Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4137-R

Appeal PA14-14-2

Order PO-4108

Carleton University

April 13, 2021

Summary: The appellant requested a reconsideration of Order PO-4108 on the basis that there is a fundamental defect in the adjudication process, as described in section 18.01(a) of the IPC's *Code of Procedure*. In this Reconsideration Order, the adjudicator finds that the appellant has not established the ground for reconsidering Order PO-4108 under section 18.01(a) of the *Code*, and she denies the reconsideration request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended; IPC *Code of Procedure*, section 18.01(a).

Orders and Investigation Reports Considered: Orders PO-2538-R, PO-3062-R, PO-4108, and MO-4003-R.

Cases Considered: *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 (S.C.C.).

OVERVIEW:

[1] This reconsideration order relates to Order PO-4108, which was issued in Appeal PA14-14-2, which itself was a continuation of an earlier Appeal PA14-14 involving Carleton University (the university) and an individual. The university received a request from the individual under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to surveys conducted of a specific group of students and faculty. In response to the request, the university issued an access decision denying access to some records on the basis of the research exclusion in section 65(8.1)(a) of

the *Act*. The requester appealed the university's decision to the Information and Privacy Commissioner of Ontario (the IPC), and Appeal PA14-14 was opened. Adjudicator Stephanie Haly conducted an inquiry and issued Order PO-3576, in which she found that the research exclusion did not apply and ordered the university to issue an access decision for records responsive to three parts of the appellant's request.[1]

[2] The university filed an application for judicial review of Order PO-3576. In *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*,[2] the Divisional Court found that Adjudicator Haly's decision was "reasonable and consistent with the evidence of legislative intent, a contextual analysis of the provisions in the *Act* and established interpretive principles." The court ordered the university to decide which records were responsive to the request, and provide an access decision to the appellant.

[3] Following the Divisional Court's decision, the university issued a decision granting partial access to the responsive records. The university withheld portions of the records pursuant to sections 13(1) (advice or recommendations), 18(1)(c) (economic or other interests), and 21(1) (personal privacy) of the *Act*.

[4] The appellant appealed the university's decision and Appeal PA14-14-2 was opened. During mediation, the appellant removed certain records and issues from the scope of his appeal.[3] When the appeal entered the adjudication stage, I decided to conduct an inquiry, which concluded with my issuing Order PO-4108 on January 27, 2021. In Order PO-4108, I partially upheld the university's decision to withhold portions of the records under section 21(1), but found that the section 18(1)(c) exemption did not apply. I ordered the university to disclose the non-exempt portions of the records to the appellant.

[5] On February 17, 2021, I received a reconsideration request from the appellant. I invited the appellant to provide written submissions in support of his request, with reference to the reconsideration grounds set out in section 18.01 of the IPC's *Code of*

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[1] Parts 2, 6, and 7 of the request, which sought access to the following information:

> 2) Minutes of all meetings of the Commission on Inter-Cultural, Inter-Religious and Inter-Racial Relations on Campus [the commission] from the following months: January 2011; February 2011; April 2011; and from March 2012 until November 2012.
>
> 6) The second survey and its results, as well as an explanation of the survey methodology, who designed the survey, who approved the survey, how it was conducted, and who analyzed the survey results.
>
> 7) The raw data generated by the second survey.

[2] 2018 ONSC 3696.

[3] The appellant indicated that he was not seeking access to the only information that had been severed from the records responsive to part 2 of the request, or the information that had been severed on the basis of the advice or recommendations exemption in section 13(1). Therefore, the records responsive to part 2 of the request and the application of section 13(1) were no longer at issue in Appeal PA14-14-2.

Procedure (the *Code*). For the reasons that follow, I find that the appellant has not established grounds for reconsideration under section 18.01 of the *Code*, and I deny the reconsideration request.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4108?

[6] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code*. Section 18 reads in part as follows:

> 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 other similar error in the decision.
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> 18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

[7] The reconsideration process set out in the *Code* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, Senior 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 Association of Architects*.[4] With respect to the reconsideration request before him, he concluded that:

> [T]he parties requesting reconsideration … argue that my interpretation of the facts, and the resulting legal conclusions, are incorrect… In my view, 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 such as [*Grier v. Metro Toronto Trucks Ltd*].[5]

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[4] [1989] 2 SCR 848 (SCC).
[5] 1996 CanLII 11795 (ON SC), 28 OR (3d) 67 (Div Ct).

> 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.

[8] The senior adjudicator's approach has been adopted and applied in subsequent IPC orders.[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 *Act* did not apply to information in 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…

The appellant's reconsideration request

[9] The appellant submits that there was a fundamental defect in the adjudication process, as described by section 18.01(a) of the *Code*, which warrants a reconsideration of Order PO-4108. He provides two main reasons in support of this request: the first is that my findings may have been tainted by bias, and the second is that it appears that in reaching my decision in Order PO-4108, I did not consider all of the "pertinent information" that the appellant provided to the IPC.

[10] In support of his first claim, the appellant refers to a number of excerpts from Order PO-4108, which he submits are indicative of adjudicator bias. For example, the appellant refers to paragraphs 69 and 70, which state:

> There are a number factors in section 21(2) that weigh against disclosure. In particular, as noted above, I am satisfied that the factors weighing against disclosure in sections 21(2)(f) and (h) apply. Based on the evidence before me, I accept that the respondents provided honest, specific, and detailed written responses to the survey questions, based on the understanding that they would remain confidential.

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[6] See, for example, Orders MO-3478-R, PO-3062-R, and PO-3558-R.

> Moreover, having reviewed the survey responses in detail, I am also satisfied that the narrative responses contain intimate details of the respondents' personal experiences as students, faculty, and staff on campus at the university. I accept that this information is highly sensitive, and that there is a reasonable expectation of the respondents suffering significant personal distress if the information is disclosed.

[11] The appellant maintains that it was impossible for me to determine whether the survey respondents' responses were "honest," as I had no way of investigating or testing the responses for veracity. He notes that even the university acknowledges, "the survey responses are subjective and were not verified for accuracy." He also claims that my statements appear "sympathetic to the survey respondents."

[12] The appellant also submits that "bias may also have been a factor behind the assertion" in paragraphs 65 and 66 of the order, which read:

> From my review of the records, I accept the university's evidence that if a respondent did not identify as Jewish during the opening "demographic questionnaire" portion of the survey, then the survey did not proceed to the remaining questions. As a result, simply by completing the entire survey, the respondents reveal that they are of the Jewish faith.
>
> Accordingly, I find that the narrative responses that specifically refer to the respondents' religious and/or ethnic beliefs or associations are exempt under section 21(1) on the basis that their disclosure would be a presumed unjustified invasion of personal privacy under section 21(3)(h).

[13] The appellant maintains that I "justified" the non-disclosure of narrative responses "on the grounds that the religious beliefs of respondents would automatically be known because all respondents to the survey were necessarily of the Jewish faith." He then goes on to say that although I accepted the university's evidence, based on my "review of the records," I did not explain what that evidence consists of. Additionally, the appellant submits that while the university submitted in both its initial and reply representations that only Jewish students, staff, and faculty were allowed to participate in the survey, those assertions "were not accompanied by any evidence."

[14] The appellant maintains that he challenged the university's claim in his sur-reply representations, but that I did not refer to all of his submissions on this matter in Order PO-4108. In particular, he notes that I did not mention that the survey's Informed Consent form states, "[a]lthough this survey was constructed with Jewish students [and Jewish faculty and staff] in mind, if you are not Jewish, we would still like to hear from you. Please complete the survey to the best of your ability."

[15] According to the appellant, it is "absolutely nonsensical for such instructions to have been included at the outset of the survey if non-[Jewish respondents] were to be excluded from participating in the survey." He also says that, as noted in his sur-reply

representations, "there was nothing in the survey which instructed non-[Jewish respondents] not to complete the survey once they indicated they were not Jewish."

[16] In support of his second claim regarding fundamental defects in the adjudication process, the appellant submits that, "pertinent information [he] provided to the mediator for [Appeal] PA14-14-2 has apparently not been considered by the adjudicator." He maintains that in an email to the mediator, he stated the following:

> Given the steps taken to protect anonymity, there is no potential harm for respondents in releasing this information to me. Furthermore, data of the kind I am now requesting was released to commission members for the first survey (the survey which led to the second survey for Jewish students, faculty, and staff). Additionally, in response to another *FIPPA* request I made, Carleton University released complaints about me made by three students, two of whose identities were revealed even though I never asked to know their names. In that case the university did not maintain anonymity when providing me with documents, yet with the request giving rise to this appeal they have not released documents despite anonymity having been assured. The attachments accompanying this email contain the three aforementioned student complaints.

[17] According to the appellant, the "stark inconsistency" in the university's procedures around the preservation of anonymity was relevant to the issue, but was excluded from my consideration of the matter.

Analysis and findings

[18] Section 18.01(a) of the *Code* allows the IPC to reconsider an order where there was a fundamental defect in the adjudication process. Past IPC orders have determined that a fundamental defect in the adjudication process may involve:

- failure to notify an affected party,[7]
- failure to invite representations on the issue of invasion of privacy,[8] or
- failure to allow for sur-reply representations where new issues or evidence are provided in reply.[9]

[19] The appellant's primary ground for alleging that there was a fundamental defect in the adjudication process is that he claims the decision in Order PO-4108 may have

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[7] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.
[8] Order M-774.
[9] Orders PO-2602-R and PO-2590.

been influenced by adjudicator bias. In support of his position, the appellant refers to several passages from Order PO-4108, which he maintains are indicative of bias on my part.

[20] As noted by Adjudicator Steven Faughnan in Order MO-4003-R, bias, or a reasonable apprehension of bias, would be a ground for reconsidering Order PO-4108. It would also be a ground for my recusing myself and the reconsideration request being assigned to another adjudicator.

[21] The Ontario Divisional Court has affirmed that in assessing a claim of bias on the part of a decision maker, "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."[10] The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough; however, actual bias need not be proven.

[22] The Supreme Court of Canada has described the test for finding a reasonable apprehension of bias as follows:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."[11]

[23] Applying this test to the circumstances of this appeal, and considering the concerns that have been raised by the appellant, I find that a reasonable person with knowledge of the facts would not conclude that I would not, or did not, fairly decide the issues raised in Appeal PA14-14-2. In arriving at this conclusion, I have taken into account the fact that my findings in Order PO-4108 were made on a case-specific basis, having considered the representations provided by the parties, and based on a thorough review of the records at issue.

[24] The appellant takes issue with the wording in paragraphs 69 and 70 of Order PO-4108 and alleges a connection between a purported inability to verify the veracity of the survey responses, my finding on the personal privacy exemption, and bias on my part. However, my finding on the personal privacy exemption was not contingent on whether

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[10] *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing Martin v. Martin (2015), 2015 ONCA 596 (CanLII) at para 71.

[11] *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

the survey responses were, in fact, "honest." Having considered the appellant's comments, I remain satisfied that my findings that the information at issue was highly sensitive and provided in confidence, as contemplated by the factors weighing against disclosure of personal information in sections 21(2)(f) and (h) of the *Act*, were available based on the entirety of the evidence before me. Further, I find no reasonable basis for concluding that the appellant's concerns about verification support a finding of a reasonable apprehension of bias on my part.

[25] In response to the appellant's submission that I did not refer to all of his representations in making my findings, I note that decision-makers are not required to summarize or refer to all of the arguments or evidence that are before them when providing reasons for a decision.[12] Accordingly, I do not accept the appellant's argument that Order PO-4108 demonstrates bias on my part because I did not summarize or address every point raised in his representations.

[26] Finally, in my view, the appellant's submissions regarding bias reflect his disagreement with my decision in Order PO-4108 and, in some cases, amount to him seeking to re-argue issues that I have already considered and decided. As stated above, numerous IPC orders have held that a reconsideration request is not a forum for re-arguing or substantiating arguments made (or not) during an inquiry, and a party's disagreement with an adjudicator's interpretation of the facts and resulting legal conclusions does not fit within the reconsideration criteria in section 18.01 of the *Code*.[13]

[27] I find, therefore, that the appellant has not established a reasonable apprehension of bias on my part, and I reject his claim that there was a fundamental defect in the adjudication process on this basis for the purpose of section 18.01(a) of the IPC *Code*.

[28] The second reason the appellant claims there was a fundamental defect in the adjudication process is because he maintains that "pertinent information" that he provided to the mediator was "apparently not considered" in reaching my decision.

[29] The documents distributed during my inquiry clearly directed the appellant to make written representations and to provide me with all relevant arguments, documents, and evidence to support his position on the issues.[14] If the appellant wished

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[12] *Canada v. Vavilov*, 2019 SCC 65 at para 106.
[13] See Orders PO-2538-R and PO-3062-R, for example.
[14] The Notice of Inquiry dated August 12, 2019, set out the matters at issue in Appeal PA14-14-2, posed a number of questions for the appellant to respond to regarding those matters, and invited the appellant to respond to the university's non-confidential representations. The cover letter that accompanied the Notice of Inquiry advised that, "the representations you provide to this office should include *all of the*

to rely on the information that he provided to the mediator, he should have reiterated that information in his written representations at the inquiry stage.

[30] Regardless, I did review the information the appellant provided to the mediator.[15] As I mentioned previously, it is not necessary for a decision-maker to catalogue all legal or factual considerations presented in preparing her reasons for decision.[16] I find the appellant's assertion that I did not consider "pertinent information" that he provided to the mediator does not establish a fundamental defect in the adjudication process under section 18.01(a) of the *Code*.

[31] Therefore, having considered the appellant's reconsideration request and representations, I find that he has not established the grounds for reconsideration under section 18.01(a) of the *Code*. In reviewing the appellant's reconsideration request, I also considered whether any of his arguments might fit within the other grounds for reconsideration under section 18.01 of the *Code*, and I find that they do not. As a result, there is no basis upon which the IPC may reconsider Order PO-4108.

ORDER:

1. I deny the appellant's reconsideration request.

2. I lift the interim stay of Order PO-4108 and order the university to disclose the non-exempt portions of the records to the appellant, as ordered in Order PO-4108, by **May 18, 2021** but not before **May 13, 2021**.

3. In order to verify compliance with order provision 2, I reserve the right to require the university to provide this office with a copy of the records it discloses to the appellant.

4. The timelines noted in order provision 2 may be extended if the university is unable to comply in light of the current COVID-19 situation, and I remain seized of this appeal to consider any resulting extension request.

Original Signed by: April 13, 2021

Jaime Cardy
Adjudicator

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arguments, documents and other evidence you rely on to support your position in this appeal" (emphasis added).

[15] That is, the information that was not subject to mediation privileged.

[16] *Canada v. Vavilov*, 2019 SCC 65 at para 106.