ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-025

January 21, 2008

UNIVERSITY OF CALGARY

Case File Number 3482

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Summary: The Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the University of Calgary (the "Public Body") for copies of reference letters submitted by external referees in the process of determining whether to promote him to full professor. The Public Body relied on section 19(2) of the Act to refuse to disclose information, stating that the evaluations were obtained in confidence and that disclosure would identify the referees as participants in a formal employee evaluation process.

The Adjudicator concluded that the Public Body did not properly apply section 19(2), as it had applied the test under section 19(1) to the reference letters, rather than the requirements of section 19(2). In particular, the Public Body did not properly consider whether the information identifies or could reasonably identify the referees. Section 19(2) differs from section 19(1) in that it requires this particular analysis.

The Adjudicator applied section 19(2) to the information in the reference letters and ordered the Public Body to disclose to the Applicant the personal information that he found did not identify or could not reasonably identify the referees as participants in a formal employee evaluation process.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(n)(viii), 1(n)(ix), 6(1), 6(2), 17, 19, 19(1), 19(2), 19(3), 71(1), 72, 72(2)(a) and 72(2)(b); *Civil Enforcement Act*, S.A. 1994, c. C-10.5; *Post-Secondary*

Learning Act, S.A. 2003, c. P-19.5. **ON:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, s. 49(c), as it read in 1994.

Authorities Cited: AB: Orders 98-021, 2000-003, 2000-021, 2000-029, F2002-008, F2004-022 and P2007-002. **CAN:** *National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029. **ON:** Order P-773. **Other:** *Black's Law Dictionary*, 7th ed. (St. Paul: West Group, 1999) and Legislative Assembly of Alberta, *Final Report of the Select Special Freedom of Information and Protection of Privacy Act Review Committee* (Edmonton: March 1999).

I. BACKGROUND

[para 1] In a request to access information under the *Freedom of Information and Protection of Privacy Act* (the "Act"), dated April 27, 2005, the Applicant asked the University of Calgary (the "Public Body") for copies of all reference letters submitted in the process of determining whether to promote him to full professor. He had previously only obtained some limited excerpts from the letters.

[para 2] By letter dated June 3, 2005, the Public Body denied the Applicant's request on the basis that section 19(2) of the Act gave it the discretion to refuse to disclose evaluative material that could identify a participant in a formal employee evaluation process when the information is provided explicitly in confidence.

[para 3] By letter dated July 14, 2005, the Applicant asked this Office to review the Public Body's decision to deny his access request. Mediation was authorized but was not successful. The matter was therefore set down for a written inquiry.

[para 4] The Faculty Association of the University of Calgary (the "Intervener"), which is the academic staff association established for the Public Body under the *Post-Secondary Learning Act*, sought and was granted intervener status in this inquiry.

II. RECORDS AT ISSUE

[para 5] The records at issue are three reference letters consisting of two, four and two pages, respectively.

[para 6] The Applicant indicates that the Public Body provided him with some limited excerpts from two or more of these letters. The Public Body submitted a copy of a letter from it to the Applicant, which reproduces three excerpts from the reference letters and attaches a lengthier excerpt as an appendix.

[para 7] For the purposes of this inquiry, I will consider the Applicant's right of access to all of the information in the records at issue, even though he has already obtained access to some of it.

III. ISSUE

[para 8] The issue in this inquiry is whether the Public Body properly applied section 19 of the Act (confidential evaluations) to the records at issue.

IV. DISCUSSION OF ISSUE

[para 9] Under section 6(1) of the Act, an applicant has a right of access to any record in the custody or control of a public body, including a record containing personal information about the applicant. Under section 6(2), that right does not extend to information excepted from disclosure. One such discretionary exception to disclosure is found under section 19 of the Act, which reads as follows:

> *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] Under section 71(1) of the Act, it is up to the Public Body to prove that the Applicant has no right of access to the information in the records at issue. In both its June 3, 2005 letter to the Applicant and its submissions in this inquiry, the Public Body states that it specifically relied on subsection 19(2) in refusing to disclose the requested information to the Applicant.

[para 11] The Applicant states that he wishes to obtain the three letters stripped of any information that could be used to identify the authors. Although he has received selected passages, he submits that they have been taken out of context. He argues that the selective use of excerpts of a letter containing scholarly critiques of an individual's work may be used against him or her, even thought the letter concludes in favour of promotion. He wishes to obtain the "full context" of the passages that have been released to him.

[para 12] The Public Body submits that, when applying for promotion, the Applicant understood or ought to have reasonably understood that references would be kept confidential and he would not have access to them. It states that the process of maintaining the confidentiality of external reference letters is well known within academic institutions and is detailed in university policies. The Public Body indicates

that it solicits external references in confidence so as to ensure absolute candour and frank disclosure.

1. The test under section 19(2)

[para 13] This Office has not yet articulated a test for the proper application of section 19(2) of the Act. However, given the wording of the provision, a public body must establish the following in order to exercise its discretion to refuse to disclose information under section 19(2):

(i) the information must be provided by a participant in a formal employee evaluation process concerning the applicant,

(ii) the information must be provided, explicitly or implicitly, in confidence, and

(iii) the information must be personal information that identifies or could reasonably identify the participant.

[para 14] I find that the information in the records at issue was provided in a formal employee evaluation process concerning the Applicant. The Applicant is an employee of the Public Body. The information was prepared and submitted by external referees evaluating the Applicant's scholarly and professional reputation so that the Public Body could use the information, among other evidence, to determine whether or not to promote the Applicant to the rank of full professor. The process was formal in that individuals are required to submit an application to be considered for promotion to full professor, the application, references and other material is considered by a Promotions Committee, and the process is in accordance with established *Procedures Pertaining to Appointment, Promotion and Tenure of Academic Staff*.

[para 15] To meet part (i) of the above test, the information must also be provided by a "participant" in a formal employee evaluation process. Under subsection 19(3) of the Act, "participant" includes a peer, subordinate or client of an applicant, but does not include the applicant's supervisor or superior.

[para 16] The information in the records at issue was provided by individuals external to the Public Body. It was not prepared by the Applicant's supervisor or superior, so subsection 19(3) does not preclude the application of subsection 19(2) in this inquiry on that basis.

[para 17] The Intervener argues that the non-exhaustive list of who is included in the term "participant" in section 19(3) of the Act should be interpreted as excluding the external referees who provided the information in the present matter. It submits that the *ejusdem generis* rule of statutory interpretation means that the term "participant" should be restricted to individuals of the same kind or class as those expressly mentioned in section 19(3). The Intervener suggests that an external referee is not in the same category

as a "peer", "subordinate" and "client", as such a person has no interaction with an employee as part of that employee's exercise of his or her employment duties. The Applicant adopts the Intervener's views on the interpretation of "participant" in his rebuttal submissions.

[para 18] I do not accept the Intervener's argument. A precondition for the application of the *ejusdem generis* rule is that general words must follow, rather than precede, the enumeration of the specific things [*National Bank of Greece (Canada) v. Katsikonouris*, [1990] 2 S.C.R. 1029 at para. 12]. Here, general words do not follow the list of individuals in section 19(3) (e.g., "peer, subordinate, client *and any other participant*"). Instead, the three specific examples follow the more general term. The intention is accordingly to remove any ambiguity as to whether those examples are in fact included in the category of "participant". Even if the *ejusdem generis* rule could apply, I see nothing in the nature of the relationship between an employee and a peer, subordinate and client that precludes an external referee from being in the same class of persons. An external referee might also have interaction with an employee as part of that employee's exercise of his or her employment duties. Moreover, an external referee may fall within the meaning of "peer".

[para 19] I find that the individuals who provided the information in the records at issue were "participants" in a formal employee evaluation process concerning the Applicant. Part (i) of the above test is therefore met.

[para 20] Part (ii) of the test under section 19(2) of the Act requires the information to be provided, explicitly or implicitly, in confidence. I find that this part of the test is met in this inquiry. A copy of a letter from the Public Body requesting an external referee's evaluation of the Applicant indicates that the reply may be made "in confidence." The letter refers to and attaches the Public Body's *Procedures Pertaining to Appointment, Promotion and Tenure of Academic Staff*, article 6.3.7 of which states that it is the responsibility of the Promotions Committee Chair "to gather confidential material such as letters of reference from external referees."

[para 21] Because an external referee reading the Public Body's letter and a copy of the accompanying *Procedures* would understand that the information he or she gives is provided in confidence, the information given in reply would be provided implicitly in confidence. Moreover, the information in at least one of the records at issue was provided explicitly in confidence, as the author marked it "confidential." I accordingly find that the information in the records at issue was provided, explicitly or implicitly, in confidence. Part (ii) of the above test is therefore met.

[para 22] Part (iii) of the test under section 19(2) of the Act requires the information to be personal information that identifies or could reasonably identify the participant in the formal employee evaluation process. Unlike section 19(1), section 19(2) does not authorize a refusal to disclose "evaluative or opinion material" in and of itself. Section 19(2) only authorizes a refusal to disclose identifying information. However, depending on the circumstances, it is possible that disclosure of all or part of an evaluation or

opinion would also disclose the identity of the individual who provided it (Order P2007-002 at para. 69).

[para 23] Section 19(2) authorizes a refusal to disclose "personal information". Under section 1(n)(ix) of the Act, "personal information" includes "the individual's personal views or opinions, except if they are about someone else." The personal views or opinions provided in a formal employee evaluation process are therefore not the personal information of the participant providing the information. It might therefore be argued that the external referees' views or opinions about the Applicant do not fall within section 19(2), in that they are not "personal information" that the Public Body has the discretion to refuse to disclose.

[para 24] However, section 19(2) does not specify *whose* personal information may be withheld. Although the views or opinions provided in a formal employee evaluation process are not the *participant's* personal information, they are the *applicant's* personal information. Under section 1(n)(viii) of the Act, "personal information" includes "anyone else's opinions about the individual." As the external referees' views or opinions are the personal information of the Applicant, it remains within the discretion of the Public Body to refuse to disclose those views or opinions, provided that they are also information that identifies or could reasonably identify the referee.

[para 25] I find that the views or opinions in the records at issue are personal information. It is also clear that the names, addresses and biographical details provided by the referees about themselves are personal information. In a later section of this Order, I will apply the remainder of part (iii) of the test under section 19(2) of the Act to determine which of this personal information constitutes information that identifies or could reasonably identify the referees as participants in a formal employee evaluation process.

2. The Public Body's application of section 19(2)

[para 26] The Public Body did not and does not purport to rely on section 19(1) of the Act, as opposed to section 19(2), in refusing to disclose the requested information to the Applicant. In both its original response to the Applicant's access request and its submissions in this inquiry, the Public Body indicates that it relied on section 19(2) in refusing to disclose the requested information. In its rebuttal submissions, it further states: "It is to be noted that section 19(1) was not relied upon by the University and the comments made in respect of this section are not relevant considerations for the purposes of this specific complaint."

[para 27] However, in its submissions in this inquiry, the Public Body applied the test that has been articulated by this Office regarding the proper application of section 19(1) of the Act. For instance, it applied the first branch of the test under section 19(1) and submitted that the requested information fulfilled the requirement of being "evaluation or opinion material" (Order 2000-029 at para. 107). As discussed above, however, the fact that information is an evaluation or opinion does not mean that it may

be withheld under section 19(2), except to the extent that disclosure could reasonably identify the individual who provided the information.

[para 28] Although the Public Body purports to apply only section 19(2) of the Act to the records at issue, it refers to other requirements under section 19(1). The Public Body states that, in order to be authorized to refuse to disclose information, the information must be compiled for the purpose of determining the Applicant's "suitability, eligibility or qualifications for employment" [a requirement under section 19(1)]. The Public Body then describes the context in which the information in the records at issue was provided as a "formal employee evaluation process" [a requirement under section 19(2)]. This further demonstrates that the Public Body confused the tests under section 19(1) and 19(2).

[para 29] The problematic result of confusing the tests is that, in my view, the Public Body did not properly consider whether the information in the records at issue was information *that identifies or could reasonably identify* a participant in a formal employee evaluation process, as required under section 19(2) of the Act. In its submissions, the Public Body indicates, under three headings, that it considered whether the information was evaluative or opinion material, whether it was compiled for a formal employee evaluation process and whether it was provided in confidence. It provides explanations as to why it believed these criteria were met. However, with respect to the requirement under section 19(2) that the information also identify the authors of the reference letters, the Public Body simply states: "The letters were reviewed to see if they could be disclosed without disclosing the identity of the writer. This was not possible." The Public Body does not explain how it came to this conclusion.

[para 30] I recognize that the Public Body further states in its rebuttal submissions that it "is not able to provide more of the text [of the reference letters] than what has already been supplied to the Applicant without compromising the identity of the author" and that "the records were reviewed to see if any more text could be disclosed without identifying the authors." Despite those statements, the Public Body has not demonstrated to me that it properly applied section 19(2) of the Act. The Public Body does not explain how or why specific information in the records at issue identifies or could reasonably identify the participants in the formal employee evaluation process concerning the Applicant.

[para 31] I have reviewed the four excerpts from the reference letters that were provided in a letter from the Public Body to the Applicant, dated Mach 24, 2005. I see nothing that distinguishes these excerpts from much of the remaining content in the reference letters. The excerpts already disclosed by the Public Body indicate certain views or opinions of the external referees, which the Public Body apparently determined was information that would not identify them. There remain other views or opinions in the reference letters, which I believe would identify the referees to no greater or lesser extent than the excerpts already provided to the Applicant, yet these have not been disclosed.

[para 32] In explaining its exercise of discretion, the Public Body states that it was not exercised for an improper or irrelevant purpose. In support of this statement, it explains that its exercise of discretion "is consistent with long standing policies of the University, is consistent with processes used in other academic institutions and the rationale for such confidentiality is to ensure complete candour and frankness." However, the long standing policies of the Public Body, and those of other academic institutions, have very limited relevance when determining what information may be withheld under section 19(2) of the Act. Section 19(2) only allows information that identifies the external referees to be withheld. It does not allow some, most or all of the remainder of the reference letters to be withheld, even if that happens to be a long standing practice of academic institutions. The Public Bodies' polices and procedures are only relevant to the extent that they weigh in favour of or against the disclosure of *identifying* information.

[para 33] The Public Body's misunderstanding and misapplication of section 19(2) of the Act is apparent in one of its earlier letters to the Applicant, dated April 1, 2005, which the Public Body attaches to its submissions. The letter is subsequent to the March 24, 2005 letter to the Applicant reproducing selected excerpts from the reference letters and prior to the Applicant's formal access request of April 27, 2005 under the Act. Nonetheless, I believe that the April 1, 2005 letter reflects the Public Body's approach to the access request, given the Public Body's statements in its submissions that it "is not able to provide more of the text [of the reference letters] than what has already been supplied to the Applicant." In other words, my understanding is that the Public Body's stated approach in the April 1, 2005 letter continued to be its approach in response to the formal access request.

[para 34] The April 1, 2005 letter states: "The response I have now received is that it is not possible to provide you with copies of the letters, even if identifying features are removed. This was seen to be in violation of clauses of the APT manual [the *Procedures Pertaining to Appointment, Promotion and Tenure of Academic Staff*]." The letter goes on to state: "While there is no problem with relevant extracts from the letters being made available to the candidate (for comment or rebuttal in an appeal), the letters as a whole remain confidential documents."

[para 35] The statement that the Public Body cannot provide copies of the letters *even if identifying features are removed*, and my understanding that it provided no further excerpts from the reference letters following the Applicant's access request, reinforces to me that it misapplied section 19(2) of the Act. What the Public Body appears not to understand is that section 19(2) of the Act takes precedence over the Public Bodies' policies and procedures. It is not entitled to withhold "the letters as a whole" and does not have the discretion to withhold *non-identifying* information. It only has the discretion to withhold *identifying* information.

[para 36] The Public Body argues that the process by which external references are generally kept confidential is a standardized process "that has been negotiated between the University and the Applicant's arguing agent." The Public Body provides no

additional details about this "negotiation" or which "agent" is being referred to. Regardless, the Act supersedes an agreement regarding the withholding of information, except where the Act itself permits that withholding; public policy mandates that parties cannot contract out of the *Freedom of Information and Protection of Privacy Act* (Order 2000-003 at para. 26; Order 2000-029 at para. 54).

[para 37] The Applicant and Intervener acknowledge that individuals are sometimes provided with some of the comments provided by referees in their reference letters. An affidavit submitted by the Intervener states that the general deficiencies of an individual, as identified by referees in an evaluation, are sometimes shared with an applicant without identifying the referees. It therefore appears that the Public Body or departments within it are in the practice of disclosing *some* of the content of external evaluations. Indeed, that was the case in this inquiry.

[para 38] While I recognize that the Public Body is not necessarily withholding entire reference letters, section 19(2) of the Act gives it the discretion to refuse to disclose certain information only. The information must identify the participant in the formal employee evaluation process. Section 19(2) does not give the Public Body the discretion to withhold anything other than this identifying information. In other words, the Public Body does not properly exercise its discretion under section 19(2) if it chooses to disclose *some* of the non-identifying information. Unless there is an applicable exception to disclosure elsewhere in the Act, the Public Body must disclose *all* of the non-identifying information. This is because, under sections 6(1) and (2) of the Act, the Applicant has a right of access to his personal information, which includes the opinions expressed about him in the reference letters, unless the information is excepted from disclosure. Information in a reference letter that does not identify the author is *not* excepted from disclosure under section 19(2).

[para 39] To exercise its discretion properly, a public body must show that it considered the objects and purposes of the Act, and did not exercise its discretion for an improper or irrelevant purpose (Order 98-021 at para. 51). Because the Public Body used the test that has been articulated for section 19(1) of the Act, rather than specifically and clearly address the requirements set out in the wording of section 19(2), I conclude that the Public Body applied the wrong test when it purported to exercise its discretion to refuse to disclose the information requested by the Applicant. In particular, it did not properly apply the criterion by which information may be withheld under section 19(2) only if it identifies or could reasonably identify the participant in the formal employee evaluation process. Although the tests under section 19(1) and 19(2) have similarities (such as the requirement that the information be provided in confidence), they are not the same.

[para 40] Because the Public Body applied the wrong test, it did not properly apply its discretion to refuse to disclose to the Applicant the information that he requested. An abuse of discretion includes when discretion is exercised on an erroneous view of the law, and an abuse of discretion deprives the decision-maker of his or her jurisdiction in the case, rendering the decision a nullity (Order 2000-021 at para. 51).

[para 41] Although it states that it considered whether more information could be disclosed to the Applicant without identifying the authors, the Public Body provided insufficient evidence to demonstrate that it actually did so. I require evidence of the Public Body's determination as to whether information falls within the exception to disclosure under section 19(2) of the Act and evidence of its discretionary decision determining whether the information should nevertheless be disclosed (Order F2004-022 at para. 47). I was provided with no such evidence here, as the Public Body did not tell me why – given the requirement that the withheld information identify the external referees – it disclosed certain parts of the records at issue but not others.

[para 42] This means that even if the Public Body was aware of the correct test under section 19(2) of the Act, and only inadvertently made reference to the requirements of section 19(1), I still conclude that the Public Body did not properly apply section 19(2) to the records at issue. The Public Body has not discharged its burden, under section 71(1) of the Act, of proving that the Applicant has no right of access to the information in the records at issue.

3. Section 19(1) versus section 19(2)

[para 43] The Public Body may wonder whether it had the possibility of refusing to disclose the information in the records at issue under section 19(1) of the Act, as opposed to section 19(2). I therefore wish to clarify that I do not believe that section 19(1) applies in the circumstances of this inquiry. In order for personal information to be withheld under section 19(1), it must be evaluative or opinion material compiled "for the purpose of determining an applicant's suitability, eligibility or qualifications for employment or for the awarding of contracts or other benefits by a public body."

[para 44] The Intervener submits that section 19(1) of the Act does not apply in this inquiry, given the meaning of "employment". It cites the definition of "employment" as "1. The act of employing; the state of being employed. 2. Work for which one has been hired and is being paid by an employer." [*Black's Law Dictionary* at p. 545]. The Intervener accordingly argues that section 19(1) should be interpreted as requiring the evaluative or opinion material to be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for *the act of employing or being employed*. It submits that section 19(1) applies to the evaluative material compiled when an individual is becoming employed and not when a public body already employs the individual.

[para 45] Despite the Intervener's submissions, there remains an argument that section 19(1) of the Act might apply in the present inquiry, on the basis that the determination of whether or not the Applicant should be promoted is for the purpose of determining his suitability, eligibility or qualifications for employment. One might argue that there is nothing in section 19(1) specifying that it only applies to *new* employment and that it cannot also apply to *existing* employment. Indeed, the definition cited by the Intervener also defines "employment" as the *state* of being employed, so that section

19(1) might be interpreted to refer to an individual's suitability, eligibility or qualifications for the (existing or continuing) state of being employed.

[para 46] While I recognize the competing interpretations, I do not believe that the reference to "employment" in section 19(1) of the Act was intended to refer to employment in a position already occupied by an applicant. In Order 2000-029 (at para. 111), it was noted that, in 1998, the University of Alberta made a recommendation to the Select Special Freedom of Information and Protection of Privacy Act Review Committee that what is now section 19(1) be amended to read "the applicant's suitability, eligibility or qualification for employment *or continuation of employment* or for the awarding of government or local public body contracts or other benefits including admission to a post-secondary education program…" [my emphasis]. Although the discussion in that Order and the response of the Select Special Committee related to the application of the section to an individual's admission to a post-secondary education program, the Committee also rejected the addition of the words "or continuation of employment". This suggests to me that section 19(1) is not intended to apply to reference letters or evaluations provided in the context of existing or continuing employment.

[para 47] In Order F2002-008 (at para. 15), which applied section 19(1) of the Act, the Adjudicator noted that a particular 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" [my emphasis]. In an Ontario Order, which applied a provision comparable to section 19(1), the Inquiry Officer referred to an individual's "suitability for *new* employment" and stated that the characterization of … remarks or evaluations of performance as *performance appraisals of current employment*, or for the purpose of suitability for employment, depends on the context in which they are given." [my emphasis] (Ontario Order P-773 at paras. 22 and 25, referring to the phrase "suitability, eligibility or qualifications for employment" as it then read in section 49(c) of the Ontario *Freedom of Information and Protection of Privacy Act*).

[para 48] Given the distinctions that others have made between new and current employment when applying section 19(1) of the Act or a comparable provision, I believe that it is generally understood that the phrase "suitability, eligibility or qualifications for employment" in section 19(1) refers to new employment. Having said this, the phrase can also apply to a new position with the same employer (Order F2002-008 at para. 15).

[para 49] In the present inquiry, I do not believe that the Applicant's promotion to full professor would be new employment or appointment to a new position. The Public Body's *Procedures Pertaining to Appointment, Promotion and Tenure of Academic Staff* refer to appointment or promotion to full professor as an appointment or promotion to a "rank" (articles 3.8.1, 3.8.2 and 3.8.3). The Collective Agreement governing the Applicant likewise refers to an academic staff member's "rank" [definition (b)(i) of the Agreement]. The Intervener indicates that such a change in rank results in little change to the individual's duties, responsibilities, function and sometimes even salary.

[para 50] It is therefore my understanding that an individual's progression from assistant to associate to full professor within the Public Body does not involve an appointment to a new position. Rather, it involves promotion within an existing employment position. I considered the fact that an individual applies for the promotion, but I still do not believe that this amounts to applying for a new position. I accordingly believe that the Applicant's possible promotion to full professor is not for the purpose of determining his "suitability, eligibility or qualifications for employment," within the meaning of section 19(1) of the Act.

[para 51] However, one must also consider whether the Applicant's promotion would amount to the "awarding of contracts or other benefits" within the meaning of section 19(1) of the Act. I believe that there would be an "awarding" of something, as the term implies that there is a decision-maker who has some authority to give, assign or grant something (Order 98-021 at paras. 22 and 23). Here, the Public Body decides whether to grant promotion and therefore "awards" it.

[para 52] I do not believe that the Applicant's promotion is the awarding of a "contract," as the Applicant is already employed by the Public Body and his promotion to the rank of full professor would presumably not involve any new contract. The same Collective Agreement continues to apply. I have no evidence that there is a particular contract of employment or any other contract that is awarded to individuals when they become full professors.

[para 53] In the context of what is now section 19(1) of the Act, a "benefit" has been defined as, among other things, "a favourable or helpful factor or circumstance, or an advantage" (Order 98-021 at para. 27). This is a very broad definition. It has been found to apply, for example, to the rights and entitlements that flow from the appointment of an individual to bailiff, as the *Civil Enforcement Act* allows only bailiffs to perform certain functions and duties (Order 98-021 at paras. 28 and 29).

[para 54] An individual's appointment to bailiff entails a favourable circumstance or advantage in that he or she becomes entitled to do many things not previously entitled to do. I do not believe that the same can be said for an individual's promotion from associate to full professor, as the Intervener indicates that the individual's duties and functions remain essentially the same. While there may be differences in certain rights and entitlements of professors, depending on their rank, I believe that those rights and entitlements are secondary to any promotion and flow indirectly from it. When a public body promotes an individual, it is awarding the promotion, not a more specific benefit associated with it.

[para 55] To interpret "benefit" so broadly that it encompasses virtually any improved state of affairs vis-à-vis an individual, a public body would almost always be in a position to resort to section 19(1) of the Act rather than section 19(2). Those two provisions differ in that section 19(1) allows a public body to refuse to disclose the whole of the evaluative or opinion material whereas section 19(2) only allows it to withhold information that identifies or could reasonably identify the individual providing his or her

views or opinions. In enacting section 19(2), the Legislature must have intended for certain situations to fall under it, and not section 19(1).

[para 56] The key difference is that section 19(2) of the Act refers to a "formal employee evaluation process". In enacting the substance of the section in 1999, the Legislature appears to have wanted to give greater access to information when an individual is an employee being evaluated, as opposed to an individual wishing to obtain a new position, contract or particular benefit. The Select Special Freedom of Information and Protection of Privacy Act Review Committee stated, in its *Final Report* in March 1999, that it recommended an additional subsection to provide for "a discretionary exception to disclosure of *only* the identity or identifying content of a reference that has been submitted in confidence by peers, subordinates and clients in a formal evaluation process" [my emphasis] (*Final Report of the Select Special Freedom of Information and Protection of Privacy Act Review Committee* at recommendation 32). My emphasis of the word "only" points to the fact that the Committee did not intend for the entire opinion or evaluation to be withheld in the context of an employee evaluation. Moreover, in making its recommendation, the Committee expressly considered "the process of peer review as it related to references by subject experts outside the employer institution," which is the very situation raised by this inquiry.

[para 57] The Public Body has concerns that disclosure of reference letters will hinder absolute candor and frank disclosure on the part of referees. However, section 19(2) of the Act permits a public body to withhold all or part of the content of an evaluation if disclosing it would identify the evaluator. In other words, the disclosure of information obtained in an evaluation process under section 19(2) should not affect candor and frankness – precisely because it gives a public body the discretion to refuse to disclose information that identifies or would identify the participant in the formal employee evaluation process.

[para 58] Given my understanding of the scope of the terms used in section 19(1) of the Act and the Legislature's decision to specifically refer to a "formal employee evaluation process" in section 19(2) – presumably with the intention of differentiating that situation from situations under section 19(1) – I believe that section 19(1) would not apply to the circumstances of this inquiry. As this inquiry clearly involves a formal employee evaluation process, I find that section 19(2) is the applicable section. In any event, the Public Body only purported to refuse to disclose information under section 19(2) of the Act.

4. Other concerns of the Applicant and Intervener

[para 59] The Applicant suggests that a disinterested third party, or a committee of equal representation from both parties, should make the decision regarding the release of information in a reference letter so that the process is fair and transparent. I have no jurisdiction to address this, as the Act provides for decisions to be made by the heads of public bodies and they may delegate that authority as they see fit. While I acknowledge the Applicant's concern that the person deciding whether or not to release information

may also have a stake in its release, I believe that this is possible regardless of the public body. In other words, there is nothing unique in the university setting that justifies a unique process. In any event, the Applicant recognizes that this Office does not have the jurisdiction to order particular procedural changes within the Public Body.

[para 60] The Applicant and Intervener question the appropriateness of keeping the identity of referees confidential, as an individual selected as a referee may have a personal or academic conflict of interest with the applicant, not be knowledgeable about the applicant's specialization even though they work in the same field, or have a reputation of being negative when assessing others. These factors may weigh in favour of a public body not exercising its discretion to withhold information, even where it would identify the referee. However, a public body's decision regarding the disclosure of identifying information under section 19(2) of the Act is nonetheless discretionary. Provided that it applies the proper test and does not refuse to disclose *non-identifying* information under section 19(2), I see no reason at this time to specify whether certain factors should weigh in favour or against the disclosure of *identifying* information – except that I would point out that a public body, under section 17 of the Act, must refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

[para 61] The Intervener suggests that the Public Body at least identify the pool of referees, so that an applicant can challenge the use of any particular individual as referee, or allow an applicant to suggest other referees for the pool. It also states that there is no consistency across the Public Body about what referees are asked to comment on, and whether they receive the correct criteria and appropriate information on which to base their comments. Except with respect to the disclosure of information contained in a reference letter, I have no jurisdiction to address these other procedural matters.

5. The identifying information in the records at issue

[para 62] I have found that the Public Body did not properly apply section 19(2) of the Act to the reference letters, or explain in its submissions why specific information was withheld on the basis that it identifies or would identify the external referees. I considered ordering the head of the Public Body, under section 72(2)(b) of the Act, to reconsider the decision to refuse to disclose to the Applicant the information in the records at issue. However, I believe that I am in a position to apply section 19(2) so as to determine whether information in the records at issue identifies or could reasonably identify a participant in a formal employee evaluation process. Where there is some ambiguity, I intend to err towards concluding that the information is identifying information.

[para 63] I wish to make it clear that I am not exercising any discretion on behalf of the Public Body, as I am only determining whether the information in the records at issue is identifying or non-identifying information. If it is non-identifying information, it is not subject to the discretionary exception to disclosure under section 19(2) of the Act. If it is identifying information, it remains within the discretion of the Public Body to disclose it.

[para 64] Prior to the Applicant's formal access request under the Act, the Public Body already provided him with four excerpts from the reference letters. I do not distinguish these below, as they are not among those excerpts that I find to contain identifying information. Even if they do contain identifying information, the Public Body had the discretion to disclose them.

[para 65] There are three records at issue, which I will discuss in the order that they were provided by the Public Body in its *in camera* submission. In respect of those records, I find the following to be personal information that identifies or could reasonably identify a participant in a formal employee evaluation process (with the nature of the information or my brief explanation in parentheses):

Record 1 (dated January 6, 2005)

- All of the first paragraph on page 1 (biographical information) with the exception of the last sentence of that paragraph
- The last three lines on page 2 (name, position and institution)

Record 2 (dated January 2, 2005)

- The letterhead, name, geographical location and contact information at the top and bottom of page 1
- The dates on page 1 (depending on the knowledge of the Applicant, they may identify this particular referee)
- The name at the top of page 2
- The name at the top of page 3
- The last sentence of the footnote on page 3 (it refers to the referee's own experience, which may identify him or her)
- The name at the top of page 4
- The last two words of the first line after the six points on page 4 and the first two words of the next line (they indicate whether or not the referee knows the Applicant)
- The last sentence on page 4 (it refers to something within the knowledge of the referee, which may identify him or her)
- The name and signature on page 4

Record 3 (undated)

- All of the first paragraph on page 1 (biographical information and information indicating whether or not the referee knows the Applicant)
- The first sentence of the second paragraph on page 1 (it refers to something within the knowledge of the referee, which may identify him or her)
- The first five words of the second sentence of the third paragraph on page 1 (they refer to the referee's own experience, which may identify him or her)
- The last two sentences of the fourth paragraph on page 1 (they refer to the referee's own experience, which may identify him or her)

- The first sentence on page 2 (and the first word of that sentence on the preceding page) (it indicates the referee's availability to provide additional information and his or her contact information)
- The name, position, institution and geographical location at the bottom of page 2

[para 66] Except for the information referred to above, I conclude that all of the other information in the records at issue is not personal information that identifies or could reasonably identify a participant in a formal employee evaluation process under section 19(2) of the Act. The Public Body therefore did not have the discretion to refuse to disclose to the Applicant this other information. It remains within the discretion of the Public Body, under section 19(2), to disclose the information that I have referred to above, even though it would identify the external referees (provided that the Public Body also considers the application of the mandatory exception to disclosure under section 17 of the Act regarding an unreasonable invasion of a third party's personal privacy).

V. ORDER

[para 67] I make this Order under section 72 of the Act.

[para 68] I find that the Public Body did not properly apply section 19 of the Act (confidential evaluations) to the records at issue. Specifically, it did not properly apply section 19(2).

[para 69] On the basis that the Public Body was not authorized to refuse access to non-identifying information under section 19(2) of the Act, I order the head of the Public Body, under section 72(2)(a), to give the Applicant access to those parts of the records at issue that I have found in this Order not to be personal information that identifies or could reasonably identify a participant in a formal employee evaluation process.

[para 70] I order the Public Body to notify me, in writing, within 50 days of receiving a copy of this Order that it has complied with the Order.

Wade Riordan Raaflaub
Adjudicator