

Information and Privacy Commissioner,
Ontario, Canada



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

RECONSIDERATION ORDER MO-4225-R

Appeal MA20-00086

The Corporation of the City of Brampton

Order MO-4156

July 19, 2022

Summary: The City of Brampton's former Chief Administrative Officer (CAO) requested a reconsideration of Order MO-4156 in which the adjudicator ordered the city to disclose his employment contract.

In this Reconsideration Order, the adjudicator denies the reconsideration request on the basis that the affected party has not established that grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Order MO-4156.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 11 and 16; the IPC *Code of Procedure*, section 18.01.(a), (b) and (c).

Orders and Investigation Reports Considered: Order P-1137.

Cases Considered: *Chandler v. Alberta Assn. of Architects*, (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.); *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, 2014 ONSC 3295 (CanLII); *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2956 (CanLII).

OVERVIEW:

[1] This reconsideration order addresses the affected party's request that I

reconsider Order MO-4156.

[2] An individual (the appellant in Order MO-4156) filed a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the City of Brampton (the city) for the employment contract (contract) of the city's CAO. At the time of the city's receipt of the request, the affected party was employed as the city's CAO.

[3] The city notified the affected party under section 21(1), and he objected to the disclosure of the contract. The city issued an access decision denying the appellant access to the contract, relying on the exemptions in sections 6(1)(b) (closed meeting) and 14(1) (personal privacy) of the *Act*. The appellant filed an appeal with the Information and Privacy Commissioner of Ontario (IPC). Mediation did not resolve the appeal and it was transferred to the adjudication stage in which an adjudicator may conduct an inquiry.

[4] I decided to conduct an inquiry into the issues remaining in dispute and invited the appellant, the city and the affected party to make representations, which they did. After considering the representations of the parties along with the contract itself, I issued Order MO-4156 where I found that the discretionary exemption at section 6(1)(b) (closed meeting) did not apply and went on to consider the city's claim that the personal privacy exemption under section 14(1) applied.

[5] I found that section 14(4)(a) applied to most of the information in the contract which describes the affected party's benefits and employment responsibilities. As such, the disclosure of that information would not be an unjustified invasion of personal privacy and the section 14(1) exemption does not apply. I ordered the city to disclose this information as the city had not claimed that any other exemption applied and I was satisfied that no mandatory exemption applied.

[6] The only information I found exempt under section 14(1) was the affected party's starting salary.

[7] I went on to consider the appellant's argument that the public interest override in section 16 applied to the salary information, and I found that it did. As a result, I ordered the city to disclose the entire contract to the appellant.¹

[8] The affected party filed a reconsideration request of Order MO-4156. In support of his request the affected party sent two emails to the IPC along with written submissions prepared by his lawyer. I will refer to these documents collectively as the affected party's submissions.

[9] The basis of the affected party's reconsideration request is that there was a fundamental defect in the adjudication of the appeal, and/or Order MO-4156 contains a

¹ But for the portion containing the affected party's home address, which the appellant did not seek.

clerical or accidental error.

[10] In this reconsideration order, I find that the affected party has not established grounds under section 18.01 of the *Code* for reconsidering Order MO-4156. Accordingly, the reconsideration request is denied and the interim stay of the order provision in Order MO-4156 is lifted. The city is again ordered to disclose the entire employment contract to the appellant, but for the portion containing the affected party's home address which the appellant did not pursue.

RECORD:

[11] The record at issue consists of a one-page cover letter signed by a city official and the affected party, attaching a three-page document entitled "Appendix A: Specified Terms and Conditions of Employment" signed by the affected party. I will refer to it as the "contract."

DISCUSSION:

Does the affected party's reconsideration request meet any of the grounds for reconsideration in section 18.01 of the *Code*?

[12] There is no express reconsideration power in the *Act*. The IPC's power to reconsider a decision is therefore limited to the grounds at common law, which are reflected in the IPC's reconsideration criteria and procedure set out in section 18 of the *Code*, which 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.

[13] The IPC has recognized that a fundamental defect in the adjudication process may include a failure to notify an affected party,² a failure to invite representations on

² Orders M-774, R-980023, PO-2879-R, and PO-3062-R.

an issue to be decided,³ or a failure to allow for sur-reply representations where new issues or evidence are provided in reply.⁴ 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*.

[14] Section 18.01(b) of the *Code* relates to whether an adjudicator has the jurisdiction under the *Act* to make the order in question. An example of a jurisdictional defect would be if an adjudicator ordered a body that is not an institution under the *Act* to disclose records.

[15] Previous IPC orders have held that an error under section 18.01(c) may include a misidentification of the "head" or the correct ministry,⁵ or another mistake that does not reflect the adjudicator's intent in the decision.⁶

[16] 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, 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*.⁷ 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, 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.*⁸

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.⁹ In Order PO-3062-R, for example, the adjudicator was asked to reconsider a finding that the discretionary exemption in section 18(1) of the *Freedom*

³ Orders M-774 and R-980023.

⁴ Orders PO-2602-R and PO-2590.

⁵ Orders P-1636 and R-990001.

⁶ Order M-938.

⁷ ([1989] 2 SCR 848 (*Chandler*)).

⁸ 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).

⁹ See, for example, Reconsideration Orders PO-3558-R and PO-3062-R.

of Information and Protection of Privacy Act did not apply to the information in the records at issue in that appeal. The adjudicator 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...

[18] As stated above, the affected party cites sections 18.01(a) and (c) in support of his reconsideration request and alleges that:

- I failed to consider material evidence as part of the "public interest" analysis,
- I failed to notify the city official who signed the contract about the appeal, and
- I failed to consider the possible application of the discretionary exemption at section 11 (economic and other interests).

Section 18.01(a) fundamental defect in the adjudication process

Allegation No. 1 – I failed to consider material evidence as part of the "public interest" analysis

[19] Section 16 of the *Act*, the "public interest override," provides for the disclosure of records that would otherwise be exempt under another section of the *Act*. It states:

An exemption from disclosure of a record under sections 7, 9, 9.1, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[20] For section 16 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the section 14(1) exemption.

[21] The affected party disagrees with my finding in Order MO-4156 that there is a compelling public interest in the disclosure of his starting salary identified in the contract and states:

The fact that some members of the public continue to circulate false allegations for political gain should not become the standard of which personal information is disclosed in the name of the public interest.

[22] The affected party asserts that "... questions and concerns relating to the city's

CAO selection process have been put to rest and are publicly available on local media reports.”

[23] The affected party alleges a fundamental defect occurred in that I failed to consider material evidence. The material evidence the affected party alleges that I failed to consider is an April 6, 2021 news article which reports that the Ombudsman Ontario (Ombudsman) dismissed two complaints related to the city’s hiring practices. The article submitted by the affected party states that the city and Ombudsman received several complaints alleging an abuse of process in hiring staff. The article indicates that the complaints were eventually dismissed.

[24] In his reconsideration submissions, the affected party says he “already shared with [the] IPC correspondence from the Office of the Ombudsman relating to the matter of the city’s CAO selection process.” However, the affected party did not produce a copy of the news article or any document originating from the Ombudsman during the inquiry.¹⁰

[25] The affected party also says that other concerns were raised by a “staff person” in 2021 which were “subsequently sent to local law enforcement, the Ontario Ombudsman, and Deloitte LLP” and also dismissed.

[26] Finally, in support of his position that a fundamental defect in the adjudication process occurred, the affected party repeats arguments he and the city made during the inquiry.

Decision and Analysis

[27] I have considered the affected party’s submissions and find that they do not establish a basis for reconsideration under section 18.01(a).

[28] In my view, the affected party seeks to re-argue the appeal or introduce new evidence in support of his position. My reasons for finding that the public interest override in section 16 applied to the affected party’s starting salary are found at paragraphs 81 to 86 of Order MO-4156.

[29] As I have stated above, the IPC’s reconsideration process, which is set out in section 18 of the *Code* and has been considered in many past orders, is not intended to provide parties with a forum to re-argue their cases or an opportunity to present new evidence. Section 18.02 of the *Code* provides that 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.

¹⁰ My November 12, 2020 letter addressed to the affected party inviting his representations during the inquiry included the following passage:

The representations you provide to this office should include all of the arguments, documents and other evidence you rely on to support your position in this appeal.

[30] In any event, I am not satisfied that the affected party's new evidence would have changed the result in Order MO-4156. I remain satisfied that there is compelling public interest in the disclosure of the affected party's salary information. As I noted above, this was the only information to which I found the public interest override applied; the other information in the contract was ordered disclosed because it was not exempt under section 14(1) to begin with.

[31] In considering whether there is a "public interest" in disclosure of the record, one asks whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.¹¹ The affected party does not, in his reconsideration submissions, suggest there is no relationship between the disclosure of his starting salary as the city's CAO and the city's operations.

[32] The affected party alleges that the appellant's interest in his salary information is motivated to advance private interests. However, even if the affected party were able to demonstrate that the appellant was motivated by private interests, if a private interest raises issues of more general application, the IPC may find that there is a public interest in disclosure.¹² I am not persuaded that this is a ground to reconsider my order.

[33] Finally, the affected party seeks to rely on evidence he did not provide during the inquiry. The affected party argues this evidence demonstrates that there is no compelling public interest in the disclosure of his starting salary. However, I remain satisfied that disclosing this information would add to the information the public has to express political opinion or make political choices.

[34] In the circumstances, I am unable to conclude that the Ombudsman's review provided another forum for the public interest considerations identified in this appeal to be addressed. In Order MO-4156, the public interest I identified included the public's right to know the affected party's starting salary, noting that "the salaries the city pays to its senior employees have been the subject of recent wide media interest." It is not clear to me that the specific matter of the affected party's starting salary was addressed by the Ombudsman or the other complaint processes referenced in the affected party's reconsideration representations.

[35] For the reasons stated above, I find that the affected party has failed to establish a basis for reconsideration under section 18.01(a).

Allegation No. 2 - I failed to notify the city official who signed the contract about the appeal

[36] The affected party submits that I failed to notify an affected party about the appeal. This is the individual who signed the contract. In paragraph 41 of Order MO-

¹¹ Orders P-984 and PO-2607.

¹² Order MO-1564.

4156 I stated:

...I reject the city's argument that the signature of the individual who signed the contract on its behalf constitutes this individual's personal information. This individual's signature appears in connection with their professional or official capacity with the city and thus cannot be said to reveal anything of a personal nature.¹³ As this information does not constitute the personal information of any identifiable individual, the exemption at section 14(1) cannot apply and I will order the city to disclose this information to the [appellant].

[37] The affected party argues that the individual who signed his contract should have been provided an opportunity to make representations during the inquiry and states:

[T]he IPC has a duty to ensure procedural fairness is provided to all parties potentially affected by an access to information request.

Decision and Analysis

[38] Section 39(3) gives the IPC the discretion to inform other parties that an appeal has been received if those parties have "an interest" in that appeal. This provision states:

Upon receiving a notice of appeal, the Commissioner shall inform the head of the institution concerned of the notice of appeal and *may also inform any other institution or person with an interest in the appeal*, including an institution within the meaning of the *Freedom of Information and Protection of Privacy Act*, of the notice of appeal. [Emphasis added]

[39] Although the IPC has discretion under section 39(3) as to whether to notify a person with an interest in an appeal, such discretion must be informed by the principles of natural justice.¹⁴ In some circumstances, the duty of procedural fairness requires that the IPC notify persons whose interests might be affected by the possible disclosure of the records in order to give them an opportunity to submit representations as to whether those records should be disclosed.¹⁵

[40] I have considered the affected party's argument, and I am satisfied that in the circumstances of the appeal, procedural fairness did not require that the IPC notify the city official who signed the contract. As noted above, this individual's signature

¹³ Order MO-4060.

¹⁴ *Ministry of Community Safety and Correctional Services v. Information and Privacy Commissioner*, 2014 ONSC 3295 (CanLII).

¹⁵ *Ibid.* See also *Northstar Aerospace v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2956 (CanLII).

appeared in an official or professional context and thus could not be described as constituting "personal information" under section 2(1). In my view, the point was not even arguable. There was no defect in my not notifying this official of the appeal.

[41] Accordingly, I find that the affected party's argument does not establish a basis of reconsideration under section 18.01(a).

Section 18.01(c) Clerical error, accidental error or omission or other similar error in the decision

Allegation No. 3 - I failed to consider the possible application of the discretionary exemption at section 11 (economic and other interests)

[42] The affected party says that I should have considered the possible application of the discretionary exemption under section 11 (economic and other interests) despite the city not citing the exemption in its access decision to the appellant.

[43] In paragraph 54 of Order MO-4156, I noted that, during the inquiry, the city mentioned that disclosure of the severed information may prejudice future city negotiations with job candidates. I also noted (in a footnote) that the city did not claim that the discretionary exemption at section 11 applies in the circumstances of this appeal, which is what this particular submission of the city's appeared to be directed at.

[44] The affected party submits that "the IPC has a duty to ensure that all identified sections of *MFIPPA* receive due consideration when rendering a decision."

Decision and Analysis

[45] I have considered the affected party's evidence and I am satisfied that no error or omission occurred which would establish a basis of reconsideration under section 18.01(c).

[46] The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head "shall" refuse to disclose a record if the record qualifies for exemption under that particular section. A discretionary exemption uses the permissive "may." It is important to note that the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these discretionary exemptions.¹⁶

[47] Given that the purpose of the discretionary exemption is to protect the city's interests, and not those of the affected party, I am satisfied that no error or omission arose in my not considering the possible application of section 11 during the inquiry. The city did not cite section 11 in its access decision to the appellant or during the inquiry. During the inquiry, the affected party had an opportunity to provide

¹⁶ Order PO-3063.

representations and did not take the position that any exemption but the mandatory personal privacy exemption under section 14(1) applied to the contract. In rare cases, the IPC can entertain an affected party's raising a discretionary exemption.¹⁷ However, the affected party did not raise the section 11 exemption during the inquiry and it is too late for him to do so now.¹⁸

[48] Having regard to the above, I find that the affected party has failed to establish a ground for reconsideration under section 18.01(c) of the *Code* on the basis that section 11 was not considered in Order MO-4156.

Summary of my reconsideration findings

[49] I have considered the affected party's evidence and argument and conclude that he has not established a fundamental defect in the adjudication process within the meaning of section 18.01(a) of the *Code*. Nor has the affected party established that Order MO-4156 contains a clerical error, accidental error or omission or other similar error within the meaning of section 18.01(c).

[50] As the affected party has not established any of the grounds for reconsideration set out in sections 18.01(a), (b) or (c), I deny the reconsideration request.

ORDER:

- I deny the affected party's reconsideration request and lift the interim stay of Order MO-4156.
- I order the city to disclose the record, but for the affected party's home address to the appellant by August 24, 2022, but not before August 19, 2022.
- In order to verify compliance with order provision 2, I reserve the right to require the city to provide the IPC with a copy of the record it provided to the appellant.

Originally Signed By: _____

July 19, 2022

Jennifer James
Adjudicator

¹⁷ I note that previous IPC orders have held that in certain circumstances the IPC may consider the application of a discretionary exemption that is not raised by the institution but raised by a third party appellant or affected party (see Orders P-1137, PO-1705, PO-1787, MO-2567 and PO-3063). Order P-1137 is often cited for the proposition that "[b]ecause the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the *most unusual of cases* that an affected person could raise the application of an exemption which has not been claimed by the head of an institution."

¹⁸ Although I invited representations from the affected party during the reconsideration stage about his position that he should be able to raise section 11, his representations amounted to a re-arguing of the appeal.