

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2003-007**

July 16, 2003

**THE CITY OF EDMONTON**

Review Number 2547

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to written records of a reference that The City of Edmonton (the “Public Body”) received from the Third Party regarding the Applicant, after the Applicant’s job interview with the Public Body. The Public Body refused to disclose the information under section 19(1) of the Act (confidential evaluations). The Commissioner found that, although the information met the criteria for section 19(1), the Public Body did not exercise its discretion properly in refusing access to that information. Therefore, the Commissioner ordered the Public Body to reconsider its decision to refuse access.

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n)(vii), 1(n)(viii), 17, 19, 19(1), 72(2)(b).

**Authorities Cited: AB:** Orders 98-021, 2000-029.

**I. BACKGROUND**

[para 1] The Applicant requested access under the *Freedom of Information and Protection of Privacy Act* (the “Act”) to written records of a reference that The City of Edmonton (the “Public Body”) received from the Third Party regarding the Applicant, after the Applicant’s job interview with the Public Body.

[para 2] The Public Body located three lines of responsive information on a two-page record of the Applicant's job interview with the Public Body, but refused to disclose the information under section 19(1) of the Act (confidential evaluations).

[para 3] The Applicant requested a review by this Office, and the matter was ultimately set down for a written inquiry with my delegated Adjudicator, who accepted the Applicant's submissions *in camera*. When it became evident that the Adjudicator might have a conflict with this case, I accepted the Applicant's submissions *in camera* and heard the inquiry.

## II. RECORD AT ISSUE

[para 4] At issue are three lines on the two-page record of the Applicant's job interview.

## III. ISSUES

[para 5] The issue set out in the Notice of Inquiry is:

Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the records/information?

[para 6] The Public Body subsequently asked to add section 17 (personal information) as an issue. Section 17 is a mandatory ("must") provision of the Act that I would consider even if the Public Body did not raise it.

## IV. DISCUSSION OF THE ISSUES

### **ISSUE A: Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the records/information?**

[para 7] Only section 19(1) is at issue. It reads:

*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.*

[para 8] The facts appear to be that an employee of the Public Body (the “Employee”) conducted a job interview with the Applicant and thereafter telephoned the Third Party. The Third Party had been a supervisor of the Applicant and had terminated the Applicant’s employment with another public body. The Third Party was no longer employed with that public body and was not a referee for the Applicant, but was a colleague of the Employee.

[para 9] The discussion between the Employee and the Third Party was apparently “off the record”, but some of the Third Party’s comments about the Applicant were recorded on the back of the Applicant’s job interview sheet. The Third Party insists that this was a personal telephone conversation, not a reference check. It is evident that the Third Party did not intend for the information to be used for eligibility for employment.

[para 10] Order 98-021 sets out the three criteria for section 19(1):

- Personal information that is evaluative or opinion material
- Personal information compiled for the purposes of determining the applicant’s suitability, eligibility or qualifications for employment...
- Personal information provided, explicitly or implicitly, in confidence

[para 11] The Public Body says that the first line withheld is the Third Party’s description of the relationship with the Applicant and is therefore information about the Third Party, not about the Applicant. In Order 2000-029, the former Commissioner found that, because the overall objective of reference letters is to provide an opinion about the person seeking the job (an applicant), a third party’s description of the relationship with an applicant was part of the personal views or opinions of the applicant and therefore the applicant’s personal information (section 1(n)(viii) of the Act).

[para 12] Even though I am not dealing with a reference letter here, the information is nevertheless the Third Party’s description of the relationship with the Applicant. Since the context in which the information has been provided is the same employment context in which a reference letter is provided, I find that the information is part of the personal views or opinions of the Applicant and therefore personal information that is evaluative or opinion material.

[para 13] The Public Body says that the second line withheld is both the Applicant’s and the Third Party’s personal information because it is an opinion that reveals the employment relationship between the Third Party and the Applicant, as set out in section 1(n)(vii) (employment history).

[para 14] In Order 98-021, the former Commissioner decided that “personal information” in the section number that is now section 19 can be interpreted to be a third party’s personal information or an applicant’s personal information. However, he said that an opinion about an applicant is the applicant’s personal information, as provided by section 1(n)(viii).

[para 15] The second line is an opinion about the Applicant. Therefore, it is personal information that is evaluative or opinion material.

[para 16] Since the opinion about the Applicant appears on the Applicant's job interview sheet, I find that the personal information that is evaluative or opinion material was compiled for the purpose of determining the Applicant's suitability, eligibility or qualifications for employment. The "off the record" assertions of the Public Body and the Third Party lead me to conclude that the personal information that is evaluative or opinion material was provided implicitly, if not explicitly, in confidence.

[para 17] The third line withheld requires some interpretation. Taken in the context of the second line and the Applicant's statement in his submissions about the reasons that the Third Party dismissed the Applicant from employment, I find that the third line is an opinion about the Applicant and is therefore personal information that is evaluative or opinion material. The other criteria for section 19(1) are also met, for the same reasons as above.

[para 18] Section 19(1) is a discretionary ("may") provision. Even though information meets the criteria for section 19(1), a public body may nevertheless decide to disclose that information. To exercise its discretion properly, a public body must consider the objects and purposes of the Act, and not exercise its discretion for an irrelevant or improper purpose.

[para 19] On the issue of exercising its discretion properly, the Public Body says:

Section 19 attempts to address the two competing interests – the right of an individual to have access to his or her personal information versus the need to protect the flow of frank information to provincial and municipal institutions so that appropriate decisions can be made. It is submitted that the City of Edmonton assessed the competing interests when exercising its discretion to withhold access to the record at issue.

[para 20] In this case, the Third Party denies acting as referee. This is corroborated by the Applicant. There is no evidence that the Public Body had the Applicant's consent to collect the Applicant's personal information from the Third Party.

[para 21] I am concerned about whether the Public Body had the authority under the Act to collect the Applicant's personal information indirectly from the Third Party. Therefore, I do not accept that the Public Body exercised its discretion properly in refusing access to that information. I intend to order the Public Body to reconsider its decision to refuse access.

[para 22] The Public Body also argues that section 19 is a type of common law privilege for communications relating to references, and that the referee/employer relationship should be preserved. The Public Body quotes an Ontario Court of Appeal decision that upheld non-disclosure relating to reference letters of hospitals, on the basis of the criteria that establishes a common law privilege.

[para 23] However, section 19(1) contains its own criteria, which are not the same as those establishing a common law privilege. Therefore, the Public Body's argument cannot apply to section 19(1).

**ISSUE B: Does section 17 of the Act (personal information) apply to the records/information?**

[para 24] Given my decision under section 19(1), I do not find it necessary to consider whether section 17 also applies to the same information the Public Body withheld.

**V. ORDER**

[para 25] I make the following Order under section 72(2)(b) of the Act.

[para 26] I order the Public Body to reconsider its decision to refuse access to the information withheld from the Applicant under section 19(1) of the Act.

[para 27] Within 50 days after being given a copy of this Order, I order the Public Body to notify me and to notify the Applicant, in writing, about what decision it has reached on reconsideration.

Frank Work, Q.C.  
Information and Privacy Commissioner