Order F20-25

MINISTRY OF HEALTH

Erika Syrotuck
Adjudicator

June 12, 2020

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Summary: The Ministry requested that the adjudicator reconsider her decision about one record that was the subject of Order F20-09. The adjudicator found that her original order did not reflect her manifest intention. As a result, she issued a new order regarding the disputed record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 14.

INTRODUCTION

[1] This order is in response to a request that I reconsider my decision about one record that was the subject of Order F20-09.

[2] In 2015, the applicant Pharmacy requested records relating to the Ministry of Health's investigation of the Pharmacy.[1] In Order F20-09, I addressed the Ministry's decision to withhold information under a number of exceptions under the *Freedom of Information and Protection of Privacy Act* (FIPPA) in response to this request. I found that the Ministry was authorized to withhold some but not all of the records in dispute under s. 14 (solicitor client privilege).

[3] I did not authorize the Ministry to withhold an email chain at pages 2277-2280 of the records in dispute under s. 14. This is the part of my decision that the Ministry asks that I reconsider. The applicant also made submissions on whether I should re-open this inquiry to reconsider my decision regarding this email chain.

[1] I will not repeat the background here, see Order F20-09, 2020 BCIPC 10 at paras. 1 – 9.

ISSUE

[4] The issue is whether I should re-open Order F20-09 in order to reconsider my decision respecting the Ministry's claim of solicitor client privilege to the email chain at pages 2277 – 2280.

DISCUSSION

Functus Officio – jurisdiction to reconsider

[5] In general, once an administrative tribunal has made a final decision on a matter, it is considered to be "*functus officio*" and the tribunal cannot revisit it.[2]

[6] However, in its decision in *Chandler v Alberta Association of Architects*, the Supreme Court of Canada has said the following about when a tribunal may reconsider a decision:

> "As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*., *supra*.
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> To this extent, the principle of *functus officio* applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal."[3]

[7] In *Chandler,* the Supreme Court further noted that the exceptions set out in *Paper Machinery Ltd. v. J. O. Ross Engineering Corp*. are:

> 1. where there had been a slip in drawing it up, and,
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> 2. where there was an error in expressing the manifest intention of the court.[4]

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[2] *Chandler v. Alberta Association of Architects*, 1989 CanLII 41 (SCC), [1989] 2 SCR 848 [*Chandler*].
[3] *Ibid.*
[4] *Ibid.*

[8] Orders issued under s. 58 of FIPPA are final and binding and there is no provision in FIPPA that gives me the power to reopen and reconsider an order.

Background - Order F20-09

[9] The Ministry's application to re-open concerns my findings in Order F20-09 respecting two of the records at issue under s. 14: a chain of emails at pages 2274-2276 and a chain of emails at pages 2277-2280.

[10] Before addressing the arguments of the parties, I will give a brief overview of the relevant portions of Order F20-09.

[11] The main issue in Order F20-09 was the Ministry's decision to refuse to disclose a number of emails along with some attachments on the basis of solicitor client privilege. The Ministry did not provide any of these records for my review. Initially, it provided an affidavit from a lawyer who was personally involved in the emails at issue and a table of records. I wrote to the Ministry three times asking for more submissions on some or all of the records in dispute, including those that are the subject of this reconsideration. In response, the Ministry provided a more detailed table of records and information in several letters.

[12] In Order F20-09, I found that the email chain at pages 2277-2280 was not subject to solicitor client privilege, and therefore could not be withheld by the Ministry under s.14. At paragraphs 47 and 48 of that order, I provided my reasons:

> [This] email chain contains eleven emails. The Ministry says that the two initial emails between Lawyer A and the College relate to the joint investigation between the College and the Ministry. Lawyer A then forwards these two emails to Ministry employees. The remaining emails are between LSB Lawyers and Ministry employees. The Ministry describes this record as counsel obtaining information from third parties. The Ministry says that the emails between the College and Lawyer A are privileged because they are part of the same email chain.
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> I am not satisfied that the emails in this chain are privileged communications. The first two emails are between the College and Lawyer A and as such are not confidential communications between a client and a lawyer. The balance of the emails [….] are only between LSB and the Ministry. However, as I described above, not every communication between a client and a lawyer is privileged. The Ministry's description of this email chain is only that it is collecting information from a third party. In other words, the Ministry does not describe the nature of the communications between it and LSB. The Ministry does not explain how anything on the email chain is related to seeking, formulating or giving legal advice. The Ministry also does not explain how these emails are part of the

> continuum of communications between client and lawyer so that advice may be given. The Ministry had multiple opportunities to provide evidence in this inquiry. Without this type of information, I am unable to conclude that the email chain is privileged.[5]

[13] However, I found that the Ministry did establish that the email chain at pages 2274-2276 was subject to solicitor client privilege and therefore that the Ministry was authorized to withhold it under s. 14. I provided my reasons at paragraph 46:

> The Ministry has explained that [this] email chain is counsel obtaining information from third parties, forwarding this information to the Ministry and seeking instructions. I am satisfied that the latter emails between the Ministry and LSB are directly related to seeking legal advice. While the two initial emails between the College and Lawyer A are not confidential communications between a client and lawyer, I am satisfied that, if disclosed, they would allow an accurate inference to be made about the nature of the instructions sought by LSB from the Ministry. Therefore, severing the first two emails from the chain would not be appropriate.[6]

Parties' positions

[14] The Ministry requests that I re-open the inquiry on the basis that the Ministry made an accidental slip and omission and as a result, my order regarding the email chain at pages 2277-2280 did not reflect my true intention.

[15] The Ministry says that it "unintentionally misdescribed" the nature of the two email chains.[7] The Ministry provided evidence in its reconsideration application that the email chain at pages 2277-2280 comprises the same seven emails as at pages 2274-2276 plus four additional emails.[8] The Ministry says that the emails at pages 2277-2280 would have been more appropriately described the same as the email chain at pages 2274-2276.[9]

[16] Therefore, the Ministry says that my order is inconsistent because I have made different findings with respect to the same records. The Ministry says that my intention in Order F20-09 "was to confirm the Ministry's decision to withhold third party communications where disclosing such communications would reveal subsequent privileged communications."[10]

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[5] Order F20-09, 2020 BCIPC 10 at paras. 47-48, footnotes excluded from the quote.
[6] Order F20-09, 2020 BCIPC 10 at para. 46, footnote excluded from the quote.
[7] In its November 22, 2018 "Appendix B".
[8] The Ministry provided an affidavit from a Paralegal with the Legal Services Branch of the Ministry of Attorney General dated May 7, 2020. See paragraphs 6 – 11 of this Affidavit.
[9] The Ministry's May 7, 2020 application to reconsider at page 8.
[10] The Ministry's May 7, 2020 application to reconsider at page 8.

[17] In support of its position, the Ministry argues that an "accidental slip or omission" captures mistakes made by a party, in addition to those made by the decision maker. The Ministry points to the Ontario Supreme Court's decision in *Grier v Metro International Trucks*.[11] In that case, the issue was whether an Employment Standards Act referee could reconsider a decision based on an incorrect date in the parties' agreed statement of facts. When the error was later identified, one of the parties asked the referee to reconsider her decision. She declined to do so, stating she was *functus officio*. On judicial review, the Ontario Supreme Court found that that the error in the date was a relevant and important factor in the referee's decision and that the decision was "fatally tainted by her reliance on a crucial fact which both parties agree is incorrect." The Court said that the parties were entitled to a decision on the merits based on a full and accurate statement of the facts and concluded that the referee should be permitted to reconsider the matter and render a valid decision.

[18] The Ministry also references the Alberta OIPC's decision to reconsider some of the information at issue in Order F2010-026.[12] The Ministry says that in this case, the adjudicator re-opened the order on the basis that he had intended to authorize the public body to withhold all information that could identify a confidential source of law enforcement information but had not done so based on his misunderstanding of the record. The adjudicator re-opened the inquiry and amended the order on the basis that it did not reflect his original intent.[13]

[19] The applicant says that there was no accidental slip or omission and that there was no error in expressing my manifest intention. Rather, the applicant says that my decision flows logically and directly from the Ministry's submissions.[14] The applicant notes that the Ministry had four opportunities to submit evidence on these particular records.

[20] The applicant says that the circumstances in the present case are not like those in *Grier*. Specifically, the applicant says that the error in *Grier* was a minor typographical error and both parties agreed that it was a mistake. The applicant disagrees that there was a mistake made by the Ministry in this case.[15]

[21] In addition, the applicant disagrees that the decision to reconsider in Alberta Order F2010-026 is applicable to the present case. The applicant says that the adjudicator in that decision had the records before him and made the original order on the basis of his own understanding of the records, the content of which turned out to be misleading. Further, the applicant says that there was no indication in that case that the parties had the opportunity to submit clarification

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[11] *Grier v. Metro International Trucks Ltd.,* 1996 CanLII 11795 (ON SC) [*Grier*].
[12] Addendum to Order F2010-026, 2011 CanLII 96620 (AB OIPC).
[13] *Ibid* at para. 14.
[14] Applicant's reply to the request to reconsider, dated May 15, 2020 at page 6.
[15] Applicant's reply to the request to reconsider, dated May 15, 2020 at page 7.

about the records over the course of the adjudication process. The applicant says that these factual differences make this decision distinguishable from the present case.[16]

[22] Rather, the applicant says that the Ministry is attempting to submit fresh evidence about the contents of the records after I made my decision. The applicant argues that this should not be permitted because this evidence was available to the Ministry throughout the inquiry. In making this argument, the applicant relies on the test set out by the Supreme Court of Canada in *R v Palmer*[17] and used by the Court of Alberta Queen's Bench in *Alberta Teachers' Association v Northern Lights School District.*[18]

[23] In *R v Palmer*, the Supreme Court set out the criteria for evaluating whether fresh evidence should be heard on appeal. These criteria are:

> 1. "The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases: see *McMartin v. The Queen*, 1964 CanLII 43 (SCC), [1964] S.C.R. 484.
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> 2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
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> 3. The evidence must be credible in the sense that it is reasonably capable of belief, and
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> 4. It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."[19]

[24] The Applicant says that the correct description of the records was available to the Ministry at all times throughout the inquiry. It says that, as a result, the first branch of the test is not met.[20]

[25] In response, the Ministry says that it is not seeking to re-open the order on the grounds that it wishes to supplement its evidence. It maintains that there was an accidental slip or omission which resulted in different orders for what was the same record. Therefore, it argues that the appropriate legal test is the one set out in *Chandler* rather than *Palmer*.[21]

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[16] Applicant's reply to the request to reconsider, dated May 15, 2020 at pages 7 – 8.
[17] *Palmer v. The Queen,* 1979 CanLII 8 (SCC), [1980] 1 SCR 759 [*Palmer*].
[18] *Alberta Teachers' Association v Northern Lights School Division No. 69*, 2013 ABQB 220 (CanLII) [*Northern Lights*].
[19] As set out in *Public School Boards' Assn. of Alberta v. Alberta (Attorney General),* 2000 SCC 2 at para. 6. See also *Northern Lights supra* note 18.
[20] Applicant's reply to the request to reconsider, dated May 15, 2020 at page 9.
[21] Ministry's reply submissions, dated May 21, 2020 at page 3.

Analysis

[26] For the reasons that follow, I have decided that Order F20-09 contains an error in expressing my manifest intention.

[27] First, I will address the Ministry's statement that it "unintentionally misdescribed" the nature of the email chains. In itself, this is particularly problematic because the Ministry did not furnish the records for my review. Instead, I relied on the Ministry's submissions, which I carefully reviewed in coming to my decision. In all circumstances, but especially where the records have not been provided for review, public bodies must furnish their best evidence from the outset.[22] Not doing so constrains the Commissioner's ability to make an accurate and informed decision and the applicant's ability to respond. In short, a public body's duty to provide the best evidence from the outset impacts the fairness of the entire proceeding.

[28] In addition, I gave Ministry three additional opportunities to provide submissions on these particular records. Each time, this created a delay for the applicant. The Ministry should have taken the time at any one of these opportunities to provide a fulsome and accurate description of the records.

[29] Given this, I am in full agreement with the applicant that it is difficult to conceive of the Ministry's failure to provide an accurate description of the records as either accidental or unintentional.

[30] However, despite all this, the Ministry's evidence now demonstrates to me that I have made a different decision with respect to the same email chain. My intention was to authorize the Ministry to refuse to disclose the email chain at pages 2274-2276 on the basis that disclosing it would reveal information directly related to seeking legal advice. The information in the Ministry's request to re-open demonstrates that this finding applies equally to the email chain at pages 2277-2280. For this reason, I have decided that it is appropriate for me to reconsider my decision to give effect to my original intent.

[31] In making this decision, I am guided by the Alberta OIPC's decision to reconsider information in dispute in Order F2010-026. In that case, the adjudicator concluded that not amending the original decision would reveal the very information that he intended to protect.[23] In my view, the same rationale applies here: not allowing the Ministry to refuse to disclose the email chain at pages 2277-2280 would fail to give effect to my order regarding the email chain at pages 2274-2276. In this way, I am satisfied that, given the information in the Ministry's application to reconsider, my original order reflected an error in expressing my manifest intention.

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[22] Order F18-18, 2018 BCIPC 21 at para 17; Order F19-21, 2019 BCIPC 23 at para. 122.
[23] See Addendum to Order F2010-026, 2011 CanLII 96620 (AB OIPC) at para. 14.

[32] For this reason, I have decided that it is appropriate for me to re-open this inquiry to authorize the Ministry to withhold the email chain at pages 2277-2280 of the records under s. 14.

[33] As a result of this finding, I do not need to address whether the information in the Ministry's request to re-open constitutes "fresh" evidence and if so, whether the criteria in *Palmer* are met.

CONCLUSION

[34] For the reasons given above, under s. 58 of FIPPA, I confirm the Ministry of Health's decision to refuse to disclose pages 2277-2280 of the records under s. 14 of FIPPA.

June 12, 2020

ORIGINAL SIGNED BY

Erika Syrotuck, Adjudicator

OIPC File No.: F15-63856