

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4154-R

Appeal MA19-00811

Order MO-4134

Ottawa Police Service

January 26, 2022

Summary: The appellants requested a reconsideration of Order MO-4134. In this Reconsideration Order, the adjudicator finds that the appellants did not establish that grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Order MO-4134 and denies the reconsideration request.

Statutes Considered: IPC *Code of Procedure*, sections 18.01 and 18.02.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, 1989 CanLII 41 (SCC).

Orders Considered: Orders MO-2227, MO-4134, PO-2538-R and PO-3062-R.

OVERVIEW:

[1] The Ottawa Police Service received identical requests from each of two appellants¹ under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the following information:

¹ The appellants are known to one another and the police combined the two requests for processing purposes. The appellants submitted joint representations in the appeal.

..all types of communications between the Ottawa Police and [named organisation] employees who worked on the occurrence file [specified occurrence number] concerning myself - I would like all forwards, replies, and reply-alls (including dates of February 14, 2019 to July 19, 2019). I would like all memos, notes, documents, emails, texts, voicemails, transcripts, or

Any other information leading to or pertaining to the following:

Filing of occurrence [specified occurrence number], All communications surrounding the investigation surrounding firearm related fax, their communications to the RCMP concerning this matter. All notes, records of documented conversations between [named officers], Freedom of Information Supervisor [named individual], [named officer] advising [named organisation] to file suspicious occurrence.

...

I would also like a confirmation of email properties of each those emails to confirm information sent, received and modified.

[2] After notifying an individual whose interests may be affected by the disclosure of the requested information (the affected party), and receiving their position on disclosure, the police issued an access decision. In their decision, the police granted partial access to the requested information, relying on section 38(b) (personal privacy) of the *Act* to deny access to the portion they withheld.

[3] The appellants appealed the police's decision.

[4] At mediation, the police issued a supplementary decision letter disclosing some additional information to the appellants, but maintained their reliance on section 38(b) of the *Act* to deny access to the portions they withheld.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[6] I decided to conduct an inquiry and representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction Number 7*.

[7] During the course of the inquiry, the notified affected party consented to the disclosure of additional information to the appellants. The police ultimately issued a supplementary decision letter and disclosed this information, which included the affected party's name and title, to the appellants. Also in the course of the adjudication, the appellants raised allegations of bias against me and/or the IPC. Accordingly, I added bias as an issue to be addressed by the appellants in the appeal.

[8] In Order MO-4134, I upheld the police's decision to withhold some information but ordered other information to be disclosed to the appellants. I also found that the appellants had failed to lead sufficient evidence to support an allegation of bias against myself or the IPC. Of the information in 42 pages of records only minimal information pertaining to the affected party and another identifiable individual continued to be withheld.

[9] After I issued Order MO-4134, the appellants sought a reconsideration of that decision.

[10] In this order, I find that the appellants have not established any grounds for reconsidering the order. The request for reconsideration is denied.

DISCUSSION:

Reconsideration criteria and procedure

[11] This office's reconsideration criteria and procedure are set out in section 18 of the *Code of Procedure*. 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.

[12] 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*.² 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,

² 1989 CanLII 41 (SCC).

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 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] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.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 *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...

Reassertion of allegation of a reasonable apprehension of bias

[14] At various times throughout the processing of their appeal the appellants raised allegations of bias against me and/or the IPC. As set out in Order MO-4134, when asked to provide representations on the issue of bias in the Notice of Inquiry I sent them, the appellants declined. Although largely successful on their appeal, the appellants have again raised an allegation of bias in their reconsideration request.

[15] As I wrote in Order MO-4134, the Ontario Court of Appeal noted that "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."⁵ The onus of demonstrating bias lies on the person who alleges it, and mere suspicion is not enough.

[16] However, actual bias need not be proven. The test is whether there exists a "reasonable apprehension of bias."

³ 1996 CanLII 11795 (Div. Ct.).

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

⁵ *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.) at paragraph 40, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at paragraph 71.

[17] That said, bias, or any reasonable apprehension of bias, would be a ground for reconsidering Order MO-4134. It would also be a ground for my recusing myself and the reconsideration request being assigned to another adjudicator.

[18] In Order MO-2227, Senior Adjudicator John Higgins, in addressing an allegation of bias against this office, explained the test as follows:

A recent statement of the law by the Supreme Court of Canada concerning allegations of bias against an adjudicator is found in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In that decision, the court stated:

In Canadian law, one standard has now emerged as the criterion for disqualification. The criterion, as expressed by de Grandpre J. in *Committee for Justice and Liberty v. National Energy Board*, supra, at p. 394, is the reasonable apprehension of bias:

...the 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.

...

The grounds for this apprehension must, however, be substantial, and I ... refuse to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience". [Emphasis added.]

[19] In support of their renewed allegation of bias, amongst other things, the appellants assert that I considered the allegation of bias made against me, that delays in processing the appeal were unreasonable, the conduct of IPC staff caused them concern and that I inappropriately focused on the contents of the facts in the appeal.

[20] It is generally established that a complaint of bias must be made to the adjudicator so the adjudicator may decide whether or not to disqualify himself or herself. If the adjudicator declines to do so it is to be presumed he or she will give a

reason and in that event the question of bias may come before a Court, if necessary.⁶ If the appellants had concerns about IPC staff they should have been raised at the time so that they could be addressed. As I wrote at paragraph 18 in Order MO-4134 the time to raise an allegation of bias is at the earliest possible instance. It is at that time the allegation can be properly addressed and determined.

[21] In the proceedings before me the appellants were provided ample opportunity to argue all the matters at issue in the appeal, to provide any materials they wished to rely upon and to respond to any matter raised by the other parties. This included the appellants' challenge to an extension of time that I granted for the delivery of representations by the affected party.

[22] The fact that the appellant disagrees with my findings in Order MO-4134 is not evidence of a reasonable apprehension of bias on my part. Furthermore, neither procedural rulings "against" a party, nor an order dismissing an appeal, are, in and of themselves, evidence of bias.⁷

[23] I find, therefore, that the appellant has fallen well short of demonstrating a reasonable apprehension of bias.

The request to reconsider Order MO-4134 on the basis of section 18 of the IPC Code of procedure

[24] The appellants provided lengthy representations in support of other grounds for their reconsideration request. I have reviewed them but will not set them out in detail here. I find that the appellants arguments related to my Order MO-4134 are a clear attempt to re-argue the appeal. The substance of the arguments the appellants make on this reconsideration request are ones that they made, or could have made to me in the adjudication of the appeal⁸. To the extent that the appellants have provided new information, this also is not a basis for reconsidering my decision. 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. In any event, I am not satisfied that any of the material provided would alter my determinations in Order MO-4134, or otherwise be a ground for reconsidering my order.

[25] While the appellants may disagree with my findings in Order MO-4134, they have not established that there is a fundamental defect in the adjudication process; some other jurisdictional defect in the decision; or a clerical error, accidental error or omission or other similar error in the decision. I find that the appellants have not established any

⁶ See in this regard the discussion at paragraph 15 of *Mary-Helen Wright Law Corporation v British Columbia (Human Rights Tribunal)*, 2018 BCSC 912; *Envirocon Environmental Services, ULC v Suen*, 2018 BCSC 1367 at paragraph 87 and *Arsenault-Cameron v. Prince Edward Island*, 1999 CanLII 641 (SCC).

⁷ *C.S. v. British Columbia (Human Rights Tribunal)*, 2017 BCSC 1268 at paragraph 164, affirmed 2018 BCCA 264.

⁸ This would have included submissions in support of their bias allegation.

of the grounds upon which I may reconsider Order MO-4134.

[26] Accordingly, the appellants' reconsideration request is denied.

ORDER:

The appellants request to reconsider Order MO-4134 is denied.

Original Signed By: _____

Steven Faughnan

Adjudicator

January 26, 2022