

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 2000-007

May 2, 2000

THE CITY OF CALGARY

Review Number 1793

I. BACKGROUND

[para 1.] On December 9, 1999, the Applicant made a correction request under section 35(1) of the *Freedom of Information and Protection of Privacy Act* (the "Act") to the City of Calgary (the "Public Body"). The Applicant requested that the Public Body remove one of the Applicant's performance evaluations from the Public Body's personnel file and replace it with a reference letter.

[para 2.] On December 23, 1999, the Public Body wrote to the Applicant informing the Applicant that it was denying the Applicant's correction request under section 35(1) of the Act but, as required by section 35(2) of the Act, it had linked the file with the correction that was requested. In that letter, the Public Body also informed the Applicant that it had placed the reference letter on the file.

[para 3.] On January 3, 2000, the Applicant wrote to this Office requesting a review of the Public Body's response to the Applicant's correction request. In particular, the Applicant asked for a review of the Public Body's decision not to remove a comment from the performance evaluation that states that the Applicant did not work well with others. The matter was set down for a written inquiry.

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

II. RECORD AT ISSUE

[para 5.] The record at issue is a one-page letter dated September 14, 1999 authored by the Applicant's supervisor. The letter evaluates the Applicant's work performance. The information at issue in this inquiry is the hand-written comment on the letter which states the Applicant "Did not work well when working with others, had conflicts".

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 information in 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 section 35(1) and (2). However, in Order 97-020, I said 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. The applicant must show that: (i) there is personal information about the 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 its 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.

(1.1) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.

(2) If no correction is made in response to a request under subsection (1), or if because of subsection (1.1) no correction may be made, the head of the public body must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.

(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.

(3.1) Despite subsection (3), the head of a public body may dispense with notifying any other public body or third party that a correction, annotation or linkage has been made if

(a) in the opinion of the head of the public body, the correction, annotation or linkage is not material, and

(b) the individual who requested the correction is advised and agrees in writing that notification is not necessary.

(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 the 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) In this Act,

(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,

...

(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 requests that a supervisor's comment regarding the Applicant's inability to work well with others be deleted from the record pursuant to section 35(1) of the Act. The Applicant states that this information is incorrect and has submitted a number of other favorable performance evaluations as evidence of the Applicant's ability to work with others. The Applicant also states that sections 77(1), 79(1), 82(1), 101(1), 126(c), 126(d) and 129 of the *Employment Standards Code*, S. A. 1996, c. E-10.3 are relevant to this inquiry.

[para 13.] The Public Body argues that the information in the record at issue constitutes a third party's opinion and, therefore, pursuant to section 35(1.1), is not subject to a correction under section 35(1). The Public Body states that this information constitutes the supervisor's belief and subjective assessment of the Applicant's performance.

[para 14.] Section 35(1) states that an applicant who believes there is an "error or omission" in the applicant's personal information may request a public body that has the information in its custody or under its control to correct the information. However, section 35(1.1), which came into force on May 19, 1999 as an amendment to the Act, codified my earlier decisions and clearly states that, despite section 35(1), a public body must not correct an opinion.

[para 15.] 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. Furthermore, I stated that a Public Body is only able to correct an applicant's personal information if there is an error or omission of "fact" in that 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.] 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 17.] After carefully reviewing the information in the record at issue, I find that the Applicant has not met the burden of proof under section 35(1). In my view, the information in the record constitutes an opinion under section 35(1.1) and, therefore, must not be corrected. Consequently, I find that the Public Body correctly applied section 35(1) to the record.

[para 18.] I also find that the sections of the *Employment Standards Code* cited by the Applicant are not relevant to this inquiry. My jurisdiction to review a public body's decision regarding a correction request is set out in sections 35, 62, 66 and 68 of the *Freedom of Information and Protection of Privacy Act*. Although the sections of the *Employment Standards Code* cited by the Applicant may be relevant if the

Applicant were to bring an action in another forum, these sections are not relevant to my decision in this inquiry.

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

[para 19.] As I have determined that the Public Body correctly applied section 35(1) in refusing to correct the record, I do not find it necessary to address whether the removal of the information in 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, or if no correction may be made because of section 35(1.1), 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 must 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 the 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 or she 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. This form included the Applicant’s name, the correction request date, a description of the correction request and a statement which says that the form had been sent to the Applicant and to all public bodies and organizations to which it had disclosed the information in the year preceding the request. The form was also signed and dated by the author.

[para 25.] During this inquiry, I reviewed a copy of the file sent to me by the Public Body. On that copy I found a copy of the record but I did not find a copy of the Personal Information Annotation form. When my Office asked the Public Body about the discrepancy, the Public Body said that it inadvertently made an error and sent my Office an incomplete copy of the file. The Public Body also confirmed that a copy of the form was on the original file.

[para 26.] However, due to this discrepancy, I subsequently requested that the original file be sent to my Office for my review. After a review of the original file, I found that the Personal Information Annotation form was on the file next to an internal memorandum regarding the correction request and the record at issue. Therefore, I find the Public Body correctly linked the correction request to the record pursuant to section 35(2) of the Act.

VI. ORDER

[para 27.] I make the following Order under section 68 of the Act:

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

[para 28.] I find that the Public Body correctly applied section 35(1) when it decided not to correct the information in the record at issue.

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

[para 29.] As I have determined that the Public Body correctly applied section 35(1) in refusing to correct the information in the record at issue, I do not find it necessary to address whether the removal of the information in 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 30.] I find that the Public Body correctly linked the correction request to the information in the record at issue as required by section 35(2) of the Act.

Robert C. Clark
Information and Privacy Commissioner