

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER PO-4184-R

Appeal PA17-171

Lambton College of Applied Arts and Technology

Order PO-4128

September 14, 2021

Summary: The appellant requested a reconsideration of Order PO-4128. The appellant alleged there were procedural defects and other errors in the order. In this Reconsideration Order, the adjudicator grants the reconsideration request in part, correcting a typographical error in the order. She finds there was no fundamental defect in the adjudication process or other jurisdictional defect in Order PO-4128 and denies the balance of 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.

Orders and Investigation Reports Considered: Order PO-4128.

Cases Considered: *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848 (SCC) and *Grier v. Metro International Trucks Ltd.*, (1996), 28 O.R. (3d) 67.

OVERVIEW:

[1] This reconsideration order relates to Order PO-4128, which was issued in Appeal PA17-171, involving an individual, the appellant, and Lambton College of Applied Arts and Technology (the college). The appellant had submitted a four-part access request to the college, under the *Freedom of Information and Protection of Privacy Act* (the *Act*), for video recordings, electronic records, sound recordings and plans. The college dealt with each part of the appellant's request separately. The college issued an interim access decision including a fee estimate of \$640 to process the video recordings, which

included blurring the faces of individuals other than the appellant in the videos to protect their privacy. The college advised the appellant it was prepared to grant him full access to the electronic records. The college advised the appellant it did not have custody or control of audio or sound recordings. Finally, the college granted the appellant partial access to the plans identified in the fourth part of the appellant's request after notifying an affected party. The college withheld portions of the plans under the personal privacy exemption in section 21(1) of the *Act*.

[2] The appellant appealed the college's decision. The appellant raised a number of issues in his appeal and during mediation. These issues include the delegation of authority under the *Act* by the head of the college, the fee estimate for the video recordings and the college's denial of his fee waiver request, the application of the personal privacy exemption to some of the records, reasonable search, and the public interest override. The appellant also claimed his rights under the *Canadian Charter of Rights and Freedoms* (the *Charter*) had been violated.

[3] A mediated solution could not be reached and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*. The adjudicator initially assigned to Appeal PA17-171 invited the college and the appellant to provide representations in response to a Notice of Inquiry, which summarized the facts and issues in the appeal. The college submitted representations. The adjudicator provided the appellant with a copy of the college's representations in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure* (the *Code*), but the appellant did not submit representations in support of his appeal. The adjudicator provided the appellant multiple opportunities to submit representations in response to the Notice of Inquiry and the college's representations. However, despite receiving a number of extensions to the deadline to make representations, the appellant did not do so.

[4] The appeal was then transferred to another adjudicator to complete the inquiry. The adjudicator provided the appellant with an additional opportunity to submit representations. He did not do so.

[5] In the meantime, the adjudicator issued another order, Order PO-4093, relating to Appeal PA17-170 involving the same parties. The appellant submitted a reconsideration request in that appeal alleging bias on the part of the adjudicator in both Appeal PA17-170 and this appeal, Appeal PA17-171.¹

[6] Just prior to the issuance of Order PO-4128, the appellant requested an additional extension to provide his representations. However, the adjudicator denied the request because the appellant had been provided numerous opportunities over a period

¹ I dismissed the appellant's reconsideration request in respect of Order PO-4093 in Reconsideration Order PO-4155-R.

of two years to provide his representations and failed to do so. The adjudicator proceeded to issue her order.

[7] In Order PO-4128, the adjudicator allowed the appeal, in part. She dismissed the appellant's bias allegation. She found the head of the college properly delegated their authority under the *Act*. The adjudicator also dismissed the appellant's *Charter* claims. The adjudicator upheld the college's decision with respect to its section 49(b) claim and found the public interest override did not apply to the personal information. The adjudicator upheld part of the college's fee and ordered it to refund a portion of the fee to the appellant. Finally, the adjudicator upheld the college's denial of the appellant's request for a fee waiver and upheld the college's search.

[8] Shortly after the order was issued, the appellant submitted a reconsideration request for Order PO-4128. The appellant submitted two emails in which he raised concerns regarding Order PO-4128 and the adjudicator. The appellant was provided an opportunity to make written submissions in support of his reconsideration request, with reference to the reconsideration grounds set out in section 18.01 of the *Code*. The reconsideration file was transferred to me to complete a review of the appellant's reconsideration request. I granted the appellant a number of extensions to submit his submissions in support of his reconsideration request. The final deadline for submitting representations was August 20, 2021. The appellant did not make any submissions. The appellant was advised that the substance of his emails dated April 16 and 19, 2021 would be considered his reconsideration submissions.

[9] For the reasons that follow, I allow the reconsideration request to the extent of correcting the typographical error found in paragraph 42. I find the appellant has not established any other basis upon which I should reconsider Order PO-4128 and deny the balance of the reconsideration request.

DISCUSSION:

[10] Generally, the adjudicator who issues a decision in an appeal will respond to any reconsideration request. However, in the case where that adjudicator is no longer available, the reconsideration request can be assigned to another adjudicator. I refer the parties to section 18.08 of the *Code*, which states,

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.

In this case, Adjudicator Lan An issued Order PO-4128. However, the adjudicator is unavailable to respond to the reconsideration request and it has been assigned to me to resolve.

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4128?

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

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.

[12] 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, the adjudicator 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*.² With respect to the reconsideration request before him, the adjudicator concluded,

[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.*]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 [institution] and the affected party. As Justice Sopinka comments in *Chandler*, "there is a sound policy basis for recognizing the family of proceedings before administrative tribunals." I have concluded that this rationale applies here.

[13] This approach has been adopted and applied in subsequent IPC decisions.⁴ For example, in Order PO-3062-R, the adjudicator was asked to reconsider her finding that the discretionary exemption in section 18 of the *Act* did not apply to the information in

² [1989] 2 SCR 848 (SCC).

³ 1996 CanLII 11795 (ONSC), 28 OR (3d) 67 (Div. Ct.).

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

the records at issue in that appeal. The adjudicator determined 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,

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 reconsideration request

[14] The appellant's reconsideration request focuses on the adjudicator's decision to issue the order in the absence of his representations. The appellant claims the adjudicator violated his procedural rights by proceeding to issue her order without his representations. The appellant claims he intended to submit written representations but was not provided with the opportunity to do so, in breach of his procedural rights. The appellant claims he advised the adjudicator of the circumstances that made him unable to submit representations within the prescribed amount of time. The appellant also states he requested an adjournment of the appeal so that he could have time to prepare his written representations. Despite these requests, the appellant claims the adjudicator denied him the opportunity to submit written representations.

[15] The appellant also submits the adjudicator dismissed his *Charter* claim without providing him an opportunity to bring evidence to support it. The appellant also submits the adjudicator did not respond to his request for her recusal, which is inconsistent with the principles of natural justice. Finally, the appellant states the order contains "numerous errors of facts as well as errors of law." The appellant did not identify any of these alleged errors in his submissions beyond a potential typographical error in paragraph 42 of Order PO-4128.

[16] The appellant does not refer specifically to any of the grounds for reconsideration identified in section 18.01. Given the nature of the appellant's reconsideration submissions, I will consider whether the appellant has established there was a fundamental defect in the adjudication process for the purposes of section 18.01(a). In addition, the appellant alleges there is an error at paragraph 42 of Order PO-4128 and I will consider whether he established there is an accidental error or omission in the order for the purposes of section 18.01(c). The appellant's submissions do not raise any suggestion that the third ground for reconsideration in section 18.01(b) could apply here.

Fundamental defect in the adjudication process

[17] The appellant did not directly refer to section 18.01(a). However, it appears the appellant claims there was a fundamental defect in the adjudication process because the adjudicator did not allow him to submit written representations during the inquiry.

[18] As set out above, paragraph (a) of section 18.01 of the *Code* specifies that the

IPC may reconsider an order where it is established that there is a fundamental defect in the adjudication process. The IPC has recognized that a fundamental defect in the adjudication process may include a failure to notify and affected party,⁵ a failure to invite representations on the issue of invasion of privacy,⁶ or a failure to allow for sur-reply representations where new issues or evidence are provided in reply.⁷ These orders demonstrate that a breach of the rules of natural justice respecting procedural fairness qualifies as a fundamental defect in the adjudication process as described in section 18.01(a) of the *Code*.

[19] As stated above, the appellant claims he was not provided with an opportunity to make submissions during the inquiry. The appellant submits Order PO-4128 is misleading when it says he "received numerous time extension to [submit his representations], but he chose not to submit representations."⁸ The appellant submits he did not waive any of his procedural rights and had specifically informed the IPC that he intended to submit his written representations. Nonetheless, the appellant submits the adjudicator denied him the opportunity to provide his submissions. The appellant states he requested an adjournment of the inquiry to allow him to submit his representations, but the adjudicator "ignored" his request and denied him the right to respond in writing to the case and the evidence presented by the college.

[20] The appellant also submits the adjudicator dismissed his *Charter* claim without providing him with an opportunity to provide evidence to support it.

[21] Order PO-4128 addresses the history of the inquiry and the appellant's extension requests as follows:

The adjudicator initially assigned to this appeal invited the college and the appellant to provide representations on the issues in this appeal. She received representations from the college. In accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*, a copy of the college's representations (in their entirety) was shared with the appellant. The appellant did not submit representations in support of his appeal.⁹ The appellant was then transferred to me to continue the inquiry.

Once the appeal was transferred to me, I provided the appellant with an additional opportunity to provide representations in response to the college's representations and the Notice of Inquiry. He did not do so.

⁵ Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

⁶ Orders M-775 and R-980023.

⁷ Orders PO-2602-R and PO-2590.

⁸ Page 5, footnote 1.

⁹ Footnote 1 in Order PO-4128: "The appellant was given multiple opportunities to submit representations in response to a Notice of Inquiry and to the college's representations. The appellant received numerous time extensions to do so, but he chose not to submit representations."

Shortly before this order was to be issued, the appellant requested an extension of time to provide representations, stating "I only need a short period of time for completing my written representations to your office after I complete my final academic term". The appellant has had numerous opportunities over the last two years to provide representations, and his last-minute request for a further extension does not present any ground on which I should grant one. I deny his request.

[22] Based on my review of Order PO-4128 and the appellant's reconsideration request, I find the appellant has not established there was a fundamental defect in the reconsideration process. The adjudicator states the appellant had "numerous opportunities over the last two years to provide representations." In most circumstances, nearly two years is well beyond sufficient time for a party to make submissions in response to a Notice of Inquiry and another party's representations. The appellant did not provide any submissions to demonstrate the amount of time he was provided was not sufficient other than to claim he intended to submit written representations but was denied the opportunity. I disagree. Based on my review, I find the appellant was provided with ample opportunity to submit his representations in support of his appeal. Instead of using the multiple opportunities he had to provide representations, the appellant continued to request additional time extensions and requested that his file be put on hold, pending receipt of his representations. The appellant's actions demonstrate that instead of seeking to participate meaningfully in the inquiry, he wished to prolong the appeal.

[23] Absent exceptional circumstances, which are not present here, it is unreasonable for a party to ask for an appeal to be adjourned or placed on hold for extended periods of time. Furthermore, it is unreasonable to expect the IPC to use its limited adjudicative resources to continuously consider and grant extension requests when there is no reasonable expectation the appellant will file his submissions. Upon review of Order PO-4128, the appellant's reconsideration request and the surrounding circumstances, I find the appellant has not established there was a fundamental defect in the adjudication process of Appeal PA17-171.

[24] The appellant also submits the adjudicator did not respond to his request for her recusal, which is inconsistent with the principles of natural justice. I have reviewed Order PO-4128 and I find the adjudicator addressed this issue in her consideration of the appellant's claim that there was bias, or a reasonable apprehension of bias, on her part. Therefore, I find the appellant has not established there was a fundamental defect in the adjudication process under section 18.01(a) of the *Code*.

Accidental or other similar error

[25] In his reconsideration request, the appellant refers to paragraph 42 of Order PO-4128, which states:

Despite the appellant's protestation that he is not raising bias, his earlier correspondence clearly raised the issue. Although the appellant's bias

allegation was raised in the context of a reconsideration request regarding Appeal PA17-170, his allegation is framed as a broad allegation that I am impartial. Moreover, he specifically alleged that I will be impartial in my adjudication of this appeal, Appeal PA17-171, and asked that I be removed from the appeal. I have therefore decided to address his bias allegation as a preliminary issue in this appeal. [Emphasis added]

The appellant submits the underlined text in paragraph 42 is a typo. In addition, the appellant states the order contains “numerous errors of facts as well as errors of law.” However, the appellant did not identify any of these alleged errors.

[26] As stated above, the IPC may reconsider an order if it is established that there is a clerical error, accidental error or other similar error in the decision under section 18.01(c) of the *Code*. Previous orders have held that an error under section 18.01(c) may include:

- a misidentification of the “head” or the correct ministry;¹⁰
- a mistake that does not reflect the Adjudicator’s intend in the decision;¹¹
- information that is subsequently discovered to be incorrect;¹² and
- an omission to include a reference to and instructions for the institution’s right to charge a fee.¹³

[27] I acknowledge there is a typographical error in paragraph 42 of Order PO-4128. It is clear from the context that the adjudicator meant to say “partial” rather than “impartial” in paragraph 42 of the order and this is simply a typographical error. I find this error fits within section 18.01(c) of the *Code*, as an accidental or other error in the decision. Therefore, I will allow the request for reconsideration of Order PO-4128 to the limited extent of correcting this clerical error in the order.

[28] The appellant alleges there are “numerous errors of facts as well as errors of law” in his reconsideration request. However, the appellant did not refer to any specific alleged error in fact or in law in his reconsideration request. I have reviewed Order PO-4128 and am unable to find any other error that would allow for reconsideration under section 18.01(c) of the *Code*.

[29] Accordingly, I find there was no fundamental defect in this office’s adjudication process and there is no jurisdictional defect in Order PO-4128. I find there is a clerical

¹⁰ Orders P-1636 and R-990001.

¹¹ Order M-938.

¹² Orders M-983 and MO-1200-R.

¹³ Order MO-2835-R.

error in that "impartial" should read "partial" in paragraph 42.

ORDER:

1. I allow the reconsideration request in part. The word "impartial" in paragraph 42 of Order PO-4128 should read "partial".
2. I deny the balance of the reconsideration request.

Original signed by: _____

Justine Wai
Adjudicator

September 14, 2021 _____