

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-4593-R

Appeal PA23-00111

Ministry of Transportation

Order PO-4552

January 22, 2025

Summary: After locating additional records related to the original request, the ministry submitted a request for reconsideration of Order PO-4552, claiming a fundamental defect in the adjudication process and other errors. In this reconsideration order, the adjudicator finds that the ministry has not established grounds for reconsideration under the IPC's *Code of Procedure* and denies the reconsideration request.

Statutes Considered: IPC's *Code of Procedure*, sections 15.01(a) and (c); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended.

Order Considered: Order MO-1200-R.

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

OVERVIEW:

[1] The Ministry of Transportation (the ministry) asked that I reconsider Order PO-4552, in which I ordered the ministry to disclose several records to the appellant.

[2] Order PO-4552 addressed an appeal under the *Freedom of Information and Protection of Privacy Act* (the *Act*) where the appellant sought records related to real estate property value assessments for the proposed GTA West Corridor Highway

(Highway 413). The ministry refused access to this information, relying on the exemptions in sections 12 (Cabinet records) and 18(1) (economic and other interests) of the *Act*. The appellant (then the requester) appealed this decision to the Information and Privacy Commissioner of Ontario (IPC).

[3] In Order PO-4552, I ordered the ministry to disclose two records to the appellant and upheld the ministry's decision for the 12 remaining records, finding that the records were exempt from disclosure under section 12 of the *Act*. Portions of the other records for which only section 18(1) was claimed were also ordered disclosed.

[4] The ministry submitted a reconsideration request regarding my findings on section 12, stating that there was a fundamental defect in the adjudication process and requesting a stay of the order. In accordance with the reconsideration process outlined in section 15.08 of the IPC's *Code of Procedure* (the *Code*), the reconsideration request was first reviewed by the Assistant Commissioner and Director of Adjudication, who determined that the request should be assigned to me to determine if any of the grounds for reconsideration in section 15.01 of the *Code* had been met.¹ The Director of Adjudication also granted a stay of order provision 2 (requiring the ministry to disclose the records) pending the determination of the reconsideration request.

[5] The ministry agreed to share the reconsideration request with the appellant, with the exception of certain sections that described the records at issue in Order PO-4552. After reviewing the reconsideration request, I determined that I did not need to seek representations from the appellant.

[6] For the reasons that follow, I deny the ministry's reconsideration request and lift the stay of the order.

DISCUSSION:

[7] The sole issue in this appeal is whether there are grounds under the *Code* to reconsider the order.

[8] Under the common-law principle of *functus officio*, once a decision-maker has determined a matter, they do not have jurisdiction to consider it further. However, in *Chandler v Alberta Assn. of Architects*,² the Supreme Court of Canada said that while "there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals," an administrative decision could be reopened in certain

¹ The ministry submitted the request after the 21-day deadline to submit a reconsideration request specified by section 15.04 of the *Code*. The ministry acknowledged this and requested that the deadline date be varied under section 17.01 of the *Code*, stating that the request was made as soon as the ministry became aware of the need for the reconsideration request, and prior to the compliance date in Order PO-4552. The Director of Adjudication considered the circumstances outlined by the ministry and determined that waiving the deadline date for the ministry's reconsideration request was appropriate.

² 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.) (*Chandler*).

circumstances.³

[9] Section 15.01 of the *Code* summarizes the common law position, acknowledging that the IPC has the ability to re-open a matter to reconsider it in certain circumstances. It says:

15.01 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) a jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or other similar error in the decision.

[10] The ministry references sections 15.01(a) and (c) in its reconsideration request. Section 15.01(a) of the *Code* allows the IPC to reconsider its decision or order if a party requesting reconsideration establishes that there was a fundamental defect in the adjudication process. A fundamental defect would be a breach of rules of procedural fairness,⁴ such as:

- a failure to notify an affected party;⁵
- a failure to invite representations on an issue;⁶ or
- a failure to invite sur-reply representations where new issues or evidence are provided in reply.⁷

[11] Section 15.01(c) of the *Code* contemplates "clerical or accidental error, omission or other similar error in the decision," such as, for example, an order provision containing inconsistent severance terms with respect to the records.⁸ Such errors under section 18.01(c) may include:

- a misidentification of the "head" or the correct ministry;⁹
- a mistake that does not reflect the adjudicator's intent in the decision;¹⁰

³ *Ibid.*

⁴ Orders PO-3960-R and PO-4134-R.

⁵ Orders M-774, R-980023, PO-2879-R and PO-3062-R.

⁶ Order M-774.

⁷ Orders PO-2602-R and PO-2590-R.

⁸ See, for example, Order PO-2405, corrected in Order PO-2538-R.

⁹ Orders P-1636 and R-990001.

¹⁰ Order M-938.

- information that is subsequently discovered to be incorrect;¹¹ and
- an omission to include a reference to and instructions for the institution's right to charge a fee.¹²

[12] It is important to note that the reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their cases,¹³ whether or not they made those arguments during the inquiry.¹⁴

Representations

[13] The ministry provided representations in support of its reconsideration request. As discussed above, I did not seek representations from the appellant.

Omitted information

[14] The ministry submits that there was a fundamental defect in the adjudication process and an accidental error or omission that justifies a reconsideration of the order. The basis for the ministry's request involves what it describes as its own inadvertent omission regarding the records at issue in the appeal. It explains that while reviewing Order PO-4552, it discovered that "record 2," in the form provided to the IPC during the appeal process, was an incomplete document. It describes record 2 as a PDF version of an Excel document containing nine worksheets with accompanying titles. It explains that when the original Excel document was converted to a PDF format, the following information was inadvertently omitted and therefore not submitted to the IPC:

1. Three tables and accompanying explanatory notes at the end of worksheet 8;
2. A column on a worksheet;¹⁵ and
3. The titles of each worksheet.

[15] In its reconsideration request, the ministry provided a new version of the record 2 (described as "record 15" by the ministry) with the omitted information highlighted. It submits that without the new information found in record 15, it is not possible to understand the purpose and content of record 2 (and record 1¹⁶), or its overlap with the other records. The ministry also provided an explanation of how the information in records 15 and 2 overlap with the other records at issue. As this would reveal the content of the

¹¹ Orders M-938 and MO-1200-R.

¹² MO-2835-R.

¹³ Order PO-2538-R, citing *Chandler*, and Orders PO-3062-R, PO-3558-R, and MO-4004-R.

¹⁴ Order PO-3062-R.

¹⁵ The ministry provided a more detailed explanation, but to avoid providing more information about records where I accepted the ministry's section 12 claim, I have not reproduced it.

¹⁶ Record 1, identified as a separate record by the ministry in PA23-00111, is reproduced in its entirety in record 2. For this reconsideration order, I will only refer to record 2.

records that I found to be exempt from disclosure in Order PO-4552, I have not reproduced it here.¹⁷

Analysis and finding

[16] The ministry provided minimal explanation for how the omission underlying this reconsideration request occurred, generally stating that it was an inadvertent error that occurred due to the software used to prepare the records, and that it was not noticed until the ministry began the process of complying with Order PO-4552. While it is understandable that such errors can occur, it is not clear why it was not noticed earlier in the process, for example when the ministry was preparing its representations for the appeal.

[17] I can accept the ministry's general submission that record 15, to the extent that it differs from record 2, may give rise to additional considerations in the appeal. However, as discussed below, I find that the ministry has not established that the reconsideration criteria in the *Code of Procedure* have been met.

Section 15.01(a)

[18] The ministry submits that there was a fundamental defect in the adjudication process because record 2, in the form provided by the ministry, was an incomplete record. Specifically, the ministry states this resulted in:

1. No opportunity to make submissions; and
2. Failure to consider material evidence.

[19] For the first point, it explains that its submissions in the appeal were based on record 2, which it states is incomplete. It submits that due to this omission, the parties did not have an opportunity to make submission in respect of record 15 or the omitted information. It states that this constitutes a fundamental defect in the adjudication process leading to the order, warranting a reconsideration.

[20] For the second, the ministry references MO-4004-R, stating that there the IPC granted a reconsideration request because the adjudicator did not consider material evidence, leading to a fundamental defect in the adjudication process. It submits that in the present appeal, the omitted information is highly material evidence because it identifies that record 2 was intended to present a range of options to be considered as part of Cabinet submissions.

[21] The ministry specifically references one of the omitted titles as showing how the

¹⁷ This is in accordance with the sharing criteria outlined in section 6(a) of *Practice Direction 7*.

information in a chart was considered as part of a submission.¹⁸ It also provided information on how the omitted titles provide information on how the information in record 2 could form a part of the deliberative process and for deciding provincial priorities. It notes that charts prepared as part of submissions may be revisited, revised, and expanded upon as required until completion of the Highway 413 project, and that in these cases the assumptions, calculations and details of the charts are revised for the purpose of preparing them for Cabinet submission.

Analysis and finding

[22] I have considered the ministry's arguments for section 15.01(a), and I find that it has not established that a reconsideration is warranted in the circumstances.

[23] As discussed in *Chandler*, the doctrine of *functus officio* limits the ability of decision-makers to reopen matters, except in limited circumstances. Importantly, while various reasons for reopening a matter are discussed by the Court, they all focus on errors of the tribunal, rather than errors of a party to the matter before the tribunal. This same approach has been applied by the IPC in reconsideration decisions and is reflected in the *Code*, where the grounds for reconsideration relate to errors in the adjudication process or the decision, rather than errors made by the parties -- even if such errors were inadvertent. If errors made by parties during an inquiry were grounds for reconsideration, it is difficult to conceive how IPC decisions could be viewed with any degree of finality.

[24] I do not accept the argument that the ministry's error, even if not a ground for reconsideration on its own, led to a fundamental defect in the adjudication process, either due to a lack of an opportunity to provide submissions, or a failure to consider material evidence. Although record 15 was not provided to the IPC, the ministry had a full opportunity to provide representations on the records that were at issue in the appeal. If the ministry believed that there was additional context to the records that would have supported its claims of Cabinet confidentiality under section 12(1)(c) (such as, for example, information about the nature or titles of the tables in record 2), it was not barred from providing that context. It chose not to do so, instead providing limited representations on how section 12(1)(c) applied.

[25] To say that the ministry was unable to provide representations on the omitted information in record 15 presumes that the ministry was somehow limited to only commenting on the specific information in the records, rather than their broader context. Indeed, in its reconsideration submission, the ministry provided further context on the relationship between record 2 and the others for which I upheld the exemption. These additional submissions relied little on the omitted information, and could have been provided, in some form, during the original inquiry in the context of record 2.

¹⁸ The ministry provided the title of the chart as part of its representations, but because the title would provide additional information on records that I found exempt from disclosure, I have not reproduced it here.

[26] With respect to the failure to consider material evidence, the ministry has not claimed that the omitted information in record 15 was before me in the appeal. It is therefore difficult to conceive how my failure to consider this evidence, which was not before me, could be a ground for a reconsideration. Furthermore, even if the ministry's claim is that its own inadvertent error led to me not considering the evidence, I do not agree that this is a ground for reconsideration. As discussed above, whether or not the omitted information was contained in record 2, the ministry could have provided this information in its submissions. It did not do so, and it was accordingly not considered by me in my decision. As such, I find that the ministry has not established that any of the grounds for reconsideration in section 15.01(1)(a) are met.

Section 15.01(c)

[27] The ministry submits that there is both an inconsistency in the order that does not reflect my intention, and a "fundamental error," engaging section 15.01(c) of the *Code*. (Section 15.01(c) does not contain a reference to a "fundamental error.") Regarding the inconsistency, the ministry references Order PO-4520-R, where the adjudicator allowed a reconsideration where she had initially failed to take sufficient notice of the fact that information in one record she ordered disclosed overlapped and provided critical contextual information about another record she found exempt from disclosure. In that reconsideration decision, the adjudicator concluded that if she had taken sufficient notice of the overlap between the records, she would have found the ordered-disclosed record exempt from disclosure for the same reasons that the other records were found exempt from disclosure.

[28] The ministry submits that I should make the same finding here. It states that because I found portions of records 3, 4, 5, 6, 12, and 13 exempt from disclosure under section 12(1) of the *Act*, and because the information in record 2 overlaps with those records or portions of the records, I should also have found record 2 to be exempt from disclosure. It states that to find otherwise is inconsistent with my intention to protect Cabinet's deliberative secrecy and my finding that the other records were exempt under section 12(1). It notes that this inconsistency is even more apparent upon consideration of record 15 with the added context of the omitted information.

[29] With respect to the "fundamental error," the ministry submits that the omission of the information in record 15 represents a fundamental error. It references Order MO-1200-R, where the adjudicator agreed to reconsider an order to correct a factual error of a fundamental nature going to the actual issue to be determined. In Reconsideration Order MO-1200-R, the adjudicator refers to this as an "accidental error." The adjudicator in Order MO-1200-R found that the reconsideration was warranted because the original adjudicator was unaware of a key fact relevant to the application of the labour relations exclusion in the *Municipal Freedom of Information and Protection of Privacy Act*.

[30] The ministry submits that its failure to provide the information in record 15 during the inquiry gives rise to a similar fundamental error. It states that the omitted information

is relevant and material as it makes clear that record 2 was intended to present a range of options for Cabinet to consider in developing its priorities for the province, and that it would reveal the substance of deliberations of Cabinet.

Analysis and finding

[31] I do not agree with the ministry's submission that ordering disclosure of record 2 while upholding the exemption claim for the other records gives rise to an inconsistency. Order PO-4552 does not contain a finding that the information in record 2 could not potentially be used to calculate or determine information that appeared before Cabinet. Rather, Order PO-4552 states that, even if this is possible, the numbers contained in record 2, many of which are not related to the specific numbers that exist in the other records, do not reveal the substance of Cabinet deliberations on their own.

[32] Indeed, in its reconsideration submission the ministry notes that "[i]t is not possible to understand the purpose and content of Record 2, or its overlap with the other records, without reviewing it as a full and complete document containing the Omitted information: Record 15." It could be argued that the additional information in record 15 is relevant to the issues in the appeal, but record 15 was not before me. Without the omitted information, I continue to find that disclosure of the information in record 2 would not reveal the substance of Cabinet deliberations. Accordingly, I find that the ministry has not established that there is an inconsistency in the order.

[33] For the fundamental error, the ministry's argument assumes that the record at issue is record 15, rather than record 2. Order PO-4552 did not order record 15 to be disclosed, and my dismissal of this reconsideration request will not require the ministry to disclose record 15. I do not agree that the analysis in Order MO-1200-R, where the adjudicator's error about underlying facts changed whether the IPC had jurisdiction over the matter, is relevant to this appeal. Here, the ministry's error resulted in some information being omitted from a record at issue, but any affect this had related only to whether the ministry's exemption claims were sufficiently supported by the ministry. The issue in Order PO-4552 did not involve whether the IPC had jurisdiction over the records at issue.

[34] Furthermore, as discussed in the 15.01(a) analysis, the ministry's own error in providing the IPC with the wrong record did not prevent the ministry from submitting any further evidence or making any further arguments. The ministry could have made the arguments that it now makes and provided the context that it now provides in the inquiry. It did not do so. These arguments, in my view, are the ministry's efforts to re-argue the very issues decided in Order PO-4552 with the benefit of additional evidence. These circumstances are not contemplated by section 15.01(c) and I decline to reconsider Order PO-4552 on this basis. As such, I do not agree that the ministry's failure to provide the omitted information, or the fact that I did not consider information that was not before me, represents a fundamental error.

ORDER:

1. I deny the ministry's reconsideration request.
2. I lift the stay of provision 2 of Order PO-4552 and order the ministry to comply with Order PO-4552. As the time for compliance has now passed, I order the ministry to disclose the records by **February 5, 2025**. For clarity, I am ordering the ministry to disclose the original records at issue, **not** record 15.
3. In order to verify compliance with Order PO-4552, I reserve the right to require the ministry to provide me with a copy of the records disclosed to the appellant in accordance with Order PO-4552.

Original Signed by: _____

Chris Anzenberger
Adjudicator

January 22, 2025