Information and Privacy
Commissioner/Ontario

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

Reconsideration Order R-980034

Appeal P-9700315

Order P-1575

Ministry of the Attorney General

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BACKGROUND:

The Ministry of the Attorney General (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) from an employee for certain "page 3 forms" and notes made by evaluators in the context of participating in her performance appraisal. The Ministry claimed that any responsive records would fall within the parameters of section 65(6)3 of the Act, and therefore outside its jurisdiction. The appellant appealed the Ministry's decision. The issue of whether the Ministry had conducted a reasonable search for responsive records was also addressed in this appeal.

Order P-1575 dealt with these issues. In that order, I found that the performance appraisal was not an employment-related matter in which the Ministry had an "interest", and that, therefore, the third requirement of section 65(6)3 was not established. Accordingly, I found that any responsive records, should they exist, were subject to the Act. With respect to the issue of reasonableness of search, I stated:

> I accept the Ministry's position that the original notes were destroyed prior to the date of the appellant's request. However, although the Act does not require an institution to create or recreate records in response to an access request, it also does not preclude an institution from doing so. Based on the representations provided by the appellant, it would appear that "page 3 forms" or similar notes may have been recreated by the evaluators between the time of the appellant's performance appraisal and the date of her request under the Act. In my view, if any such records exist, they would be responsive to the appellant's request. The Ministry's representations do not address the possible existence of these records and, as a result, I am not convinced that the Ministry's search for records was reasonable.

As a result, I ordered the Ministry to conduct a further search for additional records responsive to the appellant's request. If responsive records were located, I ordered the Ministry to provide an access decision to the appellant.

The Ministry made an application to the Divisional Court for a judicial review of Order P-1575, and also asked me to stay the provisions of the order pending the final disposition of the judicial review application. After receiving representations from the parties, I denied the request for a stay, and required the Ministry to comply with the provisions of the order in accordance with sections 26 and 29 of the Act.

The Ministry complied with Order P-1575 by conducting searches and issuing a decision letter to the appellant, claiming that the requested records did not exist. The appellant appealed this decision (Appeal PA-980274-1).

NATURE OF THE APPEAL:

Before Appeal PA-980274-1 could be disposed of, the Ministry submitted a request that I reconsider Order P-1575 "on the basis of new information that has come to the Ministry's attention." The Ministry stated that, after the issuance of Order P-1575, the appellant filed a grievance against the Ministry. According to the Ministry:

> . . . it is the Ministry's position that this is an employment related matter in which the Ministry has a legal interest. It is clear from the correspondence relating to the grievance that disclosure of these same records is sought for the purposes of the grievance. Accordingly, the third part of the test has now been established and brings the matter within the scope of 65(6)3 of the Act. Therefore, any responsive records are not subject to the Act.

A Notice of Reconsideration was sent to the appellant and the Ministry. Representations were received from both parties.

SHOULD ORDER P-1575 BE RECONSIDERED

The reconsideration policy of the Commissioner's office provides, in part, as follows:

> 1.1 A decision-maker may reconsider a decision where it is established that:
>
> (a) there is a fundamental defect in the adjudication process;
>
> (b) there is some other jurisdictional defect in the decision; or
>
> (c) there is a clerical error, accidental error or omission or similar error in the decision.
>
> 1.2 A decision-maker will not reconsider a decision simply on the basis that new evidence is provided, whether or not that evidence was obtainable at the time of the decision.

The Ministry submits:

> Pursuant to Article 1.1(b) of the Policy, there is a jurisdictional defect in Order P-1575 in that the IPC did not have jurisdiction to make the Order because the records are exempt from the Act under section 65(6)3. The basis of the lack of jurisdiction is new evidence that was not obtainable prior to the making of the Order. As this new evidence goes to jurisdiction, Article 1.2 of the Policy cannot be applied to prevent reconsideration.

The appellant states that the Ministry's request for reconsideration has been made some seven months after Order P-1575 was issued. The appellant argues that the Commissioner is functus officio in respect of this matter, and she is entitled to expect finality in Order P-1575. The appellant submits that there is no statutory authority for me to revisit my decision on the basis of new information which has come to the attention of the Ministry and, therefore, the Ministry's request for reconsideration should be denied.

The leading case on the ability of a tribunal to reconsider a decision is the Supreme Court of Canada's decision in Chandler v. Alberta Assn. Of Architects (1989), 62 D.L.R. (4th) 577 (S.C.C.). The issue 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, generally speaking he or she has no jurisdiction to further consider the issue.

In Chandler, Sopinka J., writing for the majority, made the following statements:

> ... 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.

In Reconsideration Order M-938, former Adjudicator Anita Fineberg applied the court's direction in Chandler. She had been asked to reconsider her decision in Order M-913, to the effect that the exemption in section 13 of the Municipal Freedom of Information and Protection of Privacy Act applied to a list of names of all police officers employed by the Metropolitan Toronto Police. The reconsideration request was based on a claim of new evidence which had recently become available (namely that several of the officers were publicly named in an Annual Report that had been published by the Police). Former Adjudicator Fineberg made the following statements:

> 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.

Former Adjudicator Fineberg went on to find that she was precluded from reconsidering her decision, despite the existence of "new evidence", because the reconsideration request did not fit

within the scope of Chandler and the Commissioner's reconsideration policy, and she was functus.

Courts also have determined that a tribunal's decision cannot be reopened "because there has been a change of circumstances" from the time of the original decision. For example, in Canadian Union of Postal Workers v. Canada Post Corp. (1991), 7 O.R. (3d) 598, [1991] O.J. No. 2221 (Div. Ct.), the court considered whether an arbitrator was functus at the time of a new decision, which in effect "corrected" an earlier one. The Court accepted the applicant's submission pertaining to when a decision-maker is functus, as follows (at p. 605):

> The applicant argues that once an administrative tribunal has reached a final decision in respect of a matter that is before it in accordance with its enabling statute, **that decision cannot be revisited** because the tribunal has changed its mind, made an error within jurisdiction or **because there has been a change of circumstances** ... [emphasis added]

The Court took the position that the second decision decided a different matter from the first, but that in any case the arbitrator's terms of reference allowed him to reopen the matter. On this basis the Court rejected the applicant's argument that the arbitrator was functus, but stated that ". . . in my view the applicant correctly stated the law . . ." (Page 606).

In Chaudry v. Canada (Minister for Employment and Immigration) [1995] 1 F.C. 104, [1994] F.C.J. No. 1085 (T.D.), the Court reviewed a decision by an immigration tribunal refusing to reopen refugee claims to hear new evidence of changed country conditions. Nadon J. found that this was not sufficient to permit the tribunal to re-open the case, and rejected arguments that refusing to do so violated the Canadian Charter of Rights and Freedoms.

Based on the general directions provided by Chandler, and the comments provided by the courts in the Canadian Union of Postal Workers and Chaudry cases, in my view, a decision of the Commissioner should not be re-opened because of a change in the circumstances that existed at the time of the original decision. The parties are both in agreement that no grievance existed at the time of my original decision in Order P-1575. Had the grievance existed or been reasonably foreseeable before I issued my order, and had I ignored it, it could be argued that this omission would constitute a "jurisdictional defect in the decision" (paragraph 1.1(b) of the reconsideration policy). However, that was clearly not the case. Similarly, had I made my decision based on what was subsequently discovered to be a factual error of a fundamental nature going to the actual issue to be determined, this could in certain circumstances constitute an "accidental error" (paragraph 1.1(c) of the reconsideration policy (See Grier v. Metro International Trucks Ltd. (1996), 28 O.R. (3d) 67, discussed in Reconsideration Order MO-1200-R). That too is not the situation I am faced with in this case.

The gist of the Ministry's argument is that because at this point in time I have no jurisdiction over the records, I must change my earlier decision that I had jurisdiction at the time the earlier decision was made. This is not a tenable argument.

In my view, there has been no fundamental defect in the adjudication process, no other jurisdictional defect in my decision, nor any clerical error, accidental error or omission, or

similar error in the decision. Accordingly, I find that I am functus with respect to my decision in Order P-1575, and without jurisdiction to re-open that decision for the purpose of considering the "new evidence" provided by the Ministry. Therefore, the Ministry's request for reconsideration of Order P-1575 is denied.

My decision not to reconsider has another basis as well.

The order provisions in Order P-1575 read as follows:

> 1. I order the Ministry to conduct a further search for additional records responsive to the appellant's request, that is, any recreated evaluators' notes.
>
> 2. If, as a result of the further search, the Ministry locates additional responsive records, I order the Ministry to provide a decision letter to the appellant regarding access to these records in accordance with sections 26 and 29 of the Act, treating the date of this order as the date of the request.
>
> 3 I order the Ministry to provide me with a copy of the decision letter referred to in Provision 1 by forwarding it to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

The Ministry has fully complied with these provisions. Therefore, in my view, the reconsideration of Order P-1575 is moot in any event, since it would make no practical difference at this point whether the order is rescinded or not.

The leading case on the issue of mootness is the Supreme Court of Canada's decision of Borowski v. The Attorney General of Canada [1989] 1 S.C.R. 342. In that case the court commented on the topic of mootness as follows:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the Borowski case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, it must be decided if "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the

event that such a dispute has disappeared, it must then be decided whether the adjudicative body should nonetheless exercise its discretion to proceed with the case.

Applying the first part of the two-step analysis in the case of Order P-1575, it is clear that there is no tangible and concrete dispute outstanding with respect to the order itself, since it has been fully complied with.

As far as the second part is concerned, the Court in Borowski identified the following principles behind the law relating to mootness, which can assist in assessing whether discretion should be exercised in favour of proceeding with a case that has failed to meet the requirements of the first part: (1) the fact that "a court's competence to resolve legal disputes is rooted in the adversary system"; and (2) the concern to avoid wasting judicial resources. The Court went on to state:

> The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action. ... There also exists a rather ill-defined basis for justifying the deployment of judicial resources in cases which raise an issue of public importance of which a resolution is in the public interest.

In my view, this is not an appropriate case to proceed with in the absence of an outstanding tangible and concrete dispute, since a reconsideration of Order P-1575 would have no practical effect on the rights of the parties. If I were to reconsider, and end up changing my findings on the basis that the appellant has filed a grievance, I would not have to change my interpretation of section 65(6)3 in order to do so. Section 65(6) is fact-specific, and the same interpretation of the meaning of the section can lead to different outcomes based on a change of facts or circumstances. In addition, the meaning of section 65(6)3 is before the Divisional Court in other ongoing judicial review applications, which provides a forum for addressing any public interest considerations that might otherwise be relevant.

THE COMMISSIONER'S RECONSIDERATION POLICY

In its representations, the Ministry states:

> You have asked whether the request for reconsideration falls within the ambit of the IPC policy on the reconsideration of decisions. It appears that you assume the policy to be binding upon you. This assumption is in error. If you treat the policy as a code of binding rules and refuse to consider other valid and relevant criteria or issues, you improperly fetter your discretion ...

In my view, the Commissioner's Reconsideration Policy is consistent with the applicable principles of administrative law. The policy does not exist in a vacuum. It is intended as a guide for parties who may want to submit a reconsideration request, and for adjudicators in deciding whether a request should be accepted. Adjudicators must not, and do not, apply the policy rigidly, and it is clear from my preceding discussion that I considered all relevant circumstances in the present appeal. Having done so, I was not persuaded by the Ministry that I should reconsider my decision.

Although it is important to recognize that discretion to go beyond the strict wording of the policy exists, it is also important to acknowledge that discretion must be exercised within the parameters of administrative law principles and jurisprudence. The policy does not purport to displace these applicable rules of administrative law; rather, it seeks to summarize them, and in my view, does so successfully.

APPEAL PA-980274-1

The Ministry submits that, in view of the filing of the grievance by the appellant, the Commissioner does not have jurisdiction over the records and issues raised in Appeal PA-980274-1. Because the existence of the grievance was not known at the time the Notice of Inquiry in this appeal was issued, a Supplementary Notice will be sent to the parties, seeking representations on the issue of whether the requested records, should they exist, fall within the scope of section 65(6).

Original signed by: March 25, 1999
Tom Mitchinson
Assistant Commissioner