

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4788-R

Appeal PA25-00288

Alcohol and Gaming Commission of Ontario

February 17, 2026

Summary: The AGCO asked for reconsideration of Order PO-4624, claiming there were fundamental defects in the adjudication process, and jurisdictional defects. In this reconsideration order, the adjudicator finds that the AGCO 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 (b); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

Orders Considered: Orders PO-4624 and PO-3637.

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

OVERVIEW:

[1] The Alcohol and Gaming Commission of Ontario (AGCO) submitted a request for reconsideration of Order PO-4624 (the Order), in which I partially upheld the AGCO's access decision to withhold certain records, but ordered it to disclose others.

[2] The Order addressed an appeal to the Information and Privacy Commissioner of Ontario (IPC) under the *Freedom of Information and Protection of Privacy Act* (the Act), by the executor of a deceased individual's estate (the appellant) who sought access to the AGCO's death investigation regarding the deceased.

[3] In the Order, I ordered the AGCO to disclose portions of an AGCO inspection report and a document in its entirety (referred to by the AGCO in its reconsideration request as “the letter”), which the AGCO had withheld under section 49(a) (discretion to refuse requester’s own information) read with the law enforcement exemptions in sections 14(1) and 14(2)(a), and with the solicitor-client privilege exemption in section 19. I also ordered the AGCO to disclose portions of email correspondence and related attachments that it had withheld under sections 17(1) (third party information) and 19.

[4] In its reconsideration request, the AGCO argued that there were fundamental and jurisdictional defects in the adjudication process, and asked for a stay of the order. In accordance with section 15.08 of the IPC’s *Code of Procedure* (the *Code*),¹ the IPC’s Director of Adjudication conducted an initial review of the reconsideration request, and determined that the reconsideration request should be assigned to me. I granted a stay of the order provision requiring disclosure.

[5] I reviewed the AGCO’s reconsideration request and determined that I did not need to seek representations from the appellant.

[6] For the reasons that follow, I dismiss the AGCO’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 circumstances.³

[9] Section 15.01 of the *Code* summarizes the common law position, acknowledging that a decision-maker 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:

¹ Available online at <https://www.ipc.on.ca/en/resources-and-decisions/code-procedure-appeals-under-freedom-information-and-protection-privacy-act-and-municipal-freedom>.

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

³ *Ibid.*

- (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 AGCO relies on sections 15.01(a) and (b) of the *Code* in its reconsideration request.

[11] 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

[12] Section 15.01(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.

[13] 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,⁸ whether or not they made those arguments during the inquiry.⁹

The AGCO's reconsideration request

[14] The AGCO makes four arguments (referred to as "grounds" in its reconsideration request) to support its claim that the grounds in sections 15.01(a) and (b) of the *Code* are met. I summarize and address these arguments below. Three of the four arguments relate to the application of solicitor-client privilege to the letter and email correspondence, while the fourth relates to the application of the section 14 law enforcement exemption.

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

⁹ Order PO-3062-R.

Arguments 1, 2, and 3: the AGCO's legal privilege over the letter and the email correspondence, and jurisdictional defects

[15] The AGCO submits that I could have provided it with an opportunity to reply to the appellant's representations on the application of legal privileges, including litigation privilege and settlement privilege, claimed for the email correspondence and the letter. It submits that I agreed with the appellant's representation, as outlined in paragraph 76 of the Order:

The records on pages 51-56 are described by the AGCO as email correspondence and attachments. Some of the emails are between AGCO staff and legal counsel, and I find that these portions are exempt under section 19(a), subject to my review of the AGCO's exercise of discretion, below. However, there are a significant number of emails that are correspondence between the AGCO and legal counsel for a party that the AGCO is investigating, along with a corresponding attachment. As the appellant notes in her representations, to accept the AGCO's argument that any document that was at some point reviewed by a lawyer is protected by section 19 would defeat the *Act's* access scheme. The AGCO has not explained how email correspondence to adverse legal counsel qualifies for exemption under section 19, and I find that it does not.

[16] The AGCO argues that I "appear to have adopted the representation of the appellant" and further states that it could have been provided the opportunity to expound on how email correspondence between opposing counsel is protected by a legal privilege. It also submits that my characterization of the email correspondence does not reflect its true nature. It argues that the email correspondence reflects settlement discussions between the AGCO and the regulated entity regarding the entity's compliance issues underlying the access request.

[17] Referring to Order PO-2602-R, the AGCO submits that the IPC has recognized that a fundamental defect can occur where a party was not given an opportunity to provide reply representations. It submits that I could have asked it to clarify or further discuss its solicitor-client privilege claim, which would include giving it the opportunity to discuss how settlement privilege applies. The AGCO argues that since it was not provided with an opportunity to reply to the appellant's "new issue" and was only made aware that I sought more explanation in the Order's reasons, this amounts to a fundamental defect in the adjudication process.

[18] The AGCO makes similar arguments for the letter that I ordered disclosed. It submits that I noted in paragraph 74 of the Order that the appellant generally argued that neither statutory solicitor-client privilege nor statutory litigation privilege applies to the records:

The appellant submits that section 19 does not apply merely because the records were forwarded to legal counsel at some point, as this does not meet the definition of a protected communication, nor is it consistent with the purpose of the protection afforded by solicitor-client privilege. She explains that accepting the AGCO's arguments would mean that any document could be protected from disclosure by simply forwarding it to legal counsel. She also explains that neither statutory solicitor-client privilege or statutory litigation privilege apply to the records.

[19] The AGCO states it could have been informed that additional details, such as context, were needed to assist me in determining whether the section 19 exemption applies. It also submits that it could have been given the opportunity to provide representations regarding whether solicitor-client privilege had been waived. As with the emails, the AGCO argues that I could have sought additional details on the application of settlement privilege to the letter. It submits that because I did not provide it this opportunity, there was a fundamental defect in the adjudication process.

Analysis and finding

[20] I have considered the AGCO's representations under section 15.01(a), and I find that it has not established that there was a fundamental defect in the adjudication process. I disagree with its claim that I was required to provide it with an opportunity to reply to the appellant's representations. The appellant's arguments did not give rise to a new issue that was not before the AGCO, or to new arguments about an existing issue in the appeal. The AGCO had the opportunity to address the solicitor-client privilege issue when making its representations, including the application of litigation or settlement privilege and the question of waiver of privilege that it refers to in its reconsideration representations. All of these aspects of the solicitor-client privilege issue were included in the Notice of Inquiry that was sent to the AGCO inviting its representations on its exemption claim.

[21] The Notice of Inquiry also confirmed that, as per section 1(a)(ii) which sets out the *Act's* purposes, "necessary exemptions from the right of access should be limited and specific." It further stated that under section 53 of the *Act*, the burden of proof that a record falls within one of the specified exemptions of the *Act* lies with the institution that refuses access to a record relying on a specified exemption. The AGCO knew that it had the burden of proof to establish the application of the exemptions it claimed, including the solicitor-client privilege exemption, when it was preparing its representations. Instead of justifying its solicitor-client privilege claims by explaining why the exemption applied to each record in satisfaction of this burden of proof, it broadly claimed that section 19 applied and provided minimal specific representations.

[22] With respect to the emails, addressed in paragraph 76 of the Order, while I generally agreed with the appellant's representations that the AGCO's section 19 exemption claims were broad, I do not find that this general argument was one which

the AGCO should be given the opportunity for reply. The appellant did not raise any specific new arguments in her representations; she merely stated that the AGCO's position was overly broad and she disagreed with the AGCO's claims. That she would disagree with the AGCO's decision to apply the section 19 exemption to the records at issue is something the AGCO was aware of by the very fact that she was appealing the AGCO's decision. The AGCO's failure to provide specific representations in support of its exemption claims in the first instance does not then require me to provide it with an opportunity to respond to the appellant's disagreement with its claims.

Settlement privilege

[23] On the application of settlement privilege, the AGCO claims, for the first time, that the emails and letter I ordered disclosed are protected by settlement privilege. While it claimed during the inquiry that the records are protected by litigation privilege – by broadly stating that the records relate to potential litigation and were drafted by legal counsel – it did not mention settlement privilege in its representations. The Notice of Inquiry provided to the AGCO specifically discussed settlement privilege, which the AGCO chose not to address in its representations.

[24] The AGCO states that seeking its reply would have given it the opportunity to discuss the applicable law regarding settlement privilege, but it has not explained why it was not able to do so in the first instance. The AGCO was aware of the nature of the emails at issue, and it was open to it to explain, as it seeks to now, why emails between adverse parties are subject to solicitor-client privilege. The appellant's representations did not mention settlement privilege, and there is nothing in them that would give rise to new issues that had not already been presented to the AGCO in the original Notice of Inquiry. Accordingly, I find that the reconsideration ground in section 15.01(a) is not established.

[25] The AGCO also argues that my decision to not seek representations on settlement privilege gives rise to a jurisdictional error, satisfying the reconsideration ground in section 15.01(b) of the *Code*. It submits that the Supreme Court of Canada has discussed the importance of settlement privilege, and established that it is a common law class privilege that protects the confidentiality of communications and information exchanged for the purposes of settling a dispute.¹⁰ It argues that it noted the connection between the letter and email correspondence in its representations, and points out that the letter addresses potential litigation. With respect to the email correspondence, it submits that it reflects how the parties discussed settlement. It submits that prior to ordering disclosure, I should have provided the AGCO with the opportunity to address settlement privilege, and this amounts to a jurisdictional defect. It also notes that as one party cannot unilaterally waive privilege, the jurisdictional defect would also affect the regulated entity

¹⁰ The AGCO cites *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 and *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35.

that was in discussions with the AGCO.¹¹

[26] As with its other section 19 claims, the AGCO was given the opportunity to provide representations on the application of settlement privilege as part of its representations. In its reconsideration request, the AGCO explains how the courts have considered the application of settlement privilege to communications between parties in a proceeding.¹² It was open to the AGCO to make these same arguments in its original representations, relying on the same decisions it now cites, but it did not do so. I also note that the regulated entity that the AGCO references was also given the opportunity to provide representations, and it did not claim that the records were subject to settlement privilege.

[27] While it is clear that the AGCO disagrees with my finding on the subject, it has not explained how its disagreement gives rise to a jurisdictional issue. As such, I find that a reconsideration is not warranted under section 15.01(b) of the *Code*.

Argument 4: law enforcement and the inspection report

[28] The AGCO submits that my conclusions regarding the application of section 14(2)(a), which relates to law enforcement reports, gave rise to a fundamental defect in the adjudication process. It refers to Order PO-3066-R, where the adjudicator acknowledged that her characterization of a record was “unclear and incomprehensible,” rendering the order fundamentally defective.

[29] In support of its position, the AGCO argues that I acknowledged that there were evaluative comments within the inspection reports, and states that this gives rise to an apparent contradiction. It further argues that the report contains a manager’s disposition to “forward” the matter “to Legal,” which constitutes consideration of the observations. It submits that, in consideration of this information, I erred in finding that the record is not an inspection report within the meaning of section 14(2)(a).

[30] It also submits that I failed to consider Order PO-3637, referenced in the AGCO’s original representations, where records appended to a law enforcement report were found to be exempt from disclosure under section 14(2)(a) because they were “integral” to the main report. It submits that this reasoning applies to the inspection report at issue in the Order. It provides new representations with its reconsideration request, submitting that the evaluative comments within the inspection reports are more than mere observations, and that the inspection report was integral for the evaluative commentary in the Deputy Registrar’s submission. It also disagrees with my finding that the inspection report is analogous to a police occurrence report. It submits that I erred in my analysis,

¹¹ The AGCO cites *Hallman Estate (Re)*, 2009 CanLII 49643 (ON SC) in support of its position.

¹² See, for example, *Clayton v. SPS Commerce Canada Ltd.*, 2018 ONSC 5017 (CanLII), at para. 8; *Howes v. Howes*, 2018 ONSC 6297 (CanLII), at para. 14 where the criteria for the application of settlement privilege are outlined. This test has since been adopted by the IPC in Orders PO-4406 and PO-4752, among others.

which constitutes a fundamental defect in the adjudication process.

[31] Last, it submits that I relied on the appellant's representations that the inspection report consisted of mere observations or recordings of fact, and it could have been given the opportunity to provide reply representations on this. Additionally, it submits that I could have sought reply representations regarding how the inspection report was subject to solicitor-client privilege, particularly with regard to how courts have recognized that seeking legal advice is privileged, and how it became part of a "working paper" for the AGCO's legal counsel towards providing advice.

Analysis and finding

[32] I do not agree that my finding regarding the nature of the inspection report gave rise to a contradiction or a fundamental defect in the adjudication process. The IPC has consistently held that occurrence reports, even with the presence of a few comments that might be considered evaluative in nature, do not qualify as "reports" for the purposes of section 14(2)(a) of the *Act* as they consist primarily and essentially of descriptive material.¹³ Consistent with this reasoning, I found that, even with the presence of a few evaluative comments, the report was primarily and essentially descriptive in nature, and the section 14(2)(a) exemption therefore did not apply.

[33] With respect to Order PO-3637, the AGCO only referenced Order PO-3637 in its initial representations to support its position that the inspection report was triggered by a specific incident, rather than being the result of a routine inspection. I accepted this position. It now submits, again for the first time, that I could have found that the inspection report was "integral" to the main report, as was found in Order PO-3637. As with the AGCO's arguments regarding settlement privilege, it had the opportunity to make these arguments in its original representations, but it did not do so. As stated above, the reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their cases.

[34] The AGCO further claims that I could have given it the opportunity to provide additional representations on the nature of the report and whether it was protected by solicitor-client privilege. Again, the AGCO had the opportunity to provide arguments supporting its exemption claims when it provided its initial representations. The appellant's representations, that the AGCO did not meet the burden of proof for its exemption claims, did not raise any issues that warranted a response from the AGCO; all of the arguments that the AGCO is now making in its reconsideration request are ones it could have made in its initial representations. Accordingly, I find that the reconsideration ground in section 15.01(a) is not met.

[35] Having found that the AGCO has not established the reconsideration grounds in section 15.01(a) or (b) of the *Code*, I deny its reconsideration request.

¹³ See, for example, Orders M-1109 and PO-3321.

ORDER:

1. I deny the AGCO's reconsideration request.
2. I lift the stay of Order PO-4624 and order the AGCO to comply with Order PO-4624 by **March 19, 2026**.
3. In order to verify compliance with Order PO-4624, I reserve the right to require the AGCO to provide me with a copy of the records disclosed to the appellant.

Original Signed by: _____
Chris Anzenberger
Adjudicator

February 17, 2026 _____