ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2021-13

April 13, 2021

CALGARY POLICE SERVICE

Case File Number 006570

Office URL: www.oipc.ab.ca

Summary: The Applicant had applied for a position with the Calgary Police Service (the Public Body). He subsequently made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Public Body for records relating to polygraph testing results and his HR file. The Public Body provided some records, withholding information under sections 19, 20, and 26 of the Act.

The Applicant requested a review of the Public Body's response, and subsequently an inquiry.

The Adjudicator determined that the Public Body properly applied section 19(1) to the scores and comments of employees who interviewed the Applicant, as well as the interpretation of the polygraph test results.

The Adjudicator upheld the Public Body's application of section 26(c) to the interview questions, and the instructions for the interviewers regarding how to assess the Applicant. The Adjudicator found that this exception did not apply to the Scantron or 'bubble' sheets filled in by the Applicant for multiple choice exams, as these sheets did not reveal the related exam questions.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 19, 20, 26, 72.

Authorities Cited: AB: Orders 97-002, 98-021, 2000-029, F2002-008, F2003-020, F2004-015, F2003-020, F2014-15, F2015-19, F2020-01

Cases Cited: *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII), *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII)

I. BACKGROUND

[para 1] The Applicant had applied for a position with the Calgary Police Service (the Public Body) but was not successful. On May 5, 2017, he made an access request under the *Freedom of Information and Protection of Privacy Act* (FOIP Act) to the Public Body for:

> 1. Polygraph Testing Results from Monday, July 25, 2016 for [the Applicant]
> 2. HR file for [the Applicant], file manager [Cst. D]

[para 2] The Public Body responded to the request, identifying 329 pages of responsive records. The Public Body withheld some information in the records under sections 19(1), 20(1)(c) and 26(c).

[para 3] The Applicant requested a review of the Public Body's decision, and subsequently an inquiry.

II. RECORDS AT ISSUE

[para 4] The records at issue consist of the information withheld under sections 19, 20 and 26.

III. ISSUE

[para 5] The issues set out in the Notice of Inquiry, dated November 9, 2020, are as follows:

1. Did the Public Body properly apply section 19(1) of the Act (confidential evaluations) to the information in the records?

2. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

3. Did the Public Body properly apply section 26 of the Act (testing procedures, tests and audits) to the information in the records?

IV. DISCUSSION OF ISSUE

Preliminary issue – scope of inquiry

[para 6] The Applicant has raised concerns about the fairness of the Public Body's hiring process, including its reliance on polygraph testing. I do not have jurisdiction to review the Public Body's hiring processes generally, or whether it is appropriate to rely on polygraph test results.

[para 7] The Applicant has also raised the possibility that the Public Body has discriminated against him, in contravention of the *Alberta Human Rights Act*. I do not have jurisdiction to review complaints about possible contraventions of that Act.

1. **Did the Public Body properly apply section 19 of the Act (confidential evaluations) to the information in the records?**

[para 8] The Public Body applied section 19(1) to information on pages 97, 99-101, 116, 117, 121-124, 127-129, 140-143, 222, 328, and 329 of the records at issue. This provision 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.*

[para 9] In order for section 19(1) to apply, the information:

a. must be evaluative or opinion material;
b. must be compiled for the purpose of determining the applicant's suitability, eligibility or qualifications for:
   i. employment; or
   ii. for the awarding of contracts or other benefits by a public body; and
c. must be provided explicitly, or implicitly in confidence (Orders 2000-029, F2002-008).

[para 10] The information withheld under section 19 consists of notes of Public Body employees who participated in interviewing the Applicant, the score assigned to the Applicant as a result of the interview, as well as an interpretation of the Applicant's polygraph test results. This all consists of the Applicant's personal information.

[para 11] In Order 98-021, former Commissioner Clark cited the Concise Oxford Dictionary definition of "evaluative" as the adjective of "evaluate", meaning "to assess, appraise, to find or state the number of." He also cited the definition of "opinion" as "a belief or assessment based on grounds short of proof; a view held as probable." In Order 97-002, former Commissioner Clark found that the belief that a person would be a suitable job candidate is an opinion.

[para 12] In Order F2015-19 I considered a similar situation, in which the public body withheld interview evaluation sheets and scoring metrics under section 19(1). As in this case, the recorded responses of the applicant were disclosed to the applicant; however, the score for each part of the interview was withheld. I found (at para. 12):

> The test scores fall within the definition of "evaluative" used in past Orders of this Office, insofar as they represent a numerical assessment of the Applicant's responses to the interview questions. The additional comments on page 20 include a conclusion regarding the Applicant's suitability, and could be interpreted as an opinion of the Applicant. Therefore, the first two parts of the above-cited test are met.

[para 13] This analysis applies here as well. The opinions of the interviewers, including the score assigned to the Applicant, and the opinions of the person interpreting the polygraph test, are all evaluations or opinions about the Applicant, created or compiled during the Applicant's job application process.

[para 14] The main difference between the facts here and the facts in Order F2015-19 are regarding whether the evaluations and opinions were provide in confidence. In Order F2015-19, I did not accept the public body's argument that the scores or comments were compiled and provided in confidence. I found that there was no indication on the records that the scoring or comments were provided in confidence and the public body had not provided any evidence that there was an expectation of confidence, either implicit or explicit.

[para 15] In this case, the records include booklets that each interviewer filled out during the Applicant's interview. The notes taken by each interviewer of the Applicant's answers to the questions were disclosed to him. The opinions of the interviewers about the Applicant's interview were withheld under section 19, as were the scores assigned to the Applicant. The questions asked of the Applicant were withheld under section 26, which will be discussed in the relevant section of this Order. The booklets explicitly state that the contents are confidential.

[para 16] The nature of the discussion about the interpretation of the polygraph test withheld under section 19(1) indicates that the assessor's opinions and evaluation were provided in confidence. The comments made by the assessor reveal the various factors considered in assessing the test, which would not be publicly available information. It seems clear that if these factors were known to test-takers ahead of time, the test results could be undermined.

[para 17] The Applicant has pointed to past Orders of this Office wherein an applicant was provided with polygraph information: Orders F2020-017 and F2014-15. In the former case, the information at issue consisted of the questions asked and answers given during a polygraph test; this information was withheld under section 20(1). In this case, the information relating to the Applicant's polygraph test consists of the examiner's interpretation of the test results, which is different information. Similarly, in Order F2014-15 the record at issue was a video recording of the applicant's polygraph test; a video recording of an individual taking the test is not the same type of information as the examiner's interpretation of the results. Further, the issue in Order F2014-15 was whether the video revealed confidential business information of the organization conducting the polygraph tests. Neither Order is applicable to this case.

[para 18] The information withheld under section 19(1) meets the criteria for that provision.

Exercise of discretion

[para 19] Section 19(1) is a discretionary exception. In *Ontario (Public Safety and Security) v. Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), the Supreme Court of Canada commented on the authority of Ontario's Information and Privacy Commissioner to review a head's exercise of discretion.

[para 20] The Supreme Court of Canada confirmed the authority of the Information and Privacy Commissioner of Ontario to quash a decision not to disclose information pursuant to a discretionary exception and to return the matter for reconsideration by the head of a public body. The Court also considered the following factors to relevant to the review of discretion:

- the decision was made in bad faith
- the decision was made for an improper purpose
- the decision took into account irrelevant considerations
- the decision failed to take into account relevant considerations

[para 21] In Order F2010-036 the adjudicator considered the application of the above decision of the Court to Alberta's FOIP Act, as well as considered how a public body's exercise of discretion had been treated in past orders of this Office. She concluded (at para. 104):

> In my view, these approaches to review of the exercise of discretion are similar to that approved by the Supreme Court of Canada in relation to information not subject to solicitor-client privilege in *Ontario (Public Safety and Security).*

[para 22] In *Edmonton Police Service v. Alberta (Information and Privacy Commissioner)*, 2020 ABQB 10 (CanLII) (*EPS*), the Court provided detailed instructions for public bodies exercising discretion to withhold information under the Act. The Court said (at para. 416)

> What *Ontario Public Safety and Security* requires is the weighing of considerations "for and against disclosure, including the public interest in disclosure:" at para 46. The relevant interests supported by non-disclosure and disclosure must be identified, and the effects of the particular proposed disclosure must be assessed. Disclosure or non-disclosure may support, enhance, or promote some interests but not support, enhance, or promote other interests. Not only the "quantitative" effects of disclosure or non-disclosure need be assessed (how much good or ill would be caused) but the relative importance of interests should be assessed (significant promotion of a lesser interest may be outweighed by moderate promotion of a more important interest). There may be no issue of "harm" in the sense of damage caused by disclosure or non-disclosure, although disclosure or non-disclosure may have greater or lesser benefits. A reason for not disclosing, for example, would be that the benefit for an important interest would exceed any benefit for other interests. That is, discretion may turn on a balancing of benefits, as opposed to a harm assessment.

[para 23] It further explained the weighing of factors at paragraph 419:

> …If disclosure would enhance or improve the public body's interests, there would be no reason not to disclose. If non-disclosure would benefit the public body's interests beyond any benefits of disclosure, the public body should not disclose. If disclosure would neither enhance nor degrade the public body's interests, given the "encouragement" of disclosure, disclosure should occur. Information should not be disclosed only if it would run counter to, or degrade, or impair, that is, if it would "harm" identified interests of the public body.

[para 24] Lastly, the Court described burden of showing that discretion was properly exercised (at para. 421):

> I accept that a public body is "in the best position" to identify its interests at stake, and to identify how disclosure would "potentially affect the operations of the public body" or third parties that work with the public body: EPS Brief at para 199. But that does not mean that its decision is necessarily reasonable, only that it has access to the best evidence (there's a difference between having all the evidence and making an appropriate decision on the evidence). The Adjudicator was right that the burden of showing the appropriate exercise of discretion lies on the public body. It is obligated to show that it has properly refrained from disclosure. Its reasons are subject to review by the IPC. The public body's exercise of discretion must be established; the exercise of discretion is not presumptively valid. The public body must establish proper non-disclosure. The IPC does not have the burden of showing improper non-disclosure.

[para 25] The Applicant argues that the polygraph test interpretation should be provided to him so that he can satisfy himself that he has not been the subject of discrimination. This concern is not relevant to whether section 19(1) applies to the information, but it is relevant to whether the Public Body should exercise its discretion to provide the information to the Applicant even if it does apply.

[para 26] In its initial submission, the Public Body states that it considered that the Applicant has a general right of access, especially to information about him. It acknowledged the importance of access to the Applicant's ability to assess the correctness of the information the Public Body has about him.

[para 27] It concluded that these factors do not override the reasons for withholding the information. It states (initial submission, at para. 29):

> However, the evaluative or opinion information at issue was given in confidence, and it is important to the success of the recruitment process that evaluators are completely candid about their assessments, and can provide those evaluations and opinions without fear that such information be disclosed or made public. Police officers hold a unique position in our society and it is important that candidates are properly vetted by people who can do so without qualification or distraction. Having weighed the Applicant's right of access to records against the negative consequences of disclosure on the CPS's recruitment process, the CPS exercised its discretion to invoke section 19(1).

[para 28] In this case, the records indicate that the Public Body employees tasked with assessing the Applicant's suitability for a position were asked to not only score the Applicant's answers in the interview, but also to provide their personal assessment of the Applicant's character, as it related to the role of a police officer. I accept the reasons given by the Public Body for exercising its discretion to withhold the interviewers' evaluations under section 19(1).

[para 29] Regarding the interpretation of the polygraph test, the Public Body provided additional arguments regarding the possible harm that could result from the disclosure of this information. It states (at para. 13):

> First, the Applicant does not have knowledge of how the CPS interprets polygraph tests, so disclosure would afford the Applicant new information rather than a record of information he already knew. Second, the standardized nature of prospective police officer polygraph interviews entails that information about the interpretation of such data is more useful for those who may later submit to

> such interviews, compared to the bespoke nature of polygraph interviews conducted during a complex criminal investigation.

[para 30] I accept the reasons given by the Public Body for exercising its discretion to withhold information about the interpretation of the polygraph test under section 19(1).

2. Did the Public Body properly apply section 20(1) of the Act (disclosure harmful to law enforcement) to the information in the records?

[para 31] The Public Body withheld information on pages 100, 101, 328 and 329 under section 20(1)(c). This same information was withheld under section 19(1), and I have found that section to have been properly applied. Therefore, I do not need to consider the application of section 20(1)(c) to that same information.

3. Did the Public Body properly apply section 26 of the Act (testing procedures, tests and audits) to the information in the records?

[para 32] The Public Body withheld information on pages 108-115, 120-127, 133-140, 311, 313 and 315 under section 26(c). This provision states:

> *26 The head of a public body may refuse to disclose to an applicant information relating to*
>
> > *(a) testing or auditing procedures or techniques,*
> >
> > *(b) details of specific tests to be given or audits to be conducted,*
> >
> > *or*
> >
> > *(c) standardized tests used by a public body, including intelligence tests,*
>
> *if disclosure could reasonably be expected to prejudice the use or results of particular tests or audits.*

[para 33] The Public Body describes the information withheld under this provision as (initial submission at para. 35):

> [The redactions] are to information in interview evaluation sheets set out in a standard form and scoring keys by which an applicant's reply to standardized interview questions can be assessed. Such Redactions are also to the Applicant's answers to a standardized multiple choice test used by the CPS to assess prospective employees.

[para 34] The Public Body withheld the questions asked of the Applicant in his interview, contained in the interview booklets. The interview booklets also contain instructions for the interviewers regarding how to assess the Applicant; this is likely what the Public Body is referring to as “scoring keys”.

[para 35] Pages 311, 313 and 315, withheld under section 26(c), are described in the Public Body’s index of records as tests; one is referred to as the “Alberta Police Cognitive Ability Test”, and two are referred to as the “Alberta Communication Test”. However, these pages do not consist of the actual exam; rather, they are the Applicant’s answers to multiple choice

questions, as recorded on a fillable Scantron or 'bubble' sheet typically used for multiple-choice exams. I could not locate the multiple-choice exam questions in the records at issue.

[para 36] The Public Body has described the interview questions as standardized questions under section 26(c). In Order F2003-020 the adjudicator accepted the application of section 26(c) to interview questions, as disclosure could invalidate their future use. The adjudicator also accepted the application of 26 to the scoring keys used to assess the interviewee's answers.

[para 37] Regarding the scoring keys, it seems clear that disclosing the factors used to assess interview answers could lead to the prejudice contemplated under section 26(c). I accept that this exception applies.

[para 38] Regarding the interview questions, the Public Body has told me that the interview questions continue to be used, and that

> …the questions used to interview prospective police officers, and the guidelines used to evaluate answers to such questions, if disclosed, would undermine the utility of such interview questions, as it would allow future candidates to frame appropriate replies. (Initial submission, at para. 38)

[para 39] I accept that the interview questions in the records at issue are used regularly by the Public Body, and that disclosing the questions could prejudice their future use. I agree that section 26(c) applies.

[para 40] The application of section 26(c) to the Scantron or 'bubble' sheets filled in by the Applicant in relation to multiple-choice exams is another matter. In Order F2004-015, former Commissioner Work considered the application of section 26(c) to answers and scores for intelligence and psychological tests administered to an individual. While the Commissioner found that section 26(c) applied to the individual's test answers as they could reveal the questions asked, this provision did not apply to the scoring sheets, as these pages did not contain or reveal the questions in the test.

[para 41] I make this same finding with respect to the Scantron or 'bubble' sheets filled in by the Applicant. These sheets do not provide any indication of the questions that were asked. The Public Body argues that "the Applicant's answers to the standardized multiple choice test, if disclosed, would invalidate the future use of the test if the Applicant shared the information with other recruits" (initial submission at para. 38).

[para 42] The records contain three separate 'bubble' sheets; each states the particular test to which they correspond. Possibly the Public Body is arguing that another recruit could memorize the Applicant's answers and obtain the same score as the Applicant. Assuming the Applicant passed the tests, this would allow another recruit to pass the tests without understanding the questions or answers.

[para 43] In order for this to occur, the Public Body would have to use the exact same tests, and other recruits would have to know that the tests are identical. It seems to me that there is an important distinction between knowing interview questions ahead of time, and knowing which

multiple-choice options another test-taker chose on a test. The benefit of advance knowledge of interview questions is the same regardless of the order in which those questions are asked in an interview. However, in the case of the 'bubble' sheets in the records at issue, it is not known what answer is the correct one; all that is revealed is which option of the multiple choices the Applicant chose, for each question. It is not even evident from the records which answers the Applicant got right or wrong. Even if it were known which answers were correct, it is not apparent from these records what the actual answer is; it is only known which corresponding option was correct (i.e. a, b, c, d, or e).

[para 44] This information would be rendered useless if the Public Body were to keep the questions but change the order of the questions, or change which option (a, b, c, d or e) corresponds to the correct answer. In order for section 26(c) to apply, the test would have to be prejudiced by disclosure. In my view, disclosing the Applicant's answers filled out on a 'bubble' sheet does not prejudice the usefulness of the test insofar as there are several reasonably simple avenues by which the Public Body could prevent cheating by way of memorizing another test-taker's answers.

[para 45] I find that section 26(c) applies to the interview questions and scoring keys. Following Order F2004-015, I find that this provision does not apply to the 'bubble' sheets filled out by the Applicant on pages 311, 313 and 315, as these do not reveal the questions asked on the test.

Exercise of discretion

[para 46] Section 26 is a discretionary exception; the discussion above regarding the proper exercise of discretion in the application of section 19(1) applies here as well.

[para 47] In this case, the Public Body states that it considered the Applicant's right of access under the Act, particularly to his own information. The Public Body states that it determined that the negative consequences of disclosing standardized questions used in its recruitment process outweighs that right of access.

[para 48] I accept that the Public Body properly exercised its discretion to apply section 26(c) to the information that falls within that provision.

V. ORDER

[para 49] I make this Order under section 72 of the Act.

[para 50] I find that section 19 applies to the information withheld under that provision.

[para 51] I find that section 26 applies to most of the information withheld under that provision. However, I find that this provision does not apply to the information on pages 311, 313, or 315 and order the Public Body to provide those pages to the Applicant.

[para 52] I further 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.

____

Amanda Swanek
Adjudicator