

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2002-008

December 20, 2002

CITY OF CALGARY

Review Number 2283

Office URL: <http://www.oipc.ab.ca>

Summary: The Applicant applied for an employment opportunity with the City of Calgary (the “Public Body”) while being employed in a different department of the Public Body. The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) for notes made while checking with the Applicant’s references. The Public Body denied access to a two-page record under section 19(1) of the FOIP Act, on the grounds that the record contained confidential evaluations. The Adjudicator found that the Public Body had properly applied section 19(1) and confirmed the decision of the head to deny access.

Statutes Considered: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c-F-25, ss. 19 [previously section 18], 19(1) [previously section 18(1)], 19(2) [previously section 18(2)], 19(3) [previously section 18(3)], 72 [previously section 68].

Authorities Considered: AB: Order 98-021.

I. BACKGROUND

[para 1] On August 7, 2001, the Applicant sent an access request under the *Freedom of Information and Protection of Privacy Act* (the “FOIP Act”) to the City of Calgary (the “Public Body”). The request was for the reference notes created by the Public Body’s employees while conducting an employment competition in which the Applicant was a

candidate. The Applicant wanted the names of persons who had made reference comments and the specific comments made.

[para 2] On September 12, 2001, the Public Body responded to the Applicant and indicated that two pages of records were withheld from access under section 19(1) [previously section 18(1)] of the FOIP Act.

[para 3] On September 14, 2001, the Applicant requested that the Office of the Information and Privacy Commissioner conduct a review of the Public Body's decision to deny access to the records.

[para 4] Mediation was authorized, but was not successful. The matter was set down for a written inquiry. The Notice of Inquiry was sent to the parties on January 24, 2002.

[para 5] Both parties submitted initial briefs. The Applicant requested that her initial brief be accepted "in camera". After reviewing the brief, I decided not to accept it "in camera. It was my view that it did not contain personal or sensitive information. Therefore, the submissions were exchanged. The Applicant did not submit a rebuttal.

[para 6] The Revised Statutes of Alberta (R.S.A. 2000) came into force on January 1, 2002. Consequently, all section numbers referred to in this Order reflect the new numbering. Where a section number is listed, the previous number has also been included as follows: section 19 [previously section 18]. Unless otherwise noted, the text of each section remains the same.

II. RECORD AT ISSUE

[para 7] The record at issue consists of two hand-written pages. The pages are the notes made by an employee of the Public Body while conducting a telephone reference check on June 8, 2000, during the course of an employment competition. The Applicant was the subject of the notes.

III. ISSUE

[para 8] There is one issue for this inquiry: Did the Public Body properly apply section 19 [previously section 18] of the FOIP Act (confidential evaluations) to the record?

IV. DISCUSSION OF THE ISSUE

A. Does section 19(1) [previously section 18(1)] or section 19(2) [previously section 19(2)] apply to the record?

[para 9] Section 19 [previously section 18] of the FOIP Act states:

19(1) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body when the information is provided, explicitly or implicitly, in confidence.

(2) The head of a public body may refuse to disclose to an applicant personal information that identifies or could reasonably identify a participant in a formal employee evaluation process concerning the applicant when the information is provided, explicitly or implicitly, in confidence.

(3) For the purpose of subsection (2), "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.

[para 10] In her submission, the Applicant argued that section 19(3) [previously section 18(3)] would apply to the record. Therefore, it was the Applicant's position that the Public Body would not be authorized to withhold the record under section 19(2) [previously section 18(2)] of the FOIP Act.

[para 11] In order for section 19(3) [previously section 18(3)] to apply, the person being interviewed would have to be the Applicant's supervisor or superior. The Applicant concluded that this must have been the case for the following reasons:

- The Applicant was employed in another position with the Public Body.
- When applying for the position, the Applicant supplied the names of three references in addition to her supervisor.
- After the competition, the Applicant spoke with all three of her references. All three denied being contacted.
- The Applicant concluded that her supervisor must have been the person contacted.

[para 12] On the basis of this conclusion, the Applicant argued that section 19(2) [previously section 18(2)] would be the applicable sub-section because of the reference to "supervisor or superior" in section 19(3) [previously section 18(3)].

[para 12] The Public Body argued that it had applied section 19(1) [previously section 18(1)] when deciding to refuse access. In its rebuttal submission, the Public Body argued that section 19(2) [previously section 18(2)] refers to *a formal employee evaluation process concerning the applicant*. The Public Body argued that the interview was not conducted for the purpose of a formal employee evaluation. It was conducted for the purpose of determining the Applicant's *suitability, eligibility or qualifications for employment*, as set out in section 19(1) [previously section 18(1)] of the FOIP Act.

[para 13] To support this position, the Public Body offered the following factual information:

- The Applicant was an employee of the Public Body. However, she worked in a different department than the position she applied for.

- The Applicant supplied the names of references with her employment application.
- The Public Body contacted the reference for the purpose of determining the Applicant's suitability for the position for which the Applicant applied.
- Without the Applicant's application for a new position, the conversation would not have taken place and the record would not have been created.

[para 14] The Public Body included an affidavit from the Public Body's employee who telephoned the Applicant's reference (the "Third Party") and created the record. The Public Body's employee stated in the affidavit that the reference check was made *solely for the purpose of determining the Applicant's suitability, eligibility and qualifications for the position of [position name]. The discussion with the Third Party occurred as a result of the Applicant's application for the position. If the Applicant had not applied for the position, the Third Party would not have been contacted to provide a reference check.*

[para 15] In addition to the affidavit evidence, it is apparent from the text of the record that the reference check was made for the purpose of determining the Applicant's suitability for a new position and not as a result of a performance review in her current employment position. Therefore, I find that the record was *compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment* as set out in section 19(1) [previously section 18(1)] of the FOIP Act. Having made that decision, I must now decide if the information meets the other requirements of section 19(1) [previously section 18(1)] of the FOIP Act.

[para 16] In Order 98-021, the Commissioner set out a three-part test to determine if section 19(1) [previously section 18(1)] applies. The three parts are as follows:

1. The information must be personal information that is evaluative or opinion material.
2. The personal information must be compiled for,
 - Determining the applicant's suitability, eligibility or qualifications for employment, or
 - Awarding a contract or other benefit.
3. The personal information must be provided explicitly or implicitly in confidence.

B. Is the information in the record personal information that is evaluative or opinion material?

[para 16] The Public Body submits that the record contains the personal information of the Applicant and the Third Party. The personal information of the Third Party is limited to name, department of employment, and telephone number. The remainder of the personal information consists of the Third Party's opinions about the Applicant's

character and personality, competence and skills in an employment situation, which is the Applicant's personal information.

[para 17] I have reviewed the information contained in the record and agree with the Public Body's characterization. I find that the record contains personal information that is both evaluative and opinion material.

[para 18] I have already found that the information was compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for employment. Therefore, I find that the second part of the test has been met.

C. Was the personal information provided in confidence?

[para 19] I note that the word "CONFIDENTIAL" appears prominently in the top left corner of the record. In the affidavit, the Public Body's employee states the following:

...to my mind, the conversation that I had with the Third Party was implicitly a confidential discussion.

[para 20] The Public Body also argued that it is important for conversations of this type to remain confidential so that frank and open comments may be obtained. The Public Body further argued that it would be difficult for the Public Body to have people give references if they were not confidential. The Applicant was silent on the issue of confidentiality. I find that the personal information was provided in confidence.

D. Conclusion Regarding Section 19(1) [previously section 18(1)]

[para 21] I find that the information in the record fits all of the requirements of section 19(1) [previously section 18(1)] of the FOIP Act.

[para 22] Section 19(1) [previously section 18(1)] is a discretionary ("may") exception. Therefore, even if the information fits within the exception, the Public Body must exercise its discretion regarding the disclosure of the information. I note that the Public Body released fifteen pages of records to the Applicant, most of which had little or no severing. Therefore, I am satisfied that the Public Body has properly exercised its discretion.

E. Additional Issue Raised by the Applicant

[para 23] The Applicant raised the issue that the Public Body is not required to collect reference material because it uses targeted selection to assess the ability of candidates. The Applicant offered excerpts from the Collective Agreement between the Public Body and the union in which she is a member as justification for her position.

[para 24] The matter before me was whether the Public Body had properly applied an exception under the FOIP Act in denying access to a record that was in the custody of the

Public Body. I do not have jurisdiction to assess whether the Public Body is following the terms of its collective agreement. Consequently, I will not deal with this issue.

V. ORDER

[para 25] I make the following order under section 72 [previously section 68] of the FOIP Act.

[para 26] I find that the Public Body properly applied section 19(1) [previously section 18(1)] to the record. I confirm the decision of the head to refuse access to the record.

Dave Bell
Adjudicator