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

Reconsideration Order MO-1958-R

Appeal MA-040147-1

Interim Order MO-1926-I

Ottawa-Carleton Catholic District School Board

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BACKGROUND:

This is my decision on a reconsideration request made by the Board in relation to Order MO-1926-I. The appeal leading to that order dealt with a decision of the Ottawa-Carleton Catholic District School Board (the Board) made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act (*the *Act).* The appellant had made the following five-part request for information pertaining to the sale of a school property at a specified address in the city of Ottawa:

1. The Board Report and related memos pertaining to, leading up and following-up to Resolution CW 167-06 on July 2, 2002, regarding the motion on sale of surplus schools.

2. The assessed value of the property at [a specified address] and date of this assessment.

3. The value of the successful bid resulting from the tendering process and date of the bid opening; the amounts and names of the successful bids.

4. The bidder's written submission with respect to the tendering process.

5. The chronology of actions taken and the dates of these actions which demonstrate that the Board complied with Ontario Regulation 444/98 regarding the "Disposition of Real Property".

The Board denied access to the requested records. The appellant appealed this denial of access. During mediation of the appeal, the Board agreed to disclose some of the records. At the conclusion of mediation, the only remaining issue was the application of section 6(1)(b) (closed meeting) to the records responsive to items 1 and 5 of the appellant's request.

This appeal was transferred to me for adjudication and I conducted an inquiry into the appeal. I received representations from the Board, the appellant and an affected party. The affected party indicated that it has no objection to the release of documents or information pertaining to any of its transactions with the Board, with the exception of third party commercial information requested by a competitor and correspondence it or its solicitors sent to the Board that contains a settlement offer or that is marked "without prejudice" or "confidential". Further records were disclosed during the adjudication stage of the appeal, with the result that only five records remained at issue when I issued Order MO-1926-I, which had been withheld under section 6(1)(b).

During my adjudication, a factual issue arose with respect to the application of section 6(1)(b) to records 4 and 5. This exemption applies to a record "that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public". I had asked for copies of board minutes to substantiate that the meetings in question were authorized to be held in the absence of the public. The Board provided the wrong minutes in relation to one such meeting, and did not correct this error even after this was drawn to its attention.

Based on the representations and documentary evidence I had then received from the parties, I issued Order MO-1926-I dated May 20, 2005, in which I made the following order:

1. I uphold the Board's decision that records 1, 2 and 3 qualify for exemption under section 6(1)(b) of the *Act*.

2. I order the Board to release records 4, 5 to the appellant in their entirety on or before **June 27, 2005**.

3. I order the Board to release record 6 to the appellant in its entirety no later than **June 27, 2005** but not before **June 21 2005**.

4. In order to verify compliance with provisions 2 and 3, I order the Board to provide me with copies of the material disclosed to the appellant.

5. I order the Board to re-exercise its discretion under section 6(1)(b) of the *Act*, in respect of records 1, 2 and 3, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide.

6. I order the Board to provide me and the appellant with representations on its exercise of discretion no later than **June 3, 2005.**

7. The appellant may submit responding representations on the exercise of discretion issue no later than **June 17, 2005**.

8. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues arising from this order.

Prior to the date for disclosure of records 4 and 5, the Board wrote to me seeking a reconsideration of my decision to order the release of these records. The Board cited a "discrepancy" stating that "by mistake" the wrong evidence had been provided in support of its position on the application of the section 6(1)(b) exemption to records 4 and 5. In addition, the Board sought a stay of the re-exercise of discretion provisions in Order MO-1926-I pending my decision on its reconsideration request.

I granted an interim stay of provisions 2, 5, 6 and 7 of Order MO-1926-I, and the part of provision 4 that relates to records 4 and 5, and I sought representations from the Board on why it believes I should reconsider my order, with specific reference to sections 18.01 and 18.02 of the *Code of Procedure*. I also invited the Board to comment on the relevance of the Supreme Court of Canada's decision in *Chandler* [*Chandler v. Alberta Assn. of Architects* (1989), 62 D.L.R. (4th) 577 (S.C.C.)] and the Divisional Court's decisions in *Grier* [*Grier v. Metro International Trucks Ltd. (1996), 28 O.R. (3d) 67 (Div. Ct.)*] and *Duncanson* [*Duncanson v. Toronto (Metropolitan) Police Services Board, [1999] O.J. No. 2464 (Div. Ct.)*], and to provide any other information that it considered relevant to its reconsideration request.

The Board submitted representations, which I shared in their entirety with the appellant. I invited the appellant to respond to the Board's representations. The appellant chose not to do so.

GROUNDS FOR RECONSIDERATION

Code of Procedure

The reconsideration procedures of the Information and Privacy Commissioner/Ontario (the IPC) are set out in section 18 of the *Code of Procedure* (the *Code*). In particular, sections 18.01 and 18.02 of the *Code* state:

> 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 omission 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.

Board's representations

In support of the Board's reconsideration request its lawyer states:

> We submit to you that equitable principles ought to apply in the circumstances of this case. […A] series of honest yet unfortunate mistakes were made in delivering the proper Minutes to you. A discussion took place between myself and [a named IPC employee] as to the corresponding documents which obviously did not jive with the exemption being claimed under section 6(1)(b) of the *Act*. Only upon reading your Interim Order did our client then notice the discrepancy which was apparently caused by a misapprehended date between 2002 and 2003 (i.e. minutes of a 2002 meeting were provided when in fact the minutes of a 2003 meeting were required). In our client's mind it had provided the Adjudicator with the proper documents and only after review of your Interim Order was the error highlighted in view of what appeared to be an inconsistent treatment of similar documents. […] [T]he mistake was apprehended as quickly as possible and was pointed out both to the Adjudicator and the [appellant] and the correct documents were forwarded to the Adjudicator forthwith. As such, there is no possible prejudice that can be demonstrated by the [appellant] and on that basis alone it is our submission that the records in question ought to be included within the discretionary exemption under section 6(1)(b)…

The Board relies on sections 18.01(a) and (c) of the *Code* in support of its position.

With respect to section 18.01(a) the Board states:

> We submit that we have provided the necessary facts to establish that there has been a fundamental defect in the adjudication process not by reason of the Adjudicator's error but by reason of error in the transmission of evidence. To proceed otherwise and refuse to reconsider the matter would […] lead to an error and prejudice to our client which can otherwise be readily remedied by way of reconsideration.

The Board also relies on section 18(1)(c), stating that the error that occurred was "clerical, accidental or an omission which significantly affected the decision". The Board submits that "fairness dictates that the error ought to be corrected and reconsideration ought to flow from the principles of equity and fairness given the lack of any prejudice to any of the parties to this process."

The Board also submits that it "may be appropriate" to apply a "balance of convenience approach" in this case. The Board's lawyer states that the prejudice to its client, if I choose not to reconsider, would be far greater than if I choose to reconsider. The Board's lawyer states that the appellant will suffer no apparent prejudice if I reconsider while the Board would be prejudiced if I do not reconsider.

The Board also comments on the application of section 18.02 of the *Code* in the circumstances of this appeal. The Board submits that section 18.02 does not apply in this case since, but for the Board's mistake in providing the wrong minutes, the correct minutes would have been provided in evidence. The Board asks that section 18.02 be given a "liberal interpretation" to allow a "flexible approach" so that the correct minutes are not considered as new evidence. In support of its position on section 18.02, the Board cites sections 2.01 and 2.04 of the Code, which read:

> 2.01 This Code is to be broadly interpreted in the public interest in order to secure the most just, expeditious and least expensive determination on the merits of every appeal.
>
> 2.04 The IPC may in its discretion depart from any procedure in this Code where it is just and appropriate to do so.

The Board also made representations on the *Chandler*, *Grier* and *Duncanson* decisions. The Board states that the "common theme" in those cases is whether the adjudicator is *functus officio*.

The Board submits that Order MO-1926-I is distinguishable from the above three cases since it was an interim decision while those cases involved final decisions. In support of its position, the Board refers to provision 8 of Order MO-1926-I, set out above.

The Board concludes that on the basis of the wording of provision 8 I remain seized of all issues, not only the exercise of discretion issue. The Board also states that the above cases "support the principles of fairness and equity in the decision making process" and that the Courts have determined that "tribunals ought to do what is right in the circumstances of each case".

With respect to the *Grier* decision in particular, the Board states:

> [T]he Ontario Divisional Court held that a flexible approach to the doctrine of *functus officio* was called for in the circumstances of that case. The court determined that the Tribunal ought to reconsider the matter afresh and render a new decision. Justice MacPherson for the Court relied on the decision in *Chandler*. Justice MacPherson also relied on the decision of *Kingston Re: Ontario (Mining & Lands Commissioner)* (1977), 18 O.R. (2d) 166 (Div. Ct.) wherein Southey J. said at p. 169:
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> > Where an officer or a Tribunal like the Mining and Lands Commissioner makes an order purporting to implement a settlement agreement between the parties before it, and it subsequently turns out that the order, through inadvertence or negligence of one or more of the parties, or their representatives, does not accurately embody the settlement, the appropriate proceeding, in our view, is for the interested party to apply to the tribunal to have its order amended. Such an application was made to the Mining Commissioner in this case by the conservation authority; that application was dismissed in a lengthy and carefully written decision dated February 3, 1977, on the ground that the Commissioner had no authority to make the correcting order. One of the grounds for this decision was that the Commissioner was bound in these circumstances by the doctrine of *functus officio* and could not reopen his decision in the absence of express statutory authority. With the greatest deference to the view of the Commissioner, the doctrine of *functus officio*, in our judgment, does not prevent a tribunal from reopening a matter and correcting an order made by it, where a mistake has occurred of the nature alleged in this case.
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> We submit that the reasoning in *Grier* applies specifically to the present case. The Court found that the parties had made a mistake, and that the mistake influenced the decision of the referee. The Court found the matter was to be placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact. There existed no compelling reason for concluding that the mistake should not be corrected. The Court demonstrated that the administrative Tribunal ought to apply a flexible approach particularly with respect to the doctrine of *functus officio*.

Analysis and findings

I will first address the provisions of the *Code*. In the absence of a statutory provision in the *Act* to govern reconsiderations, the *Code* reflects the common law as to when a decision may be reconsidered and when the adjudicator is *functus officio*.

The Board relies on sections 18.01(a) and (c) of the *Code*.

The application of section 18.01(a) as a basis for reconsideration necessitates the existence of a fundamental defect in the adjudication process. Examples that could fall under this section include a failure by the adjudicator to notify an affected party with an interest in the issues under appeal, a failure to consider all relevant evidence tendered and a misinterpretation and/or a misapplication of the law. The circumstances in this case are quite different. The Board erred in providing the wrong evidence in regard to records 4 and 5 at the initial inquiry. However, this was the evidence tendered by the Board and I reached my decision that the section 6(1)(b) exemption did not apply to records 4 and 5 on the strength of that evidence. In my view, this does not constitute a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the *Code*.

With respect to section 18.01(c), the Board must establish the existence of a clerical error, accidental error or omission or other similar error in the decision. It appears that the Board is referring to an "accidental error or omission". In Order R-980034, former Assistant Commissioner Tom Mitchinson commented on the meaning of this phrase, as follows:

> … 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).

Although an error of the nature referred to by the Board might, in some circumstances, lead to a successful reconsideration request as constituting an "accidental error", I have concluded that this is not the case here. As will be evident from my analysis of the *Grier* decision, below, the process I followed in attempting to obtain the correct information from the Board means that this error cannot accurately be described as "accidental", and the circumstances of this case do not favour a reconsideration. In my view, therefore, section 18.01(c) of the *Code* does not justify a reconsideration in this instance.

In my view, the circumstances in *Grier*, which the Board has relied upon in support of its reconsideration request, are distinguishable from those in this case. In *Grier*, the parties "accidentally" placed before the decision-maker an important fact which was incorrect. The issue in the case was how much vacation pay an employee was entitled to, and the decision-maker adjudicating the case under the *Employment Standards Act* made her decision on the basis of an incorrect date provided accidentally in the agreed statement of facts. The decision-maker declined to reopen the decision on the basis that she was *functus officio*. On judicial review the Court quashed the decision-maker's decision (and the decision-maker's decision not to reconsider) and referred the matter back to the administrative tribunal for reconsideration.

MacPherson J., writing for the majority, states with reference to Sopinka J.'s comments in the *Chandler* decision:

> I believe that the flexibility of which Sopinka J. speaks … is appropriate on the present application. Under the ESA [the Employment Standards Act] the referee is charged with interpreting the successor rights provisions. Referee Novick purported to do this in her first decision. However, the parties accidentally placed before her an important fact which was incorrect. On the face of her first decision it is clear that this incorrect fact influenced her decision. Moreover, if there were any doubt about this, Referee Novick expressly confirmed her reliance in her subsequent decision dealing with the request for a rehearing. In these circumstances, I think that a fair conclusion is that her first decision, like the tribunal's decision in Chandler, was a nullity. She intended to make a final disposition; however, that disposition was fatally tainted by her reliance on a crucial fact which both parties agree is incorrect. She should be permitted, as was the tribunal in Chandler, "to reconsider the matter afresh and render a valid decision"...
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> In the present case, the parties made a mistake. The mistake influenced the decision of the referee. I can see no compelling reason for concluding that the mistake should not be corrected and the matter placed back before the referee for a new decision which would be untainted by reliance on the incorrect fact.
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> In conclusion, the flexibility in the application of the principle of functus officio articulated by Sopinka J. in Chandler permits a just resolution of the issues raised on this application. The parties are entitled to a decision on the merits based on a full and accurate statement of the facts.

Unlike the circumstances in *Grier* where the parties were jointly responsible for an accidental typographical error, the error in this case is qualitatively different. This is not an accidental typographical error, but rather an error that the Board made alone and one which the Board was given ample opportunity to correct during the course of the inquiry. In the Board's representations its lawyer mentions a conversation that he had with an employee of this office during which this employee indicated that documents tendered in evidence did not correspond with some of the records for which the section 6(1)(b) exemption was being claimed. In fact, there were several conversations between this employee and the lawyer in an effort to secure the minutes of *in camera* meetings of the Board held on May 28, 2002 and September 23, 2003. Subsequently, we received a letter from the Board's lawyer, dated April 15, 2005, which included the minutes of Board meetings for May 28, 2002 and September 24, 2002. Upon receiving this correspondence I wrote to the Board's lawyer (letter dated April 29, 2005), stating:

> Your representations make reference to a meeting conducted on "September 23, 2003" and, accordingly, I asked for a copy of those minutes. Unfortunately, you have sent minutes from a September 24, 2002 meeting, which does not relate to the records in this appeal. Please forward the minutes for the September 23, 2003 *in camera* meeting.

The Board's lawyer responded with a letter dated May 4, 2005, in which he states:

> We are in receipt of your letter dated April 29, 2005 which was received today and forwarded to our client for further clarification of the issues raised. We are advised that there are no further documents that are in our client's possession other than what we have disclosed in the context of this matter. We trust that you will see fit to protect our client's confidential information.

Despite our office's considerable efforts to secure the September 23, 2003 minutes from the Board prior to issuing my decision, the Board failed to provide them to us. I was left with no alternative but to prepare my decision based on the information before me at that time, which I did. While I understand the Board's current predicament, I gave the Board more than enough opportunities to provide the correct evidence. In my view, this weighs heavily against granting the Board's reconsideration request.

As noted above, the *Chandler* decision speaks of a flexible approach to the question of reconsideration in the context of an administrative tribunal. In particular, the Court stated:

> [The principle of *functus officio*] ... 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.* [Emphasis added.]

In my view, therefore, the question of what is "just" in a case that might otherwise qualify for reconsideration is a relevant factor. In this case, I must consider the appellant's legitimate expectation regarding the finality of these proceedings, and the impact of disclosure on the Board and the affected party. In light of the opportunities provided to the Board, as set out above, in my view, it would be unfair to the appellant to reconsider in this case. With regard to the potential for prejudice to the Board upon the release of records 4 and 5, the Board has alluded to prejudice in its representations but has not provided any details to support its position. I find the Board's position vague and speculative. In my view, based on the evidence before me, any possible prejudice to the Board is outweighed in this instance by prejudice to the appellant if I reconsider. With respect to the impact of disclosure on the affected party, records 4 and 5 do not include "without prejudice" or "confidential" correspondence from the affected party to the Board and there is no evidence before me that this record contains confidential third party information. Accordingly, I am satisfied that the affected party would not be prejudiced by the release of records 4 and 5 to the appellant.

In conclusion, for the reasons set out above, I decline to reconsider Order MO-1926-I.

ORDER:

1. I order the Board to release records 4 and 5 to the appellant in their entirety on or before **September 15, 2005**.

2. I order the Board to release record 6 to the appellant in its entirety, if it has not already done so, no later than **September 15, 2005**.

3. In order to verify compliance with provisions 1 and 2, I order the Board to provide me with copies of the material disclosed to the appellant.

5. I order the Board to re-exercise its discretion under section 6(1)(b) of the *Act*, in respect of records 1, 2 and 3, taking into account all of the relevant factors and circumstances of this case and using the above principles as a guide.

6. I order the Board to provide me and the appellant with representations on its exercise of discretion no later than **September 15, 2005**.

7. The appellant may submit responding representations on the exercise of discretion issue no later than **September 28, 2005**.

8. I remain seized of this appeal in order to deal with the exercise of discretion issue, and any other issues arising from this order.

Original Signed By: August 31, 2005
Bernard Morrow
Adjudicator