Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER PO-4273-R

Appeal PA22-00222

Ministry of Education

Order PO-4259

June 29, 2022

Summary: The Ministry of Education (the ministry) requested a reconsideration of Order PO-4259. That order involved an appeal from the ministry's decision to withhold nine stakeholder records requested under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The ministry decided to withhold the responsive records under the mandatory exemption at section 12(1) (Cabinet records) of the *Act,* and in part under the mandatory exemption at section 21(1) (personal privacy). In Order PO-4259, the adjudicator found that the ministry failed to establish that section 12(1) applies to the records, but upheld the ministry's decision to withhold most of the personal information found in three of the nine records. As a result, she ordered the ministry to disclose the records to the appellant, except for the portions that she found to be exempt under the personal privacy exemption at section 21(1).

The ministry requested a reconsideration of Order PO-4259, on the basis of section 18.01(a) (fundamental defect in the adjudication process) of the IPC's *Code of Procedure*. In this Reconsideration Order, the adjudicator finds that the ministry has not established that there are grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4259, and denies the reconsideration request. As a result, she orders the ministry to disclose the records in accordance with Order PO-4259.

Rules Considered: IPC *Code of Procedure*, section 18.01.

Orders Considered: Orders PO-2538-R, PO-3062-R, and PO-4259.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.); *Grier v. Metro International Trucks Ltd.*, (1996), 28 O.R. (3d) 67 (Ontario Divisional Court).

OVERVIEW:

[1] The Ministry of Education (the ministry) requests a reconsideration of Order PO-4259. In this reconsideration order, I will explain why I will not reconsider Order PO-4259.

[2] In the appeal resolved by Order PO-4259, the request made to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) was for the submissions of nine specified stakeholders made during the 2018 public consultation about public education. The ministry withheld the records in full, under the introductory wording of the mandatory exemption at section 12(1) of the *Act* (Cabinet records).[1] I did not uphold the ministry's claim of section 12(1) in Order PO-4259, and as a result, I ordered the ministry to disclose the records to the appellant, without certain exempt *personal information*[2] found in some of the records.

[3] After I issued Order PO-4259, the ministry requested a reconsideration of the order, citing section 18.01(a) (fundamental defect in the adjudication process) of the IPC's[3] *Code of Procedure* (the *Code*).

[4] I granted the ministry's request for an interim stay of Order PO-4259, and invited the ministry and the appellant to provide representations about granting a full stay.

[5] In this reconsideration order, I find that the ministry has not established a ground for reconsideration under section 18.01 of the *Code*. Therefore, I have determined that it is neither necessary to share the ministry's representations requesting a reconsideration with the appellant, nor to consider granting a full stay of Order PO-4259 pending the resolution of the reconsideration request. I deny the reconsideration request, lift the interim stay and order the ministry to comply with Order PO-4259.

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[1] The ministry later claimed the mandatory exemption at section 21(1) (personal privacy) over portions of three of these records, a claim which I upheld in part. An affected party provided consent to the release of their personal information found in one of the records, so this personal information could no longer be withheld under the personal privacy exemption at section 21(1) of the *Act*. The ministry has not asked for a reconsideration of that aspect of Order PO-4259.

[2] As the term "personal information" is defined in section 2(1) of the *Act*; I found this information to be exempt under section 21(1) of the *Act*.

[3] Information and Privacy Commissioner of Ontario.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Order PO-4259?

[6] The only issue to be decided is whether the ministry has established that there are grounds under section 18.01 of the *Code of Procedure* to reconsider Order PO-4259.[4]

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

> 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.

[8] Past IPC orders have explained that an adjudicator is *functus* unless the party requesting the reconsideration (in this case, the ministry), establishes one of the grounds in section 18.01 of the *Code*.[5] *Functus officio* is a common law principle, and 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 reflect the common law, which acknowledges the ability of a decision-maker to re-open a matter to reconsider it in narrow circumstances.[6]

[9] The ministry relies on section 18.01(a) of the *Code*.

[10] Section 18.01(a) 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. Past orders have found that various breaches of the rules of natural justice respecting procedural fairness will qualify as a fundamental defect in the adjudication process for the purpose of section 18.01(a) of the *Code*.[7] Examples of such breaches would include failure to notify an affected party[8] or to invite sur-reply representations where new

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[4] I advised the appellant in a letter dated June 8, 2022 that I had decided to grant the ministry's request for an interim stay, and in a letter dated June 9, 2022 addressed to the ministry and the appellant, I advised that I had granted the interim stay.
[5] See, for example, Orders MO-2904-R, MO-4042-R, and MO-4057-R.
[6] Order PO-2879-R.
[7] Order PO-4134-R.
[8] Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

issues or evidence are provided in reply.[9]

The ministry's reconsideration request

[11] In seeking a reconsideration of Order PO-4259, the ministry submits that the following are fundamental defects in the adjudication process within the meaning of section 18.0(a) of the *Code*:

- the "failure to accord the ministry a right of sur-reply following the Court of Appeal's decision in connection with Order PO-3973" and
- my "misapprehen[sion]" of the ministry's position set out in the ministry's reply representations regarding the "balancing approach" discussed in Order PO-3973.

[12] I will discuss each of these reasons for seeking a reconsideration of Order PO-4259, in turn. Having said that, I note that they are related. Essentially, the ministry appears to take issue with what it sees as my reference to its reliance on a "balancing approach" to the interpretation section 12.

Lack of opportunity to provide representations after the Ontario Court of Appeal's decision regarding Order PO-3973 (the mandate letters order)

[13] To begin, it is useful to explain the history of Order PO-3973 (the mandate letters order). Order PO-3973 was issued on July 15, 2019. In that order, the former Information and Privacy Commissioner of Ontario found that Cabinet Office had not established that the Premier's mandate letters were exempt under the introductory wording of section 12(1) of the *Act*. The Divisional Court dismissed the Government of Ontario's (the government's) application for judicial review of the mandate letters order, and a majority of the Court of Appeal dismissed the government's appeal from the Divisional Court's decision. This had the effect of upholding the mandate letters order.

[14] The government then sought leave to appeal the Court of Appeal's decision, from the Supreme Court of Canada. The Supreme Court of Canada granted leave to appeal, but has not yet heard the appeal.

[15] When the parties made their representations in the appeal that I adjudicated, the Court of Appeal had not yet issued its decision in relation to the mandate letters order. I issued Order PO-4259 after the Court of Appeal released its decision in respect of Order PO-3973, but without seeking additional representations from the parties on the Court of Appeal's decision.

[16] At the Court of Appeal, Cabinet Office argued that the IPC erred by injecting a balancing test into its interpretation of section 12(1) of the *Act*. The majority of the

[9] Orders PO-2602-R and PO-2590.

Court of Appeal rejected that argument.[10]

[17] The ministry says that I made findings in paragraphs 23 and 27 of Order PO-4259 in relation to its reply representations. It also notes that, in its reply representations, it "reserve[d] the right" to provide further representations, if it was "necessary and appropriate in light of any . . . Court of Appeal decision in Order PO-3973." It argues that I should have offered it the opportunity to make additional submissions after the Court of Appeal released its decision. The passages that the ministry takes issue with are found in paragraphs 23 and 27 of Order PO-4259, which I will set out here, including the original footnotes:

> [23] I note the Ministry's reliance (in its reply representations) on the balancing approach set out in section 12(1), and set out in Order PO-3973:[11] "This case is about striking a balance...between a citizen's right to know what government is doing and government's right to consider what it might do behind closed doors" [emphasis in Order PO-3973].[12]"
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> [27] In the ministry's reply representations, it relies on the IPC's analysis in Order PO-3973 regarding the meaning of the term *deliberations*:
>
> > I would not limit the substance of deliberations...to records which permit accurate inferences to be drawn regarding discussion of the pros and cons of a course of action. In my view, the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process.

[18] The ministry then submits that:

- it was never provided an opportunity to provide further representations after the Court of Appeal decision was released on January 26, 2022,
- I invited the ministry to provide "sur-reply representations" on February 3, 2022 on the effect of the responses of three of the nine organizations that authored the responsive records, but did not invite representations on the Court of Appeal's decision at that time, and

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[10] *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, 2022 ONCA 74, paras 78- 87.

[11] The Ontario government is currently seeking leave to appeal the decision of the Court of Appeal (which dismissed an appeal from the Divisional Court, which had upheld the IPC's decision) to the Supreme Court of Canada. However, I have included the ministry's submission in relation to this order because it seeks to *rely* on this part of the analysis in it, notwithstanding the application for leave to the Supreme Court of Canada.

[12] The IPC was quoting with approval from a Nova Scotia case involving a substantially similar exemption, *O'Connor v. Nova Scotia, 2001 NSCA 132*.

- I then issued my decision on May 4, 2022, which was after the government filed its request for leave to appeal the Court of Appeal's decision regarding Order PO-3973 to the Supreme Court of Canada, but before the Supreme Court granted that leave on May 19, 2022.

[19] The ministry submits that it should have been provided the right to provide representations to state its position based on the Court of Appeal's decision. It does not explain whether or how the passages with which it takes issue (paragraphs 23 and 27) affected the result in Order PO-3973, or whether or how the Court of Appeal's decision factored into my analysis. The ministry mainly appears concerned that I misstated its position, and/or that its position might have changed, or been expressed differently, following the Court of Appeal's decision. It also points out that its submissions on Order PO-3973 were in response to the appellant's own submissions in relation to that order.

Analysis/findings

[20] As mentioned, Order PO-3973 (the mandate letters order) was issued on July 15, 2019. In that order, the former Information and Privacy Commissioner of Ontario found that Cabinet Office had not established that the Premier's mandate letters were exempt under the introductory wording of section 12(1) of the *Act*. The government's application for judicial review of the mandate letters order was dismissed by the Divisional Court, and the Court of Appeal, in a majority judgment, upheld the Divisional Court. The appeal to the Supreme Court of Canada has not yet been heard.

[21] In January 2020, I began the inquiry into the present appeal that was resolved by Order PO-4259. The Notice of Inquiry that I sent to the ministry cited many past IPC orders, but Order PO-3973 (the mandate letters order) was not one of them. While the IPC's adjudication of appeals may be affected by parallel court processes if, for example, the same records or *type* of records being withheld under the same provisions of the *Act* are the subject of a court process,[13] that was clearly not the case here.

[22] Rather than my inviting comment on Order PO-3973 in the inquiry resolved by Order PO-4259, it was the *ministry* that cited Order PO-3973 in its representations. It did so in its initial representations (citing Order PO-3973, amongst other orders, after setting out the test for section 12(1)), and then more explicitly at the reply stage.

[23] The appellant cited many IPC orders in its representations, but Order PO-3973 was not one of them. In my view, this undermines the ministry's present assertion that its reply representations during the inquiry included references to Order PO-3973 which "addressed arguments raised by the appellant in connection with Order PO-3973."

[24] For the purpose of considering the ministry's request for reconsideration of Order PO-4259, it is useful to examine the relevant portions of the ministry's reply representations. In its reply representations, the ministry said it would focus on two

[13] Since Order PO-3973 was issued, the IPC has issued several orders involving section 12(1) of the *Act*.

issues raised by the appellant, one of them being the appellant's "assert[ion]" about whether the circumstances were *rare and exceptional* such that the records could be exempt under section 12(1) without having been put before Cabinet or one of its committees. It is in this context that the ministry's comments about Order PO-3973 appear. I will include the two short paragraphs before the ministry's comments specifically discussing Order PO- 3973, for more fulsome context, here:

> ISSUE A: Rare and Exceptional Circumstances
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> 4. The appellant asserts that the lack of "rare and exceptional circumstances" within the meaning of Order P-72, means that the records at issue in this appeal are not subject to the exemption in subsection 12(1).
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> 5. The Ministry respectfully submits that a once-in-a-generation consultation on education in the province of Ontario, covering a wide range of topics, and resulting in over 72,000 stakeholder submissions, gives rise to such rare and exceptional circumstances.
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> 6. Order PO-3973 (recently upheld on judicial review by the Divisional Court: [citation omitted]), pending appeal to the Court of Appeal for Ontario), sets out a nuanced analysis of this issue, espousing "an approach that balances the competing interests at stake." Following paragraph 97, Order PO-3973 quotes with approval from *O'Connor v. Nova Scotia* [citation omitted]:
>
> > This case is about striking a balance…between a citizen's right to know *what government is doing* and government's right to consider *what it might do* behind closed doors [emphasis in Order PO-3973].
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> 7. "[W]hat the government is doing" is the subject of the decision, or the decision itself as communicated to the public. "[W]hat [the government] might do" is the substance of the deliberations. In paragraph 98 of that order, the analysis continues:
>
> > I would not limit the substance of deliberations…to records which permit accurate inferences to be drawn regarding discussion of the pros and cons of a course of action. In my view, the words of the exemption may extend more generally to include Cabinet members' views, opinions, thoughts, ideas and concerns expressed within the course of Cabinet's deliberative process.
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> 8. The records at issue in this appeal involve the results of consultations. Order PO-3973 recognized that the "results of any consultations" could be subject to the section 12 exclusion, at paragraph 119 . . . . [.]

[25] In my view, it is clear from the above wording, and the ministry's choice to rely on Order PO-3973, that whatever disagreement the ministry may have had with the reasoning in Order PO-3973, if any, it was *not* on the points that the ministry chose to highlight from that order in its reply representations.

[26] From what I have set out above, it is clear that the ministry was citing passages out of Order PO-3973 in support of its position that the nine records at issue in the appeal that I was adjudicating were exempt under section 12(1), despite not having been put before Cabinet or its committees. This assessment is consistent with a statement in the ministry's request for reconsideration: that in its reply representations, it "sought . . . to reference certain statements made by former Commissioner Beamish in [Order] PO-3973 in support of its arguments that the records in question would reveal the substance of future deliberations."

[27] I observe that in asserting a right to provide further representations on a Court of Appeal decision relating to Order PO-3973, the ministry stipulated that this right would depend on the circumstances: ". . . the Ministry . . .reserves the right to sur-reply should it be necessary and appropriate in light of . . . any Court of Appeal decision relating to Order PO-3973." While no party can "reserve the right" to make representations at a future date (it is up to the adjudicator to determine whether to invite additional representations), the ministry itself qualified this "right."

[28] In my view, the ministry has not adequately explained how it was a fundamental defect in the adjudication process when I did not provide the ministry with an explicit opportunity to comment on a Court of Appeal decision that *upheld* an order which the ministry *chose* to cite in the inquiry *in support of its position* that the nine records were exempt. I find no basis for concluding such an opportunity was required for procedural fairness to the ministry, in light of the ministry's reply representations, as set out above. Again, it was reasonable for me to conclude that by citing Order PO-3973, the ministry was relying on it.

[29] For these reasons, I am not satisfied that it was a fundamental defect in the adjudication process when I did not solicit the ministry's representations on the Court of Appeal's decision.

[30] I also note as an aside that, when I invited supplementary representations from the ministry on a different issue, it did not ask to make representations on the Court of Appeal's decision, which had been released by then.

[31] As mentioned, the ministry also points out that I issued Order PO-4259 after the government filed its request for leave to appeal the Ontario Court of Appeal's decision regarding Order PO-3973 to the Supreme Court of Canada, but before the Supreme Court granted that leave. Since leave has been granted, the ministry submits that the IPC "should defer any reliance on PO-3973."

[32] The Supreme Court of Canada has before it the issue of whether the mandate letters order should be upheld. The Supreme Court of Canada will not be considering whether the submissions of nine stakeholders made during a public consultation process are exempt under the introductory wording of section 12(1), or the evidence put forward by the Ministry of Education in the appeal that I adjudicated. The cases are factually distinct. I am not satisfied that there is any reason to have deferred my consideration of this appeal pending the Supreme Court's decision. I also observe that the ministry knew the mandate letters matter was before the courts and never asked me to place this appeal on hold pending the resolution of the mandate letters matter.

[33] I also disagree with the ministry that I relied on Order PO-3973. What I did was refer to the ministry's reliance on specific passages in Order PO-3973, and set out my reasons for not accepting the ministry's interpretation of those passages or their relevance to the facts before me.

[34] For these reasons, the ministry has not established that, in the circumstances, there was a fundamental defect in the adjudication of the appeal resolved by Order PO-4259 on the basis that I did not invite it to provide representations after the Court of Appeal issued its decision about Order PO-3973, or on the basis that I adjudicated the appeal while the mandate letters matter was before the courts.

The ministry's submission that I misapprehended its position

[35] The ministry also submits that I misapprehended its position, and that this was a fundamental defect in the adjudication process leading to Order PO-4259.

[36] More specifically, the ministry states that it did not, and does not, take the position that the "balancing approach" cited in Order PO-3973 from a Nova Scotia case ("*O'Connor*")[14] is the correct approach to the interpretation of the opening words of section 12(1) of the *Act*. The ministry sets out the reasons for its substantive position about the *O'Connor* approach, but for the purpose of this reconsideration request, it is not necessary for me to set out those arguments here. The ministry states that the Supreme Court of Canada will have to decide the issue of whether the *O'Connor* "balancing approach" mentioned in Order PO-3973 is the correct interpretive approach to be applied to section 12(1) of the *Act*.

[37] As I noted earlier, the ministry's reconsideration request contains a statement that, in its reply representations during the inquiry, it "sought . . . to reference certain statements made by former Commissioner Beamish in PO-3973 in support of its arguments that the records in question would reveal the substance of future deliberations." The ministry also re-states certain arguments found in specified paragraphs of its reply representations, and asserts that it "did not address in its reply representations the proper interpretative approach to section 12(1) of the *Act*."

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[14] *O'Connor v. Nova Scotia*, 2001 NSCA 132.

[38] The ministry submits that

> paragraphs 23 and 27 of the reasons, . . ., which may be construed incorrectly as the Ministry taking a position inconsistent with Ontario's position in PO-3973 and its appeals, should be reconsidered.

Analysis/findings

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

[40] 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*.[15] 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.*][16]
>
> 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.

[41] This approach has been adopted and applied in subsequent orders of the IPC.[17] 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[.]

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[15] [1989] 2 SCR 848 (S.C.C.).
[16] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).
[17] See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.

[42] I agree with this approach, and adopt it here.

[43] The ministry states that I made findings in paragraphs 23 and 27, when I noted the ministry's reliance, in its reply representations, on certain statements made in Order PO-3973. I disagree. In paragraphs 23 and 27 of Order PO-4259 I simply summarized paragraphs 6 and 7 of the ministry's reply representations, which I have set out above. To the extent that the ministry is asking me to change my assessment or summary of its position, that is not a basis for a reconsideration.

[44] The ministry also submits that paragraphs 23 and 27 of Order PO-4259 may be construed incorrectly as the ministry's taking a position inconsistent with the government's position in the mandate letter matter. To the extent that my summary of the ministry's reply representations, as set out above, may contradict (or appear to contradict) Cabinet Office's position in the mandate letters proceedings, that does not establish that there was a fundamental defect in my adjudication of the present appeal, particularly since the ministry has not explained whether or how any alleged misapprehension of its position on the "balancing approach" affected my findings.

[45] For these reasons, the ministry's reconsideration request is denied.

ORDER:

1. The ministry's reconsideration request is denied.

2. I lift the interim stay I granted on June 8, 2022 and order the ministry to disclose records 2, 4, 5, 6, 7, and 8, in full, and to disclose the portions of records 1, 3, and 9 that are not exempt under section 21(1) of the *Act* to the appellant by **August 3, 2022** but not before **July 29, 2022.** The ministry is to withhold *personal information* in records 1, 3 and 9, under the mandatory exemption at section 21(1) of the *Act*, except for the personal information directly relating to the author of record 3.

3. In order to verify compliance with this order, I reserve the right to require the ministry to provide me with a copy of the records sent to the appellant, under paragraph 2 of this order.

Original Signed by: June 29, 2022

Marian Sami
Adjudicator