Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-3651-R

Appeals MA11-23-2 and MA11-23-3

Orders MO-2841-I and MO-3467

Toronto Police Services Board

August 21, 2018

Summary: The appellant requested a reconsideration of Interim Order MO-2841-I and Order MO-3467. The orders arose from the appellant's request for access to records that postdated a previous request, but addressed similar subject matter. In this Reconsideration Order, the adjudicator finds that the appellant is out of time to file a reconsideration request in Interim Order MO-2841-I. In any event, even if the reconsideration request in Interim Order MO-2841-I was timely, the adjudicator finds that the appellant has not established that grounds exist under section 18.01 of the IPC's *Code of Procedure* for reconsidering Interim Order MO-2841-I or Order MO-3467. The appellant's reconsideration request is denied.

Statutes Considered: IPC *Code of Procedure*, sections 18.01(a), 18.01(c) and 18.04.

Orders considered: Orders MO-2841-I, MO-3107-F, MO-3467, PO-2538-R and PO-3062-R.

Cases Considered: *Chandler v. Alberta Association of Architects* [1989] 2 SCR 848; *R. v. Stinchcombe*, [1995] 1 SCR 754; *R. v. Quesnelle*, 2014 SCC 46.

OVERVIEW:

[1] The Toronto Police Services Board (the police) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) on December 1, 2010:

> I am requesting access to and copies of all personal records through [*MFIPPA*] as an UPDATE from my request received 17 October 2003 [identified request] of copies of all written and electronic records, including all log books, flipbooks, notebooks, files, telephone messages, inter and intra office emails and Outlook Express records, or any similar proprietary internal or external communication system used by [the police] in whatever format, of Officer #[specified badge number] or "[named police officer]". This will include all internal or external records, of any and all sorts and formats of communication between "[named police officer]" and Officers of the Hamilton Wentworth Police Service, Correctional Service of Canada and the National Parole Board, and all revised and altered "police occurrence" reports relative to me alleged to have been authored by "[named police officer]". My request will also include all personal references and documentation in Internal Investigation File [specified number].

[2] After extending the time to respond to the request, which then resulted in a deemed refusal appeal assigned Appeal File number MA11-23, the police issued a decision letter. The police advised that their search yielded only one responsive record, which consisted of a series of emails. The police granted partial access to this record, relying on section 38(a) (discretion to refuse requester's own information), in conjunction with section 9(1)(d) (relations with other governments) and section 38(b) (personal privacy) to deny access to the portion they withheld. As the police issued a decision letter, the deemed refusal Appeal File MA11-23 was closed and appeal file MA11-23-2 was opened to address the appellant's position that he should be granted access to the withheld portion of the record identified as responsive by the police, his position on the reasonableness of the police's search for responsive records and his concerns about the conduct of the police during the course of the appeal.

[3] In the course of mediation of Appeal MA11-23-2, the appellant provided the mediator with a letter outlining where he believed additional responsive records would be located within police document storage areas. As set out in the Revised Mediator's Report dated September 22, 2011:

> … The mediator then advised the police of the appellant's position.
>
> As a result of the concerns raised by the appellant, the police conducted an additional search. The police advised that they located additional documents that may be responsive to the request. The police, however, advised that they would need several weeks to review those records to determine if any of those records were responsive to the request.

[4] Also during mediation, the appellant requested that a finding be made concerning alleged police misconduct. As set out in the Revised Mediator's Report:

> It is the appellant's position that [the police] are deliberately delaying his appeal. He also believes that there was a conscious effort by the police to mislead the mediator during the mediation process.

[5] At the appellant's request, the mediator added to the appeal the issue of whether the appellant can invoke the application of the offence provisions contained in sections 48(1)(d) and (e) of the *Act*.

[6] The police did not provide forthwith a supplementary decision related to the additional documents located. As a result, the appellant advised he could not wait any longer for the police to issue a supplementary decision and instructed the mediator to forward the appeal to the next stage of the appeals process.

[7] Accordingly, the following issues were identified by the mediator in his Revised Mediator's Report for Appeal MA11-23-2 dated September 22, 2011 at pages 4 and 5, as remaining in dispute:

ISSUE:	Reasonable Search
SECTION(s):	17
RELEVANT RECORDS:	the appellant contends that additional records exist
ISSUE:	Discretion to refuse requester's own information
SECTION(s):	38(a) in conjunction with section 9(1)(d)
RELEVANT RECORD:	email correspondence
ISSUE:	Personal Information
SECTION(s)	38(b) in conjunction with section 14(1)(f) and 14(3)(b)
RELEVANT RECORD:	email correspondence
ISSUE:	Offences
SECTION(s)	48(1)(d) and 48(1)(e)

[8] The file was transferred to the adjudication stage and I conducted an inquiry.

[9] On January 31, 2013, I issued Interim Order MO-2841-I. As set out in my Interim Order, primarily because the police chose to provide an "additional clarification" letter rather than representations and/or an affidavit in response to a Notice of Inquiry, I found that the police did not conduct a reasonable search for responsive records.

Accordingly, I ordered them to conduct further focussed searches and to provide a reasonable amount of detail to this office regarding the results of those searches, including those conducted by the police officer named in the request whom I described as an affected party in my interim order. I determined that other outstanding issues would be addressed after the police provided the results of their search and a federal government agency was notified of the appellant's access request.

[10] In particular, my interim order provided as follows:

> I order the police to conduct further searches for records responsive to the request. I order the police to provide me with an affidavit sworn by the individual(s) who conducts the search(es), including the affected party, by March 5, 2013 deposing their search efforts. At a minimum, the affidavit(s) should include information relating to the following:
>
> > (a) information about the individual(s) swearing the affidavit describing his or her qualifications, positions and responsibilities;
> >
> > (b) a statement describing their knowledge and understanding of the subject matter of the request;
> >
> > (c) the date(s) the person conducted the search and the names and positions of any individuals who were consulted;
> >
> > (d) information about the type of files searched, the nature and location of the search, and the steps taken in conducting the search;
> >
> > (e) the results of the search;
> >
> > (f) if as a result of the further searches it appears that responsive records existed but no longer exist, details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

[11] The police conducted a further search in response to my interim order, but did not identify any additional records responsive to the request.

[12] The police also provided documentation from their analyst and the police officer in support of their position that they conducted a reasonable search for responsive records in accordance with the terms of my order. I sent a copy of the analyst's materials and the non-confidential portions of the police officer's materials to the appellant and invited his submissions in response. The appellant provided me with voluminous responding materials.

[13] On September 30, 2014 I issued Final Order MO-3107-F. In that order, I addressed the issue of access to the email that the police sought to withhold under section 38(a), in conjunction with section 9(1)(d) as well as 38(b), the offence issue raised in the Revised Mediator's report and the reasonableness of the police's search for responsive records.

[14] In particular, my order provided as follows:

1. I order the police to disclose to the appellant the balance of the withheld information in the record at issue by sending it to him by November 5, 2014 but not before October 31, 2014.

2. I order the police to conduct further searches for the records that I have specified at paragraphs 83, 109, 115 and 116 in [the order].

3. If, as a result of the further searches, responsive records are identified, I order the police to provide a decision letter to the appellant by November 5, 2014 regarding access to these records in accordance with sections 19, 21 and 22 of the *Act*.

4. In order to ensure compliance with paragraph 1 of this order I reserve the right to require the police to provide me with a copy of the record as disclosed to the appellant.

5. I remain seized of this appeal with respect to compliance with this order or any other outstanding issues arising from this appeal.

[15] Appeal File MA11-23-2 was then closed.

[16] The police disclosed the balance of the withheld information in the email and issued a decision letter regarding their further searches. In their decision letter, the police wrote:

> Further to information gleaned from prior contact with former officer, [named police officer], and noted in our decision letter of December 01st, 2011, any notes taken on "steno notepads" were in the possession of the officer and not this Police Service. As we were advised by [named police officer], any notes of importance would have been transcribed later into the officer's issued memorandum book. Access cannot be granted to any notes that may exist as they are not in the custody/control of this Service and could not be located by [the identified police officer] when they were requested. [83] and [115] A search of all materials in the Services' possession regarding the appellant's case were searched and confirmed further that there were no steno pads located.

> A review of the materials in the Services' possession did not locate the "certain notes to the crown attorney … in the context of disclosure." [116]
>
> Lastly, as stated above, while with the Service, we were advised by [named police officer] that his home email was never used for work. Without any compulsion to produce any data that may exist on his personal computer drive, records not in the care/custody of the Service remain the officer's personal property. [Named police officer] is no longer an employee of the Service and access to his personal email account cannot be granted as it is not under the Service's control. [109]

[17] The requester appealed this decision and MA11-23-3 was opened to address the appeal. As the issues under appeal could not be resolved at mediation, this appeal proceeded to inquiry. On July 7, 2017 I issued Order MO-3467 upholding the reasonableness of the police's search and dismissing the appeal. Accordingly, Appeal File MA11-23-3 was closed.

[18] By letter dated July 17, 2017, the appellant sought a reconsideration of Orders MO-2841-I and MO-3467. He does not request a reconsideration of Order MO-3107-F.

[19] In this order, I find that the appellant has not established the grounds for reconsideration in section 18.01 of the IPC *Code of Procedure* (the *Code*) and I do not reconsider Orders MO-2841-I and/or MO-3467.

DISCUSSION:

Are there grounds under section 18.01 of the IPC's *Code of Procedure* to reconsider Orders MO-2841-I and/or MO-3467?

[20] This office's reconsideration process is set out in section 18 of the *Code* which applies to appeals under the *Act*. Sections 18.01 and 18.02 state:

> 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
>
> (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.

[21] There is a time limit for requesting reconsideration set out at section 18.04 of the *Code*:

> 18.04 A reconsideration request shall be made in writing to the individual who made the decision in question. The request must be received by the IPC:
>
> > (a) where the decision specifies that an action or actions must be taken within a particular time period or periods, before the first specified date or time period has passed; or
> >
> > (b) where decision does not require any action within any specified time period or periods, within 21 days after the date of the decision.

The appellant's submissions

[22] The appellant submits that grounds 18.01(a) and (c) apply in the circumstances.

[23] The appellant points to paragraph 3 of Order MO-2841-I that discussed the Revised Mediator's Report in Appeal MA11-23-2 which refers to the police locating additional documents. The appellant also refers to the explanation that the police provided in support of the reasonableness of their search for responsive records, as reproduced at paragraph 23 of Order MO-3467.

[24] Paragraph 23 of Order MO-3467 states:

> The police explain:
>
> > … the former officer acknowledged that he did take notes during the trial, though the pads were not part of the notes retained by the [police]. He advised that the notes taken were regarding part of the testimony given on the stand. At that time, he advised that the notes were not in the [police's] possession, but may be in his personal possession (possibly at his home). In his follow up response in 2013, the officer advised that he had looked for the steno pad but was unable to locate it. He advised that any information he deemed important was re-written into his memorandum book, and confirmed that the notes were not retained by the [police]. It should be noted that his memorandum books remain with the [police].

[25] The appellant submits that:

> There is no evidence that copies of the "additional documents" and "memorandum books" identified by the police and which constituted a

> direct response to the access request for "records" created in the Office of the Chief of Police and by the Officer employed as a member of the Toronto Police Force between 2003 and 2010 were delivered by the police, or reviewed or assessed as part of the Adjudication process. This constitutes a fundamental defect in the process.
>
> There is no evidence that the Adjudicator had the records before him (for example, the identified memorandum books), or in the alternative, and as provided for in [*MFIPPA*], was invited to the Office of the Chief of Police or by the Chair of the Toronto Police Services Board to view the records which had been found as a result of the additional searches Ordered. This is an omission in due process.

[26] The appellant submits that he has provided this office with multiple copies of police records, which, "should, at the very least, have been equally disclosed by the police from their own bank of records and their own copies of those copies of the originals provided by the appellant".

[27] The appellant also takes the position that the police failed to satisfy the terms of Order MO-2841-I and were in contempt of my order.

[28] The appellant submits that:

> There is no evidence that a search, which was to be conducted by an experienced employee, either by way of affidavit or "clarification letters", although TPS File 10-4126 clearly indicates the File concerns the responsive records of "Officer [named police officer] and Office of the Chief of Police".

[29] He further submits that there is no evidence that the relevant sections of the *Act* were considered or applied by the police's Freedom of Information Coordinator (FOIC), especially when the police conceded that they had located additional records.

[30] He submits that "a similar determination -- that an Adjudicator failing to actually view the records may lead to errors and omissions -- was made by Adjudicator Bhattacharjee in Order MO-2953-R at paragraph 13", when he wrote:

> … I have found that some accidental errors or omissions ... resulted from the fact that the adjudicator was only able to view the records at the police's office and did not have the records before him when he later prepared his decisions.

[31] The appellant also submits that I should not have accepted the FOIC's reliance on information that she received from the officer:

> It is impermissible for the adjudicator to conclude that the FOIC was "entitled to rely on his (…) statements" without transferring the matter to Internal Affairs or the RMU and describing the issue about the reliability or lack of it of the Officer, and relying on their report back to the FOIC on reviewing the service record of the Officer (who has since left the Force), as these matters were properly theirs to investigate and assess, not the FOIC. Determining the reliability of an Officer is not the responsibility of the FOIC, and there is a Unit dedicated to this at all police services.

[32] The appellant further submits that my analysis does not indicate that I considered the provisions of section 4.1 of the *Act*, enacted in 2014, with respect to "what measures were taken for the preservation of the responsive records … located by the police between 2003 and 2010 (the time frames of the Request)".

[33] Section 4.1 of the *Act* reads:

> 4.1 Every head of an institution shall ensure that reasonable measures respecting the records in the custody or under the control of the institution are developed, documented and put into place to preserve the records in accordance with any recordkeeping or records retention requirements, rules or policies, whether established under an Act or otherwise, that apply to the institution.

[34] He submits that:

> In this case the Adjudicator has determined that the records are Institutional Records, and were created as part of a bank of investigation notes in various forms and used by the Crown in the prosecution of criminal charges laid by the subject officer with the knowledge of the Chief of Police … and the Premier of Ontario … , but without the knowledge of the appellant or any investigation of the appellant. Furthermore, there are no memorandum notes disclosed about these meetings and actions, despite the claim of the police that they have "the memorandum books" of the Officer which were requested at trial, but never disclosed.

[35] In that regard, he adds that I also failed to consider the mandatory direction of *R. v Stinchcombe*[1] (*Stinchcombe*), since criminal proceedings had been initiated, submitting that:

> … there are no legal grounds for the Officer to determine personally outside of his employment what parts of his investigation can be disclosed and which cannot be disclosed. …

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[1] *R. v. Stinchcombe*, [1995] 1 SCR 754, 1995 CanLII 130

[36] The appellant submits that:

> As to the decision to destroy records or not, no such entitlement to deem what is or is not "important" in a criminal investigation exists; the Officer has a legal compulsion to disclose all the records, whether inculpatory or exculpatory, and the police have a compelling legal responsibility to monitor (supervise) the Officer and vet his "notes", and place them in secure storage with designated management. All police notes in a criminal investigation are "formal" and reviewable by higher authority and rank. "Informal" police notes created while on duty don't exist.
>
> The requirements of *Stinchcombe* are not esoteric elements of the law, but, for someone in the field of the law, such as is alleged of the FOIC as an employee of a police force, it is impermissible to misrepresent the actual status of the records to the Adjudicator as being selectively "formal" or "informal" - no such discretion exists. This constitutes an error and omission. These are trial records; the memorandum books in the possession of the police will identify them as such, and, given the effects of the criminal charges laid by the Officer without the knowledge of the Crown, the Appellant nor with the knowledge or informed and ongoing consent of the various […] he had contacted by email and phone, it is inescapable to conclude that they are "of importance" and were subject of the elements of Section 4.1 (preservation and conservation of records) of [*MFIPPA*].
>
> To rely on false and misleading information provided by the FOIC suggesting the ex-officer is honest, without independent verification by the Adjudicator of the status of the Officer (for example, to have reviewed the *Police Service Act* charges against him) and the documented evidence of his dishonesty and unprofessional conduct, represents an error or omission, in the Adjudicator's failure to consider relevant information, and instead relying on unverifiable hearsay rather than demonstrable evidence. Clearly, as the attachments show, he has told a different story to the Attorney General than to the FOIC, neither of which is reliable.

[37] The appellant asserts that:

> However, the most significant and egregious omission is represented by a failure to Adjudicate the Issues in [the] Revised Mediator's Report of 22 September 2011 - in fact, an entire page of issues identified in the Report (page 5) is not dealt with, as if it had been lost or ignored or was "an omission". Only the issue identified on Page 4 (Reasonable Search) of the RMR seems to have occupied the attention of the Adjudicator for the past six years.

Analysis and finding

[38] Interim Order MO-2841-I was issued on January 31, 2013. Order MO-3107-F, which addressed the remaining issues in Interim Order MO-2841-I, was issued on September 30, 2014. The appellant's reconsideration request is dated July 17, 2017. His request to reconsider Order MO-2841-I is clearly out of time. Based on the reasons set out below, I would not exercise any discretion I have to extend the time to reconsider that order. Although I have found the request to reconsider Order MO-2841-I out of time, even if it had been timely, I would have refused it for the reasons set out below.

[39] The appellant's request to reconsider Order MO-3467 is within the time frame for requesting a reconsideration.

[40] To begin, I observe that the reconsideration process set out in this office's *Code* is not intended to provide parties with a forum to re-argue their cases. In Order PO-2538-R, 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 Association of Architects*.[2] With respect to the reconsideration request before him, he 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.*][3]
>
> 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] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.[4] In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 of the *Freedom of Information and Protection of Privacy Act*[5] did not apply to information in records at issue in that appeal. She determined that the institution's request for

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[2] [1989] 2 SCR 848 (S.C.C.).
[3] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).
[4] See, for example, Orders MO-3478-R, PO-3062-R and PO-3558-R.
[5] R.S.O. 1990, c. F.31, as amended.

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…

[42] In my view, the appellant's arguments in this case are a clear attempt to re-argue the appeal. Most of the arguments the appellant makes on this reconsideration request are ones that he made to me in the adjudication of the appeals. To the extent that the appellant has provided new information, this also is not a basis for reconsidering my decision. 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.

Reasonable search, destruction/retention of records and the application of Stinchcombe

[43] In Order MO-3107-F, I made a determination with respect to the additional documents referred to in the Revised Mediator's Report in Appeal MA11-23-2 in the context of my findings regarding the reasonableness of the police's search for responsive records. At paragraph 75 of Order MO-3107-F, I wrote that:

> In my view, the police have provided sufficient evidence to demonstrate that they took sufficient steps to review the boxes of records that were located during mediation and have satisfied me that the contents are not responsive to the request. Although the appellant questions the timing and scope of the review, I am satisfied that such an inspection took place, the person who conducted the review was an experienced employee knowledgeable in the subject matter of the request and that individual expended a reasonable effort to locate responsive records. Unfortunately, none were found.

[44] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. There is no requirement of a perfect search, only that it is reasonable. I considered all the appellant's arguments, which he repeats in his reconsideration request, in making my determinations in Orders MO-2841-I and MO-3467. Although I did not specifically refer to section 4.1 of the *Act*, the appellant's submissions were wide ranging and covered the same arguments he makes in this reconsideration request.

[45] Finally, the appellant submits that I failed to consider and apply *Stinchombe* in the circumstances of the appeals. However, the disclosure mechanisms under *MFIPPA* and the rules in *Stinchcombe* are different processes, with different considerations. I note that the Supreme Court of Canada has observed that the rule in *Stinchcombe*

applies to:

> "the Crown" and does not refer to all Crown entities, federal and provincial: "the Crown" is the prosecuting Crown. All other Crown entities, including police, are "third parties". With the exception of the police duty to supply the Crown with the fruits of the investigation, records in the hands of third parties, including other Crown entities, are generally not subject to the *Stinchcombe* disclosure rules."[6]

[46] I will not comment on whether the Crown met its obligations to the appellant under *Stinchcombe*.

[47] I am not satisfied that I should revisit the determinations that I made in Orders MO-2841-I and MO-3467 with respect to these matters. Accordingly, I find that the appellant has failed to establish that these would be grounds for reconsidering my decisions identified in section 18.01 of the *Code*.

Offences under 48(1)(d) and/or (e) of the Act raised in the Revised Mediator's Report

[48] At paragraph 14 of Order MO-3107-F, I wrote:

> The appellant provides voluminous representations in support of his contention that the police have committed offences that fall within the provisions of sections 48(1)(d) and/or (e) of the *Act*, including allegations that this office was misled by the police and the police took an inordinate amount of time to address the search for responsive records. These sections require a willful act by the offending party, and need the consent of the Attorney General to commence a prosecution. The *Provincial Offences Act*[7] permits any member of the public to lay a charge under section 48(1) of the *Act*, and the appellant was always at liberty to attend on a Justice of the Peace and lay an information.[8] Accordingly, it is not necessary for me to further address this issue in this order.

[49] Contrary to the assertions of the appellant, this issue, which was raised on page 5 of the Revised Mediator's Report, was addressed as I committed to do in Order MO-2841-I. I am not satisfied that I should revisit this determination. Accordingly, I find that the appellant has failed to establish that this would be a ground for reconsidering my decisions identified in section 18.01 of the *Code*.

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[6] *R. v. Quesnelle*, 2014 SCC 46 at para. 11.
[7] R.S.O. 1990, c. P.33.
[8] See section 23 of the *Provincial Offences Act* and also see Privacy Investigation Report MC-000014-I and Orders M-777, MO-1540 and P-1534.

Other issues in the Revised Mediator's Report

[50] Final Order MO-3107-F addressed the application of sections 38(a), in conjunction with section 9(1)(d), and 38(b) to the balance of the email at issue in that appeal, which was ordered disclosed to the appellant.

[51] Contrary to the assertions of the appellant, all the remaining issues, which were raised at page 5 of the Revised Mediator's Report, were addressed as I committed to do in Order MO-2841-I. I am not satisfied that I should revisit my determinations on these matters. Accordingly, I find that the appellant has failed to establish that this would be grounds for reconsidering my decisions identified in section 18.01 of the *Code*.

[52] Having reviewed the appellant's reconsideration request, I find that there was no fundamental defect in this office's adjudication process in Orders MO-2841-I and MO-3467 and that there is no clerical error, accidental error or omission or other similar error in Orders MO-2841-I and MO-3467. In conclusion, I find that the appellant's reconsideration request does not establish any of the grounds upon which this office may reconsider a decision.

ORDER:

I deny the appellant's reconsideration request.

Original Signed by: August 21, 2018
Steven Faughnan
Adjudicator