Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4271-R

Appeal PA19-00149

Ministry of the Attorney General

Order PO-4222

June 27, 2022

Summary: The appellant requested a reconsideration of Order PO-4222 which disposed of the reasonable search issue raised by a decision of the Ministry of the Attorney General (the ministry). The appellant had made a request under the *Act* to the ministry for records relating to correspondence he had sent to the ministry and also records referred to in a newspaper article by the Toronto police. The ministry disclosed information to the appellant but the appellant argued that additional responsive records should exist. In Order PO-4222, the adjudicator partly allowed the appeal and ordered that the ministry conduct a further search for certain records. The appellant requested a reconsideration of Order PO-4222 on the basis of that there was a breach of procedural fairness, an affected party had not been notified and that the adjudication of the appeal had been an abuse of process. In this reconsideration order, the adjudicator finds the appellant has not established any of the grounds to reconsider Order PO-4222 and dismisses the request.

Order Considered: Orders PO-2538-R, PO-3062-R, and PO-4222.

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 order addresses the appellant's request for reconsideration of Order PO-4222.

[2] Order PO-4222 arose from an appeal of the Ministry of the Attorney General's (the ministry's) decision in response to a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The appellant's request was for correspondence he had sent to the ministry and records referred to by the Toronto police in a newspaper article. The ministry granted partial access to the responsive records, withholding information under the exemptions set out in sections 13(1) (advice and recommendations) and 19 (solicitor-client privilege) of the *Act*. Also in its decision, the ministry noted that court records are not in the ministry's custody or control, and are therefore not subject to the *Act*. The ministry further advised the appellant that these records may be accessible from the originating courthouse and provided their contact information. Lastly, the ministry referred the appellant to the Archives of Ontario for further responsive records.

[3] The appellant appealed the ministry's decision to the Information and Privacy Commissioner of Ontario (the IPC). At adjudication, the sole issue before me was whether the ministry had conducted a reasonable search for records responsive to the appellant's request as the appellant alleged that additional records should exist.

[4] After conducting an inquiry, I found the following in Order PO-4222:

- The ministry's search for records relating to the appellant's correspondence was reasonable.
- The ministry's search for copies of the informations, the Canada wide warrant and indictments was not reasonable and I ordered the ministry to conduct another search.

[5] The appellant asks that I reconsider Order PO-4222 on the basis that an affected party was not notified; a breach of procedural fairness occurred during the inquiry into the appeal and there has been an abuse of process denying his right of access under the *Act*. Following receipt of the appellant's reconsideration request, I informed the ministry of the request but determined that I did not need to provide the ministry with an opportunity to submit representations in response.

[6] In this order, I deny the appellant's reconsideration request as he has not established any of the grounds in section 18.01 of the IPC's *Code of Procedure* (the *Code*).

DISCUSSION:

[7] The sole issue to be decided in this decision is whether there are grounds under section 18.01 of the *Code* to reconsider Order PO-4222.

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

[9] Section 18.01 says:

> 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 omission or other similar error in the decision.

[10] Past IPC orders have explained that an adjudicator is *functus* unless the party requesting the reconsideration (in this case, the appellant), establishes one of the grounds in section 18.01 of the *Code*.[1] *Functus officio* is a common law principle, which means that once a matter has been determined by a decision-maker, he or she generally has no jurisdiction to further consider the issue. However, the *Code* provisions in section 18.01 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.[2]

Appellant's reconsideration request

Breach of procedural fairness

[11] The appellant submits that there was a breach of procedural fairness in relation to both him and the ministry when I did not provide the ministry with the appendices to his representations during my inquiry into the appeal. The appellant submits that in Order PO-4222, while I addressed the possible breach of his procedural fairness rights, I did not address any breach of the ministry's procedural fairness rights. The appellant states:

> Procedural fairness is owed to both parties. In this case, it was both the ministry and the appellant that were owed this, and the ministry, in not having access to the full case that had to be met, was the party that was denied that fairness, which renders the entire process unfair to both parties.

[12] The appellant submits that if his entire submissions had been provided to the ministry to provide representations then the ministry's reply representations would have been "…differently framed." The appellant alleges that the ministry's reply representations would have provided a more fulsome response to the questions and concerns that he raised in his representations. The appellant submits that he is owed this response from the ministry and the ministry was entitled to know the full extent of

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[1] See, for example, Orders MO-2904-R, MO-4042-R, and MO-4057-R.
[2] Order PO-2879-R.

the appellant's arguments. And because I denied both parties what they were entitled to during the adjudication of the appeal, this is a ground for reconsideration of Order PO-4222.

An affected party was not notified

[13] The appellant submits that the Archives of Ontario (the Archives) should have been given notice as an affected party in the appeal and should have been provided with an opportunity to submit representations.

[14] The appellant submits that he seeks records predating 2018, that the Archives takes the position that it does not have these records and that the ministry also takes the position that it does not have those records. The appellant submits that the Archives should have been asked to submit representations during the inquiry on the issue of the ministry's search for responsive records. The appellant appears to argue that the Archives should have been given an opportunity to respond to the ministry's position that there may be responsive records relating to the appellant in the Archives' record holdings.

[15] The appellant submits that when he submitted a request to the Archives (at the ministry's suggestion) for ministerial records relating to the passing of political control of the Liberal Party to the Conservative party, he was told by the Archives of Ontario that the records he seeks are too recent to be in the Archives' record holdings and would be found in the ministry's off-site storage facilities. The appellant goes on to note that there are no relevant ministry records at the Archives.

[16] Lastly the appellant submits that following receipt of Order PO-4222 he again contacted the Archives and was told that he would need the transfer numbers and temporary box numbers of any records sent to the Archives by the ministry.

[17] The appellant submits that even though he brought this issue to my attention during the inquiry, this issue has not been resolved by Order PO-4222. Accordingly, as I did not provide the Archives with an opportunity to address the ministry's position, the appellant argues that this is a ground for reconsideration.

Abuse of process amounting to denial of access under the Act

[18] The appellant submits that following receipt of Order PO-4222 he sought, from the Legislative Assembly, a constituency inquiry into the expunging and removal of ministerial records by the Conservative government in 2018. In reply, the appellant states that he received a report from Andrea Horwath, MPP for Hamilton Centre and leader of the Official Opposition, stating that there are "no Legislative Assembly protocols with respect to the archiving or purging of government Ministerial records on transfer of power".

[19] Further the appellant notes that the report states that the IPC "did not challenge

the accuracy of the Ministry's statement, suggest that its practices are contrary to FIPPA requirements, or ask the Ministry to produce a policy document."[3]

[20] The appellant submits that the report identifies what he calls "gaps and omissions" in the adjudication process that he argues require a reconsideration of Order PO-4222 and a further search of the ministry's off-site storage facilities.

[21] The appellant, under this ground for reconsideration, also identifies these other reasons why Order PO-4222 should be reconsidered:

- The ministry failed to provide evidence of the searches conducted for its alleged searches in 2019 and 2021.
- Other decisions of the IPC have required email, database and hard drive searches and the appellant reasonably expected that similar searches would have been ordered in Order PO-4222.
- Adjudicators in past decisions required institutions to conduct interviews with staff members who conducted the search. In the inquiry into this appeal, the appellant provided the names of ministry staff and interviews should have been required from those staff members.
- The appellant's reply representations were not provided to the ministry for reply and they were "studiously minimized" in Order PO-4222, whereas the ministry's positions were quoted at length and the appellant's replies given no comparable weight.

[22] The appellant asks that Order PO-4222 be designated as an interim order and have order provisions similar to a "standard order" by the IPC and he provides a template for an order provision requiring the ministry to provide me with representations regarding its additional search for records.

Analysis and finding

[23] Based on my review of the appellant's representations, I find that he has not established that there are any grounds under section 18.01 of the *Code* to reconsider Order PO-4222.

[24] The reconsideration process set out in the IPC's *Code* is not intended to provide parties with a forum to re-argue their cases.

[25] In Order PO-2538-R, the adjudicator reviewed the case law regarding an

[3] I note that while the appellant quotes from this "report", he did not provide a copy of it to the IPC. It appears the appellant provided a copy of Order PO-4222 to the Legislative Assembly as part of his "constituency inquiry". The IPC was also not contacted by the Legislative Assembly about Order PO-4222 or the appeal.

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 reconsideration, the adjudicator 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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> 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.

[26] This approach has been adopted and applied in subsequent orders of this office. For example, in Order PO-3062-R, an adjudicator was asked to reconsider her finding that the discretionary exemption did not apply to information in records at issue. 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[.]

[27] I agree with the approach in the above-referenced decisions. In the present circumstances, I find that all of reasons identified by the appellant as to why I should grant his reconsideration request are attempts to reargue the same issues in the appeal.

[28] The appellant's ground that there was unfairness to the ministry in its not being provided with the appellant's appendices was raised during the inquiry into the appeal. As the appellant notes, I addressed this in paragraphs 50 and 51 of Order PO-4222 and found that there was no breach of procedural fairness. Moreover, I found that neither party's procedural fairness rights were breached during the adjudication of the appeal when I stated in paragraph 51:

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[4] [1989] 2 SCR 848 (S.C.C.).
[5] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

> Accordingly, given the fact that the parties were given an opportunity to have their cases heard and to respond to one another's arguments, I find that I was not unfair to either of the parties.

[29] Had the ministry disagreed with my finding that its procedural fairness had not been breached, I assume the ministry would have submitted a reconsideration request of its own. It did not. The appellant, through his reconsideration request, is again arguing that there was a breach to his procedural fairness rights because he was denied the ministry's response to all the allegations in his representations. The appellant would like a reconsideration so that the ministry would be required to respond to the appellant's representations that he made during the inquiry.

[30] Section 52(13) of the *Act* states, in part, "…no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made."[6] While section 52(13) is tempered by the parties' right to procedural fairness in an appeal, I find that there was no unfairness to the parties' rights when I decided that I did not need the ministry to comment on the appellant's appendices. Accordingly, I find that this is not a fundamental defect in the adjudication process nor any other ground to reconsider Order PO-4222 and I decline to reconsider the order on this basis.

[31] The appellant's argument regarding the Archives not being provided an opportunity to participate in the appeal as an affected party could be characterized as a fundamental defect in the adjudication process under paragraph (a) of section 18.01. However, the appellant's arguments regarding the Archives are the ones he raised during the inquiry and I addressed these same arguments in Order PO-4222 at paragraph 62. The appellant's submissions in this regard are substantially similar to those arguments raised during the inquiry as he disagrees with my finding regarding this issue in Order PO-4222. My decision not to solicit representations from the Archives was one I was entitled to make in controlling the process before me. I made no findings against the Archives and it was my view that there was no reason to provide them with an opportunity to respond to the ministry's representations. I find that there was no fundamental defect in the adjudication process and the appellant has not established that this is a ground to reconsider Order PO-4222.

[32] The appellant's final ground for reconsideration is that there were gaps in the adjudication process which he submits were highlighted in the response the appellant received regarding his request for a constituency inquiry. The appellant's submissions in this regard do not support his position that there was a fundamental defect in the adjudication process under paragraph (a) of section 18.01. Instead, the appellant is

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[6] Section 52(13) of the *Act* states in full, "The person who requested access to the record, the head of the institution concerned and any other institution or person informed of the notice of appeal under subsection 50(3) shall be given an opportunity to make representations to the Commissioner, but no person is entitled to have access to or to comment on representations made to the Commissioner by any other person or to be present when such representations are made."

attempting to reargue his position that the ministry is being untruthful regarding responsive records being potentially available at the Archives. This is the same argument that he raised during the inquiry which I dealt with in Order PO-4222. I decline to reconsider Order PO-4222 on this basis.

[33] Finally, the appellant submits that Order PO-4222 was deficient as it was not an interim order and it did not contain order provisions similar to past IPC decisions on similar issues. The appellant submits that Order PO-4222 should be reconsidered on this basis. This argument is not a ground for reconsideration under paragraphs (a), (b) or (c) of section 18.01. There was no fundamental defect in the adjudication process and there is no jurisdictional defect in the decision. Lastly, I did not make an accidental error or omission in deciding that Order PO-4222 was a final decision nor did I err in not including other order provisions in my decision. I decline to reconsider Order PO-4222 on this basis.

ORDER:

The appellant's reconsideration request is denied.

Original Signed by: June 27, 2022
Stephanie Haly
Adjudicator