

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4004-R

Appeal MA19-00190

The Corporation of the Municipality of Clarington

February 1, 2021

Summary: Both the municipality and the affected party requested a reconsideration of Order MO-3893. The requester/appellant and the affected party were involved in an incident on a skating rink run by the municipality. In Order MO-3893, the adjudicator ordered the municipality to disclose the affected party's name and contact information to the requester on the basis that it was not exempt under section 38(b) of the *Municipal Freedom of Information and Protection of Privacy Act*.

In this order, the adjudicator grants the reconsideration requests on the basis that there was a fundamental defect in the adjudication process when certain evidence was overlooked. Taking into account this evidence, the adjudicator finds that the withheld information at issue is exempt under section 38(b) and she upholds the municipality's decision to withhold it.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 14(1) and 38(b).

Orders Considered: Orders PO-2590-R, PO-3064-R, MO-3584-R, PO-3960-R and PO-4044-R.

BACKGROUND:

[1] This reconsideration order is with respect to Order MO-3893.

[2] In response to an access request, the Municipality of Clarington (the municipality) located a responsive record relating to an incident at a skating rink where the appellant claims to have been injured. The municipality decided to withhold the information of an individual (the affected party) on the basis of the discretionary personal privacy exemption in section 38(b).

[3] After conducting an inquiry, I found that some of the withheld information relating to the affected party was not exempt under section 38(b) of the *Act*. I ordered the municipality to disclose the non-exempt information to the appellant. In coming to my conclusion that there would be no unjustified invasion of the affected party's personal privacy, I placed significant weight on the factor favouring disclosure at section 14(2)(d) (fair determination of the appellant's rights).

[4] Both the municipality and the affected party¹ have requested a reconsideration of Order MO-3893.²

[5] I sought representations from the appellant on the issues set out in the reconsideration requests. Pursuant to section 7 of this office's *Code of Procedure* (the *Code*) and *Practice Direction Number 7*, the municipality's reconsideration request (in its entirety) was shared with the appellant.³ The appellant's counsel provided submissions in response to the municipality's reconsideration request.

[6] In this order, I grant the requests for reconsideration on the basis that there was a fundamental defect in the adjudication process leading to my decision in Order MO- 3893. I find that I overlooked material evidence of the affected party that the affected party, who provided his name and contact information to the municipality following the incident, is a minor, and that he was not given the opportunity to speak to a parent before providing his information to the municipality.

[7] After considering this factor along with the other factors for and against disclosure and balancing the interests of the parties, I find that disclosure of the withheld information at issue is exempt under section 38(b). As such, I allow the reconsideration requests and uphold the municipality's decision not to disclose any of the affected party's personal information to the appellant.

¹ The affected party is represented by a family member.

² Shortly after submitting its reconsideration request, the municipality provided this office with a copy of the Statement of Claim filed by the appellant's counsel against the municipality, the Regional Municipality of Durham and John Doe.

³ I did not share the affected party's representations with the appellant as they simply stated that the affected party is asking for a reconsideration.

RECORDS:

[8] The record is an accident/incident report. The withheld information at issue consists of the name and address of the affected party contained on page 1 of the record.

ISSUES:

- A. Do the requests for reconsideration meet any grounds for reconsideration in section 18.01 of the *Code*?
- B. Should Order MO-3893 be reconsidered?

DISCUSSION:

A. Do the requests for reconsideration meet any grounds for reconsideration in section 18.01 of the *Code*?

[9] The reconsideration requests must meet one of the grounds for reconsideration as set out in section 18.01 of the *Code*. Section 18.01 and 18.02 state:

18.01 The IPC may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or other similar error in the decision.

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 reconsideration process set out in this office's *Code of Procedure* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, Adjudicator John Higgins reviewed the case law regarding an administrative tribunal's power of reconsideration, including the Supreme Court of Canada's decision in *Chandler v. Alberta Assn. of Architects*.⁴ With respect to the reconsideration request before him, he concluded:

[T]he parties requesting reconsideration ... argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect ... In my view,

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

these arguments do not fit within any of the criteria enunciated in section 18.01 of the *Code of Procedure*, which are based on the common law set out in *Chandler* and other leading cases as *Grier v. Metro Toronto Trucks Ltd.*⁵

On the contrary, I conclude that these grounds for reconsideration amount to no more than a disagreement with my decision, and an attempt to re-litigate these issues to obtain a decision more agreeable to the LCBO and the affected party ... As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the finality of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[11] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.⁶ In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 of the *Freedom of Information and Protection of Privacy Act* did not apply to the information in the records at issue in that appeal. She determined that the institution's request for reconsideration did not fit within any of the grounds for reconsideration set out in section 18.01 of the *Code*, stating as follows:

It ought to be stated up front that the reconsideration process established by this office is not intended to provide a forum for re-arguing or substantiating arguments made (or not) during the inquiry into the appeal.

[12] I agree with these statements. A reconsideration request is not a forum to re-argue a case or to present new evidence, whether or not that evidence was available at the time of the initial inquiry.

[13] The municipality argues that the IPC does not have jurisdiction to decide whether the information at issue should be disclosed. It states that the court is the proper forum to address the matter of disclosure, not the IPC.

[14] I disagree. Although other possible methods of access exist, it does not mean that the IPC is the incorrect forum to deal with issues about disclosure. The IPC has long held that the availability of another process for disclosure is not a barrier to obtaining access under the *Act*.⁷

[15] The municipality also argues that I made an error in failing to properly consider the factors in section 14(2) in making my determination on whether disclosure of the personal information at issue would be an unjustified invasion of the affected party's personal

⁵ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

⁶ See, for example, Orders PO-3062-R and PO-3558-R.

⁷ See Order M-1146.

privacy. Specifically, the municipality argues that I failed to consider the fact that the affected party is a minor.

[16] To the extent that the municipality is arguing that I weighed the evidence improperly, this is not a basis for reconsideration. Moreover, an adjudicator is not required to expressly refer in her decision to every piece of evidence put forth by the parties.

[17] I find, however, that there was a fundamental defect in the adjudication process due to my overlooking highly material evidence. During the inquiry, the affected party argued that he is a minor and moreover, he gave his information to the municipality without first having the chance to talk to his parent or guardian. I overlooked this evidence.

[18] In its reconsideration request, the municipality argues that I did not consider the fact that the affected was a minor and that at no time did his parent or guardian consent to the collection of his personal information. Although the municipality did not make this argument during the inquiry, the affected party did.

[19] Specifically, during the inquiry, the affected party pointed out that he was a minor at the time of the incident. He also pointed out that he was not given an opportunity to call his parent prior to providing his personal information to the municipality.⁸

[20] The threshold for reconsideration is high, and mere disagreement with an error in a decision is not a ground for reconsideration. There must be a fundamental defect in the adjudication process in order for section 18.01(a) ground to be met. A fundamental defect would be a breach of procedural fairness, such as a party not being given notice of an appeal or not being given an opportunity to provide submissions during the inquiry.⁹

[21] In Reconsideration Order PO-4044-R, the adjudicator found that there was a fundamental defect in the adjudication process when she overlooked the material evidence of the parties on a highly relevant fact.¹⁰

[22] I find that a similar error occurred here. By overlooking a material factor favouring non-disclosure of the information, there was a fundamental defect in the adjudication process. I find, therefore, that there is a basis for me to reconsider Order MO-3893. Given this conclusion, I will now address whether Order MO-3893 should be reconsidered.

⁸ The appellant was unaware of these facts because the affected party did not consent to sharing them. He has since consented to having them discussed in this reconsideration order.

⁹ For an example, see Order PO-3960-R.

¹⁰ The issue in that appeal was whether the IESO had "designated" certain information under section 20(1) of the *Electricity Act*.

B. Should Order MO-3893 be reconsidered?

[23] Having determined that the municipality has established one of the grounds to reconsider Order MO-3893, I will now proceed to review the municipality's position on the application of the section 14(2) factors to my determination of the section 38(b) issue.

[24] In Order MO-3893, I found that the record at issue contains both the personal information of the appellant and the affected. Having found this, I will now consider whether disclosure of the affected party's personal information would constitute an unjustified invasion of the affected party's personal privacy under section 38(b).

[25] Sections 14(1) to (4) provide guidance in determining whether disclosure of the information would be an unjustified invasion of personal privacy under section 38(b). In Order MO-3893, I found that sections 14(1)(a) to (e) and section 14(4) were not relevant in the circumstances. I also found that the presumption argued by the municipality (section 14(3)(b)) did not apply. I will not revisit those findings.

[26] I will now weigh the factors in sections 14(2) and balance the interests of the parties.¹¹

[27] Section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.¹² Some of the factors listed in section 14(2), if present, weigh in favour of disclosure, while others weigh in favour of non-disclosure. The list of factors under section 14(2) is not exhaustive. The institution (and the IPC) must also consider any circumstances that are relevant, even if they are not listed under section 14(2).¹³

[28] In Order MO-3893, I found that the listed factor under section 14(2)(d) (fair determination of rights) and the unlisted factor (the *Act* should not be used in a way that prevents individuals from exercising their legal rights) favoured disclosure.¹⁴

[29] With respect to the factors favouring non-disclosure, I found that the listed factor in section 14(2)(h) (supplied in confidence) applied.¹⁵ I did not consider any unlisted factors favouring non-disclosure.

¹¹ Order MO-2954.

¹² Order P-239.

¹³ Order P-99.

¹⁴ See paragraphs 39 to 45 of Order MO-3893 for my discussion of the factor at section 14(2)(d). See paragraphs 56 to 57 of Order MO-3893 for my discussion of this unlisted factor.

¹⁵ See paragraphs 53 to 55 of Order MO-3893 for my discussion of the factor at section 14(2)(h).

[30] I will now take into account the unlisted factor that the affected party is a minor and that the information at issue was supplied by him to the municipality prior to consulting with a parent or guardian.

[31] The municipality's reconsideration request submits the following about the affected party:

... Not only was the information provided in confidence, but the affected party is a child who would have no apprehension of the possible consequences if that information was to be disclosed. At no time did a parent or a guardian of the affected party consent to the collection or disclosure of the confidential information. In my submissions, these facts are a crucial omission by the IPC.

[32] In response to the municipality's reconsideration request, the appellant's counsel submits:

... We do not have the name or address for service on [the affected party]. They have been named as John Doe in the [Statement of Claim]. They would have to appear before court to give evidence on the subject matter in relation to the claim and the defence by the [municipality]. Their parents can be added as litigation guardians to the claim if he remains a minor.

[33] It is clear that at the time of skating rink incident the affected party was a minor and continues to remain a minor during this reconsideration process. It also appears that the municipality staff who completed the accident/incident report did not ask the affected party whether he wished to contact his parents or guardians prior to collecting his personal information. As such, arguably the affected party did not have full understanding of the possible consequences of providing his personal information to the municipality staff. In my view, fairness requires that I take into account, not only the fact that the affected party is a minor, but also the fact that he likely did not understand the consequences of providing his personal information to the municipality staff. As such, I find that this factor should be given considerable weight in the circumstances of this appeal.

[34] In Order MO-3893, I found that the factors favouring disclosure outweighed the factor favouring non-disclosure and thus disclosure of the affected party's personal information would not constitute an invasion of his personal privacy.

[35] However, after considering the factor that the affected party is a minor who may have had little comprehension of the consequences of providing his personal information, I come to a different conclusion. In my view, the factors favouring disclosure are outweighed by the factors favouring non-disclosure. Specifically, I find that the factor raised by the municipality in its reconsideration request strongly weighs in favour of non-disclosure of the affected party's personal information.

[36] Also relevant is the fact that, as alluded by the appellant, she has commenced a civil action against the municipality.

[37] After considering and weighing the factors (listed and unlisted), and balancing the interests of the parties, I find that disclosing the affected party's personal information at issue would constitute an unjustified invasion of his personal privacy under section 38(b) in this case. In these circumstances, I am of the view that the matter of disclosure of this information to the appellant should be left to the court hearing the civil action against the municipality, because the court will have a better appreciation of the competing equities and will be better placed to determine this issue. Thus, I uphold the municipality's decision to withhold the information from disclosure.

ORDER:

1. The municipality and the affected party's requests for reconsideration are granted.
2. I uphold the municipality's decision not to disclose the personal information of the affected party under section 38(b) of the *Act*.

Original Signed by: _____

Lan An
Adjudicator

February 1, 2021 _____