Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4043-R

Appeal PA19-00568 (Original Appeal PA16-219)

Order PO-3998

Ministry of the Solicitor General

May 14, 2020

Summary: This reconsideration order dismisses the appellant's request for reconsideration of Order PO-3998. In that prior decision, the adjudicator partially upheld the ministry's decision under section 14(1) of the *Act* to withhold information about the Ontario Provincial Police's acquisition of cell site simulators, but ordered the ministry to disclose information found not exempt. The appellant requested reconsideration on the basis that the ministry's denial of access was based on circumstances that ceased to exist before the issuance of Order PO-3998. In this reconsideration order, the adjudicator finds that the appellant has not established any ground for reconsideration of Order PO-3998, and denies the request for reconsideration.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 14(1).

Orders and Investigation Reports Considered: Order PO-3998; Reconsideration Order MO-3751-R.

Cases Considered: *Chandler v. Alberta Association of Architects*, 1989 CanLII 41; [1989] 2 S.C.R. 848.

INTRODUCTION:

[1] This is a decision on a request for reconsideration of Order PO-3998.

[2] As background, the appellant, a journalist, requested records relating to the

Ontario Provincial Police's acquisition of cell site simulators. The Ministry of the Solicitor General decided to deny access to the records and she brought an appeal of that decision to this office. On October 10, 2019, I issued Order PO-3998, disposing of the appeal. In that order, I directed the ministry to disclose portions of the records to the appellant, by November 18, 2019.

[3] On December 6, 2019, the appellant requested that I reconsider Order PO-3998. Her request is based on new information that she received following receipt of the records from the ministry. In effect, the appellant argues that the new information shows that the ministry's denial of access, and the appeal, were based on circumstances that ceased to exist long before the issuance of my decision. She asks that I reconsider the order so that she does not have to file a new request for the same records, and potentially go through another appeal based on the new information.

BACKGROUND:

[4] In Order PO-3998, I upheld the ministry's decision to withhold certain information in the records based on the exemption in section 14(1)(c) of the *Freedom of Information and Protection of Privacy Act*. This exemption grants the ministry the discretion to deny access to information whose disclosure could reasonably be expected to "reveal investigative techniques and procedures currently in use or likely to be used in law enforcement." Since I accepted the ministry's argument that the section 14(1)(c) exemption applied to this information, I did not need to decide whether any of the other law enforcement exemptions claimed by the ministry also applied. Further, I found it unnecessary to assess the ministry's claims that disclosure of this information could reasonably be expected to prejudice intergovernmental relations, harm national security interests, reveal confidential third party business information or reveal confidential solicitor-client communications.

[5] In that order, I also decided that section 14(1)(c), and related law enforcement exemptions, did not justify withholding certain other information in the records. In essence, I found that disclosure of general information about certain functionalities of the OPP's cell site simulator could not reasonably be expected to harm law enforcement interests when information about these functionalities was already in the public domain.

[6] The ministry disclosed the portions of the records as directed in Order PO-3998. Following this disclosure, the appellant contacted the OPP with additional questions arising out of the information she had received. Some questions related to the OPP's use of specific functions (such as interception of private communications), the type of warrant enabling use those functions, and the type of investigations in which those functions have been used. Following an exchange of emails, the OPP told the appellant that it had switched to new equipment in 2017 that was not capable of intercepting private communications.

[7] Shortly after receiving this information, the appellant filed this reconsideration

request, alleging that this new information meant that the exemption the ministry relied on to withhold the records was no longer relevant and, indeed, had ceased to be relevant long before the conclusion of her appeal. She posed the question: how can the OPP rely on a discretionary exemption regarding current or likely investigative techniques for a piece of equipment it stopped using?

[8] I sent the appellant's reconsideration request to the ministry and two affected parties for a response, inviting them to address any of the issues raised by the appellant. I also invited them to comment on the timeliness of the request and whether it would be just and appropriate to proceed with it, despite its apparent lateness. The affected parties have not responded. I have before me the submissions of the appellant and the ministry on the reconsideration request, as well as their submissions on the original appeal.

DISCUSSION:

[9] This office's reconsideration process is set out in section 18 of the IPC's *Code of Procedure,* which applies to this appeal. Sections 18.01 and 18.02 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.

[10] The time limit for requesting reconsideration is set out at section 18.04 of the *Code*:

> 18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:
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> (a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or
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> (b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

[11] The *Code* grants the IPC a discretion to waive any of its requirements:

> 20.01 The IPC may waive or vary any of the procedures prescribed by or under this Code, including any requirement or time period specified in any written communication from the IPC, if it is of the opinion that it would be advisable to do so in order to secure the just and expeditious determination of the issues.

[12] In my analysis, I will address the issues raised by the appellant's request as follows:

1. I accept the late request for reconsideration.

2. I find there is no "fundamental defect in the adjudication process" that justifies reconsideration of the order

The late request

[13] Applying section 18.04 of the *Code*, the time limit for requesting reconsideration of Order PO-3998 was November 13 (the earliest date by which disclosure was required under the order).

[14] The appellant submits that the *Code* permits me to depart from a procedure in the *Code* where it is "just and appropriate" to do so, and that allowing this reconsideration to proceed would be both just and very much in the public interest. She describes the timing of her receipt of the records from the ministry, her prompt request for more information in relation to the records, her receipt of the key piece of information which forms the basis of this request for reconsideration, and then her submission of this request within 48 hours of receipt of that information.

[15] In its submissions on the timeliness of the request, the ministry relies on section 18.04(a) of the *Code*, stating that "time lines are intended to create certainty, in this case around the reconsideration process". It does not point to any prejudice in responding to a late request for reconsideration.

[16] As I indicate above, section 20.01 of the *Code* permits me to "waive or vary" any procedure under the *Code*, where I am of the opinion that it would be advisable to do so "in order to secure the just and expeditious determination of the issues". This includes the time limit for filing a request for reconsideration. Given the relatively brief delay, the events that occurred after the order was issued, the diligence of the appellant in filing the request once the facts on which she relies came to her attention, and the lack of any prejudice to the ministry, I accept the appellant's request to waive the time limit for filing this request for reconsideration. I find it appropriate to do so in order to secure the "most just and expeditious determination of the issues".

The request for reconsideration

[17] As described above, shortly after receiving new information from the OPP, the appellant filed this reconsideration request, alleging that this new information meant that the exemption the ministry relied on to withhold the records was no longer relevant. The appellant submits that indeed, it had not been relevant for more than two years before she received the records.

[18] The appellant argues that I should reconsider Order PO-3998 because the circumstances she describes amount to a "fundamental defect in the adjudication process", within the meaning of section 18.01(a) of the *Code*. She submits that the phrase "fundamental defect" should be interpreted broadly, to apply to a situation like hers where the IPC spent two years considering the application of exemptions that were not relevant the entire time (because the ministry had stopped using the equipment described in the records).

[19] She submits that the public interest would not be served by compelling her to file another identical request, hoping that the ministry agrees it cannot rely on the discretionary exemption covering law enforcement techniques, and if not, going through the appeal process again.

[20] The appellant argues that, during the course of the appeal, I drew the ministry's attention to certain new evidence, and I did so in order to promote the just and expeditious determination of the issues on their merits. She asks that I do the same with respect to the new evidence she has filed in support of her request for reconsideration.

[21] The ministry points out that this request is based on new evidence, and section 18.02 of the *Code* specifically states that the IPC will not reconsider a case simply on the basis that new evidence has been provided. It refers me to the Supreme Court of Canada decision in *Chandler v. Alberta Association of Architects*[1], in which the Court referred to the "sound policy reasons for recognizing the finality of proceedings before administrative tribunals." It therefore disputes the appellant's submission that a "fundamental defect in the adjudication process" is a "fairly broad ground" for reconsideration of a final decision.

[22] In requesting the ministry's submissions in response to this request for reconsideration, I specifically asked the ministry to address my concern that my decision was based on the assumption that the ministry was using the same cell site simulator equipment, and at no point did the ministry correct this assumption. The ministry stated, among other things, that it was not asked whether it continued to use

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[1] 1989 CanLII 41 (SCC); [1989] 2 S.C.R. 848.

the same equipment. Also, counsel indicated that he was not personally aware of this change in equipment. Finally, the ministry stated that the great majority of OPP staff who worked on this appeal had moved on to different positions by the time the last request for representations was received.

[23] The ministry also submits that the exemption in section 14(1)(c) does not cease to apply simply because it has purchased new cell site simulators. It states that it would rely on the same exemptions regardless of which equipment it was using, referring to its original representations in the appeal in which it states "as with most surveillance technology used by law enforcement, the less that is publicly known about the technology, the greater its usefulness."

[24] The ministry states that the exemption protects law enforcement interests broadly, and not just those of the OPP. Even if the exemption was found to no longer be applicable to the OPP's use of cell site simulators, it might still be applicable to other police forces which use the cell site simulator the OPP previously used.

[25] The ministry also submits that even if section 14(1)(c) were no longer applicable, it continues to rely on numerous other exemptions whose application, in my order, I found it unnecessary to determine.

Analysis

[26] I agree with the ministry's submission that decisions of this office should not be revisited except in limited, exceptional circumstances. The provisions of the *Code* must be applied in a manner that respects the "sound policy reason for recognizing the finality of proceedings before administrative tribunals" advanced by the Supreme Court of Canada in the *Chandler* decision cited above.

[27] Consistent with this approach, and with the provisions of the *Code* themselves, the introduction of new evidence does not normally justify reopening an appeal. In this case, the appellant's argument is essentially that the new evidence she has uncovered goes to the heart of her request, and of my decision. Her argument is that the OPP's change of equipment fundamentally changes the facts on which I based my decision. She submits, simply, that the law enforcement exemption was no longer relevant once the OPP stopped using the equipment described in the records.

[28] I have considered the appellant's submissions carefully. I acknowledge her concern about the fairness of the adjudication process in circumstances such as this, when I was not aware of a change in highly relevant facts at the time I issued my order. Although the existence of new evidence is not normally a basis to re-open an appeal, the IPC has also recognized that there may be exceptional circumstances where the importance of finality in decision-making should give way. In Reconsideration Order MO-3751-R the IPC allowed a request for reconsideration of an order on the basis that a city's failure to provide information that was central to the issues decided was a "fundamental defect" in the adjudication process. In that case, the adjudicator allowed

the request for reconsideration, revisiting her finding that the city had conducted a reasonable search for records. In the reconsideration order, she ordered the city to conduct a further search. It is apparent from that order that the city failed to provide the key information despite several requests from the adjudicator to address those very facts.

[29] In the case before me, the appellant does not assert that the ministry deliberately withheld evidence that it was no longer using the equipment to which her access request was directed. She is, however, clearly troubled by the fact that this information did not surface during my inquiry. Ultimately, I do not have to decide whether the ministry's failure to bring this to my attention would have amounted to a "fundamental defect in the adjudication process" because I conclude, for the following reasons, that the change in circumstances would not have led to a different result. Even if I take this change in circumstances into account, it would not result in a different outcome in this appeal.

[30] I refer to some of the findings in Order PO-3998. The IPC has stated often that the law enforcement exemption must "be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context." In applying section 14(1)(c) to the contractual documents, I referred to the IPC's usual test for the application of this exemption, stating that:

> …in order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization.

[31] I then applied this to the records, finding, with respect to the contractual documents, as follows:

> Information I find exempt under section 14(1)(c) consists of parts of the contractual documents that contain detailed information about the equipment purchased by the OPP, including the identity of the vendor, model numbers, operating procedures and the vendor's descriptions of the products and their capacities. I accept the ministry's submission that disclosure of this type of information could reasonably be expected to result in the harms described in these exemptions, in that this kind of specific knowledge about the equipment purchased by the OPP will allow criminals to better understand how surveillance through this equipment is conducted, and therefore how to evade it.

[32] I arrived at similar findings with respect to other parts of the records.

[33] It is apparent throughout my findings that my concern was the potential harm to the OPP's law enforcement activities. My findings that disclosure of some of the information in the records could reasonably be expected to result in the harms

described in section 14(1)(c) applied to the OPP's use or likely use of the equipment. I did not consider whether section 14(1)(c) might apply regardless of whether the OPP continued to use the same equipment.

[34] This reconsideration request is based on the assumption that, had I known during the course of the appeal that the ministry had stopped using the particular cell site simulator described in the records, I would have rejected the ministry's application of the section 14(1)(c) exemption. The appellant argues that, given the fact that the ministry stopped using this cell site simulator, the exemption is simply no longer relevant. As I state above, she asks rhetorically how the OPP can rely on an exemption protecting current or likely investigative techniques "for a piece of equipment it has stopped using."

[35] After considering the submissions of the parties, I ultimately agree with the ministry that the exemption in section 14(1)(c) applies, despite the OPP's decision to move to a different cell site simulator.

[36] As described in the ministry's original submissions in this appeal, the records contain operational detail with respect to investigative techniques and procedures relating to the use of the cell site simulators. These techniques and procedures are used as part of law enforcement investigations in which surveillance is required. In Order PO-3998, I accepted the ministry's submission that, apart from certain information that I determined was already in the public domain, disclosure of the records could hinder or compromise the effective use of the equipment in law enforcement activities.

[37] I conclude that this potential for harm from disclosure still exists in the current circumstances. First, I accept the ministry's submission that it has not stopped using the "investigative technique" discussed in Order PO-3998. It has not stopped using cell site simulators. Rather, it has switched one cell site simulator for another. The new equipment has one significant difference in functionality – it does not intercept private communications. According to the ministry, however, it is simply a "new cell site simulator."

[38] In this context, I find that the section 14(1)(c) exemption continues to apply to information in the records that reveals the ministry's procedures for the use of cell site simulators. I refer specifically here to the information in the Standard Operating Protocol that I previously found exempt under this section. Despite the fact that portions of the protocol are directed to the specific equipment in use at the time, disclosure of the exempted information could nonetheless have a detrimental impact on the effective use of cell site simulators by the OPP, regardless of the make or model.

[39] Second, I accept the ministry's submission that the exemption applies in this case not just to protect its own law enforcement interests, but of law enforcement agencies more generally. The vendor of the equipment contracts not only with the OPP, but as well with other law enforcement agencies. It has described how, due to the nature of its products, their intended use, and its clients, confidentiality plays a

significant role in its business practices. Its contracts contain strict confidentiality and non-disclosure provisions. The ministry has stated that, even within the OPP, knowledge of the contract and supporting documents is restricted to certain authorized personnel.

[40] In Order PO-3998. I accepted that disclosure of details about the equipment purchased by the OPP could allow criminals to better understand how surveillance through this equipment is conducted, and therefore how to evade it. I find that this harm exists whether it is the OPP, or other law enforcement agencies, that use this type of equipment. As demonstrated by the confidentiality surrounding the purchases of this equipment, law enforcement agencies have a common interest in the impact of disclosure of the details of shared investigative techniques and procedures.

[41] I am thus satisfied that the disclosure of information about the capabilities of the specific equipment purchased by the OPP would undermine the interests of law enforcement agencies using the same investigative techniques or procedures.

[42] For these reasons, I find there has been no "fundamental defect in the adjudication process" that warrants reconsideration of Order PO-3998. The appellant has not relied on any other ground in section 18.01 of the *Code* to support her request and I find that none apply. The request for reconsideration is dismissed.

ORDER:

The request for reconsideration is denied.

Original Signed by: May 14, 2020
Sherry Liang
Assistant Commissioner