ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER P2006-001

April 4, 2007

ALBERTA ASSOCIATION OF REGISTERED OCCUPATIONAL THERAPISTS

Case File Numbers P0107 and P0108

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

Summary: The Complainant/Applicant (hereinafter referred to as "Applicant"), an employee of the Alberta Association of Registered Occupational Therapists (the "Organization") at the time of the complaint/application, complained that the Organization refused to provide her, in accordance with the *Personal Information Protection Act*, R.S.A. 2003, c. P-6 (the "Act"), with information related to her application for employment with the Organization. The Applicant also complained that the Organization did not have the authority to collect or use her personal information without notification or consent. The information at issue consisted of two unsolicited letters and a telephone synopsis referencing and assessing the employment performance of the Applicant.

The Commissioner found that section 24(3)(c) (information revealing the identity of person who provided confidential opinion) of the Act applied to the records/information and ordered the Organization not to disclose the information. The Commissioner also found that the Organization had the authority to collect and use the Applicant's personal information without consent or notification, as provided by section 15 and section 18 of the Act, respectively.

Statutes Cited: *Personal Information Protection Act*, R.S.A. 2003, c. P-6.5; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c.F-25, *Interpretation Act*, R.S.A. 2000, c. I-8.

Orders Cited: **AB:** 97-002, 98-002.

Cases Cited: *Radhakrishnan v. University of Calgary Faculty Assn.* [1999] A.J. No. 1088, *Castillo v. Castillo*, 2005 SCC 83, *Samson Cree Nation v. Canada (Registrar of Indian and Northern Affairs* [2005] A.J. No. 685.

I. BACKGROUND

[para 1] In April 2004, the Applicant, while employed by the Alberta Association of Registered Occupational Therapists (the "Organization"), applied for a position with the Organization and interviewed for the position on August 6, 2004. After the interview, on August 18, 2004, the Organization consulted with the Applicant and asked for her consent to the collection of her employment reference information and she agreed.

[para 2] In addition, during the August 18, 2004 consultation between the Organization and the Applicant, the Applicant was informed by the Organization of the existence of two unsolicited employment reference letters and a single employment reference telephone call synopsis it received concerning her employment application.

[para 3] On August 23, 2004, the Applicant made a written request that the Organization provide her with details regarding the two letters and telephone synopsis. On August 25, 2004, the Organization advised the Applicant that she would not be hired for the position she applied for.

[para 4] On September 1, 2004, the Applicant, not having received a direct response to her August 23, 2004 written request for information, made a second written application for the same information as she requested on August 23, 2004. The Organization, on September 17, 2004, acknowledged the Applicant's August 23, 2004 request and, upon responding in accordance with section 28 (45-day time limit for responding) of the *Personal Information Protection Act* (the "Act"), refused to provide the Applicant with information related to her employment application, citing confidentiality concerns and referencing section 24(3)(c) of the Act.

[para 5] On October 18, 2004, the Applicant instructed her counsel to write to my Office asking me, pursuant to section 46(2) of the Act, to review the actions of the Organization. Further, in the October 18, 2004 letter, the Applicant contended that the Organization wrongfully refused to disclose to her the records/information regarding employment reference letters and a single employment reference telephone call synopsis. My Office opened case File Number P0107 to deal with the Applicant's access request.

[para 6] The October 18, 2004 letter from counsel for the Applicant also complained that the Organization did not have the authority, without the Applicant's consent, to collect or use her personal information and that it did so without reasonable notification or explanation as to the purpose for doing so. My Office opened Case File Number P0108 to deal with this complaint.

[para 7] Mediation, authorized under section 49 of the Act, failed, and the two case files proceeded to a written inquiry under section 50 of the Act.

II. RECORDS AT ISSUE

[para 8] The records at issue for Case File Number P0107 are two letters and a synopsis of a telephone conversation, which the Organization withheld from the Applicant. There are no records at issue for Case File Number P0108.

III. ISSUES

Case File Number P0107

Issue A: Does section 24(3)(c) of the Act (information revealing identity of person who provided confidential opinion) apply to the records/information?

Issue B: If section 24(3)(c) of the Act applies, is the Organization reasonably able to sever the information to which section 24(3)(c) applies?

Case File Number P0108

Issue C: Did the Organization have the authority to collect personal employee information, without consent, as provided in section 15(1) of the Act?

Issue D: Did the Organization comply with section 15(2) of Act and in particular with section 15(2)(c) (notifying employee that personal employee information is going to be collected and the purposes of that collection)?

Issue E: Did the Organization have the authority to use personal employee information, without consent, as provided by section 18(1) of the Act?

Issue F: Did the Organization comply with section 18(2) of the Act and in particular with section 18(2)(c) of the Act (notifying employee that personal employee information is going to be used and the purposes for the use)?

IV. DISCUSSION OF THE ISSUES

Case File Number P0107

ISSUE A: Does section 24(3)(c) of the Act (information revealing identity of person who provided confidential opinion) apply to the records/information?

[para 9] I note that for Issues A and B, the Organization has the burden of proof as provided by section 51 of the Act, which reads:

> 51 At an inquiry into a decision under which an individual was refused
> (a) access to all or part of the personal information about the individual or a record relating to the information, or
> (b) information respecting the collection, use or disclosure of personal information about the individual,
> it is up to the organization to establish to the satisfaction of the Commissioner that the individual has no right of access to the personal information about the individual or no right to the information requested respecting the collection, use or disclosure of the personal information about the individual.

[para 10] The Applicant argued that section 24(1) of the Act creates a positive obligation on an organization to provide an individual with access to personal information about that individual. Section 24(1) of the Act reads:

> 24(1) Subject to subsections (2) to (4), on the request of an individual for access to personal information about the individual and taking into consideration what is reasonable, an organization must provide the individual with access to the following:
> (a) the individual's personal information where that information is contained in a record that is in the custody or under the control of the organization;
> (b) the purposes for which the personal information referred to in clause (a) has been and is being used by the organization;
> (c) the names of the persons to whom and circumstances in which the personal information referred to in clause (a) has been and is being disclosed.

[para 11] The Applicant contended that section 24(1) of the Act means that access is mandated subject only to sections 24(2) to (4) of the Act. The Applicant argued that the denial of access by the Organization is wrongly premised on the reading of section 24(3)(c) of the Act as taking priority over section 24(1) of the Act and contended that section 24(1) of the Act is the governing provision. In these circumstances and against the backdrop of competing privacy interests, the Applicant claimed that access must be

granted to her. The Applicant further maintained that the records at issue do not meet the requirements of section 24(3)(c) of the Act as they are complaints and not opinions.

[para 12] I find that the Applicant has misinterpreted section 24(1) of the Act, which has specifically been made subject to the exceptions to disclosure contained in section 24(3) of the Act. Consequently, if an exception to disclosure applies, section 24(1) of the Act does not apply. Section 24(3)(c) of the Act reads:

> 24(3) An organization shall not provide access to personal information under subsection (1) if…
> (c) the information would reveal the identity of an individual who has in confidence provided an opinion about another individual and the individual providing the opinion does not consent to disclosure of his or her identity.

[para 13] The Organization argued that individual opinions provided to the Organization contain personal identifying information. Each of the communications lists the names and contact information of those providing the specific evaluations, or opinions, about the Applicant. Further, the Organization argued that the entire substance of the communications serve to identify the individual providing the job specific reference. The Organization also provided evidence that all of those providing references have specifically requested that the Organization keep the substance of the employment references confidential and not disclose their identity. I note that the opinions are of a nature that discusses information that concerns a work relationship with the Applicant.

[para 14] The Organization argued that the communications at issue fall squarely within section 24(3)(c) of the Act and therefore access should be denied.

[para 15] Section 24(3)(c) of the Act requires that an individual have provided an "opinion". In Order 97-002 the former Commissioner distinguished between "fact" and "opinion" and established criteria for the determination as to what is an opinion and what is fact. The former Commissioner, referencing the Concise Oxford Dictionary, interpreted "fact" to mean a thing that is known to have occurred, to exist, or to be true; an item of verified information. The former Commissioner interpreted "opinion" to mean a belief or assessment based on grounds short of proof; a view held as probable. The former Commissioner added that a fact may be determined objectively and that an opinion is subjective in nature, and may or may not be based on facts. In Order 97-002 the former Commissioner provided an example of an opinion as being a belief that a person would be a suitable employee, based on that person's employment history.

[para 16] In considering the application of section 24(3)(c) of the Act, I adopt the interpretation of "opinion" found in Order 97-002 for the purposes of section 24(3)(c) of the Act. Upon reviewing the records, I find that they all set out subjective opinions that relate characteristics of the Applicant in the context of employment experience with the Applicant and her application for a position within the Organization. Therefore, these are opinions, as defined.

[para 17] I have found that the information at issue is an "opinion". Is an opinion "personal information" under the Act? "Personal information" is defined in section 1(k) of the Act which reads:

> 1 In this Act,…
>
> (k) "personal information" means information about an identifiable individual;…

[para 18] Section 1(k) of the Act broadly and simply defines "personal information" as being information about an identifiable individual. The definition of "personal information" says nothing about "opinions". Reviewing the *in camera* submission I find that the opinions are about the Applicant who is an identifiable individual. Therefore, the opinions are the personal information of the Applicant.

[para 19] The next part of section 24(3)(c) of the Act addresses confidentiality and requires consideration as to whether the opinions were submitted in confidence and whether the individual providing the opinion consented to disclosure of his or her identity.

[para 20] I have already noted that I reviewed the *in camera* evidence and I confirm that the written evidence before me clearly allows me to conclude that all three of the individuals who provided opinions did so in confidence and did not consent to having their opinions or identities disclosed.

[para 21] In coming to this conclusion, I took into account the *in camera* submission and the word "confidential" on some of the records. I also find that it is irrelevant whether the Applicant was aware at the outset of the application process that the Organization would be collecting information in confidence or that the information at issue was unsolicited.

[para 22] Finally, I must decide whether the information would reveal the identities of the persons who provided the opinions. The supporting *in camera* evidence provided by the Organization confirms that that the specific nature of the opinions would allow the individuals who provided the opinions to be easily identified. Therefore, I find that the criteria of section 24(3)(c) of the Act have been met.

[para 23] Section 24(3)(c) of the Act requires that an organization "shall" not provide access to personal information under section 24(1) of the Act if the criteria of section 24(3)(c) of the Act are met. The use of the word "shall", in section 24(3)(c) of the Act, means it is an imperative section of the Act: see section 28(2)(f) of the *Interpretation Act*, which reads:

> (2) In an enactment,…(f) "shall" is to be construed as imperative.

[para 24] Consequently, I find that the Organization must not provide the Applicant with access to the personal information about the Applicant, as provided by section 24(3)(c) of the Act.

ISSUE B: If section 24(3)(c) of the Act applies, is the Organization reasonably able to sever the information to which section 24(3)(c) applies?

[para 25] Section 24(4) of the Act concerns the severing of information withheld pursuant to section 24(3)(c) of the Act. Section 24(4) of the Act reads:

> 24(4) If, in respect of a record, an organization is reasonably able to sever the information referred to in subsection (2)(b) or (3)(a), (b) or (c) from a copy of the record that contains personal information about the individual who requested it, the organization must provide the individual with access to the record after the information referred to in subsection (2)(b) or (3)(a), (b) or (c) has been severed.

[para 26] The Applicant argued that section 24(1) of the Act governs section 24(3)(c) of the Act and that if complete access is denied, then the Organization should be compelled to sever the information and provide the remaining information to her. The Applicant further argued that the Organization was unreasonable in not allowing her access and thereby denied her knowledge as to the substance of the personal information provided and the ability to refute the submissions.

[para 27] The Organization argued that it had advised the Applicant of a need for an expanded reference check and at that time informed her of the unsolicited critical employment references provided to the Organization regarding her performance.

[para 28] The Organization argued that it was limited to only advising the Applicant about the critical nature of the submissions, as the information at issue was provided in confidence and requested to remain in confidence. Further, the Organization argued that the identifying information could not reasonably be severed. The Organization contended that the employment reference opinions are very specific and as such it would be unreasonable for it to sever the information. The Organization argued that the substance of the information at issue, because of the context, if disclosed in whole or in part, are opinions that would serve to identify the individuals who provided them in confidence.

[para 29] The supporting *in camera* evidence provided by the Organization confirms that severing cannot reasonably take place. I agree with the Organization that the specific nature of the opinions would allow the individuals who provided the opinions to be easily identified and releasing the opinions, even in a severed format, would violate the confidence requested and reveal the identity of the individual, contrary to section 24(3)(c) of the Act. Section 24(4) of the Act is a mandatory ("must") provision. If an

organization can reasonably sever information then it must do so, but in such a way as to not disclose the identities of those providing the opinions.

[para 30] I find that the opinions about the Applicant are very specific and I agree with the Organization that the substance of the information at issue, not simply items within the communications, would serve to identify the individuals who provided the opinions in confidence. I therefore find that the Organization cannot reasonably sever the information protected under section 24(3)(c) of the Act, and for that reason cannot provide the Applicant with access to the records.

Case File Number P0108

ISSUE C: Did the Organization have the authority to collect personal employee information, without consent, as provided in section 15(1) of the Act?

[para 31] Section 15(1) of the Act reads:

> 15(1) Notwithstanding anything in this Act other than subsection (2), an organization may collect personal employee information about an individual without the consent of the individual if
> (a) the individual is an employee of the organization, or
> (b) the collection of the information is for the purpose of recruiting a potential employee.

[para 32] Section 1(j) of the Act defines personal employee information:

> 1 In this Act,…
> (j) "personal employee information" means, in respect of an individual who is an employee or a potential employee, personal information reasonably required by an organization that is collected, used or disclosed solely for the purposes of establishing, managing or terminating
> (i) an employment relationship, or
> (ii) a volunteer work relationship
> between the organization and the individual but does not include personal information about the individual that is unrelated to that relationship;…

[para 33] The Applicant argued that personal employee information was collected by the Organization, without her consent, and in so doing the Organization acted as a repository for the communications. The Applicant argued that the collection of this personal employee information disentitled her to a future benefit within an existing employment context, i.e. her future employment with the Organization. The Applicant

contended that the collection of the personal employee information was unreasonable because she does not have an ability to respond to the personal information collected. The Applicant claimed that information collected does not relate to her application for employment with the Organization.

[para 34] The Applicant submitted that, for the purposes of section 1(j) of the Act, at the time the information at issue was received by the Organization, the Applicant was both a current and potential employee of the Organization.

[para 35] The Organization argued that in these circumstances, it was reasonable to conclude that the Organization was authorized under section 15(1) of the Act, to collect potential employee personal employee information for the purpose of recruiting a potential employee.

[para 36] The Organization argued that in these circumstances the simple interpretation is that section 15(1) of the Act allows an organization to collect personal employee information, without consent, when it is engaged in recruiting a potential employee.

[para 37] The Organization argued that the Act does not define "collection". The Organization submitted that the Concise Oxford Dictionary, Ninth Edition defines collection to mean: "1. to bring or come together, assemble, accumulate. 2. systematically seek and acquire…" The definition, according to the Organization, requires steps to request, call in and seek in order to collect and that they did not collect the opinions about the Applicant. In addition, given the unsolicited nature of the opinions, it was impossible for the Organization to have provided the Applicant with any advance notice that they were to be received or for what purpose they were being received. The Organization again argued that for advance notification to be required for that which it had no idea is about to be provided is a challenge to one's common sense. The Organization argued that it would seem more appropriate to interpret "collection" to not include unsolicited information.

[para 38] The Organization contended that the unsolicited "acquisition" of employment-related personal employee information, submitted in confidence, regarding an employee and potential employee was not a collection of personal information. The Organization argued that it did not collect the information because it was unsolicited.

[para 39] All of the information at issue concerns the employee performance directly related to the Applicant's application for a position with the Organization. The Act does not define collection, but if I turn to section 33 of the *Freedom of Information and Protection of Privacy Act* I find that according to Order 98-002, collection need not be a positive act and that it does not matter how the information is collected as any manner of collection, including receiving unsolicited information, is a collection.

[para 40] The issue is whether the personal information, which is the subject of the complaint, meets the requirements for personal employee information, as contained in the definition in section 1(j) of the Act and under section 15 of the Act.

[para 41] The definition of “personal employee information” in section 1(j) of the Act specifically refers to "an individual who is an employee or a potential employee”. The words "establishing, managing or terminating" an employment or volunteer work relationship in section 1(j) of the Act make it clear that section 1(j) only applies to present employees and the “recruitment of potential employees”.

[para 42] The last part of section 1(j) of the Act also allows that personal employee information does not include personal information that is unrelated to the employment or volunteer work relationship. Thus, under this definition, only personal information that is related to the employee or volunteer work relationship is personal employee information.

[para 43] In these particular circumstances, because the Applicant was an employee of the Organization when she applied for another position with the Organization, she wears two separate and distinct hats for the purposes of the application of the Act. One hat is worn in the category of an “employee” of the Organization and the other hat is in the category as a “potential employee” of the Organization. I find that the Organization collected “personal employee information”, as defined in section 1(j) of the Act, for the purpose of recruiting a “potential employee” in accordance with section 15(1)(b) of the Act. Under section 15(1)(b) of the Act, the consent of the Applicant, even though she was an employee at the time, is not required as the purpose for collecting the personal employee information was strictly related to the recruiting of a “potential employee”. As noted in these particular circumstances the Applicant was wearing the “potential employee” hat. The information relates to the employment application of the Applicant. In this circumstance she is a potential employee. The status of the Applicant therefore does not fall within the section 1(e) definition of “employee”. I find that, for the purposes of applying section 15 of the Act, the Applicant must be considered only as a “potential employee” and not an “employee” under section 15(1)(a) of the Act. I am satisfied that the evidence before me allows me to find that there was a collection within the meaning of the Act and that the collection was for recruiting the Applicant as a potential employee.

[para 44] Section 15 of the Act specifies how personal employee information may be collected. The collection, though unsolicited, was for recruiting purposes, allowing the Organization to perform an assessment of a particular candidate it is considering recruiting for employment. I find that the Organization had the authority to collect personal employee information, without consent, for the purpose of recruiting a potential employee (the Applicant) as specified in section 15(1)(b) of the Act.

ISSUE D: Did the Organization comply with section 15(2) of Act and in particular with section 15(2)(c) (notifying employee that personal employee information is going to be collected and the purposes of that collection)?

[para 45] Section 15(2) of the Act reads:

> 15(2) An organization shall not collect personal information about an individual under subsection (1) without the consent of the individual unless
> (a) the collection is reasonable for the purposes for which the information is being collected,
> (b)the information consists only of information that is related to the employment or volunteer work relationship of the individual, and
> (c) in the case of an individual who is an employee of the organization, the organization has, before collecting the information, provided the individual with reasonable notification that the information is going to be collected and of the purposes for which the information is going to be collected.

[para 46] The Applicant argued that section 15(2)(c) of the Act is a mandatory and cumulative specific requirement. The Applicant contended that the Organization must demonstrate that she has been provided with notice that the Organization was going to be collecting her personal information and provided notice as to the purpose for which the personal information was being collected. The Applicant argued that section 15(2) of the Act governs section 15(1) of the Act. The Applicant argued that section 15(2) of the Act obliges organizations not to collect personal information about an individual specified in section 15(1) of the Act, until they have obtained consent of that individual, or the collection meets one of the criteria specified in section 15(2) of the Act.

[para 47] The Organization argued that the Applicant was made aware on August 18, 2004 of the references and that the October 18, 2004 letter from the Applicant to the Organization is written proof that the Applicant received notice that the Organization was in receipt of the unsolicited and critical opinions regarding her performance. The Organization noted that as it was the recipient of unsolicited reference information, it could not have provided the Applicant with advance notice.

[para 48] The Organization argued that it is reasonable for personal reference information concerning the performance of potential employees to be provided and that the Applicant was very much aware that her previous performance would be relevant to her application for a new position.

[para 49] As with section 15(1) of the Act, the Organization contended that the unsolicited "acquisition" of employment references related to personal employee information, submitted in confidence, regarding a potential employee and therefore there was not a collection of personal information. The Organization argued that it did not collect the information and because it was unsolicited there was no way to provide pre-notification, in accordance with section 15(2)(c) of the Act, to the Applicant.

[para 50] I have found that the Organization did, without consent, collect the personal employee information of the Applicant and did so in accordance with section 15(1)(b) of the Act.

[para 51] Section 15(1) of the Act is subject to section 15(2) of the Act. Section 15(2) of the Act states that an organization "shall" not collect "personal information" about an individual under section 15(1) of the Act, without consent, unless certain conditions are met.

[para 52] Section 15(2) of the Act contains three requirements. The "and" at the end of section 15(2)(b) means that all the requirements of section 15(2) of the Act must be met, where applicable. If those requirements are met, an organization may collect personal employee information without the consent of the individual.

[para 53] Reading the words of section 15(2) of the Act in their entire context, I find that "purposes" for collection referred to in section 15(2)(a) and (b) must be interpreted as purposes that are reasonable for which the information is being collected. Further, I find that the information must consist only of information that is related to the employment or volunteer work relationship of the individual.

[para 54] To assist me in my understanding of what is reasonable, I turn to section 2 of the Act that provides a standard as to what is reasonable. Section 2 of the Act reads:

> 2 Where in this Act anything or any matter
> (a) is described, characterized or referred to as reasonable or unreasonable, or
> (b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,
> the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

[para 55] The test to be applied is "what a reasonable person would consider appropriate in the circumstances".

[para 56] I have found that, under section 15(1)(b) of the Act, that the collection of the information was for the purpose of recruiting a potential employee. I now have to find if the collection of the personal information in these circumstances was in accordance with section 15(2) of the Act.

[para 57] Section 15(2)(a) of the Act requires that the collection of personal information by an organization be reasonable for the purposes for which the information is collected. Reviewing the evidence before me, I find that the collection of the opinions at issue is for a reasonable purpose, that being employee recruitment by the Organization. The evidence before me reveals no other purpose for the collection.

[para 58] Section 15(2)(b) of the Act requires that the information consist only of information that is related to the employment relationship of the individual. I note that in this case the Applicant is a potential employee. Section 15(2)(b) of the Act refers to information "that is related to an employment or volunteer work relationship". The facts of the case allow me to ignore the section 15(2)(b) of the Act reference to a "volunteer" relationship. However, to properly examine the application of section 15(2)(b) of the Act, I now need to address the meaning of the word "employment". The word "employment" is not defined in the Act, the *Interpretation Act* or FOIP. However, "employment" is defined in the Concise Oxford Dictionary, Ninth Edition as meaning:

> "…1 the act of employing or the state of being employed…"

Knowing this, I find that the word "employment" in section 15(2)(b) of the Act includes the act of employing or recruitment of a potential employee. In my review of section 15(1) of the Act, I found that the information at issue directly relates to the potential employment of the Applicant; in other words, the establishing of an employment relationship under section 15(1)(b) of the Act. Upon reviewing the evidence concerning the context of the information, I find that the requirements of section 15(2)(b) of the Act have been met by the Organization.

[para 59] Section 15(2)(c) of the Act requires that if an organization collects personal information about an individual who is an employee, it is required to provide that employee with reasonable notification and an explanation as to the purpose for which the information is going to be collected. In other words the notification provision of section 15(2)(c) of the Act applies to an organization that is collecting personal information about an individual "employee" with the organization. As I found in my review of section 15(1)(a) of the Act, in these circumstances, the Applicant was not an employee of the Organization. The collection of the information at issue was in direct response and related to the Applicant's application for employment for a position other than the one she held with the Organization. Therefore, I find that the Applicant for the purposes of the Act was not an "employee" but a "potential employee" and therefore section 15(2)(c) of the Act does not apply.

[para 60] I have found the information/records at issue contain "personal employee information". Further, I have found that the information at issue was collected by the Organization in order to find a suitable candidate and that the personal employee information related directly to the Applicant's employment application. I therefore find, based on the evidence before me, that the Organization complied with the applicable requirements of section 15(2) of the Act.

ISSUE E: Did the Organization have the authority to use personal employee information without consent, as provided by section 18(1) of the Act?

[para 61] Section 18(1) of the Act reads:

> 18(1) Notwithstanding anything in this Act other than subsection

> (2), an organization may use personal employee information about an individual without the consent of the individual if
> (a) the individual is an employee of the organization, or
> (b) the use of the information is for the purpose of recruiting a potential employee.

[para 62] The Applicant argued that the Organization was not in compliance with section 18(1) of the Act because the personal employee information was used outside of the principles of natural justice, i.e. the Applicant did not have an opportunity to review and respond to the opinions and that in this context the personal employee information was used unreasonably. The Applicant referenced two cases addressing the principles of natural justice she feels should apply: *Radhakrishnan v. University of Calgary Faculty Assn.* [1999] A.J. No. 1088 and *Samson Cree Nation v. Canada (Registrar of Indian and Northern Affairs)* [2005] A.J. No. 685.

[para 63] The Organization argued that the Applicant was both an existing and prospective employee, under section 18(1) of the Act, and that the unsolicited employee performance opinions were reasonably used by the Organization for consideration of a potential employee under section 18(1)(b) of the Act and consent was therefore not required.

[para 64] The Organization addressed the two cases cited in support of the Applicant's contention that the Organization, in refusing to disclose the opinions resulted in a breach of natural justice. The Organization submitted that the cases were not decided pursuant to the Act; neither case has similar facts and in neither case was there a breach of natural justice found due to the non-disclosure of documents. I find, having examined the two cases, I agree with the Organization in that the cases do not supersede the Act and I agree with the distinctions made by the Organization. In addition I add that natural justice is not a criterion under section 18(1) of the Act.

[para 65] I have found that the Organization was dealing with "personal employee information", concerning an individual who was, for these circumstances, a potential employee of the Organization. As I found with section 15 of the Act, the Organization is dealing with the Applicant strictly as a potential employee. Therefore I find, based on the evidence before me, that the Organization had the authority to use, without consent, the personal employee information under section 18(1)(b) of the Act, for the purpose of recruiting a potential employee.

ISSUE F: Did the Organization comply with section 18(2) of the Act and in particular with section 18(2)(c) of the Act (notifying the employee that personal employee information is going to be used and the purpose of the use)?

[para 66] Section 18(2) of the Act reads:

> (2) An organization shall not use personal information about an individual under subsection (1) without the consent of the

> individual unless
> (a) the use is reasonable for the purposes for which the information is being used,
> (b) the information consists only of information that is related to the employment or volunteer work relationship of the individual, and
> (c) in the case of an individual who is an employee of the organization, the organization has, before using the information, provided the individual with reasonable notification that the information is going to be used and of the purposes for which the information is going to be used.

[para 67] As in my analysis of the application of sections 15 and 18(1) of the Act, in these circumstances the contextual relationship and substance of the information at issue must be considered. I have found that the information at issue, the unsolicited opinions about the Applicant, were used for recruitment by the Organization.

[para 68] The Applicant argued that the context of transporting the status of an employee to that of a potential employee, had the effect of subverting the existing employment relationship and was used to disentitle the Applicant from a future benefit. The Applicant also argued that, within the regular employment context, justice would mandate that the Applicant would be able to review or at least respond to the criticism of her as an employee. Therefore the use was not reasonable for the purpose under section 18(2)(a) of the Act.

[para 69] The Organization argued that the information at issue strictly relates to the potential suitability of the Applicant for a new position. The Organization contended that the use was reasonable as its primary focus was for employment recruitment and therefore in accordance with section 18(2) and of the Act. The Organization noted that the information at issue only relates to the recruitment, potential employee relationship of the Applicant and thereby complies with section 18(2) of the Act. The Organization argued that, in these circumstances, the Applicant acknowledged that she was notified and plainly aware of the receipt of the employment-related critical opinions and that they would be used in determining her suitability for the position she applied for in accordance with section 18(2) of the Act.

[para 70] The Organization argued that the scope of the review of the information at issue was both reasonable and necessary regarding all of the circumstances surrounding the application of the Applicant for employment.

[para 71] I have found that, under section 18(1)(b) of the Act, the use of the information was for the purpose of recruiting a potential employee.

[para 72] Section 18(1) of the Act is subject to section 18(2) of the Act. I now need to examine if the use of the personal information was in accordance with section 18(2) of the Act.

[para 73] Section 18(2)(a) of the Act requires that the use of personal information by an organization be reasonable for the purposes for which the information is used. Reviewing the evidence before me, I find that recruitment of a potential employee by the Organization is a reasonable purpose for which the information was used. The evidence reveals no other purpose other than employee recruitment.

[para 74] Section 18(2)(b) of the Act requires that the information consist only of information that is related to the employment relationship of the individual. I note that in this case the Applicant is a potential employee. Section 18(2)(b) of the Act refers to information "that is related to an employment or volunteer work relationship". In my review of section 18(1) of the Act, I have already established that the information at issue directly relates to the potential employment of the Applicant, in other words, the use of information for recruiting purposes under section 18(1)(b) of the Act. Therefore reviewing the evidence and the context of the information, I find that the requirements of section 18(2)(b) of the Act have been met by the Organization.

[para 75] Section 18(2)(c) of the Act requires that if an organization collects personal information about an individual, who is an employee, it is required to provide that employee with reasonable notification and an explanation as to the as to the purpose for which the information is going to be collected. I have found under sections 15(1) and 18(1) of the Act that the Applicant was not an employee of the Organization. Similarly I find that the Applicant was not an "employee" but a "potential employee" and therefore section 18(2)(c) of the Act does not apply.

[para 76] I find, based on the evidence before me, that the Organization complied with the applicable requirements of section 18(2) of the Act and that section 18(2)(c) of the Act does not apply.

V. ORDER

[para 77] I make the following Order under section 52 of the Act.

[para 78] I find that section 24(3)(c) of the Act applies to the records/information. I uphold the Organization's decision to refuse to disclose the records/information and order the Organization not to disclose the records/information to the Applicant.

[para 79] I find the Organization cannot reasonably sever the information to which section 24(3)(c) of the Act applies.

[para 80] I find that the Organization had the authority to collect personal employee information, without consent, as provided in section 15(1) of the Act and that section 15(2)(c) of the Act does not apply.

[para 81] I find that the Organization complied with section 15(2) of the Act and that section 15(2) of the Act does not apply.

[para 82] I find that the Organization had the authority to use personal employee information, without consent, as provided by section 18(1) of the Act.

[para 83] I find that the Organization complied with section 18(2) of the Act and that section 18(2)(c) of the Act does not apply.

Frank Work, Q.C.
Information and Privacy Commissioner