

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4042-R

Appeal MA18-128-2

Order MO-3980

City of Burlington

April 27, 2021

Summary: The appellant submitted a request for reconsideration of Order MO-3980, seeking a correction of the order to reflect that she had paid in full the fee that had been appealed and that the city owed her a refund. In this Reconsideration Order, the adjudicator denies the reconsideration request, because the appellant has not established any of the grounds for reconsideration in section 18.01 of the IPC Code of Procedure.

Considered: The IPC's Code of Procedure, sections 18.01 and 18.02.

Orders Considered: Orders MO-3980, PO-2538-R, PO-3062-R, and PO-2879-R.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).

OVERVIEW:

[1] This reconsideration order arises from Order MO-3980, which was issued regarding an appeal of an access decision made by the City of Burlington (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request was for access to correspondence between city employees, a city councillor, and individuals of a named company. The city issued a decision granting partial access to the responsive records with severances under section 7(1) (advice or recommendations) of the *Act*. After receiving the decision, the appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC).

[2] During mediation, reasonable search, fee, and the application of the public interest override at section 16 of the *Act* were all added as issues in the appeal. I conducted an inquiry and I issued Order MO-3980, which reduced the fee the city was permitted to charge for search under section 45(1)(a) of the *Act* from \$662.50 to \$319.50 and upheld the rest of the city's decision.

[3] After Order MO-3980 was issued, the appellant contacted the IPC to convey that the order contained incorrect facts. Specifically, the appellant stated that, contrary to order provision 1, there was no balance owing for the processing of her access request, because she had paid the fee in full, as the city had asked her to do, not just a 50% deposit on the fee estimate as the order stated. After corresponding with the IPC, the appellant sought a reconsideration of Order MO-3980 and a correction of it to reflect that she had paid the fee in full and that the city owed her a refund.

[4] For the reasons that follow, I deny the reconsideration request, because the appellant has not established grounds in section 18.01 of the IPC's *Code of Procedure* (the *Code*) for doing so.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's Code of Procedure to reconsider Order MO-3980?

[5] The IPC's reconsideration process is set out in section 18.01 of the *Code*, which applies to appeals under the *Act*. 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:

- (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.

[6] I am *functus* unless the party requesting the reconsideration establishes one of the grounds in section 18.01. *Functus officio* is a common law principle, which states

that once a matter has been determined by a decision-maker, generally speaking, he or she has no jurisdiction to further consider the issue. However, the *Code* provisions are a summary of the common law position acknowledging the ability of a decision-maker to re-open a matter to reconsider it in certain circumstances.¹

The appellant's reconsideration request

[7] The appellant requests a reconsideration of Order MO-3980 under section 18.01(c) of the IPC's *Code*. The appellant notes that the error is contained at the end of Order MO-3980, where I state:

1. I uphold the city's fee for preparation and photocopying, but order that the search fee be reduced from \$662.50 to \$319.50. This results in a final fee of \$402.50, leaving the appellant with a balance of \$35.85 to pay, having already paid the \$366.65 fee deposit.

[8] The appellant states that she not only paid the deposit, but also the total amount of the fee, or \$745.50, in 2018. The appellant argues, therefore, that I should have ordered the city to refund her \$343, the difference between the original fee of \$745.50 and the reduced fee of \$402.50. The appellant confirms that after Order MO-3980 was issued, the city refunded her the proper amount in December 2020. However, the appellant takes the position that the clerical error in Order MO-3980 should be corrected in the form of a reconsideration.

[9] The appellant states that it is important that the record show that a citizen filing an access request with the city had to pay over \$745 in order to get the records requested, and three years later, an adjudicator had to rule that this was an excessive fee. The appellant states that she is concerned that the city may have a recurring practice of charging excessive fees for access requests in order to discourage members of the public from pursuing responsive records, which are not released until 100% of the fee payment is received. The appellant states that it is important to her that the record show that the city required payment of the fee in full prior to releasing the records to her, not just the 50% fee deposit.

[10] The appellant states that in order to honour the spirit and intent of the *Act* and the importance of accurate decisions, this simple administrative error should be corrected by granting the reconsideration of Order MO-3980 in accordance with section 18.01(c) of the *Code*.

Analysis and findings

[11] The appellant's arguments as to why Order MO-3980 should be reconsidered are

¹ Order PO-2879-R.

made under section 18.01(c) of the *Code*. She does not argue, and there is no basis on the evidence before me for finding, that there has been a fundamental defect in the adjudication process or other jurisdictional defect in the decision under sections 18.01(a) or 18.01(b).

[12] In Reconsideration Order PO-2538-R, former 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 Assn. of Architects*.² 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 International Trucks Ltd.*³

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.

[13] This approach has been adopted and applied in subsequent IPC orders.⁴ 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...

[14] As established by section 18.02 of the *Code*, 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.

² [1989] 2 SCR 848 (*Chandler*).

³ 1996 CanLII 11795 (ON SC).

⁴ See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

[15] As noted, contrary to order provision 1 in Order MO-3980, the appellant did not have a balancing owing to the city for the processing of her access request, because she had paid the total fee in full as requested by the city, not just a 50% deposit on the fee estimate as the order stated. The appellant argues that this error fits within section 18.01(c) of the *Code*. Previous IPC orders have held that an error under section 18.01(c) may include:

- a misidentification of the "head" or the correct ministry;⁵
- a mistake that does not reflect the Adjudicator's intent in the decision;⁶
- information that is subsequently discovered to be incorrect;⁷ and
- an omission to include a reference to and instructions for the institution's right to charge a fee.⁸

[16] In Reconsideration Order PO-2879-R, former Senior Adjudicator Higgins considered the case law regarding "accidental error" and stated:

Turning to section 18.01(c), I note that Ontario's Divisional Court considered the ground of reconsideration known as "accidental error" in the case of *Grier v. Metro International Trucks Ltd.* (1996), 28 O.R. (3d) 67. The issue in *Grier* was how much vacation pay an employee was entitled to, and the referee adjudicating the case under the Employment Standards Act made her decision on the basis of an incorrect date provided during the course of her deliberations. The Court found that because the decision was arrived at based on what was subsequently discovered to be incorrect information, the decision was a nullity and the decision maker could reopen the matter to correct the decision.

...

As noted in Order MO-1200-R, the decision in *Grier* would appear to allow an adjudicator to reopen a case in order to correct a factual error of a fundamental nature going to the actual issue to be determined.

[17] I agree with this analysis and adopt it in determining this reconsideration request.

⁵ Orders P-1636 and R-990001.

⁶ Order M-938.

⁷ Orders M-938 and MO-1200-R.

⁸ MO-2835-R.

[18] I acknowledge the error in order provision 1 of Order MO-3980. I also acknowledge that this type of error may fit within section 18.01(c) of the *Code*, as an accidental or other error in the decision, in certain situations. However, the factual error in Order MO- 3980 had no bearing on my determination of the issues in the appeal. Specifically, this error as to whether the appellant had already paid the fee in part, or in full, did not factor into my analysis of the city's fee. I am satisfied that this error had no effect on the outcome of the order, which was a reduction in the search fee the city was permitted to charge the appellant for her access request under section 45(1)(a) of the *Act*. In the circumstances, I find that the ground for reconsideration in section 18.01(c) of the *Code* has not been established.

[19] Although I have found there to be no basis for reconsidering Order MO-3980 under the *Code*, it is clear that the appellant did pay the original \$745.50 fee in full and that, given my finding on the amount of the allowable fee the city could charge the appellant for her access request, the city owed the appellant \$343. As acknowledged by the appellant, the city has refunded this amount to her, and the matter is resolved.

[20] Accordingly, I find that the appellant has not established any of the grounds for reconsideration under section 18.01 of the *Code*, and I decline to reconsider Order MO-3980.

ORDER:

The request for reconsideration of Order MO-3980 is denied.

Original Signed by: _____
Anna Truong
Adjudicator

_____ April 27, 2021