

ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 98-021

July 15, 1999

ALBERTA JUSTICE

Review Number 1471

I. BACKGROUND

[para 1.] The Applicant applied to the Sheriff of Alberta for an appointment as a bailiff under the *Civil Enforcement Act*, S.A. 1994, c. C-10.5. The *Civil Enforcement Act* applies to the carrying out of civil enforcement proceedings in Alberta. Bailiffs are involved in the seizure and removal of personal property, evictions and other functions and duties provided for or permitted under the *Civil Enforcement Act*. On January 2, 1996, the Sheriff wrote to the Applicant to inform him of the Sheriff's decision to refuse his appointment as a bailiff.

[para 2.] On July 18, 1998 the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Justice for a copy of a record containing reference checks of the Applicant. A copy of the record was attached to a fax cover sheet sent to Alberta Justice lawyers from the Sheriff of Alberta on January 22, 1996. Only the fax cover sheet was disclosed to the Applicant in response to a previous request for access.

[para 3.] On August 16, 1998 the Applicant asked my Office for a review. Mediation was authorized but not successful. An inquiry was set down for December 10, 1998.

[para 4.] The sole issue was Alberta Justice's refusal to provide access to the record containing the reference checks of the Applicant. I made it clear at the inquiry that it is beyond my jurisdiction to examine the manner in which the Sheriff conducted the Applicant's application for appointment as a bailiff.

[para 5.] Alberta Justice has refused access to the record on the basis of section 17(1) (disclosure harmful to individual or public safety), section 18 (confidential evaluations) and section 16 (disclosure harmful to personal privacy) of the Act. Alberta Justice has agreed to waive solicitor-client privilege (section 26(1)) over the record.

[para 6.] Subsequent to the inquiry, the Applicant alleged the Sheriff had made false statements under oath at the inquiry. I thus suspended the issuance of this Order until one of my Portfolio Officers could investigate those allegations. On April 29, 1999, the investigation was completed on the basis that there was no evidence of false statements to support a charge.

II. RECORD AT ISSUE

[para 7.] The record at issue is a 7-page background reference check (the "Record") dated January 18, 1996. The Deputy Sheriff in Calgary authored it for the Sheriff. Numerous references were called and the conversations are summarized in the Record. Alberta Justice withheld the entire Record.

III. ISSUES

[para 8.] There are three issues in this inquiry:

- A. Did Alberta Justice correctly apply section 18(1) of the Act to the Record?
- B. Did Alberta Justice correctly apply section 17(1) Act to the Record?
- C. Does section 16 (disclosure harmful to personal privacy) of the Act apply to the Record?

IV. DISCUSSION

Issue A: Did Alberta Justice correctly apply section 18(1) of the Act to the Record?

1. Application of section 18

[para 9.] Section 18 reads:

18 The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits when the information is provided, explicitly or implicitly, in confidence.

[para 10.] Until now, I have not had occasion to interpret section 18 in an Order.

[para 11.] This Order is pursuant to the Act with amendments in force as of October 1, 1997. The amended version of the Act (amended May 19, 1999) adds section 18(2) and 18(3).

[para 12.] Section 18 sets out a tripartite test. To qualify for the section 18 exception, the information contained in the record must satisfy each part of a three-part test.

1. The information must be personal information that is evaluative or opinion material;
2. The personal information must be compiled solely for one of the following purposes:
 - Determining the applicant's suitability, eligibility or qualifications for employment, or
 - Awarding a government contract or
 - Awarding other benefits;
3. The personal information must be provided, explicitly or implicitly, in confidence.

[para 13.] Failure to satisfy a single part of the test means that the personal information contained in the record cannot be excepted under section 18.

Part One: Is the information personal information that is evaluative or opinion material?

i) Does the Record contain "personal information"?

[para 14.] Personal information is defined by section 1(1)(n) of the Act. Section 18 does not specify whose personal information must be included in the record to fall under section 18. Consequently, I will interpret personal information to be a third party's personal information or the Applicant's personal information.

[para 15.] I find that the Record contains both the Applicant's personal information and third parties' personal information. The Record contains the personal information of the third parties that supplied the references. That information would include the individual's name, his or her employment title, the name of the individual's organization and the individual's telephone number. The opinions about the Applicant are the Applicant's personal information.

ii) Does the Record contain personal information that is "evaluative or opinion material"?

[para 16.] The Concise Oxford Dictionary defines "evaluative" to mean the adjective for "evaluate" which means "to assess, appraise, to find or state the number of". "Opinion" is defined as "a belief or assessment based on grounds short of proof; a view held as probable". I stated in Order 97-002 that an example of an "opinion" would be a belief that a person would be a suitable employee, based on that person's employment history. An "opinion" is subjective in nature, and may or may not be based on facts.

[para 17.] I have reviewed the personal information contained in the Record in order to determine whether it is evaluative or opinion material. The Record sets out "opinions" of third parties in that the third parties relate characteristics of the Applicant with respect to the Applicant's character and personality. Some references provided their opinions in the context of employment experience with the Applicant. In that sense, the opinions are also evaluative of the Applicant's skills for employment and dealing with the public. In my view, therefore, the Record contains personal information, which is evaluative or opinion material. Therefore, the first part of the test is satisfied.

Part Two: Is the personal information compiled solely for one of the following purposes:

- **Determining the applicant's suitability, eligibility or qualifications for employment, or**
- **Awarding a government contract or**
- **Awarding other benefits?**

[para 18.] It is necessary to review how bailiffs are appointed under the *Civil Enforcement Act* of Alberta in order to determine whether the Record was compiled for one of the above purposes.

[para 19.] The Sheriff stated that, in his view, the Record was compiled solely for the purpose of awarding a benefit. He stated that bailiffs are not employed by the Sheriff or by the government. A bailiff is employed by a privately run civil enforcement agency. Nor is the bailiff under contract to the Sheriff or to the government. The Sheriff said that a bailiff's employment relationship is with the civil enforcement agency. However, a bailiff can only work for agencies if a bailiff is appointed by the Sheriff.

[para 20.] For these reasons, it is Alberta Justice's position that the Record was compiled solely for the purpose of awarding a benefit, namely, an appointment as a bailiff.

[para 21.] This inquiry concerns an appointment as a bailiff. I must decide whether an appointment as a bailiff is a "benefit", whether the Sheriff "awarded" this benefit, and whether the Sheriff compiled the personal information solely for the purpose of awarding the benefit.

i) Did the Sheriff "award" the benefit

[para 22.] According to the Concise Oxford Dictionary, Ninth Edition, "award" means, among other things, to give or to order to be given as a payment, compensation, or prize; to grant to assign.

[para 23.] The word "award" implies that the decision-maker has some authority to give or to order that benefit be granted.

[para 24.] Section 10(1) of the *Civil Enforcement Act* reads:

10(1) The sheriff may appoint an individual as a civil enforcement bailiff to carry out, subject to any restrictions or conditions contained in the appointment,

- a) the seizure of personal property,*
- b) the removal of seized personal property,*
- c) evictions, and*
- d) any other functions or duties provided for or permitted under this or any other enactment.*

[para 25.] Section 22(1) of the Civil Enforcement Regulation 276/95 reads:

22(1) An application for appointment as a bailiff must be made in a form acceptable to the sheriff and be accompanied by

- (a) a fee of \$100, and*
- (b) an affidavit of the applicant in the form set out in Schedule 3.*

(2) *The sheriff may*

- (a) *with respect to a person who has applied for appointment as a bailiff, make whatever inquiry and investigation that the sheriff considers appropriate, and*
- (b) *make or refuse to make the appointment when in the opinion of the sheriff that action is in the public interest.*

(3) *A person shall not be appointed as a bailiff unless that person has*

- (a) *to the satisfaction of the sheriff, completed a course and passed an examination approved by the sheriff, and*
- (b) *entered into any agreement, undertaking or other arrangement as may be required by the sheriff.*

[para 26.] It is clear from the *Civil Enforcement Act* and Regulation that the Sheriff has the authority to appoint an applicant as a bailiff. In light of these provisions, in my view, the appointment of an individual as a bailiff by the Sheriff under the *Civil Enforcement Act* falls within the definition of “awarding”.

ii) Is a bailiff appointment a “benefit”?

[para 27.] According to the Concise Oxford Dictionary, Ninth Edition, “benefit” means, among other things, a favourable or helpful factor or circumstance, or an advantage.

[para 28.] Given that section 9(4) of the *Civil Enforcement Act* says that agencies shall use only bailiffs to carry out seizures, remove seized property and carry out evictions, *the Civil Enforcement Act* gives special responsibilities to bailiffs. Moreover, section 13(1) of the *Civil Enforcement Act* provides that bailiffs, for the purpose of carrying out civil enforcement proceedings, have special powers granted by the *Civil Enforcement Act*.

[para 29.] It is clear that if one wants to work for a civil enforcement agency conducting civil enforcement proceedings, one has to be appointed as a bailiff. It seems to me that the rights that flow from that appointment can be considered a “benefit”, as defined.

iii) Did the Sheriff compile the Record “solely” for the purpose of awarding the benefit, namely, the appointment of the Applicant as a bailiff?

Alberta Justice's Position

[para 30.] With respect to the second part of the test, Alberta Justice submits that the Sheriff compiled the Record solely for the purpose of awarding a benefit by the Sheriff to the Applicant - a bailiff appointment.

Applicant's Position

[para 31.] The Applicant states that the information was compiled under the direction of the Sheriff and that the Sheriff acted in collusion with third parties to prevent the Applicant from being employed as a bailiff. The Applicant alleges that the information was not compiled to evaluate the Applicant or to determine the Applicant's suitability, eligibility or qualifications for employment.

[para 32.] Furthermore, the Applicant argued that the Record was compiled after the Sheriff had made the decision not to appoint the Applicant as a bailiff. The Applicant says that he was given a badge with a badge number and subsequently informed that the Sheriff had refused his appointment as a Bailiff on January 2, 1996. The Record was therefore not prepared in anticipation of the Sheriff's decision, but compiled in retrospect.

My decision

[para 33.] Since section 18 says that the personal information must be compiled solely for one of the purposes, the Record cannot be compiled for other purposes than those listed in section 18.

[para 34.] However, this test also implies that the personal information must be compiled solely for a future decision either to determine the applicant's suitability, eligibility or qualifications for employment, or to award a government contract or other benefit. It would appear that the personal information is to be compiled in anticipation or in preparation of a decision, that is, before a decision is made.

[para 35.] In this case, the evidence showed that the Record was dated January 18, 1996, 16 days after the Sheriff wrote to the Applicant of his initial decision (dated January 2, 1996) not to appoint the Applicant. Therefore, I must decide whether the personal information was compiled before the Sheriff either anticipated making or made some other decision about the Applicant. To decide that matter, I must look at the legislation under which the Sheriff is authorized to make a decision.

[para 36.] Sections 21 to 31 of the Civil Enforcement Regulation, Alberta Regulation 276/95, sets out the specific provisions that deal with civil enforcement agencies, bailiffs and receivers and governs the appointment of Civil Enforcement Bailiffs. Under section 22(2) of the Regulation, the Sheriff may, with respect to a person who has applied for appointment as a bailiff, make whatever inquiry and investigation that the Sheriff considers appropriate.

[para 37.] If the Sheriff decides not to appoint an applicant as a Civil Enforcement Bailiff, an applicant may ask the Sheriff to review his decision (section 28(1) of the Regulation).

[para 38.] Section 28(1) of the Civil Enforcement Regulation reads:

28(1) On receiving the sheriff's decision, the person in respect of whom the decision was made may submit in writing a request to the sheriff that the decision be reviewed by the sheriff.

(2) Where a person requests a review under subsection (1), that person may in respect of that review make any submissions or submit any material that the person considers relevant to the matter being reviewed.

(3) When requested to conduct a review of a decision, the sheriff must, within 30 days from the day that the request for a review was received by the sheriff,

- (a) consider any additional information and material provided,*
- (b) review the reasons on which the original decision was based,*
- and*
- (c) by registered mail inform the person who requested the review of the sheriff's decision on the review.*

[para 39.] The Sheriff gave evidence that he anticipated that the Applicant would ask for a review under section 28(1) of the Regulation of his decision so he asked the Deputy Sheriff to compile the Record.

[para 40.] The Sheriff's evidence is that he used the Record in reviewing his decision whether to appoint the Applicant as a bailiff under section 28(1) of the Regulation.

[para 41.] The Sheriff testified that the review process is an opportunity for an applicant to provide more information to the Sheriff that might satisfy him that an applicant is suitable for appointment as a bailiff. With any new information from an applicant and any further information

the Sheriff might obtain through inquiry investigation, the Sheriff can conduct a new evaluative process at the review stage.

[para 42.] Because the Record is dated January 18, 1996, 16 days after the Sheriff informed the Applicant of his refusal, it is clear that the Record was not compiled for the Sheriff's initial decision. However, there are two reasons which show that the Record was nonetheless compiled for the appointment (awarding) of the Applicant as a bailiff.

[para 43.] First, the Applicant did ask for a review pursuant to section 28(1) of the Civil Enforcement Regulation on February 28, 1996. The Sheriff's evidence is that he considered the Record in addition to new information that the Applicant provided in making his decision under the review. On April 1, 1996 the Sheriff wrote to the Applicant informing him that he had conducted his review and his decision to refuse the appointment remained unchanged.

[para 44.] Second, I note that the subject listed on this Record is "Background Check of Civil Enforcement Bailiff Applicant (name)". From the face of the Record, it is apparent that the Deputy Sheriff is seeking new information that was not before the Sheriff during the initial evaluative process.

[para 45.] Therefore, I accept the Sheriff's argument that the Record was compiled to be considered by the Sheriff in anticipation of a review of his decision. The Civil Enforcement Regulation sets out a two-step decision-making process so that the initial decision under section 22(2) of the Regulation is not necessarily the final decision.

[para 46.] So the Sheriff, under the legislation can make 2 decisions, - an initial decision and a decision on review. The decision on review also goes to a decision to award the benefit. The personal information was compiled in anticipation of the review and the decision that would have to be made on the review. Therefore, the personal information was compiled solely for the purpose of awarding the benefit.

[para 47.] Part Two of the test is satisfied because the Sheriff compiled the personal information solely for the purpose of awarding of a benefit.

Part Three: Is the personal information provided, explicitly or implicitly in confidence?

[para 48.] From the face of the Record, it is clear that the third parties' that were contacted requested that these interviews be kept in the strictest of confidence. The Sheriff gave evidence that it is vital that character references and anyone else contacted or interviewed regarding

an applicant, give candid and honest answers. He added that it is important that if they are asked to provide information in confidence, that they receive an assurance that the information will be kept confidential. The Sheriff testified that this assurance was given to the third parties referred to in the Record.

[para 49.] I find that the personal information was therefore provided explicitly in confidence, satisfying part three of the test.

2. Exercise of discretion under section 18

[para 50.] Section 18 is a discretionary (“may”) provision, in that a public body may nevertheless decide to disclose the information, even if the information falls within the provision.

[para 51.] 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. In this case, based on the submissions and evidence presented by Alberta Justice, I am satisfied that Alberta Justice exercised its discretion properly under section 18 when it refused to disclose the Record.

Issue B: Did Alberta Justice correctly apply section 17(1) Act to the Record?

[para 52.] I have already found that Alberta Justice correctly applied section 18 to the Record; therefore, I do not find it necessary to consider whether section 17(1) also applies to the Record.

Issue C: Does section 16 (disclosure harmful to personal privacy) of the Act apply to the Record?

[para 53.] I have already found that Alberta Justice correctly applied section 18 to the Record; therefore, I do not find it necessary to consider whether section 16 also applies to the Record.

V. ORDER

[para 54.] I make the following order under section 68 of the Act.

[para 55.] Alberta Justice correctly applied section 18 of the Act to the Record. Alberta Justice also exercised its discretion properly in withholding the Record. Therefore, I uphold Alberta Justice’s decision to refuse to disclose the Record under section 18.

[para 56.] Having decided that section 18 applies to the Record, I do not find it necessary to decide whether sections 17(1) or 16 of the Act also apply to the Record.

Robert C. Clark
Information & Privacy Commissioner