Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-938

Appeal M_9700007
[Reconsideration]

Metropolitan Toronto Police Services Board

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

This order sets out my decision on the reconsideration of Order M-913, issued March 20, 1997. To place this order in context, I will briefly review the history of this matter.

The appellant is counsel to two reporters who submitted a request to the Metropolitan Toronto Police Services Board (the Police) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The reporters sought access to a list of the names of all officers employed by the Police. The Police denied access to this information on the basis of the following exemptions in the Act:

- danger to health or safety - section 13
- invasion of privacy - section 14(1)

On appeal, the reporters submitted that there was a compelling public interest in disclosure of this information pursuant to section 16 of the Act.

A Notice of Inquiry was sent to the Police, the reporters and the Metropolitan Toronto Police Association (the MTPA). Representations were received from the Police, the MTPA, and the counsel representing the journalists.

After reviewing the decision letter, the letter of appeal, the sample records and the representations, I issued Order M-913. I found that section 13 applied to exempt the list of the names of the officers from disclosure. I also found that there was no compelling public interest in disclosure which clearly outweighed the purpose of this exemption. In the result, I upheld the decision of the Police.

THE RECONSIDERATION REQUEST

Subsequent to the issuance of Order M-913, I received a letter from the appellant requesting that I reconsider my order "in light of new evidence which has recently become available".

The appellant submitted that the new evidence was the Metropolitan Toronto Police Service Professional Standards 1996 Annual Report (the Report) which the Police had "recently published". He provided a copy of the Report to me along with his reconsideration request. The Report lists the names, ranks and badge numbers of approximately 1,000 officers of the 5,000 employed by the Police. It contains this information with respect to those officers who have received Long Service Awards and Service Awards during the past year.

On this basis, the appellant argued that the Police had acted in an arbitrary and capricious manner in denying the requested information under the Act as the publication demonstrated that "there is no evidence that the Police make a practice of keeping officers' names secret to protect the health and safety of the force". The appellant maintained that, in fact, the information released in the Report posed more of a potential risk to the health and safety of the officers than would the disclosure of the names alone, the subject of the request under the Act.
The IPC's policy on reconsideration provides as follows:

> When an application for reconsideration of an order is received, the order should be reconsidered only where:
>
> 1. there is a fundamental defect in the adjudication process (for example, lack of procedural fairness) or some other jurisdictional defect in the order, or
>
> 2. there is a typographical error or other clerical error in the order which has a bearing on the decision or where the order does not express the manifest intention of the decision maker.
>
> An order should not be reconsidered simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the inquiry.

By letters dated April 2, 1997 (the Reconsideration Notices), I invited the Police, the appellant and the MTPA to make representations on whether or not I should reconsider Order M-913. The Reconsideration Notices set out the appellant's objections to the order in some detail. In the interests of expediency, I also invited the parties to make submissions on the substantive issues raised by the reconsideration request. These are the issues which would be dealt with in a second inquiry should I decide to grant the appellant's request for reconsideration. In response to the Reconsideration Notices, I received representations from the Police, the appellant and the MTPA.

DISCUSSION:

SHOULD ORDER M-913 BE RECONSIDERED?

Both the Police and the MTPA submit that the Report constitutes "new evidence" and that, in accordance with the IPC's policy on reconsiderations, Order M-913 should not be reconsidered "simply on the basis that new evidence is available". It is the position of the Police and the MTPA that there exist no other grounds on which Order M-913 should be reconsidered.

These parties have provided me with the following factual information to support their position that the Report is "new evidence". The Police state that the Report was not available as of March 6, 1997, the due date for representations in the appeal. The Report was first considered by members of the Police Services Board at a public meeting on March 13, 1997.

In addition, the Police confirm that there does not exist a 1995 edition of the Report containing the same information. The Police state that, historically, the names of officers entitled to long service awards, for example, were not published in any standardized report available to the public. In 1996, responsibility for awards was assigned to the Professional Standards Unit, which published the Report.

In this regard, the Police state:

> The decision to incorporate the Awards into the newly formatted annual report was made unbeknownst to not only the board, but also without consultation with any other Institutional units which could have prevented this error involving the rights of approximately 1,000 employees. Unfortunately, the Acting Coordinator of the Freedom of Information and Protection of Privacy Unit did not become aware of the situation until April 1, 1997, too late to apprise the individuals involved with this project of the FOI concerns and repercussions.

The MTPA confirms that it was not aware of the existence of the Report at the time of its submissions in the appeal "and would not have consented to the release of the information therein". The MTPA also states that, to its knowledge, similar information was not provided in earlier reports. The president of the MTPA states that neither his organization nor its officer members knew or consented to the release of the Award information included in the Report.

The Police have summarized the current situation with regard to the Report as follows:

> Numerous concerns have been raised regarding the publication of the personal information contained in the awards section of the Professional Standards 1996 Annual Report, and an internal privacy investigation has been initiated concerning the matter.
>
> The institution acknowledges that an inadvertent, yet horrendous error has been made, however, such error does not waive the institution's responsibility to protect the rights to privacy of the approximately 4,000 other police officers employed by the Service. The institution's position concerning the application of section 13 remains unchanged from that expressed in our representation dated March 6, 1997.

As indicated, the appellant's request for reconsideration is based on a consideration of the Report as "new evidence". The appellant acknowledges that this appears to be outside the bounds of the policy statement as to the grounds on which a decision-maker may reconsider an order. Nonetheless, the appellant takes the position that I should not consider myself bound by the policy statement, without considering his submissions, as to do so would amount to an unlawful fettering of my discretion.

The appellant has referred me to Chandler v. Alberta Assn. Of Architects (1989), 62 D.L.R. (4th) 577 (S.C.C.) as the "leading Canadian case with respect to the reconsideration of a decision by a tribunal". The issue before the Supreme Court of Canada in that case was the application of the common law principle of functus officio to tribunals. This principle holds that once a matter has been determined by a decision-maker, he or she has no jurisdiction to further consider the issue.

In Chandler, Sopinka J., writing for the majority, stated as follows:

> ... As a general rule, once [an administrative] tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal changes its mind, made an error within jurisdiction or because there has been a change in circumstances. It can

> only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. Ross Engineering Corp.*, *supra* [[1934] S.C.R. 186].
>
> To this extent, the principle of functus officio applies. It is based however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgements of a Court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.

The appellant has quoted the above passages from Chandler to support his contention that in this case "justice requires the reopening of the administrative proceedings". He submits that in the face of the Report, the "new evidence", the representations of the Police that disclosure of the requested information poses a potential health and safety risk is absurd.

However, in my view, the above passages do not represent Sopinka J.'s views in their entirety. He continued his discussion of the application of functus officio to administrative tribunals generally, as follows:

> Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to enable a tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, *supra* [(1971), 23 D.L.R. (3d) 1, [1972] S.C.R. 577].
>
> Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders has been conferred on it by statute: see *Huneault v. Central Mortgage & Houding Corp.* (1981), 41 N.R. 214 (F.C.A.).

Sopinka J. then went on to find that the tribunal in question, the Practice Review Board of the Alberta Association of Architects, failed to dispose of the matter before it in a manner permitted by its enabling legislation. He found that:

> In this appeal we are concerned with the failure of the board to dispose of the matter before it in a manner permitted by the *Architects Act*. The board intended to make a final disposition but the disposition is a nullity. It amounts to no disposition at all in law ... If the error which renders a decision a nullity is one that

> taints the whole proceeding, then the tribunal must start afresh ... In this proceeding the board conducted a valid hearing until it came to dispose of the matter. It then rendered a decision which is a nullity. It failed to consider disposition on a proper basis and should be entitled to do so.

With respect to the submissions on the rehearing, Sopinka J. stated:

> On the continuation of the board's original proceedings, however, either party should be allowed to supplement the evidence and make further representations, which are pertinent to the disposition of the matter in accordance with the Act and the regulation. This will enable the appellants to address frontally, the issue as to what recommendations, if any, the board ought to make.

Thus, the Court in Chandler found that the tribunal could admit new evidence on a rehearing, but only after finding that the board had failed to discharge its statutory duty and thus had not yet made a final decision. This is consistent with the characterization of the further hearing as the "continuation of the board's original proceedings".

In my view, the Chandler decision stands for the proposition that once a tribunal has made its final decision, it is functus officio and cannot reopen its proceedings unless there are indications in the enabling statute that it can do so, or where the tribunal has made a jurisdictional error, or there is an accidental or similar error in the decision. This is consistent with the IPC's policy on reconsiderations.
While Sopinka J. commented that the doctrine of functus officio should be "more flexible and less formalistic" when applied to tribunals, as opposed to courts, he does not, in my view, expand the exceptions to the doctrine beyond the parameters I have set out above. Therefore, unless I have made a jurisdictional error which renders my decision in Order M-913 a nullity, have made an accidental or similar error, or the Act indicates that I may reopen a final decision in the circumstances, the doctrine applies and I am functus.

I will consider each of these exceptions in turn:

(1) Jurisdictional Error

In my view, the failure to consider evidence which was not before me, the Report, does not constitute a jurisdictional error. This conclusion is supported by the decision of the Ontario Court of Appeal in the case of R. v. Ontario (Ontario Labour Relations Board) (1970), 13 D.L.R. (3d) 289. At p. 296, the Court stated:

> If, as is the case on the view taken by both Addy, J. and by this Court, no proper objection on *certiorari* lies to the original certification proceedings, it is difficult to understand how, without any change of facts save that the Board has been made aware of certain matters which were previously unknown to it, the Board is chargeable with a denial of natural justice in refusing to accede to the request to reopen a decision made in an unimpeachable proceeding.

While this case was decided before Chandler, in my view, there is nothing in the majority judgement of Sopinka J. in Chandler which conflicts with the above statements.

(2) Accidental Error

A decision-maker may reopen and "correct" a decision where he or she makes a mistake in the decision which does not reflect his or her intent. If, however, the order accurately reflects the original intention, then no rehearing power exists under this heading [*Paper Machinery Ltd. v. Ross Engineering Corp.*, cited in Chandler, supra].

This exception was applied in the case of Chessum & Sons v. Gordon, [1901] 1 Q.B. 694 (C.A.) in which a taxing master was allowed to issue a second taxation assessment when, by error, the applicant had failed to include one expense item in the expenses being assessed.

I do not accept the failure of the Police to refer me to the Report as an accidental error which would fall within this exception to the functus principle. In Chessum and, in fact, in the other cases relied on by the court in that decision (Fritz v. Hobson (1880), 14 Ch. D. and Barker v. Purvis (1886), 56 L.T. 131 (C.A.)), the substance of the decision-maker's decision was not being changed. Significantly, the court in Chesssum, at pp. 698-699, expressly indicated that the accidental error rule was not to apply where an applicant had further information which showed that the substance of the original decision was wrong and therefore should be changed. Therefore, even if it could be said that an "error" had been made by the Police in this case by not providing the Report as part of its original submissions, it is my view that it would not fall within this exception to the functus principle.

I am of the view that the present case is also distinguishable from the recent decision of the Ontario Divisonal Court in Grier v. Metro International Trucks Ltd. (1996), 28 O.R. (3d) 67. The decision in that case on the amount of vacation pay to which an employee was entitled was based on an incorrect date submitted by one of the parties. The Divisional Court found that since the decision was arrived at based on what was subsequently discovered to be incorrect information, the decision was a nullity and the decision-maker could reopen the matter to correct the decision.

In Grier, the decision-maker relied on a concrete fact, submitted in error, which was central to her decision. In the present case, even if I were to accept that the Report was not submitted due to error, it would simply be another piece of evidence which might have added weight to the appellant's argument that section 13 of the Act did not apply. It would not have had the same significance to my decision as did the incorrect information presented in Grier. Therefore, even the principle set out in Grier does not bring the facts of the present case within the accidental error exception.

(3) The Statute

In the case of Dumbrava v. Canada (Minister of Citizenship and Immigration) (1995), 101 F.T.R. 230, the Federal Court of Canada stated, at p. 237, that:

> ... absent an express grant of jurisdiction, it is doubtful that a decision-maker has the power to reconsider a prior decision on new grounds and exercise his or her discretion anew. The decision-making powers of a visa officer are statutory and, as such, they must be found in the statute. While I have no doubt that slips, typos and obvious errors can be corrected after a decision had been rendered, the discretion of a decision-maker is, in my view, fully exhausted once the discretionary authority to decide has been exercised in the manner contemplated by the statute. As such, a decision-maker cannot pronounce more than once on the same matter.

The Court referred to the Chandler case as authority for this proposition, and rejected the argument that the visa officer should have reopened the matter based on new submissions.

Two other post-Chandler decisions of the Federal Court of Canada, Trial Division, followed this same line of reasoning in rejecting applications to reopen proceedings under the federal Immigration Act based on new evidence [see Chaudhry v. Canada (Minister of Employment and Immigration) (1994), 83 F.T.R. 81 and Iqbal v. Canada (Minister of Employment and Immigration) (1996), 114 F.T.R. 10]. In these cases, the Court also rejected arguments that the Chandler decision expands the common law to allow a tribunal to reopen a decision based on new evidence.

Following the reasoning in these cases, I see no **express** grant of jurisdiction in the Act to permit me to reopen an inquiry based solely on the existence of new evidence, regardless of whether or not the evidence was available at the time of the inquiry.

In my opinion, the necessity of an express power to reconsider is consistent with one of the underlying purposes of the Act, i.e. to ensure that decisions on access are made as expeditiously as possible. As stated by the Williams Commission in Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy, 1980 (vol. 2, p. 359):

> In many situations, the timeliness of access will be important to the individual. Accordingly, it would be desirable to implement appeal mechanisms capable of responding with a minium of delay to a request for review.

I recognize that the present case involves a decision in which I upheld the decision of the Police to deny access to the requested information. However, if one were to accept the proposition that under the Act an inquiry can be reopened on the basis of new evidence, then the timely access principle could be frustrated in those cases in which access was initially granted.

Therefore, it is my view that the Act does not contain an express or implied power to reconsider based solely on new evidence, whether or not it was available at the time of the inquiry. This is consistent with the IPC's policy on reconsiderations.

CONCLUSION:

I find that upon issuing Order M-913, I became functus officio. Based on the foregoing discussion, none of the exceptions to this principle are present in this case. Accordingly, I am without jurisdiction to reopen Order M-913, solely for the purpose of considering the new evidence presented by the appellant. Thus, I deny the appellant's request for reconsideration of Order M-913 and confirm my decision in that order.

I should add that, if I am wrong in my finding that I am functus, the new evidence provided by the appellant would not have persuaded me to alter my decision in any event. The facts and circumstances surrounding the creation and distribution of the Report, as well as the information contained in this document, would not have caused me to conclude that the Police improperly applied the exemption in section 13 of the Act to deny access to the names of all the officers in its employ.

Original signed by: May 16, 1997
Anita Fineberg
Inquiry Officer