responses that were received are summarized in paragraphs 42-44 of the order.[13]

[27] Neither the *Act* nor the *Code* contain guidance on the manner in which affected party notification is to occur.

[28] In this appeal, the record does not identify affected parties who may have an interest on behalf of deceased individuals and does not contain any information about the location of living accused individuals. Notification, or even identification in most cases, was not possible without the ministry's assistance or cooperation. Regarding the manner of contact, the only information made available to the IPC following the ministry's compliance with Interim Order PO-4317-I consisted of names and last known addresses for the affected parties. Although the *Act* and *Code* are silent on affected party notification during an inquiry, the *Act* contains other provisions for notifying individuals in cases of the disclosure of their personal information in specific circumstances. Sections 21(1) and 49 (which deal with disclosure of personal information) state that individuals whose personal information has been disclosed in compelling circumstances affecting an individual's health and safety are to be notified of the disclosure by mail to their last known address.[14]

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[9] Dating back to 2015.
[10] An adult child, parent or sibling.
[11] Interim Order PO-4317-I, at paragraph 6.
[12] Interim Order PO-4317-I, at paragraph 30.
[13] Also see footnote 20, below.
[14] Section 21(1)(b) is an exception to the personal privacy exemption in section 21(1) that allows an institution to disclose personal information to another person in compelling circumstances affecting the health and safety of an individual, "if upon disclosure notification thereof is mailed to the last known

The ministry's affidavit

[29] With its reconsideration request, the ministry provided an affidavit sworn by the Director of Ontario Victim Services in the Victims and Vulnerable Persons Division of the Ministry of the Attorney General (MAG), who is responsible for MAG's Victim/Witness Assistance Program (VWAP). The affidavit addresses the ministry's concerns regarding the effects of disclosure on victims[15] and the notification issue.

[30] Where the ministry submits that I failed to consider the effects of disclosure on victims, I have already found above that this expresses dissatisfaction with my conclusion and raises a question of law insofar as it challenges my finding made after balancing the potential impact of disclosure against its desirability for the purpose of public scrutiny. I will therefore consider the remainder of the affidavit as it relates to the notification issue only.

[31] In the affidavit, the ministry suggests that MAG has at its disposal other means of contacting victims than by letter.[16] The affidavit states that it is not uncommon for victims to not respond to correspondence,[17] and that the very act of asking an individual to make a decision about the release of personal information can be detrimental. The affidavit explains that barriers to reaching victims exist that may affect their ability to respond, such as further trauma caused by receipt of a notification letter,[18] language barriers impairing an understanding of the notice, or out-of-date contact information in the police's possession.[19]

[32] The ministry has not explained how the existence of other methods to contact victims could be used to reconsider the order for the purpose of making further notification attempts, or how not using other undisclosed means of approaching victims represents a fundamental defect in the adjudication process. This information was not included in the ministry's representations during the inquiry or in response to the IPC's request for contact information, nor was it offered in anticipation of or in response to Interim Order PO-4317-I.

[33] In the circumstances of this appeal, best efforts to notify were limited by the information made available to the IPC. Considering the information at issue and the

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address of the individual to whom the information relates. Section 42(1)(h) contains a similar provision that contemplates notice to an individual upon disclosure of their personal information by mail to the individual's last known address.

[15] In this case, family members of deceased victims in homicide cases.

[16] The ministry includes surviving next-of-kin as victims.

[17] Which the ministry says does not necessarily mean those individuals do not care whether information at issue is disclosed.

[18] As set out in Interim Order PO-4317-I, the Divisional Court in *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, supra, held that "[n]otice would have given the victims an opportunity to advise by letter whether or not they would suffer distress if the records were disclosed to the media and public."

[19] In this case, the OPP.

range and variety of contacts, I am satisfied that the information provided by the ministry enabled the IPC to carry out best efforts to notify affected parties, and that the efforts undertaken were sufficient in the circumstances.

[34] The affidavit also does not persuade me that the adjudication process was fundamentally defective because the undertaking to notify affected parties was limited to best efforts. That only eight notified parties responded, or that 13 envelopes were returned unopened,[20] does not change my view that best efforts were made to send notices by mail to what were effectively last known addresses and that these were satisfactory in the circumstances. Inherent in any "best efforts" undertaking is the risk that some contact information may be outdated or inaccurate, or that some individuals will not receive the notice or will choose not to respond.

[35] Finally, the ministry "recommend[s] that a reconsideration consider the work of the Domestic Violence Death Review Committee" (DVDRC) of MAG." According to a website extract provided with its affidavit, the DVDRC's purpose is to assist the Office of the Chief Coroner on the investigation and review of deaths of persons that occur as a result of domestic violence, and has, as an objective, the creation and maintenance of a comprehensive database about victims and perpetrators and their circumstances. Despite this recommendation, the ministry's representations do not explain how this would affect a reconsideration or how it meets the criteria for reconsideration in section 18.01(a).[21] In the circumstances, I find that it does not.

[36] Accordingly, for these reasons, I deny the ministry's reconsideration request.

ORDER:

1. The reconsideration request is denied.
2. The interim stay of Order PO-4411-F is lifted and the ministry is ordered to comply with Order PO-4411-F by **January 12, 2024**.

Original signed by: December 12, 2023
Jessica Kowalski
Adjudicator

[20] Approximately 13 envelopes were returned unopened: seven (7) from next-of-kin of victims, and six (6) from living accused/incarcerated individuals.
[21] Even if this were to be viewed as new evidence, section 18.02 of the *Code* states that the IPC will not reconsider a decision simply on the basis of new evidence.