

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER F2002-027

October 10, 2003

UNIVERSITY OF CALGARY

Review Number 2436

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

Summary: The Applicant applied for a postdoctoral position with the University of Calgary (the “Public Body”). The Applicant was unsuccessful in being awarded the position. The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for a copy of a letter of reference (the “record”), which had been submitted to the Public Body in confidence. The Public Body refused to provide a copy of the one-page record under section 19(1) of the Act, arguing that it contained confidential evaluations or opinion material related to the Applicant’s suitability or qualification for employment. The Adjudicator found that the Public Body had properly applied section 19(1) of the Act and confirmed the decision of the head of the Public Body to refuse access to the record.

Statute Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 19, 19(1), 72.

Authority Cited: AB: Order 2000-029.

I. BACKGROUND

[para 1] The Applicant applied for a postdoctoral position with the University of Calgary (the “Public Body”). The Applicant was unsuccessful in being awarded the position. The Applicant made an access request under the *Freedom of Information and Protection of Privacy Act* (the “Act”) for a copy of a letter of reference (the “record”), which had been submitted to the Public Body in confidence. The Public Body refused to provide a copy of the one-page record under section 19(1) of the Act, arguing that it contained confidential evaluations or opinion material related to the Applicant’s suitability or qualification for employment.

[para 2] The Applicant subsequently requested that the Office of the Information and Privacy Commissioner conduct a review of the Public Body’s decision to deny access to the record.

[para 3] Mediation was authorized, but was unsuccessful. The matter was set down for written inquiry.

[para 4] The Public Body and the Applicant both submitted initial briefs. The Applicant asked for a supplemental brief to be accepted *in camera* and I accepted it because it contained personal or sensitive information.

II. RECORD AT ISSUE

[para 5] The record at issue consists of a one-page e-mail letter of reference sent to the Public Body. The Applicant is the subject of the reference letter. The Public Body supplied a copy of the record with its submission.

III. ISSUE

[para 6] There is one issue in this inquiry: Did the Public Body properly apply section 19 of the Act (confidential evaluation) to the record at issue?

IV. DISCUSSION OF THE ISSUE

Did the Public Body properly apply section 19 of the Act (confidential evaluation) to the record at issue?

[para 7] Section 19 of the Act reads:

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 8] The Public Body argued that the record was prepared for the purpose of determining the Applicant’s suitability or qualifications for employment (section 19(1) of the Act).

[para 9] The Public Body referenced Order 2000-029 where the Commissioner set out the following three-part test to determine if section 19(1) of the Act applies:

1. The information must be evaluative or opinion material,
2. Information must be 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
3. Information must be provided explicitly or implicitly in confidence.

[para 10] The Public Body argued that the record is evaluative and opinion material and therefore the record meets the first part of the test.

[para 11] The argument of the Public Body regarding the application of the second part of the test is that the postdoctoral programme is a form of employment between an academic staff member of the Public Body, whereby the Applicant, if successful, would conduct research under the direction of the academic staff member. The Public Body provided a copy of its policies that apply to postdoctoral associates. The policies contain the conditions of employment and reference the status of project employees that are post-doctoral associates. The Public Body argued that candidates competing for the position had to be evaluated as to their suitability, eligibility or qualifications for the position and this included reference checks.

[para 12] The Public Body noted that it facilitates the employment relationship between the academic staff member, who hires the successful candidate, and the post-doctoral associate by providing administrative services (such as payroll, making source deductions, etc.) and the limited benefits to the Applicant.

[para 13] The Public Body argued that the third part of the test is met in that the record was provided implicitly in confidence by the referee and the referee has subsequently confirmed that he objects to disclosure of the record.

[para 14] The Applicant argued for the application of Order 2000-029 to these particular circumstances. I note that Order 2000-029 concentrated on the application of section 17 of the Act, not section 19(1) of the Act. The Commissioner held in Order

2000-029 that section 19(1) of the Act did not apply as the circumstances did not meet all the parts of the three-part test of that section.

[para 15] The Applicant says that a postdoctoral position is an obligatory educational programme following PhD graduation, not an employment opportunity as argued by the Public Body; therefore, the Public Body did not properly exercise its discretion under section 19(1) of the Act as the record was written for admission to a postdoctoral programme. The Applicant went on to argue that these circumstances are about a postdoctoral programme similar to the circumstances found in Order 2000-029, which addressed “admission” to a “graduate programme”, and that a postdoctoral programme is also essential to a person’s career. The Applicant argued that the decisions relating to disclosure of reference letters written in support of postdoctoral positions should also be subjected to the same conditions as those for PhD programmes, and not viewed as a circumstance of employment.

[para 16] The Applicant reasoned that if she were to pursue an academic career, a post doctoral position is an obligatory period of education following the completion of a PhD; thus, the position is not the typical definition of “employment” or an “award” under section 19.

[para 17] The Applicant maintained that the personal information, other than identity, is not contained in the record and, if personal information did exist in the record, it was provided voluntarily.

[para 18] The Applicant’s other arguments include:

- Third parties should not be allowed to hide behind the cloak of “confidentiality” and/or “third party invasion of privacy”.
- The basic sense of fair play holds that an applicant should know what is being said about him or her especially when the comment can have such serious adverse consequences on career plans and opportunities.
- There is an imbalance of power between a student/postdoctoral fellow and a professor/supervisor.
- If an Applicant believes that a referee is providing a supportive reference when in fact the reference is not supportive, the Applicant should be informed of this information.
- The benefit of disclosure exceeds any injury that would be caused to a third party.

[para 19] Having reviewed the record, I find that it clearly contains personal information that is both evaluative and opinion material. Therefore, the first part of the three-part test has been met under section 19(1) of the Act.

[para 20] The Public Body provided ample evidence that the referee composed the record to assist the Public Body in relation to the Applicant applying for employment with a professor of the Public Body.

[para 21] The Public Body supplied me with evidence that the position constitutes employment conducting research for an academic staff member. The position is a paid position and is not a continuation of an educational program. I am satisfied that the record was obtained for the purpose of determining the Applicant's suitability, eligibility or qualifications for employment. Therefore, I find that the second part of the three-part test has been met.

[para 22] The Public Body also established that the record was submitted in confidence. The referee indicated that the principle of confidentiality was important to him and that he felt if letters of reference, such as the one he wrote for the Applicant, were not kept confidential, the value of them as an evaluation tool would be diminished. Interviews with the referee, by the Public Body, concluded the referee clearly did not want to have the record disclosed. I find that the record was provided to the Public Body in confidence, therefore meeting the third part of the test.

[para 23] I am also satisfied that the Public Body did not arbitrarily refuse access to the record. In exercising its discretion, the Public Body took into consideration the understanding of the referee as to the confidentiality of the record, the objects and purposes of the Act and relevant factors such as the value of confidential evaluations in these types of employment situations. Therefore, I am satisfied that the Public Body properly exercised its discretion when it was refused access to the record.

V. ORDER

[para 24] I make this Order under section 72 of the Act.

[para 25] I find that the Public Body properly applied section 19(1) of the Act to the record. I confirm the decision of the head to refuse access to the record.

Dave Bell
Adjudicator