Information and Privacy Commissioner,
Ontario, Canada

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

RECONSIDERATION ORDER MO-3555-R

Appeal MA16-92

City of Toronto

January 30, 2018

Summary: The city requested a reconsideration of Order MO-3441, in which the adjudicator granted a 50% waiver of the city's search fee pursuant to section 45(4) of the *Municipal Freedom of Information and Protection of Privacy Act*. The adjudicator grants the reconsideration request in part, correcting a clerical error in the order. She finds that there was no fundamental defect in the adjudication process or other jurisdictional defect in Order MO-3441 and denies the balance of the reconsideration request.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 45.

Orders and Investigation Reports Considered: Orders PO-2538-R and PO-3062-R.

BACKGROUND:

[1] The City of Toronto (the city) has asked that I reconsider my findings in Order MO-3441. That order arose out of a request that the appellant, a news reporter, made to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

> A description or summary of records detailing the investigation of each of the public complaints made to the Toronto Paramedic Service that fall under the category of 1) patient care and 2) paramedic deportment from Jan. 1, 2009 to Dec. 31, 2014.

[2] The city issued a decision setting out a fee estimate of $7,380 for 246 hours of search time. The appellant requested a fee waiver on the basis that the dissemination of the information in the records will benefit public health or safety, within the meaning of section 45(4)(c) of the *Act*. The city indicated that it would not waive the fee.

[3] The appellant subsequently narrowed his request to include only public complaints concerning patient care. The city revised its estimate to $2,790 for 93 hours of search time. The appellant reiterated his request for a fee waiver, but the city again did not grant the request.

[4] The appellant appealed the city's fee and fee waiver decisions to this office. Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by inviting and receiving representations from the city on the fee and fee waiver issues. I then provided the city's representations to the appellant with a Notice of Inquiry inviting him to make representations on the issues. The appellant did not provide representations. However, with the appellant's consent, I shared a copy of his arguments as set out in his appeal letter with the city. The city then filed representations in reply.

[5] In Order MO-3441, I reduced the fee estimate for search time from $2,790 to $1,020, and I ordered the city to grant a waiver of 50% of the search fee.

[6] The city now seeks a reconsideration of the fee waiver provision of my order, raising four main arguments. First, the city argues that, by accepting the appellant's Notice of Appeal as sufficient to establish the appropriateness of a fee waiver in this case, I established a lower standard with respect to fee waivers than the traditional burden imposed by the IPC. Second, the city argues that I did not provide it with knowledge of the case that it was required to meet, and thereby denied it procedural fairness. Third, the city argues that Order MO-3441 fails to provide sufficient reasons explaining how I made certain findings relevant to the fee waiver provision. Finally, the city submits that there is a clerical error in paragraph 56 of the order.

[7] By way of remedy, the city requests that this office

a. Send the matter of whether a waiver of fees in this case is fair and equitable back for consideration in accordance with an appropriate and fair appeal process;

b. Alternatively, issue a new order with reasons for the fee waiver decision that would allow for the parties to understand the basis on which the decision was made and would not preclude meaningful judicial review; or

c. In the further alternative, correct the error in paragraph 56 of the order, which misidentified the city as the "ministry".

[8] In this order, I allow the reconsideration request to the extent of correcting the

clerical error found in paragraph 56. I find that city has not established any other basis upon which I should reconsider Order MO-3441 and deny the balance of the reconsideration request.

DISCUSSION:

Background

Fee waiver provisions

[9] Section 45(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. Those provisions state

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,
>
> > (a) the extent to which the actual cost of processing, collecting and copying the record varies from the amount of the payment required by subsection (1);
> >
> > (b) whether the payment will cause a financial hardship for the person requesting the record;
> >
> > (c) whether dissemination of the record will benefit public health or safety; and
> >
> > (d) any other matter prescribed by the regulations.
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> 8. The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:
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> > 1. Whether the person requesting access to the record is given access to it.
> >
> > 2. If the amount of a payment would be $5 or less, whether the amount of the payment is too small to justify requiring payment.

[10] A requester must first ask the institution for a fee waiver before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may

uphold or modify the institution's decision.[1] The institution or this office may decide that only a portion of the fee should be waived.[2]

[11] For a fee waiver to be granted under section 45(4), the test is whether any waiver would be "fair and equitable" in the circumstances.[3] Factors that must be considered in deciding whether it would be fair and equitable to waive the fees are

- section 45(4)(a): actual cost in comparison to the fee
- section 45(4)(b): financial hardship
- section 45(4)(c): public health or safety
- section 45(4)(d)/ section 8 of Regulation 823: whether the institution grants access

[12] Any other relevant factors must also be considered when deciding whether a fee waiver is "fair and equitable".

The inquiry process leading to Order MO-3441

[13] I began my inquiry for this appeal by sending a Notice of Inquiry to the city and inviting representations on the fee and fee waiver issues. The city provided representations on both issues in response.

[14] I then sent a Notice of Inquiry to the appellant, along with a copy of the city's representations, and invited the appellant's representations. The appellant advised that he would not be filing additional submissions, and would be relying on the arguments that he had provided in his Notice of Appeal. In the appellant's Notice of Appeal, he argued that dissemination of the record would benefit public safety. I then sent the appellant's arguments as set out in the Notice of Appeal to the city and invited the city to respond to the appellant's representations. The city filed additional representations in response.

Order MO-3441

[15] In Order MO-3441, I reduced the search fee estimate from $2,790 to $1,020. The city has not challenged that aspect of Order MO-3441. I also ordered the city to grant a waiver of 50% of the search fee. My reasons for so doing included the following:

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[1] Orders M-914, P-474, P-1393 and PO-1953-F.
[2] Order MO-1243.
[3] See *Mann* v. *Ontario (Ministry of Environment)*, 2017 ONSC 1056.

First, I find that the subject matter of the records is one of public interest. The records set out complaints to the Toronto Paramedic Service about patient care delivered by its personnel. Members of the public, as potential patients of TPS personnel, clearly have an interest in the quality of patient care delivered by those personnel.

Second, I find that the subject matter of the records relates directly to a public health or safety issue. The "controlled acts" that paramedics may perform, as set out in Ontario Regulation 257/00, include, but are not limited to administration of certain medications, external cardiac defibrillation, endotracheal intubation, and blood product administration. The very nature of the services provided by paramedics – assisting individuals who are sick or injured – is a matter of public health or safety. Allegations of substandard patient care are, in my view, an issue relating to public health or safety.

The third factor is whether the dissemination of the record would yield a public benefit by disclosing a public health or safety concern, or contributing meaningfully to the development of understanding of an important public health or safety issue.

I have not seen the records, and make no finding as to whether they would or would not disclose a public health or safety concern. According to the city, many of the patient care complaints were of a relatively trivial nature. On the other hand, the appellant submitted that there were 125 patient care complaints that were investigated and where the paramedic was found at fault.[4]

However, I find that dissemination of the record would yield a public benefit by contributing meaningfully to the development of an understanding of an important public health or safety issue. Paramedics provide care for sick or injured individuals, often in emergency situations. Any issues relating to such care are, in my view, important public health or safety issues. Making the details of the patient care complaints public will assist the public in understanding these issues.

I note that much of the city's representations focus on the amount of oversight to which the TPS is subject. In my view, however, there can still be a public health and safety benefit to dissemination of records even if the subject matter of the records is a matter that receives considerable oversight. An understanding of a public health and safety issue may, for

[4] I presume that the spreadsheet of complaints and whether they were substantiated is the source of the appellant's information.

example, inform discussions about oversight measures and whether or not those measures are adequate.

Finally, I am satisfied that the appellant is likely to disseminate the contents of the records. The appellant is a news reporter who, in his letter of appeal, refers to this appeal being part of his research for public interest journalism. While the appellant has not specified exactly in what form he intends to disseminate the information, I am satisfied that he is likely to make it public in some format, whether it be in its original form or as interpreted by him.

I conclude that the factor at section 45(4)(c) applies. However, that is not the end of the matter. In order for a fee waiver to be in order, I must be satisfied that it would be fair and equitable to grant a fee waiver, taking into account the factors at section 45(4) and any other relevant factors.

The parties have not referred to the factors at sections 45(4)(a), (b) or (d), and I have no reason to believe that any of those factors are relevant here.

Other factors that have been found to be relevant to the fee waiver issue are

- the manner in which the institution responded to the request
- whether the institution worked constructively with the requester to narrow and/or clarify the request
- whether the institution provided any records to the requester free of charge
- whether the requester worked constructively with the institution to narrow the scope of the request
- whether the request involves a large number of records
- whether the requester has advanced a compromise solution which would reduce costs
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution[5]

In this case, I have taken into account that the city did provide the requester with an option to narrow his request to reduce costs and that

[5] Orders M-166, M-408 and PO-1953-F.

the appellant, too, worked constructively with the city to narrow the scope of his request. Since the city did not actually undertake the search, earlier efforts to narrow the request would not have reduced the fee below $1,020. The parties' cooperation is a factor that does not weigh in favour of nor against a fee waiver.

Another important factor to consider is whether waiver of the fee would shift an unreasonable burden of the cost of processing the request from the appellant to the city. I am mindful of the legislature's intention to include a user-pay principle in the *Act.* The user-pay system is founded on the premise that requesters should be expected to pay the fees associated with a request unless it is fair and equitable that they not do so. The fees referred to in section 57(1) are mandatory unless the appellant can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it.[6]

Having considered all of these factors, and in particular, in light of my finding that the factor in section 45(4)(c) applies, I find that it is fair and equitable to waive 50% of the search fee. In my view, this respects the user-pay principle of the *Act*, while making the records more accessible to the appellant, and without shifting an unreasonable burden to the ministry.

Reconsideration process

[16] This office's reconsideration process is set out in section 18 of the *Code of Procedure*. Section 18 reads in part as follows:

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

[6] Order PO-2726.

> 18.08 The individual who made the decision in question will respond to the request, unless he or she for any reason is unable to do so, in which case the IPC will assign another individual to respond to the request.

[17] The reconsideration process set out in this office's *Code of Procedure* 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 Assn. of Architects*.[7] 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.*[8]
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> 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.

[18] Adjudicator Higgins' approach has been adopted and applied in subsequent orders of this office.[9] In Order PO-3062-R, for example, Adjudicator Daphne Loukidelis was asked to reconsider her finding that the discretionary exemption in section 18 did not apply to the information in the records at issue in that appeal. 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…

The city's reconsideration request

[19] The city has raised four arguments in support of its reconsideration request,

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[7] (1989), 1989 CanLII 41 (SCC), 62 D.L.R. (4th) 577 (S.C.C.).
[8] 1996 CanLII 11795 (ON SC), 28 O.R. (3d) 67 (Div. Ct.).
[9] See, for example, Orders PO-3558-R and PO-3062-R.

which I will address in turn.

The city's argument that I established a lower standard with respect to issues of fee waivers than the traditional burden imposed by the IPC

[20] The city argues that in accepting the appellant's Notice of Appeal as sufficient to establish the appropriateness of a fee waiver in this case, I established a lower standard with respect to issues of fee waivers than the traditional burden imposed the IPC in these matters. It argues that that since Order 95, this office has established that the burden is on the party seeking the fee waiver to establish that the fee waiver would be fair and equitable in the circumstances of the appeal.

[21] The city submits that it would appear that the IPC has established in this case that a persuasive argument for a fee waiver is established simply by identifying one factor relevant to such a determination, and that this factor can be determined by indicating that the requester is a media outlet and the records relate to the supply of public health/safety related services.

[22] The city submits that this approach is inconsistent with previous decisions of this office, and with the Divisional Court's decision in *Mann v Ontario (Ministry of the Environment)*.[10] In the *Mann* decision, the Divisional Court found that there is only one requirement in section 45(4) for waiver of all or any part of a fee and that is whether, in the opinion of the head, it is fair and equitable to do so. The head is guided in that determination by the factors set out in the subsection.

[23] I disagree with the city that Order MO-3441 and/or the process leading thereto establish that only one relevant factor is required in order to establish a persuasive argument for a fee waiver. In Order MO-3441, and in the Notice of Inquiry that I sent to the parties, I noted that in order for a fee waiver to be granted, it must be "fair and equitable" in the circumstances. In Order MO-3441, I stated as follows:

> I conclude that the factor at section 45(4)(c) applies. However, that is not the end of the matter. In order for a fee waiver to be in order, I must be satisfied that it would be fair and equitable to grant a fee waiver, taking into account the factors at section 45(4) and any other relevant factors.

[24] In deciding that a partial fee waiver was fair and equitable in the circumstances, I accepted the appellant's submission that the factor at section 45(4)(c) - public health or safety – applied. In light of this factor and all of the other circumstances, as more fully described below, I was persuaded that a fee waiver should be granted.

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[10] 2017 ONSC 1056.

The city's argument that I did not provide it with knowledge of the case that it was required to meet, thereby denying it procedural fairness

[25] Related to its first argument is the city's second argument that this office set a new standard for fee waivers but did not indicate to the city that a persuasive case had been made and that the city was required to respond thereto. The city argues that at the time that it was initially provided with a Notice of Inquiry and asked to make representations, I had access to the appellant's Notice of Appeal. The city argues that in the original Notice of Inquiry, I denied it procedural fairness by not informing it of the "new standard" adopted in these matters, and by not informing it of the persuasive argument that I accepted and which the city would be forced to refute. The city submits as follows:

> After receiving the City's submissions, and providing the Requester a further opportunity to make submissions—which the Requester refused to exercise – the Adjudicator then provided the City with the "persuasive argument" which the Adjudicator apparently deemed sufficient for the Requester to meet the burden of establishing that a waiver of fees would be fair and equitable. However, in so doing, the Adjudicator misled the City as to the case to be met, by not presenting the Requester's Notice of Appeal as a "persuasive argument" sufficient to allow for the Adjudicator to make a decision that a waiver of fees would be fair and equitable, received prior to the City's submission on the issue, but by describing this as a document that raises issues "in response to" the City's submissions. As a result, the City was unaware of the case to be met in this matter, and so did not understand the requirements to be met in making its representations to the IPC in responding to the Requester's Notice of Appeal.

[26] As noted above, I do not accept the city's submission that I set a "new standard" in fee waiver appeals. I will now address the city's argument that it was not made aware of the case to be met.

[27] The city correctly points out that I did not put the appellant's Notice of Appeal to the city at first instance, when sending the original Notice of Inquiry to the city. The Notice of Inquiry set out section 45(4) of the *Act* and a list of other factors that this office has found to be relevant in deciding whether a fee waiver is fair and equitable. The Notice of Inquiry also specifically asked whether a fee waiver was fair and equitable in the circumstances.

[28] The city provided representations in response to the Notice of Inquiry. The city's representations focused on the public health or safety factor at section 45(4)(c). The city submitted that although the appellant had made a request for a fee waiver on the basis of public health or safety, he had not made submissions to the city. The city took the position that it had not received detailed information to support a fee waiver and

that there was therefore no basis for it to consider one.

[29] I shared the city's representations with the appellant, who advised that he was relying on his initial appeal correspondence and would not be filing any further representations. I then sent a copy of the appellant's arguments contained his Notice of Appeal to the city, and invited it to respond to the representations of the appellant on whether dissemination of the records will benefit public health or safety. The city filed representations in response.

[30] I am not satisfied that the city was denied procedural fairness, given that it was provided with

- at first instance, a Notice of Inquiry setting out the issues, including an invitation to make representations on whether a fee waiver would be fair and equitable in the circumstances; and

- a copy of the appellant's arguments, once the appellant had stated that he was relying on the arguments set out in his Notice of Appeal.

[31] I am satisfied that the city had a full opportunity to know the case it had to meet and to make representations on all the issues.

[32] The city also takes issue with the cover letter I sent to it inviting the city's reply representations and referring to the appellant's arguments in his Notice of Appeal as "representations in response to" the city's representations. In my view, this is not an error since the appellant reviewed the city's representations and informed this office that he was relying on the arguments in his Notice of Appeal. In any event, nothing turns on the content of the cover letter in this case. What is important is that the arguments relied on by the appellant were put to the city, who was given the opportunity to respond.

[33] I also see no error in not providing the appellant's Notice of Appeal to the city at the outset of my inquiry. It was only after reviewing the city's initial representations, and after the appellant advised that he would not be making additional representations and would be relying on the arguments in his Notice of Appeal, that it became necessary to put the arguments contained in the Notice of Appeal to the city.

[34] I conclude that there was no breach of procedural fairness in this case.

The city's argument that Order MO-3441 fails to provide sufficient reasons

[35] The city argues that Order MO-3441 contains the jurisdictional error of providing insufficient reasons to understand the basis for the decision. It submits that the order does not contain a meaningful explanation of my reasoning with respect to the consideration of whether a fee waiver would shift an unreasonable burden of the cost from the appellant to the city and how this balances against the section 45(4)(c) factor.

The city submits that the order appears to stand for a new proposition that the IPC has decided that media outlets do not have to pay the mandatory fees applicable to all other requesters, if they are doing research or otherwise considering reporting on public health and safety services. The city points out that a finding that one or more of the relevant factors exists does not mandate a conclusion that a waiver would be fair and equitable. It submits that the reasons in the order are insufficient to understand why the decision was made.

[36] In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board),*[11] the Supreme Court of Canada discussed the adequacy of reasons as an aspect of procedural fairness:

> Procedural fairness was not raised either before the reviewing judge or the Court of Appeal and it can be easily disposed of here. *Baker* stands for the proposition that "in certain circumstances", the duty of procedural fairness will require "some form of reasons" for a decision (para. 43). It did not say that reasons were *always* required, and it did not say that the *quality* of those reasons is a question of procedural fairness. In fact, after finding that reasons were required in the circumstances, the Court in *Baker* concluded that the mere notes of an immigration officer were sufficient to fulfil the duty of fairness (para. 44).
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> It strikes me as an unhelpful elaboration on *Baker* to suggest that alleged deficiencies or flaws in the reasons fall under the category of a breach of the duty of procedural fairness and that they are subject to a correctness review. As Professor Philip Bryden has warned, "courts must be careful not to confuse a finding that a tribunal's reasoning process is inadequately revealed with disagreement over the conclusions reached by the tribunal on the evidence before it" ("Standards of Review and Sufficiency of Reasons: Some Practical Considerations" (2006), 19 *C.J.A.L.P.* 191, at p. 217; see also Grant Huscroft, "The Duty of Fairness: From Nicholson to Baker and Beyond", in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 115, at p. 136).
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> It is true that the breach of a duty of procedural fairness is an error in law. Where there are no reasons in circumstances where they are required, there is nothing to review. But where, as here, there *are* reasons, there is no such breach. Any challenge to the reasoning/result of the decision should therefore be made within the reasonableness analysis.

[37] I do not accept the city's assertion that Order MO-3441 fails to provide sufficient reasons on the fee waiver issue. In my view, the reasons are sufficient to explain the

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[11] [2011] 3 SCR 708, 2011 SCC 62 (CanLII).

basis for my granting of a 50% waiver of the fee. The order specifically considered whether any of the factors listed in section 45(4) apply, and whether there were any other factors relevant to whether a fee waiver was fair and equitable in the circumstances. I expressly considered the following factors to be relevant in coming to my decision on a fee waiver:

- the fact that the factor at section 45(4)(c) applies
- whether the waiver of the fee would shift an unreasonable burden of the cost from the appellant to the institution[12]

[38] The city submits that it is unclear how I weighed these factors. Section 45(4) of the *Act* provides that a head shall waive the payment of "all or any part" of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so. In my view, my granting a waiver of 50% of the fee (as opposed to, for example, all of it) indicates that although the factor at section 45(4)(c) applies, a full fee waiver was not appropriate in the circumstances. After referring to the above factors, I stated

> … I find that it is fair and equitable to waive 50% of the search fee. In my view, this respects the user-pay principle of the *Act*, while making the records more accessible to the appellant, and *without shifting an unreasonable burden to the [city]* [emphasis added].

[39] The order found that two main factors were relevant: a factor weighing in favour of a fee waiver and a factor weighing against a fee waiver, and that on balance, it was fair and equitable to waive 50% of the fee. In my view, the order's reasons on this point are adequate.

The reference in paragraph 56 to the "ministry"

[40] The city is correct that the reference to the "ministry" in paragraph 56 of Order MO-3441 is a clerical error. That reference should be to the city.

CONCLUSION:

[41] For the reasons set out above, I find that there was no fundamental defect in this office's adjudication process and that there is no other jurisdictional defect in Order MO-3441. I find that there is a clerical error in that the reference to "ministry" in paragraph 56 should read "city".

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[12] Orders M-166, M-408 and PO-1953-F.

ORDER:

1. I allow the reconsideration request in part. The reference to "ministry" in paragraph 56 of Order MO-3441 should read "city".

2. I deny the balance of the reconsideration request.

Original Signed by: January 30, 2018

Gillian Shaw
Adjudicator