Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4199-R

Appeal PA18-00718

Order PO-4062

Ministry of the Solicitor General

October 18, 2021

Summary: The Ministry of the Solicitor General (the ministry) made a reconsideration request in relation to part of Order PO-4062, arguing that there was a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the IPC's *Code of Procedure*. The ministry submits that police codes were taken off the table at the mediation stage, and that a phrase that the adjudicator ordered disclosed qualifies as a "police code" and is exempt under section 14(1)(l) of the *Freedom of Information and Protection of Privacy Act.* It submits that the adjudicator should not have ordered the phrase disclosed without allowing the ministry an opportunity to make submissions. In this Reconsideration Order, the adjudicator finds that the ministry has not established any ground for reconsidering Order PO-4062 under section 18.01 of the *Code*, and denies the reconsideration request.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 14(1)(l) and 49(a).

Orders Considered: Orders PO-2538-R, PO-3062-R, MO-3393 and PO-3672.

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

OVERVIEW:

[1] The issue in this reconsideration decision is whether certain information that I ordered disclosed in Order PO-4062 was taken off the table at the mediation stage. The Ministry of the Solicitor General (the ministry) says that it was, and that on that basis, I should not have ordered it to disclose the information to the appellant.

[2] The background to the matter is as follows. Order PO-4062 arose out of the appellant's request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to OPP occurrence reports relating to the OPP's two attendances at the long-term care facility where the appellant's father resides.

[3] The ministry issued a decision granting the appellant partial access to the two occurrence reports, withholding portions in reliance on various exemptions in the *Act.*[1] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the course of the appeal, the ministry provided the IPC with a copy of the records at issue. The redactions to the records were marked. The exemptions the ministry relied on as the basis for the redactions were noted on each page of the records in a general way, by listing the claimed exemptions in the right hand margin. However, none of the exemption claims was matched to any particular redaction(s) on the pages.

[5] Of particular relevance to this reconsideration request is that, during mediation, the appellant told the mediator that she was not seeking access to police codes withheld under the law enforcement exemption at section 14(1)(l) (facilitate commission of an unlawful act or hamper the control of crime).[2] Information that consisted of police codes was therefore taken off the table for the purposes of my inquiry at the adjudication stage.

[6] The appeal did not fully settle at mediation and moved to the adjudication stage. The remaining issues, as listed in the Mediator's Report, were the discretionary personal privacy exemption at section 49(b), and the section 49(a) exemption (discretion to refuse access to requester's own personal information) with section 20 (threat to health or safety).

[7] After conducting an inquiry, in which I solicited and received written representations on these exemption claims from the parties, I issued Order PO-4062. In that order, I upheld the application of the personal privacy exemption at section 49(b) of the *Act* to some of the withheld information about individuals other than the

[1] The ministry also withheld certain information on the basis that it was not responsive to the request.
[2] She also advised that she was not seeking information identified by the ministry as not responsive to her request. There were other items taken off the table during mediation that are not relevant to this reconsideration request. None of these matters are mediation privileged.

appellant. I also found that section 49(a), read in conjunction with section 20 of the *Act* did not apply to the remaining information, which I ordered the ministry to disclose.

[8] The ministry now seeks a partial reconsideration of my order on the grounds that there was a fundamental defect in the adjudication process and that I exceeded my jurisdiction in ordering it to disclose certain information.[3] The basis for the ministry's request for reconsideration is set out below. Briefly, the ministry submits that two small portions of the information that I ordered disclosed are, in fact, "police codes" that the appellant took off the table at mediation. The ministry says I should not have ordered those portions disclosed without first seeking its submissions on the application of section 14(1)(l) to that information.

[9] As part of my consideration of the ministry's reconsideration request, I asked the appellant whether she still seeks access to the two redactions in question. She confirmed that she does. I also invited the ministry to provide further representations on whether the redactions in question are exempt from disclosure under section 14(1)(l). The ministry provided representations.[4] Given the conclusions I have reached, it was not necessary for me to invite a response from the appellant.

[10] In this order, I find that the ministry has not established any basis upon which I should reconsider Order PO-4062, and I deny the reconsideration request.

DISCUSSION:

Information ordered disclosed in Order PO-4062

[11] A noted, in Order PO-4062, I upheld the ministry's exemption claims, in part. I found that some personal information relating to other individuals was exempt from disclosure under section 49(b). I found that the remainder of the withheld information was not exempt under that exemption or under section 49(a), in conjunction with section 20.

[12] I also found that some of the withheld information was solely about the appellant. I ordered the ministry to disclose this information to the appellant, as it was not exempt under either section 49(b) or section 49(a)/20, and was neither police codes nor non- responsive information, which the appellant had advised she was no longer seeking.

[13] The ministry's reconsideration request relates to two portions of this latter information, which it says are in fact police codes that were taken off the table at mediation and should not have been ordered disclosed. I will refer to this information as

[3] The ministry has already disclosed the information that is not subject to its reconsideration request.
[4] The ministry asked that portions of its representations stay confidential. Since these portions meet the confidentiality criteria set out in *Practice Direction 7*, I am not reproducing them in this order.

"the phrase at issue" or "the information remaining at issue". The same phrase at issue appears in two places in the records.

Reconsideration process

[14] The IPC's process is set out in section 18 of the *Code of Procedure* (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:
>
> (a) a fundamental defect in the adjudication process;
>
> (b) some other jurisdictional defect in the decision; or
>
> (c) a clerical error, accidental error or omission 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.

[15] The IPC has recognized that a fundamental defect in the adjudication process may include a failure to invite representations on an issue to be decided.[5] 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*.

[16] The reconsideration process set out in the *Code* is not, however, intended to provide parties with a forum to re-argue their cases. In 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*.[6] 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.*[7]

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[5] Orders M-774 and R-980023.
[6] (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).
[7] 1996 CanLII 11795 (ON SC), 28 O.R. (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.

[17] Senior Adjudicator Higgins' approach has been adopted and applied in subsequent IPC orders.[8] In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 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...

The ministry's reconsideration request

[18] The ministry asks that I reconsider my decision to order the disclosure of the information remaining at issue because that information and section 14(1)(l) of the *Act* were not within the scope of my inquiry. It appears that the ministry relies on both sections 18.01(a) and (b) of the *Code.*

[19] The ministry provided both confidential and non-confidential representations. In its non-confidential representations, the ministry submits that the phrase at issue appearing at pages one and six of the records qualifies as a police code. It argues that this information should not have been ordered disclosed because the appellant removed police codes from the scope of the appeal during mediation. The ministry notes that this is confirmed at page 2 of the Notice of Inquiry, which states in part:

> During mediation, the appellant advised that she was not seeking access to police codes severed pursuant to the section 14(1)(l) exemption … As a result, the information withheld by the police on the basis of section 14(1)(l) of the *Act* is not at issue in this appeal.

[20] The ministry cites the *Code,* which defines a Notice of Inquiry as "[a] document prepared by the IPC setting out the issues in an appeal and inviting representations on those issues." As section 14(1)(l) was not listed among the issues in the Notice of Inquiry, the ministry states it did not submit representations on this question. It claims that the IPC exceeded its jurisdiction by ordering the disclosure of information that the

[8] See, for example, Orders PO-3558-R and PO-3062-R.

ministry had withheld under section 14(1)(l).

[21] The ministry also notes that the IPC has regularly found police codes to be exempt under section 14(1)(l).[9] It cites the following description in Order MO-3650, in which the adjudicator upheld the Guelph Police Service Board's decision to withhold "police coding information":

> The Guelph police explained that it is their regular practice to withhold police coding information when responding to freedom of information requests, primarily to prevent those engaged in illegal activities from being able to track the status and activities of police and police employees. They also explained that if their coding systems were to become common knowledge, police activity could be more easily tracked by criminals and could reasonably be expected to facilitate the commission of an unlawful act or hamper the control of crime.

[22] In its confidential representations, the ministry explains why it believes disclosure of the information at issue could be expected to facilitate crime or harm police operations.

Analysis and findings

[23] Section 47(1) provides for a right of access to one's own personal information. Section 49(a) provides for an exemption for this right of access and reads:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > where section 12, 13, 14, 14.1, 14.2, 15, 15.1, 16, 17, 18, 19, 20 or 22 would apply to the disclosure of that personal information.

[24] The discretionary nature of section 49(a) ("may" refuse to disclose) recognizes the special nature of requests for one's own personal information and the desire of the legislature to give institutions the power to grant requesters access to their personal information.[10]

[25] The ministry says that the phrase in question is exempt under section 14(1)(l), which says:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,

[9] Order PO-2699 citing Order PO-2409
[10] Order M-352.

> facilitate the commission of an unlawful act or hamper the control of crime.

[26] In a long line of decisions, the IPC has accepted that police codes are generally exempt under section 14(1)(l).[11] Many of these orders have adopted the reasoning stated in Order PO-1665:

> In my view, disclosure of the "ten-codes" would leave [Ontario Provincial Police] officers more vulnerable and compromise their ability to provide effective policing services as it would be easier for individuals engaged in illegal activities to carry them out and would jeopardize the safety of OPP officers who communicate with each other on publicly accessible radio transmission space.

[27] As described above, the ministry submits that I should not have ordered the disclosure of information it describes as police codes given that 1) these were removed from the scope of the appeal at the mediation stage, and 2) the application of section 14(1)(l) was not listed as an issue in the Notice of Inquiry nor were submissions made on that issue. As I understand it, the ministry's argument is that my failure to notify the parties of an issue, thereby denying them the opportunity to address it, is a breach of procedural fairness and a fundamental defect in the adjudication process under section 18.01(a) of the *Code.* The ministry also submits that deciding an issue that was not listed in the Notice of Inquiry is a jurisdictional defect in my decision (section 18.01(b) of the *Code*).

[28] It is true that police codes were removed from the scope of the appeal at mediation and that section 14(1)(l) is not listed among the issues in the Notice of Inquiry.

[29] However, as I mentioned above, the ministry did not specify what information in the records it considered to be police codes. Each page of the records the ministry provided to the IPC features a list of exemptions it relied on in the margin, without further details. Of particular note here is that pages one and six, where the phrase at issue appears, each contain multiple severances of other information that clearly falls into the category of police codes. That information was taken off the table at mediation and I made no order in respect of it.

[30] However, the phrase at issue is not evidently a police code. In my view, the onus was on the ministry to clearly indicate which exemptions it had applied to which redacted portions. Where an institution chooses to list the claimed exemptions in the margins, as the ministry did here, there are cases where it may be obvious which exemptions it applied to which information. Even if an exemption claim is borderline or debatable, if it is clear what information the institution applied an exemption to, an

[11] See, for example, Orders PO-2209, PO-2339, PO-2409 and PO-3742 among others.

adjudicator will generally not interfere if the requester has said that they do not seek access to that type of information.

[31] However, where an institution marks exemptions the way the ministry did here, it runs the risk that it will not be clear to the adjudicator what information the institution withheld under a given exemption. As I stated, the ministry could have identified which portions of the records it was withholding as police codes under section 14(1)(l), but it did not do this. As there were multiple severances of information on pages one and six of the records, some of which clearly consisted of police codes as the IPC has considered them historically, I do not think the ministry should have assumed the IPC would know that the ministry viewed the phrase in question to be a police code.

[32] In my view, it would be prejudicial to a requester for an adjudicator to allow an institution to claim an exemption for a certain class of information (here, "police codes"), have the requester say that they do not wish to pursue access to that kind of information, and allow the institution to claim afterward that certain information falls in that category, where it does not. This is particularly true where the information at issue is the requester's own personal information.

[33] Such is the case here. The information at issue in the ministry's reconsideration request is a phrase relating to the appellant, and is her personal information. A phrase is not a "code" in the commonly understood sense of the word. In Order PO-3672, Senior Adjudicator John Higgins dealt with a similar matter and I find his comments helpful:

> …I find that the police codes in the records are exempt under section 49(a) in conjunction with section 14(1)(l). I note, however, that three severed items on page one of the records do not appear to be a "code" as they use normal English words, not numbers or abbreviations. I will order this information disclosed.

[34] In my view, given the ordinary meaning of the word "codes" and its interpretation in IPC jurisprudence,[12] the appellant could not have reasonably known that by removing "police codes" from the scope of the appeal, the phrase in question would be taken off the table. Simply put, the information in question is not information that was evidently "police codes severed pursuant to the section 14(1)(l) exemption" as noted in the Notice of Inquiry.

[35] Based on the reasoning above, I find there was no breach of procedural fairness. The ministry could have identified the specific information it withheld as "police codes" and did not do so. In view of that fact, and since the information at issue is not a police code for the reasons I explain below, the ministry's claim of procedural unfairness is without merit.

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[12] See also Order MO-3393.

[36] During the reconsideration process, I invited the ministry to explain how section 14(1)(l) applies to the information they now submit qualifies as a police code. The ministry submitted both confidential and non-confidential representations, and I have considered both in coming to my conclusions. In my view, the ministry has not established in any event that section 14(1)(l) is applicable in the circumstances.

[37] The ministry argues that police codes are regularly exempt under section 14(1)(l) as information that assists officers during the course of their duties and says that disclosure could reasonably be expected to harm law enforcement activities. I accept that this office has consistently found that police codes are exempt under section 14(1)(l). However, this is not the question at issue.

[38] The ministry acknowledges in its representations that "police codes more commonly include information such as ten codes or area codes;" however, it does not explain how the phrase in question amounts to a code. A code, in the ordinary sense, consists of letters, numbers and/or symbols that are assigned a different meaning. While I do not discount the possibility that a phrase or a series of words could constitute a code, I cannot make such a finding based on the ministry's representations or my review of the records at issue.

[39] I have also considered whether the information at issue is exempt under section 14(1)(l), even if it is not a "police code." I have carefully considered the ministry's confidential representations, which elaborate on the ministry's position that the phrase at issue is exempt under section 14(1)(l). While the ministry submits that certain harms may come to pass if the information at issue is disclosed, its submissions on this point are, in my view, conclusory and speculative. The ministry also provides examples to support its position, but those examples are not analogous to the facts before me. Whether information of a similar type might be exempt in another context is a question to be decided when that case presents itself – that is, on a case-by-case basis. However, in the particular circumstances of this appeal and considering the specific information at issue in the records, the ministry's representations and the surrounding circumstances do not convince me that disclosure of the information in question could reasonably be expected to facilitate an unlawful act or hamper the control of crime within the meaning of section 14(1)(l).

[40] In conclusion, based on the evidence before me, I am not satisfied that the information at issue in this reconsideration order amounts to a "police code" or is otherwise exempt under section 14(1)(l).

[41] Finally, I will briefly address the ministry's submission that I exceeded my jurisdiction by ordering the disclosure of information that was not listed as being at issue in the Notice of Inquiry. In my view, this argument is without merit for reasons similar to those above addressing the alleged breach of procedural fairness. In any event, at the reconsideration stage, I gave the ministry the opportunity to make representations on whether the phrase at issue would be exempt under section

14(1)(l), and have considered those representations in coming to my decision in this reconsideration order.

[42] In sum, I have considered the ministry's reconsideration request and representations and I find it has not established grounds for reconsideration under section 18.01(a) or (b) of the *Code.* Finally, while the ministry has not argued that section 18.01(c) is applicable in this case, I have considered it and found there was no error or omission in the order and, in particular, in ordering the disclosure of the phrase at issue.

[43] For the above reasons, I deny the ministry's reconsideration request and affirm the order provisions in Order PO-4062. In light of the elapsed time since the original order, I have adjusted the timeline for disclosure below.

ORDER:

1. I deny the reconsideration request and order the ministry to disclose the information at issue to the appellant by November 17, 2021.

Original signed by
Gillian Shaw
Senior Adjudicator

October 18, 2021