

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2003-019

August 11, 2004

GRANT MacEWAN COLLEGE

Review Number 2545

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

Summary: The Applicant did not agree with the evaluation of the Applicant's performance while a student in the nursing refresher program at Grant MacEwan College (the "Public Body"). The Applicant applied to the Public Body under the *Freedom of Information and Protection of Privacy Act* to correct the Applicant's evaluation and to send new records to the Alberta Association of Registered Nurses ("AARN"), indicating that the Applicant passed the nursing refresher program. The Public Body refused to correct, on the ground that the Applicant's personal information in the three records at issue consisted of professional or expert opinions, and that the Act prohibited the correction of those opinions. However, the Public Body said it would place the Applicant's correction request on the Applicant's student file. The Commissioner found that the Applicant's personal information in the three records at issue consisted of third parties' recorded statements of facts and opinions about the Applicant, and confirmed the Public Body's decision not to correct that personal information. However, the Commissioner ordered the Public Body to properly link the three records at issue with the Applicant's correction request, and ordered the Public Body to notify the AARN about the linkage.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n), 1(n)(i),(iv),(viii), 1(r), 36, 36(1),(2),(3),(4),(5),(6), 72(3)(a),(d).

Authorities Cited: AB: Orders 96-019, 97-002, 97-020, 98-010, 2000-007.

I. BACKGROUND

[para 1] The Applicant was a student in the nursing refresher program at Grant MacEwan College (the Public Body). The Applicant did not agree with the evaluation of the Applicant's performance in the final clinical placement for that program. On August 23, 2002, the Applicant applied to the Public Body under the *Freedom of Information and Protection of Privacy Act* (the "Act") to correct the following:

#4 anecdotal record done by [two named individuals] April 22, 2002 at GMC Campus Calgary after I was removed by the security guard. These are falsified records. Also the final evaluation sent to AARN [Alberta Association of Registered Nurses] and a document stating my hrs [sic] and my failure had been discussed. * see attached letter

[para 2] The two named individuals were the Applicant's instructor in the final clinical placement (the "clinical instructor") and the Applicant's instructor in the nurse credentialing program (the "credentialing instructor").

[para 3] In the August 23, 2002 letter the Applicant attached to the correction request, the Applicant further said "...I want new records sent out to the AARN with my pass on them so I can be licensed as an RN in this province."

[para 4] In a letter dated September 30, 2002, the Public Body responded to the Applicant's correction request, as follows:

The records you have asked to be corrected or removed from your records are matters of professional opinion of your performance in the Nursing Refresher Program while a student of Grant MacEwan College. Under Section 36(2) of the Act, "the head of a public body must not correct an opinion, including a professional or expert opinion". I am therefore unable to correct or change the records in response to your request.

Under Section 36(3) of the Act, I can and will place on your file, your request to have the identified information corrected and the reason you have expressed in your letter of August 23, 2002. This information will be maintained on your student file with the College.

[para 5] The Applicant requested that this Office review the Public Body's decision. When mediation did not resolve the matter, it was set down for a written inquiry.

[para 6] In the Public Body's one written submission for the inquiry, the Public Body said that it has received the following requests from the Applicant under the Act:

- May 3, 2002: A letter requesting to correct personal information and subsequent Request for Review #2473
- July 2, 2002: A request to access information
- August 23, 2002: A request to access information and subsequent Request for Review #2581

- August 23, 2002: A request to correct personal information and current Request for Review #2545
- November 27, 2002: A request to access information

[para 7] The Public Body also said:

A copy of records from the five separate FOIP requests from this individual together with the records from two student appeals processes that bear on this matter are provided under separate cover.

[para 8] In the Applicant's initial and rebuttal written submissions for the inquiry, the Applicant refers to issues that relate to the Applicant's May 3, 2002 correction request to the Public Body, to one of the access requests made to the Public Body, and to a correction request the Applicant made to a different public body. However, my jurisdiction and this Order are restricted to the Applicant's August 23, 2002 correction request. I do not have jurisdiction in this inquiry to make decisions about any of the Applicant's other requests under the Act or any of the records at issue in those other requests.

II. RECORDS AT ISSUE

[para 9] In its submission, the Public Body says that there are two records the Applicant wants corrected. However, based on the wording of the Applicant's correction request and a review of all the records the Public Body provided to me, I have determined that there are three records that the Applicant wants corrected, consisting of the following:

1. The record entitled "Grant MacEwan College Nursing Refresher Program Anecdotal Record", which the Applicant refers to as "#4 anecdotal record" ("#4 anecdotal record").
2. The record entitled "Grant MacEwan College Nursing Refresher Program Final Evaluation Form" ("Final Evaluation Form").
3. The record entitled "Nursing Refresher Program Evaluation by Grant MacEwan College" ("Nursing Refresher Program Evaluation").

[para 10] I located those three records from among the records the Public Body labeled as "FOIPP Request #4" (the Applicant's correction request that is the subject of this inquiry) and "Appeal 2" (one of the Applicant's student appeals involving the Public Body).

[para 11] There is some question about which record is the "#4 anecdotal record". The Applicant says that the #4 anecdotal record was done by the two named individuals April 22, 2002 at the Public Body's campus in Calgary, after the Applicant was removed by the security guard. In the records the Public Body labeled as "FOIPP Request #4",

there is an anecdotal record dated April 22/23, 2002, signed by only the Applicant's clinical instructor.

[para 12] The records the Public Body labeled as "Appeal 2" show that, to complete the clinical component of the nursing refresher program, the Applicant was required to satisfactorily complete a final five-day clinical placement from April 22-26, 2002. During that time, the clinical instructor completed and signed four anecdotal records, dated April 22/23, April 24, April 25 and April 26, 2002.

[para 13] In the records the Public Body labeled as "FOIPP Request #2", the Applicant's July 2, 2002 request under the Act says that the Applicant was removed by the security guard on April 26, 2002. The Applicant also says that was the date the Applicant's tutor (clinical instructor) was to do the #4 anecdotal record with the Applicant and the final evaluation of the Applicant's clinical placement. The clinical instructor wrote on the April 26, 2002 anecdotal record that most of the form was completed without the Applicant because the Applicant refused to continue and grabbed the pen from the clinical instructor's hand.

[para 14] Therefore, I find that the "#4 anecdotal record" is the record entitled "Grant MacEwan College Nursing Refresher Program Anecdotal Record" dated April 26, 2002 (the date the Applicant was removed by the security guard), which was completed by only the clinical instructor.

[para 15] Furthermore, I find that the Final Evaluation Form completed by the clinical instructor is a separate record from the #4 anecdotal record. The Applicant's July 2, 2002 request under the Act alludes to these being two separate records when the Applicant says:

I was sent to an office down the hall to wait for my #4 anecdotal record which [the clinical instructor] was to do with me and my final evaluation 6 check marks so I could be licensed as an RN in Alberta.

[para 16] Finally, I find that the record that the Applicant refers to as being two separate documents, namely, "...the final evaluation sent to AARN and a document stating my hrs [sic] and my failure had been discussed.", is the record entitled "Nursing Refresher Program Evaluation by Grant MacEwan College", which is one record. This record lists the Applicant's total hours of theoretical instruction and clinical experience and contains the following statement: "The applicant and Grant MacEwan Community College instructor have discussed the evaluation as outlined above, prior to sending to the Alberta Association of Registered Nurses."

III. ISSUES

[para 17] There is one issue for this inquiry:

Did the Public Body properly refuse to correct the Applicant's personal information, as authorized by section 36 of the Act?

IV. DISCUSSION OF THE ISSUE

1. General

[para 18] The relevant provisions of section 36 of the Act read:

36(1) An individual who believes there is an error or omission in the individual's own 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) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.

(3) If no correction is made in response to a request under subsection (1), or if because of subsection (2) 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.

(4) 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.

(5) Despite subsection (4), 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.

(6) On being notified under subsection (4) 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.

2. Section 36(1) and section 36(2)

[para 19] Two requirements must be met for section 36(1) to apply: (a) there must be personal information of an individual, and (b) there must be an error or omission in that individual's personal information. As stated in a number of previous Orders of this Office (see, for example, Orders 97-020, 98-010 and 2000-007), an applicant is in the best position to meet those two requirements. Therefore, the Applicant has the burden of proof under section 36(1).

[para 20] Section 1(n) of the FOIP Act defines "personal information". The relevant provisions of section 1(n) read:

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,

...
(iv) an identifying number, symbol or other particular assigned to the individual,

...
(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 21] In Order 97-002, the former Commissioner distinguished between "fact" and "opinion". He interpreted "fact" to mean a thing that is known to have occurred, to exist, or to be true; an item of verified information. He interpreted "opinion" to mean a belief or assessment based on grounds short of proof; a view held as probable. He said that a fact may be determined objectively. However, an opinion is subjective in nature, and may or may not be based on facts. I intend to follow that interpretation of "fact" and "opinion" in this Order.

a. Do the #4 anecdotal record, the Final Evaluation Form and the Nursing Refresher Program Evaluation contain the Applicant's personal information?

[para 22] By way of explanation, the "Anecdotal Record" is a formal student evaluation completed by the student's "preceptor" (the clinical instructor assigned to evaluate the student). The following appears on each anecdotal record: "Competencies: Based on C.N.A.'s (April, 1999) Blueprint for the Canadian Registered Nurse Examination". There is a space for filling in the student's name, nursing unit, date and

number of clients. Following that are four columns. The first column lists approximately 169 competencies broken down by 6 categories (nurse-client relationship, health promotion, illness/injury prevention, curative/support care, rehabilitative care and professional practice). The headings for the second, third and fourth columns are “Unsatisfactory”, “Satisfactory” and “Comments”, respectively. At the end of the anecdotal record (page 11) are headings and spaces to write in the following information: “Areas Done Well”, “Areas to Improve” and “List any skills completed by simulation below”. There are spaces for the signatures of the student and the student’s preceptor.

[para 23] The #4 anecdotal record contains the Applicant’s name, which is the Applicant’s personal information, the date (April 26, 2002), the nursing unit and number of clients. The Applicant’s personal information contained here is not at issue.

[para 24] The clinical instructor checked off “Satisfactory” by some of the competencies, and “Unsatisfactory” by a number of the other competencies, adding observations and comments to support the unsatisfactory assessments. For example, the clinical instructor writes: “poor therapeutic communication – told pt [patient] that a med had to be taken [with] food, but was unsure which med or why”. I find that this example and the remainder of observations and assessments are a mix of the clinical instructor’s recorded statements of fact regarding the Applicant and opinions about the Applicant, and are therefore the Applicant’s personal information.

[para 25] The clinical instructor also assessed “Areas Done Well” and “Areas to Improve”. I find that these are opinions about the Applicant, and are therefore the Applicant’s personal information.

[para 26] The clinical instructor signed the form, but the Applicant did not. The clinical instructor wrote that the form was completed at a certain point without the Applicant’s presence. I find that this is the clinical instructor’s recorded statement of fact regarding the Applicant, and is therefore the Applicant’s personal information.

[para 27] The Final Evaluation Form has headings for the student’s name, dates of clinical experience, number of shifts worked, number of hours per shift (8-hour and 12-hour shifts), agency of clinical experience and total hours. The personal information consisting of the Applicant’s name and other recorded information about the Applicant contained here is not at issue.

[para 28] Following the headings are three columns. The first column contains the six categories of competencies I have already listed above. The second and third columns are headed “Unsatisfactory” and “Satisfactory”, respectively. The clinical instructor checked off “Unsatisfactory” in four of the six categories of competencies, and checked off “Satisfactory” in two of the six categories of competencies. I find that these are opinions about the Applicant, and are therefore the Applicant’s personal information.

[para 29] After the columns are headings and spaces to write in the following information: “Comments – Preceptor”, “Comments – Student”, “Date”, “Student

Signature”, “Preceptor/Educational Contract Person Signature” and “Coordinator Signature”. In the space for “Comments – Preceptor”, the clinical instructor wrote that the instructor could not recommend the Applicant for registration according to nursing practice standards. I find that this is an opinion about the Applicant, and is therefore the Applicant’s personal information.

[para 30] The clinical instructor signed the Final Evaluation Form and dated it April 26, 2002. The bottom of the form contains the notation that the student (the Applicant) refused to sign, as the student stated that “it is wrong”. This notation is the clinical instructor’s recorded statement of fact regarding the Applicant, and is therefore the Applicant’s personal information. That notation is signed by the clinical instructor and the credentialing instructor.

[para 31] The Nursing Refresher Program Evaluation contains the Applicant’s name, address, home telephone number and AARN Registration Number, all of which is the Applicant’s personal information. None of this personal information is at issue. The recorded information about the hours the Applicant worked at named care facilities is also not at issue.

[para 32] The Nursing Refresher Program Evaluation indicates that the Applicant has not met the course objectives and the reasons the Applicant is not being recommended for registration with the Alberta Association of Registered Nurses (“AARN”). I find that these are opinions about the Applicant and are therefore the Applicant’s personal information. This record is dated May 10, 2002, and is signed by the credentialing instructor.

b. Is there an error or omission in the Applicant’s personal information?

[para 33] The Applicant’s correction request alleges that the records are “falsified records”. In the Applicant’s initial written submission, the Applicant alleges that the clinical instructor and the credentialing instructor did an untruthful evaluation of the Applicant’s performance and said the Applicant failed the nursing refresher program. In the Applicant’s rebuttal written submission, the Applicant asks for the “4th evaluation” to be “thrown out” as it is “illegal” because the Applicant had no input into it. The Applicant also wants the credentialing instructor to send a proper final evaluation to the AARN so the Applicant can be eligible for licensing in Alberta.

[para 34] In Order 97-020, the former Commissioner said that an “error” is a mistake or something wrong or incorrect. The Commissioner said that an “omission” means that something is missing, left out or overlooked. The Commissioner also said that to “correct” means to set right, amend or substitute the right thing for the wrong thing.

[para 35] In that same Order, the former Commissioner held that the following personal information could not be corrected under what is now section 36(1):

- a disputed error or omission of fact concerning an applicant’s personal information
- a third party’s recorded statement of fact regarding an applicant’s personal information, even if the recorded fact was wrong
- a third party’s opinion about an applicant

[para 36] Following Order 96-019, which held that the definition of “third party” contained in what is now section 1(r) of the Act includes an employee of a public body, I find that the clinical instructor and the credentialing instructor are third parties. Therefore, the recorded statements of fact and opinions are those of third parties.

[para 37] In Order 97-020, the former Commissioner found that a third party’s statement of fact could not be corrected, even if that statement of fact was in error. He said that the reason was to maintain the integrity of the record. He also said: “The statement does not appear for the truth of it; it appears for the fact that it was what was said, truthful or not.” The only way an applicant could meet the burden of proof in these situations was to show that the third party’s statement of fact was not accurately recorded. The Applicant has not met that burden of proof in this case for the third parties’ statements of fact.

[para 38] In that same Order, the former Commissioner also found that an opinion was not a fact. Therefore, as an opinion was not an error omission of fact that could be corrected, an applicant could not meet the burden of proving that there was an error or omission of fact. Again, the only way an applicant could meet the burden of proof was to show that the third party’s opinion was not accurately recorded. The Applicant has not met that burden of proof in this case for the third parties’ opinions.

[para 39] In Order 98-010, the former Commissioner reiterated that an opinion could not be considered an error or omission if it accurately reflected the views of the author at the time it was recorded, whether or not the opinion was supported by fact. In Order 2000-007, the former Commissioner noted that his earlier decisions that an opinion could not be corrected were codified in what is now section 36(2) of the Act, which prohibits a public body’s correcting an opinion.

[para 40] Following Order 97-020 and section 36(2) of the Act, I find that the Public Body is not required to correct the Applicant’s personal information under section 36(1). Consequently, there is no burden on the Public Body to speak to the reasons why it refused to correct the Applicant’s personal information.

[para 41] The former Commissioner was of the view, as am I, that section 36(1) should not be used as a means of attempting to appeal decisions and opinions of a public body, with which an applicant does not agree.

[para 42] In its submission, the Public Body says that the records contain the professional opinion of the experts hired to evaluate student performance in the context of the competency blueprint for the Canadian Registered Nursing Examination. As such, the Public Body deemed the record constituted “professional or expert opinion”, which section 36(2) prohibits the Public Body from disclosing.

[para 43] Given my decision above, it is not necessary that I also decided whether the opinions are “professional or expert opinions”. However, if I had to decide, I would find that these are professional opinions. The term “professional or expert opinion” has not been defined in the Act. The Concise Oxford Dictionary, Tenth Edition, defines “professional” to mean of or relating to or belonging to a profession. The opinions are those of individuals in the nursing profession, as evidenced by a March 22, 2002 letter to the Applicant in which the Public Body says:

4) Resumes of employees of Grant MacEwan College are not provided to or shared with students. All instructors in the Nursing Refresher Program are registered members of the Alberta Association of Registered Nurses.

3. Section 36(3)

[para 44] In Order 97-020, the former Commissioner said that a Public Body has the burden of proof regarding its decision to annotate or link under what is now section 36(3).

[para 45] In its response to the Applicant’s correction request, the Public Body said:

Under Section 36(3) of the Act, I can and will place on your file, your request to have the identified information corrected and the reason you have expressed in your letter of August 23, 2002. This information will be maintained on your student file with the College.

[para 46] In its submission, the Public Body says: “It was further communicated that the student file would be annotated with the request to correct the records so identified in accordance with Section 36(3) of the Act.”

[para 47] In Order 97-020, the former Commissioner interpreted “annotate” to mean add an explanatory note to something, and “link” to mean connect or join two things or one thing to another, attach to, or combine. He said that annotation implies that the actual correction that was requested is written on the original record, close to the information under challenge. Link implies that the correction that was requested is attached to, or joined or connected with, the original record containing the information under challenge by an applicant. I intend to follow those interpretations. Only paper records are at issue.

[para 48] The Applicant annotated the #4 anecdotal record and the Final Evaluation Form with the Applicant’s own comments, and provided those annotations for what appears to be the Applicant’s student appeal. The Public Body provided both the unannotated and annotated versions to me for the inquiry, but did not say whether it

planned to do anything under section 36(3) with the Applicant's annotations. However, as discussed in Order 97-020, I find that the Public Body should not be forced to comply with the manner in which the Applicant wants to annotate the records.

[para 49] There is no evidence before me that the Applicant annotated the Nursing Refresher Program Evaluation. The Public Body provided only an unannotated version to me for the inquiry.

[para 50] The Public Body's plan to put the Applicant's August 23, 2002 correction request and letter on the Applicant's student file is not annotating, but linking. I find that the Public Body's properly decided to link by putting the Applicant's correction request on the Applicant's student file where the correction request can be retrieved with the original file. However, the Public Body's method of linking is another matter.

[para 51] For the inquiry, the Public Body provided a stack of records nearly six inches high. All those records concern the Applicant. If all those records are on the Applicant's student file, merely putting the Applicant's August 23, 2002 correction request and letter on the file will result in the Applicant's correction request being buried in the file. A person conceivably would have to go through the entire file to find that there was a correction request. Consequently, I find that the Public Body's plan to put the Applicant's August 23, 2002 correction request and letter on the Applicant's student file is not "linking the personal information with that part of the requested correction that is relevant and material to the record in question", as required by section 36(3).

[para 52] Therefore, I intend to order the Public Body to link the three records at issue with the Applicant's August 23, 2002 correction request and letter. I will leave it to the Public Body to decide how that linking will occur, namely, whether the Public Body will collect those three records, put them at the top of the file and link the Applicant's August 23, 2002 correction request and letter in one place at the top of the Applicant's student file, or link wherever the three records at issue appear in the file. I will not further review which method of linking the Public Body chooses.

4. Section 36(4), section 36(5) and section 36(6)

[para 53] There is no evidence before me that the Public Body disclosed either the #4 anecdotal record or the Final Evaluation Form to any other public body or third party during the one year before the correction request was made. Therefore, I find that section 36(4) does not require the Public Body to notify anyone about the linkage I intend to order the Public Body to make in relation to the #4 anecdotal record and the Final Evaluation Form.

[para 54] However, there is evidence before me that the Public Body disclosed the Nursing Refresher Program Evaluation to the AARN. There is also the Applicant's statement that the AARN would not license the Applicant because of the instructors' evaluation. Furthermore, the Nursing Refresher Program Evaluation says:

The applicant and Grant MacEwan Community College instructor have discussed the evaluation as outlined above, prior to sending to the Alberta Association of Registered Nurses.

[para 55] I find that the Public Body's disclosure to the AARN occurred sometime between May 10, 2002 (the date that the credentialing instructor signed the Nursing Refresher Program Evaluation) and August 23, 2002, when the Applicant complained about the evaluation and requested the correction. Since the AARN is a "third party" as defined in section 1(r) of the Act, and since the Public Body disclosed the Nursing Refresher Program Evaluation during the one year before the correction was requested, the Public Body is required by section 36(4) to notify the AARN of the linkage. There is no evidence before me that the Public Body notified the AARN. There is also no evidence before me that would allow the Public Body to dispense with the notification, as set out in section 36(5). Therefore, I intend to order the Public Body to notify the AARN of the linkage. I will not further review the manner of that notification.

[para 56] As the AARN is not a public body under the Act, the AARN is not required by section 36(6) to make the linkage in its own records when it receives the Public Body's notification.

5. Other matters

[para 57] The Applicant's written submissions contain numerous requests, some of which I have summarized below:

- The Applicant's final evaluation be re-done, passing the Applicant
- The Applicant's nursing licence for Alberta be issued to the Applicant
- An apology be given
- Financial remuneration of one million dollars be provided
- A letter be sent to specified other jurisdictions explaining that the records they got from a specified hospital were wrong
- The same letter to go to anyone else who was sent false documents.

[para 58] I have no power under the Act to deal with any of the above requests or the other requests contained in the Applicant's written submissions. I can do only what the Act allows me to do. My power in this case is restricted to reviewing the Public Body's decision under the Act not to correct the Applicant's personal information. My Office is not the board of appeal for nursing student evaluations.

V. ORDER

[para 59] I make the following Order under section 72(3)(a) and (d) of the Act.

[para 60] I confirm the Public Body's decision not to correct the Applicant's personal information.

[para 61] However, I order the Public Body to link the three records at issue with the Applicant's August 23, 2002 correction request and letter. Within 50 days of being given a copy of this Order, I order the Public Body to notify me and the Applicant, in writing, stating the method of linkage and that the Public Body has made the linkage.

[para 62] I further order the Public Body to notify the Alberta Association of Registered Nurses ("AARN") that the Public Body has made the linkage. Within 50 days of being given a copy of this Order, I order the Public Body to notify me and the Applicant, in writing, that the Public Body has notified the AARN about the linkage.

Frank Work, Q.C.
Information and Privacy Commissioner