ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-001

April 12, 2000

ALBERTA JUSTICE

Review Number 1664

I. BACKGROUND

[para 1.] On May 15, 1999, the Applicant made a correction request under section 35(1) of the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice (the "Public Body") requesting that the Public Body remove a letter from one of its files containing information about the Applicant.

[para 2.] On June 23, 1999, the Public Body wrote to the Applicant denying the Applicant's correction request and informing the Applicant that the file containing information about the Applicant had been linked with the correction that was requested but not made.

[para 3.] On June 29, 1999, the Applicant wrote to my Office requesting a review of the Public Body's response to the Applicant's correction request. Mediation was not successful, and the matter was set down for a written inquiry.

[para 4.] This inquiry proceeds on the basis of the Act as it existed before the amendments to the Act came into force on May 19, 1999.

II. RECORD AT ISSUE

[para 5.] The record at issue is a two-page letter, dated September 6, 1998, authored by a psychiatrist, that contains a diagnosis and a recommendation regarding the Applicant.

III. ISSUES

[para 6.] There are three issues in this inquiry:

A. Did the Public Body correctly apply section 35(1) to the information in the record at issue?

B. Does the removal of the record at issue constitute an acceptable method of correction under section 35(1)?

C. Did the Public Body correctly apply section 35(2) to the information in the record at issue?

IV. BURDEN OF PROOF

[para 7.] The Act is silent as to which party has the burden of proof under sections 35(1) and 35(2). However, in Order 97-020, I stated that the burden of proof for these sections is two-fold. First an applicant must prove that the two requirements under section 35(1) are met. An applicant must show that: (i) there is personal information about an applicant, and (ii) there is an error or omission in the applicant's personal information. Second, the public body has the burden of proof regarding its decision to correct or not to correct under section 35(1) and a decision to annotate or link under section 35(2).

V. DISCUSSION

[para 8.] Section 35 reads:

35(1) An applicant who believes there is an error or omission in the applicant's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) If no correction is made in response to a request under subsection (1), the head of the public body must annotate or

link the information with the correction that was requested but not made.

(3) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.

(4) On being notified under subsection (3) of a correction, annotation or linkage of personal information, a public body must make the correction, annotation or linkage on any record of that information in its custody or under its control.

(5) Within 30 days after the request under subsection (1) is received, the head of the public body must give written notice to the individual that

(a) the correction has been made, or

(b) an annotation or linkage has been made pursuant to subsection (2).

(6) Section 13 applies to the period set out in subsection (5).

Issue A: Did the Public Body correctly apply section 35(1) to the information in the record at issue?

[para 9.] The Applicant must meet two requirements for section 35(1) to apply: (i) there must be personal information about an applicant, and (ii) there must be an error or omission in the applicant's personal information.

1. Does the record contain "personal information" about the Applicant?

[para 10.] "Personal information" is defined in section 1(1)(n) of the Act. The relevant portions read:

1(1)(n) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, home or business address or home or business telephone number,

…

(iii) the individual's age, sex, marital status or family status

…

(vi) information about the individual's health and health care history, including information about a physical or mental disability,

(vii) information about the individual's educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else's opinions about the individual,

[para 11.] I have reviewed the record at issue. I find that the information in this record is the Applicant's personal information because it is recorded information about the Applicant, consisting of one or more of the kinds of personal information listed above.

2. Is there an "error" or "omission" in the Applicant's personal information?

[para 12.] The Applicant requested that, pursuant to section 35(1) of the Act, the record at issue be removed from the Applicant's file. The Applicant states that the letter is subject to correction because it constitutes a statement of fact and not an opinion. The Applicant also states that the diagnosis in the record at issue was not based on a proper assessment and is, therefore, incorrect.

[para 13.] The Public Body argued that the record at issue constitutes a Third Party's opinion and, therefore, is not subject to correction under section 35(1).

[para 14.] In Order 97-020, I defined an "error" to mean a mistake, or something wrong or incorrect. In that same Order I defined "omission" to mean something missing, left out or overlooked.

[para 15.] I also stated that a public body exercises its discretion properly if it corrects an applicant's personal information where a "fact" is incorrect, that is, there is an error or omission of "fact" in the applicant's personal information. I defined a "fact" as a thing that is known to have occurred, to exist, or to be true, or an item of verified information.

[para 16.] Conversely, I stated that a public body does not exercise its discretion properly if it corrects an applicant's personal information:

(a) when there is a dispute about whether there is an error or omission of fact concerning an applicant's personal information;

(b) when there is a third party's recorded statement of fact regarding the applicant's personal information, even if the recorded fact is wrong; or

(c) when there is a third party's opinion about the applicant.

[para 17.] In Orders 97-002 and 97-020, I defined an opinion as "a belief or assessment based on grounds short of proof; a view held as probable". I stated that an "opinion" is subjective in nature, and may or may not be based on fact. In Order 98-010, I said that an opinion cannot be considered an error or an omission if it accurately reflects the views of the author at the time it was recorded, whether or not the opinion is supported by fact.

[para 18.] After carefully reviewing the record at issue, I find that the Applicant has not met the burden of proof under section 35(1). I find that the information in the record at issue consists of a third party opinion about the Applicant. Since an opinion is not a "fact", an opinion is not subject to correction. Consequently, I find that the Public Body properly exercised its discretion under section 35(1) in refusing to correct the record at issue.

Issue B: Does the removal of the record at issue from the Public Body's file constitute an acceptable method of correction under section 35(1)?

[para 19.] As I have determined that the Public Body properly exercised its discretion under section 35(1) in refusing to correct the information in the record at issue, I do not find it necessary to decide whether the removal of the record would constitute an acceptable method of correction under section 35(1).

Issue C: Did the Public Body correctly apply section 35(2) to the information in the record at issue?

[para 20.] Section 35(2) states that if a public body does not correct an applicant's personal information, it must annotate or link the information with the correction that was requested but not made. In Order 97-020, I defined the word "annotate" to mean "add an explanatory

note" to something and the word "link" to mean "connect or join two things or one thing to another", "attach to", or "combine".

[para 21.] Furthermore, I stated that to "annotate … the information with the correction that was requested" implies that the correction that was requested is written on the original record, close to the information under challenge by the applicant. Although there is no requirement to do so, the annotation should also be signed and dated.

[para 22.] In addition, I said that to "link the information with the correction that was requested" implies that the correction that was requested is attached to, or joined or connected with, the original record containing the information under challenge by the applicant.

[para 23.] In Orders 97-020 and 98-010, I also adopted several principles found in B.C. Order 124-1996. I said that an annotation or linkage must be apparent on the file. A public body should not try to hide or bury an applicant's request for correction. The correction request should be as visible and accessible as the information under challenge, and should be retrieved with the original file. In addition, I stated that a public body should not be forced to comply with unreasonable demands of an applicant who, "in voluminous material and in nuisance fashion" insists the documents be edited in exactly the way he wishes. Rather, the annotation or linkage should be made in a fair manner. What is considered "fair" will depend on the type of records involved, the length of the correction requested by the applicant, the applicant's other avenues of redress within the public body (such as appeals), and the administrative resources of a public body.

[para 24.] In the Public Body's submission, the Public Body included a copy of a "Personal Information Annotation" form which the Public Body states was placed on the file. This form consists of the Applicant's name, the correction request date, a description of the record at issue, and a verbatim citation of the request. This form is also signed and dated by the author.

[para 25.] Upon my review of the file, I found a copy of this form on the file. I did not, however, find a copy of the record. When my Office asked the Public Body about the discrepancy, the Public Body informed my Office that due to an inadvertent administrative error during the Public Body's preparation for this inquiry, the original record had been removed from the file.

[para 26.] Therefore, as there is currently no record on the file, I do not have evidence before me that the Public Body has, under section 35(2),

annotated or linked the information with the correction that was requested but not made.

[para 27.] However, under section 54(5) of the Act I must, as Commissioner, return my copy of the record to the Public Body upon conclusion of the inquiry. Section 54(5) states:

> *54(5) After completing a review or investigating a complaint, the Commissioner must return any record or any copy of any record produced.*

[para 28.] Therefore, I intend to order the Public Body to properly link the record with the correction request by placing the Personal Information Annotation form on the file next to that record. With this Order, I will provide the Public Body with the copy of the record that it originally supplied to me.

VI. ORDER

[para 29.] Under section 68 of the Act, I make the following Order disposing of the issues in this inquiry.

Issue A: Did the Public Body correctly apply section 35(1) to the information in record at issue?

[para 30.] I find that the Public Body properly exercised its discretion under section 35(1) when it decided not to correct the information in the record at issue.

Issue B: Does the removal of the record constitute an acceptable method of correction under section 35(1)?

[para 31.] As I have determined that the Public Body properly exercised its discretion under section 35(1) in refusing to correct the record at issue, I do not find it necessary to decide whether the removal of the record would constitute an acceptable method of correction under section 35(1).

Issue C: Did the Public Body correctly apply section 35(2) to the information in the record at issue?

[para 32.] I order the Public Body to properly link the record with the correction request by placing the Personal Information Annotation form on the file next to that record. With this Order, I have provided the Public Body with the copy of the record that it originally supplied to me.

[para 33.] I further order that, within 50 days of being given a copy of this Order, the Public Body notify me in writing that it has complied with this Order.

Robert C. Clark
Information and Privacy Commissioner