

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3712

Appeal MA17-709

City of Toronto

December 20, 2018

**Summary:** The city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* for access to records of violations, orders, and inspections from Municipal Licensing and Standards regarding a specific property from 2006 until the date of the request. The city issued a decision granting partial access to the responsive records, and the requester appealed the decision to this office. An additional search was conducted during mediation, which resulted in further records being disclosed to the appellant, in part. The city relied on the discretionary personal privacy exemption at section 38(b) to deny access to the personal information of other individuals contained in the responsive records. The appellant maintained that additional records should exist, and reasonable search was added as an issue in the appeal. This order upholds the city's decision to withhold the personal information of other individuals under section 38(b), and finds that the city's search for responsive records was reasonable.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 14(2)(f), 14(2)(h), 14(3)(b), 17, and 38(b).

**Orders and Investigation Reports Considered:** Orders PO-2518 and MO-2954.

### OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for:

All records of violations, orders, inspections from MLS [Municipal Licensing and Standards] for [a specified address] from 2006 – present. Issues between [two specified addresses].

[2] The city issued a decision granting partial access to the records. The city denied access to the remainder of the records pursuant to section 14(1) of the *Act* (personal privacy).

[3] The requester, now the appellant, appealed the city's decision.

[4] During mediation, the appellant indicated that she believed additional records exist beyond what the city initially disclosed. She advised that she was seeking photographs of her property taken between 2015 and 2017.

[5] The city conducted further searches, located additional records, and issued a supplementary decision granting the appellant partial access to those records. Again, the city denied access to the withheld information pursuant to section 14(1) of the *Act*. The supplementary decision also stated as follows:

Please note that this request overlaps with another request submitted by you, 2017-02207, processed by [named city employee]. For request 2017-02207, you asked that an additional search be conducted, which it was. The records from this second search consisted of 16 pages and were sent to you under cover of a letter dated December 4, 2017 in regards to appeal number MA17-369.

Staff of Municipal Licensing & Standards has advised that the records located in the second search in respect of request number 2017-02544 are identical to those located for the second search in respect of request number 2017-02207, except for 5 pages that were not previously disclosed to you. This decision is in respect of these 5 pages.

[6] The appellant confirmed with the mediator that she had retained the records provided in response to request 2017-02207, and had received the additional five records identified in the second search for request 2017-02544. The appellant continued to maintain that further responsive records exist. As a result, reasonable search was added as an issue to this appeal.

[7] In addition to requesting a further search, the appellant advised that she was seeking access to the information withheld pursuant to section 14(1) of the *Act*. An affected party was notified but refused to consent to disclosure of their personal information. Further mediation was not possible. The appeal was moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry.

[8] Based on the adjudicator's review of the records, it appeared that the records contain the appellant's personal information, which would make the discretionary exemption in section 38(b) the relevant personal privacy exemption, rather than the

mandatory personal privacy exemption in section 14(1). Therefore, the adjudicator began the inquiry by seeking representations from the city and three affected parties in response to the issues set out in the Notice of Inquiry. She specifically asked the city to consider whether 38(b) applies to the records when it addressed the personal privacy exemption. The affected parties were asked to provide submissions on whether the records contain personal information and, if so, whether the personal privacy exemption applies. The adjudicator also enclosed a third party consent form for their consideration.

[9] In its representations, the city relied on section 38(b) with reference to section 14(1). The adjudicator also received joint representations submitted on behalf of two of the three affected parties.

[10] The file was then transferred to me to complete the inquiry. Due to confidentiality concerns, I prepared a summary of the non-confidential portions of the affected parties' representations, which were shared with the appellant with the affected parties' consent.<sup>1</sup> A complete copy of the city's representations was also shared with the appellant. The appellant was invited to provide representations in response to the issues set out in the Notice of Inquiry, as well as in response to the representations submitted by the city and two affected parties. The appellant did not provide representations.

[11] For the reasons that follow, I uphold the city's decision to deny access to the withheld portions of the records at issue. I also uphold the city's search for responsive records as reasonable.

## **RECORDS:**

[12] The city withheld information from records consisting of Investigation Cards, Inspection Reports, Waste Advisories and Computer Logs.

## **ISSUES:**

- A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- B. Does the discretionary exemption at section 38(b) apply to the information at issue?
- C. Did the city exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?

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<sup>1</sup> This non-confidential summary of the affected parties' representations was prepared and shared in accordance with *Practice Direction Number 7* and the IPC's *Code of Procedure*.

D. Did the city conduct a reasonable search for records?

## **DISCUSSION:**

### **Issue A: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[13] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

(a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[14] The list of examples of personal information under section 2(1) is not exhaustive.

Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.<sup>2</sup>

[15] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(2) Personal information does not include information about an individual who has been dead for more than thirty years.

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

(2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] To qualify as personal information, the information must be about the individual in a personal capacity. In general, information associated with an individual in a professional, official or business capacity will not be considered to be “about” the individual.<sup>3</sup>

[17] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>4</sup>

[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>5</sup>

### ***Representations and findings***

[19] The city submits that the records contain personal information as defined in paragraphs (d) and (h) of the definition in section 2(1) of the *Act*. Specifically, the city submits that the withheld information at issue includes the name of two individuals that have made complaints against the property in question, as well as the names of the owners of one of the property addresses specified in the request. The city maintains that this is the personal information of individuals other than the appellant.

[20] The city also submits that the records contain some personal information relating to the appellant.

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<sup>2</sup> Order 11.

<sup>3</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>4</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>5</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[21] The affected parties' submissions did not address whether the information in the records was personal information as defined in the *Act*.

[22] Based on my review of the records at issue and the city's submissions, I am satisfied that the records contain the personal information of both the appellant and three affected parties. This information includes the names, addresses, and telephone numbers of the individuals, and I find that it is "personal information" according to paragraphs (d) and (h) of the definition of personal information under section 2(1) of the *Act*.

**Issue B: Does the discretionary exemption at section 38(b) apply to the information at issue?**

[23] Section 36(1) of the *Act* gives individuals a general right of access to their own personal information held by an institution. Section 38 provides a number of exemptions from this right. Section 38(b) is the discretionary personal privacy exemption under Part II of the *Act*. It states:

A head may refuse to disclose to the individual to whom the information relates personal information,

If the disclosure would constitute an unjustified invasion of another individual's personal privacy.

[24] In other words, where a record contains the personal information of both the requester and another individual, and disclosure of the information would be an "unjustified invasion" of the other individual's personal privacy, the institution may refuse to disclose that information to the requester.

[25] If the information falls within the scope of section 38(b), that does not end the matter. Despite this finding, the city may exercise its discretion to disclose the information to the requester. This involves a weighing of the appellant's right of access to his or her own personal information against the other individual's right to protection of their privacy. I address the city's exercise of discretion, under Issue C below.

[26] In determining whether the disclosure of the personal information in the records would be an unjustified invasion of personal privacy under section 38(b), this office will consider, and weigh, the factors and presumptions in sections 14(2) and (3), and balance the interests of the parties.<sup>6</sup>

***Representations***

[27] The city submits that the records at issue contain both the appellant and affected parties' personal information. Accordingly, the city maintains that the discretionary personal privacy exemption at section 38(b) applies because disclosure of the affected

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<sup>6</sup> Order MO-2954.

parties' personal information would be an unjustified invasion of their personal privacy.

[28] In its submissions, the city relies on the presumption at section 14(3)(b) and the factors weighing against disclosure at sections 14(2)(f) and 14(2)(h), to support its position. These sections state:

(2) A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(f) the personal information is highly sensitive; and

(h) the personal information has been supplied by the individual to whom the information relates in confidence.

(3) A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the information:

(b) Was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

[29] With respect to the presumption at section 14(3)(b), the city refers me to Order M-382, in which then Inquiry Officer John Higgins stated, "it has been previously established that personal information relating to investigations of alleged violations of municipal by-laws falls within the scope of the presumption provided by section 14(3)(b) of the Act." The city also refers to Order MO-1496, in which Senior Adjudicator David Goodis found that section 14(3)(b) applied to information compiled by the city as part of its investigation into a possible violation of the Building Code and the city's zoning by-law.

[30] The city submits that the section 14(3)(b) presumption applies in the current appeal, as all of the personal information at issue was compiled by the city as part of its investigation into an alleged contravention of the city's Municipal Code Chapter No 548, *Littering and Dumping of Refuse*.

[31] The city maintains that none of the exceptions to the presumptions set out in section 14(4) apply.

[32] With respect to the factor weighing against disclosure at section 14(2)(f), the city submits that for information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause excessive distress to the individual to whom the information belongs. The city submits that in the circumstances of this appeal, the disclosure of the affected parties' personal information could lead to unwanted contact and could reasonably be expected to cause the affected parties "extreme distress".

[33] The city also maintains that complainants are advised that their information will be kept confidential, and they therefore have an expectation of confidentiality with regard to the personal information they provide as part of by-law investigations. Accordingly, the city maintains that the factor weighing against disclosure at section 14(2)(h) is also relevant.

[34] The joint representations of the two affected parties do not directly address the factors set out in section 14(2); however, the parties strongly object to the disclosure of their personal information due to what they refer to as a strained relationship between the parties. The confidential portions of the affected parties' representations provide further details in support of their position.

[35] As mentioned above, the appellant did not provide representations for my consideration.

### ***Analysis and findings***

[36] In Order MO-2954, Adjudicator Laurel Cropley discussed this office's approach to deciding whether the disclosure of personal information would result in an unjustified invasion of personal privacy. Adjudicator Cropley distinguished between the analyses required by the personal privacy exemptions depending on whether the relevant exemption is found in Part I or II of the *Act*.<sup>7</sup> Adjudicator Cropley determined that when the discretionary personal privacy exemption under Part II, section 38(b), is engaged because the record contains a requester's own personal information, adjudicators should consider, and weigh, the factors and presumptions in sections 14(2) and (3), and balance the interests of the parties.<sup>8</sup>

[37] This approach has been followed by adjudicators in subsequent decisions, and I adopt it in this appeal. For the reasons that follow, I find that disclosure of the withheld personal information of the affected parties would result in an unjustified invasion of their personal privacy.

[38] This office has recognized that the presumption at section 14(3)(b) can apply to a variety of investigations, including those relating to by-law enforcement.<sup>9</sup> Having reviewed the records at issue, I am satisfied that they were compiled and are identifiable as part of investigations into possible violations of city by-laws regarding waste and zoning. Accordingly, I agree with the city's position and I find that the section 14(3)(b) presumption applies. Under this section 38(b) analysis, the presumption weighs in favour of non-disclosure of the personal information at issue. I also find that none of the section 14(4) exceptions to this presumption apply in the context of this appeal.

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<sup>7</sup> The mandatory personal privacy exemption is section 14, found in Part I of the *Act*, whereas the discretionary personal privacy exemption is section 38(b), found in Part II of the *Act*.

<sup>8</sup> Order MO-2954 at para. 86.

<sup>9</sup> Order MO-2147.



[39] Under section 38(b), I must also consider and weigh any applicable section 14(2) factors to balance the appellant's right of access and affected parties' privacy interests.

[40] With respect to the factor in section 14(2)(f), I note that the city appears to be relying on older decisions of this office in claiming that disclosure could result in "excessive" distress. In Order PO-2518, former Senior Adjudicator John Higgins stated the following about the consideration of this factor:

Throughout the Ministry's representations, it argues that the information at issue is highly sensitive. Previous orders have stated that, in order for personal information to be considered highly sensitive, it must be found that disclosure of the information could reasonably be expected to cause "excessive" personal distress to the subject individual [Orders M- 1053, PO-1681, PO-1736]. In my view, this interpretation is difficult to apply and a reasonable expectation of "significant" personal distress is a more appropriate threshold in assessing whether information qualifies as "highly sensitive."

[41] Accordingly, for personal information to be considered highly sensitive under section 14(2)(f), the evidence must establish a reasonable expectation of "significant" personal distress if the information is disclosed.

[42] The confidential representations submitted jointly on behalf of two of the affected parties describe the relationship and history between them and the appellant. Having considered these submissions, I accept that disclosure of the personal information at issue could reasonably be expected to result in the affected parties experiencing significant personal distress. Therefore, I find that the factor favouring non-disclosure at section 14(2)(f) applies to the withheld information.

[43] The factor at section 14(2)(h) applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>10</sup>

[44] The city submits that it advises complainants that their personal information will remain confidential. The affected parties' confidential representations suggest that they provided personal information to the city with the understanding that it would not be disclosed to the appellant. I accept these submissions and find that in the context in which the personal information was supplied, the affected parties had a reasonable expectation of confidentiality in the information they provided to the city. Accordingly, I find that the factor favouring non-disclosure at section 14(2)(h) applies to the information at issue.

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<sup>10</sup> Order PO-1670.

[45] I have concluded that the presumption against disclosure in section 14(3)(b) and the factors weighing against disclosure in sections 14(2)(f) and 14(2)(h) apply, and I have considered the fact that no factors in favour of disclosure were claimed or established by the parties. Moreover, on my own review of the records, no factors favouring disclosure are evident. Therefore, I am satisfied that the disclosure of the personal information in the records withheld by the city would result in an unjustified invasion of the affected parties' personal privacy. Accordingly, I find that the withheld information is exempt from disclosure under section 38(b) of the *Act*, subject to my review of the city's exercise of discretion.

**Issue C: Did the city exercise its discretion under section 38(b)? If so, should this office uphold the exercise of discretion?**

[46] The section 38(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[47] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example, it does so in bad faith or for an improper purpose, it takes into account irrelevant considerations, and/or it fails to take into account relevant considerations.

[48] In either case, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>11</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>12</sup>

***Representations***

[49] The city submits that it has exercised its discretion in good faith and for a proper purpose. In support of this position, the city maintains that it considered "all the relevant factors" in deciding to deny access to the names and contact information of the affected parties. The city specifically mentions the following factors that it considered:

- the wording of the exemption in section 38(b) in conjunction with section 14(1);
- that individuals should have the right to access their own personal information and that, in this case, the appellant's personal information has been disclosed;
- that the privacy of individuals should be protected;
- the absence of any compelling or sympathetic reasons cited by the appellant;

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<sup>11</sup> Order MO-1573.

<sup>12</sup> Section 43(2).

- the fact that substantive portions of the records at issue have been disclosed; and
- that it is the historic practice of the city to withhold complainant's personal information in similar circumstances.

[50] The other parties did not address the city's exercise of discretion in choosing to withhold the affected parties' personal information.

### ***Analysis and findings***

[51] Upon review of the city's submissions and the records at issue, I find that the city properly exercised its discretion under section 38(b) of the *Act*. Based on the evidence before me, I am satisfied that the city did not exercise its discretion in bad faith or for an improper purpose. It is clear that the city considered the principle that the appellant should be able to access her own personal information and, further, that this information has been disclosed to her. It is also clear that the city considered that the affected parties should have their privacy protected. In addition to the privacy protection interests served by the presumption in section 14(3)(b) and the factors in section 14(2), I am satisfied that the city properly considered other relevant factors, such as the lack of any compelling or sympathetic reasons for disclosing the information at issue, as well as its historic practices in similar cases. Finally, I am satisfied that the city did not take into consideration irrelevant factors. Accordingly, I uphold the city's exercise of discretion to withhold the affected parties' personal information under section 38(b).

### **Issue D: Did the city conduct a reasonable search for records?**

[52] The appellant claims that additional responsive records exist beyond those identified by the city. Accordingly, I must determine whether the city conducted a reasonable search for records as required by section 17 of the *Act*.<sup>13</sup> If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.<sup>14</sup>

[53] The *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.<sup>15</sup> To be responsive, a record must be "reasonably related" to the request.<sup>16</sup>

[54] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable

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<sup>13</sup> Orders P-85, P-221 and PO-1954-I.

<sup>14</sup> Order MO-2185.

<sup>15</sup> Orders P-624 and PO-2559.

<sup>16</sup> Order PO-2554.

basis for concluding that such records exist.<sup>17</sup>

### ***Representations***

[55] The city provided written representations on the issue of reasonable search, noting that the individual who conducted the search is no longer an employee with the city's Municipal Licensing and Standards (MLS) division.

[56] In its representations, the city maintains that it "deals with similar requests on a frequent basis" and it was clear from the request that the responsive records would be located within the MLS. The city also notes that MLS was specifically mentioned in the appellant's request. Accordingly, the city maintains that there was no need to seek clarification from the appellant, nor was there any reason for searches to be conducted at other city divisions.

[57] The city explains that MLS uses a database in which all information is kept, including notes, reports, violations, permits, and correspondence related to a specific property. To search for information relating to a particular property, staff enter the subject address into the system and download an electronic copy of all information on file. In the case of an access request, that information is then submitted to the Access and Privacy Unit. The city maintains that it is "highly improbable" that responsive information would not be located using these methods.

[58] The city notes that during mediation, MLS staff were asked to conduct a second search for records that were created between 2015 and 2017. MLS staff advised that the only records on file for the appellant's address ended in 2013 and had previously been provided to the appellant.

[59] The city submits that since that the appellant's request included two addresses (the appellant's and the affected parties'), MLS staff were asked to search once more for any records that impacted the appellant's property but that may have been filed under the other address from 2006 to present. This search generated 18 additional pages of responsive records.

[60] City staff compared those 18 pages with records that had been previously disclosed to the appellant through a previous request (request number 2017-02207), and determined that the appellant had received all but five pages of records. Those five pages were then disclosed to the appellant in part.

[61] The city submits that it is not possible that records once existed but no longer exist. In support of this position, the city provided a copy of its record retention schedule, which requires that hardcopy records relating to bylaw investigations be retained for six years following the resolution of the investigation, after which they are destroyed. Staff of this office inquired about electronic records, and the city advised

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<sup>17</sup> Order MO-2246.

that the database, which goes back to 2011, "has never been purged. So those records will exist [...] Therefore, no other records ever existed, other than what has been provided [to the appellant]."

[62] Finally, the city submits that the appellant has provided no basis to conclude that additional responsive records exist, nor has she made it clear what additional records she believes should exist.

### ***Analysis and findings***

[63] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.<sup>18</sup>

[64] Based on the city's representations, I accept that its search for responsive records was conducted by an employee in the MLS division who would have been knowledgeable in the subject matter, since the appellant's request was, as the city describes, fairly routine. I am also satisfied that in conducting multiple searches of the MLS database, the employee expended reasonable efforts to locate records within the city's custody or control that are reasonably related to the request.

[65] The appellant did not provide representations in response to the Notice of Inquiry. Therefore, in deciding whether there is a reasonable basis for believing that additional records exist, the only information before me from the appellant is that when presented with the results of the city's additional search, she maintained that additional responsive records should exist.

[66] I note the city's submission that its additional search located 18 responsive records, 13 of which had previously been provided to the appellant in response to request 2017-02207. During mediation, the appellant confirmed that she had retained the 13 records disclosed to her in response to her previous request. Through this appeal, the appellant received partial access to the five remaining records.

[67] Since the appellant maintains that additional records exist, she must provide a reasonable basis for concluding that other responsive records exist beyond those that have already been located by the city. Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the appellant still must provide a reasonable basis for reaching this conclusion.<sup>19</sup> In this case, I find that she has not. Without further information from the appellant about what additional responsive records might reasonably be thought to exist or where such records may be located, I find that there is no reasonable basis for concluding that additional records exist which have not yet been located by the city's various searches.

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<sup>18</sup> Orders M-909, PO-2469 and PO-2592.

<sup>19</sup> Order MO-2246.

[68] Accordingly, I find that the city has conducted a reasonable search for records responsive to the appellant's request, and I dismiss the appellant's appeal.

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Jaime Cardy  
Adjudicator

December 20, 2018 \_\_\_\_\_