Information and Privacy Commissioner,
Ontario, Canada

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

# RECONSIDERATION ORDER PO-4515-R

Appeal PA22-00391

Ministry of Children, Community and Social Services

Order PO-4494

May 9, 2024

**Summary:** The appellant requested a reconsideration of Order PO-4494. In that order, the adjudicator upheld the ministry's decision to withhold a determination of needs tool (the tool) from disclosure under section 18(1)(d) (economic and other interests) of the *Act*. In this decision, the adjudicator finds the appellant has not established any of the grounds for reconsideration in section 18.01 of the IPC's *Code of Procedure*. The appellant's reconsideration request is denied.

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

**Orders and Investigation Reports Considered:** Order PO-4494.

## OVERVIEW:

[1] This reconsideration relates to Order PO-4494, which resolved Appeal PA22-00391, involving the appellant and the Ministry of Children, Community and Social Services (the ministry). The appellant had submitted a request to the ministry under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the criteria used by the Ontario Autism Program (the OAP) to determine the budget of core services for a child diagnosed with autism spectrum disorder (ASD). The ministry located one responsive record, a determination of needs tool (the tool). The ministry claimed the discretionary exemption in section 18(1)(d) (economic and other interests) of the *Act* to deny the appellant access to the tool. The appellant appealed the ministry's decision.

[2] I conducted a written inquiry under the *Act* and issued Order PO-4494, upholding the ministry's decision to withhold the tool from disclosure under section 18(1)(d). I also found the public interest override in section 23 of the *Act* did not apply to permit disclosure of the tool.

[3] Following the issuance of Order PO-4494, the appellant submitted a reconsideration request for the order. I provided the appellant with the opportunity to make written submissions in support of his request, with reference to the reconsideration grounds set out in section 18.01 of the IPC's *Code of Procedure* (the *Code*). The appellant submitted representations.

[4] For the reasons that follow, I find the appellant has not established grounds for reconsideration of Order PO-4494 under section 18.01 of the *Code.* I deny his request.

## DISCUSSION:

[5] The sole issue to be determined is whether there are grounds under section 18.01 of the *Code* to reconsider Order PO-4494.

[6] The IPC's reconsideration criteria and procedure are set out in section 18 of the *Code*. Section 18 reads, in part:

> 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;
>
> (b) some other jurisdictional defect in the decision; or
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> (c) a clerical error, accidental error or other similar error in the decision.
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> 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.

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

[8] *Functus officio* is a common law principle, which states that once the matter has been determined by a decision-maker, generally speaking, he or she has no jurisdiction to further consider the issue. However, the *Code*'s provisions acknowledge the ability of a decision-maker to re-open a matter to reconsider it in certain circumstances.[1] In other words, I am *functus* and unable to further consider the issues that were under appeal

[1] Order PO-2879-R.

unless the party requesting the reconsideration establishes one of the grounds in section 18.01.

## Reconsideration request

[9] The appellant did not specify which ground of section 18.01 of the *Code* he relies on in making his reconsideration request. In his submissions, the appellant claims I erred in Order PO-4494 by "introducing ableism when faced with the unexpected representations of a formally diagnosed autistic adult." The appellant also submits I "judged [his] words with extreme prejudice" and "[put] words in the mouth of the appellant." The appellant claims I "repeatedly made personal commentary to dismiss [his] representations" and "pertinent concerns… about the ministry's funding model affecting the economic interests of Ontario." The appellant also claims,

> Each firsthand anecdote serving as evidence of the Ministry's bad faith in [the appellant's] representations is rendered unintelligible when adjudicators try to read it in an allistic or non-autistic context. Which in turn lets adjudicators absolve themselves of giving equal treatment to neurodivergent authority derived from lived autistic experiences. Seeing neurodivergent experiences only with an ableist lens is an [omission] condoned blatantly everywhere in [Order PO-4494].
>
> Failure of the adjudicators to acknowledge the double empathy problem in the process invited further ableism. Adjudicators struggle to see the autistic appellant has a different communication and empathic understanding. These barriers to fair treatment of neurodivergent competence can lead to the most seemingly innocuous ableist micro-aggressions. Often the adjudicator casts doubt as a non-autistic authority over autistic perspectives to mask their own unreliability.

[10] The appellant submits I confused his meaning in his representations. He also submits I dismissed his arguments in error which led to "the absurd result of all parents of autistic children losing their access-to-information rights." He submits "parents face no other barriers to access any other medical and clinical information about their autistic children – except here."[2]

## Analysis and findings

[11] The appellant does not refer to a specific ground for reconsideration. Upon review,

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[2] The appellant's claim is incorrect. The only record before me was the generic tool created by the ministry for the DON process. The tool did not contain any information belonging to children with ASD or their families. Order PO-4494 does not impact the access rights parents have to their autistic children's clinical or medical information. Order PO-4494 only considered whether the appellant should have access to the generic tool created by the ministry to assist in the determination of a family's needs under the OAP. Accordingly, I will not consider this claim further in this order.

it appears the appellant takes the position that I was biased in the manner in which I arrived at my decision given his claims that I took a certain perspective in considering his submissions. A finding of reasonable apprehension of bias would amount to a ground for reconsidering Order PO-4494 as a fundamental defect in the adjudication process, as per paragraph 18.01(a) of the *Code*. However, for the reasons that follow, I find the appellant has not established that a reasonable apprehension of bias existed in my adjudication of this appeal.

[12] In administrative law, there is a presumption, in the absence of evidence to the contrary, that an administrative decision-maker will act fairly and impartially. The onus of demonstrating bias is on the person who alleges it. In this case, the onus of demonstrating bias is on the appellant.

[13] Mere suspicion of bias is not enough; there must be a reasonable apprehension of bias. The Ontario Court of Appeal recently noted "there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one."[3]

[14] Actual bias does not need to be proven. The test is whether there exists a *reasonable* apprehension of bias. The Supreme Court of Canada articulated what is now a long-established test for establishing a reasonable apprehension of bias as follows:

> [T]he 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."[4]

[15] In his reconsideration request, the appellant claims I was biased due to my perspective as an able-bodied and neurotypical person. The appellant claims I judged his representations with prejudice. I acknowledge the stigma the appellant and other autistic individuals face. I also acknowledge that individuals with different communication styles or empathetic understanding may face challenges in being understood. However, I find the appellant has not established that there was a reasonable apprehension of bias in the inquiry for Appeal PA22-00391 or in Order PO-4494.

[16] I confirm I thoroughly considered the appellant's arguments during my inquiry and decision-making process. I appreciate the appellant does not agree with the manner in which I summarized his representations. The appellant also takes issue with what he sees

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[3] *Ontario Medical Association v. Ontario (Information and Privacy Commissioner)*, 2017 ONSC 4090 (Div. Ct.), appeal dismissed 2018 ONCA 673, citing *Martin v. Martin* (2015), 2015 ONCA 596 (CanLII) at para. 71.

[4] *Committee for Justice and Liberty et al. v. National Energy Board et al.* [1978] 1 SCR 369, 1976 CanLII 2 (SCC).

as my personal commentary Order PO-4494. For example, the appellant referred to paragraph 21 of Order PO-4494 in which I summarized his concerns about the DON process and stated that "I cannot comment" on whether the tool is appropriate and will accurately assess the needs and children with ASD. This is true. I cannot comment on these issues; this fact is not a personal comment. Rather, I merely confirmed that my jurisdiction under the *Act* in this appeal is limited to whether the appellant should have access to the tool. I understand the appellant disagrees with my decision. However, the appellant's disagreement with my decision does not demonstrate that I was biased in my decision-making. Furthermore, his disagreement with my decision is not sufficient to establish a fundamental defect in the adjudication process under section 18.01(a) of the *Code*.

[17] Overall, it is clear the appellant disagrees with my conclusions in Order PO-4494. However, the appellant has not established my conclusions were a result of a reasonable apprehension of bias or some other fundamental defect in the adjudication process. Based on my review, I find the appellant's reconsideration request is an expression of his disagreement with my findings and conclusions. The appellant did not provide sufficient evidence to establish a reasonable apprehension of bias in my determination of his appeal. As noted above, there is a presumption of impartiality and the threshold for establishing a reasonable apprehension of bias is a high one. Upon review of the circumstances and the appellant's reconsideration representations, I am not satisfied the appellant has established that an informed person, having thought the matter through, would conclude that I did not decide the appeal fairly. In other words, I am not satisfied the appellant's reconsideration request establishes there was a fundamental defect in the adjudication process under section 18.01 of the *Code*. Lastly, having reviewed the appellant's reconsideration request, I find that he has not established any other ground for reconsideration under section 18.01 of the *Code.*

[18] For the reasons set out above, I deny the appellant's reconsideration request.

## ORDER:

The appellant's request to reconsider Order PO-4494 is denied.

Original Signed by: May 9, 2024

Justine Wai
Adjudicator