

ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2006-017

September 18, 2007

ALBERTA SECURITIES COMMISSION

Case File Numbers 3112 and 3113

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

Summary: The Applicant made a correction request under the *Freedom of Information and Protection of Privacy Act* to the Alberta Securities Commission. The Applicant requested that the Alberta Securities Commission remove her personal information from the National Registration Database. The Applicant also informed the Alberta Securities Commission that she objected to the collection, use and disclosure of her personal information.

The Alberta Securities Commission informed the Applicant that it would not amend or delete her personal information from its registration file because the information consisted of an opinion. The Alberta Securities Commission, however, agreed to annotate and link the records in accordance with section 36(3) by including a reference to, and a copy of the Applicant's correction request letter. The Alberta Securities Commission also stated that it did not have custody or control of the National Registration Database and, in particular, the information that was submitted by the Applicant's former employer. As such, the Alberta Securities Commission informed the Applicant that it would not amend or delete the information within the National Registration Database.

The Adjudicator held that the Alberta Securities Commission had custody over the records in its paper registration file and control over the permanent records within the

National Registration Database. The Adjudicator also held that the Alberta Securities Commission properly refused to correct the information at issue under section 36(1). However, the Adjudicator found that the Alberta Securities Commission did not fulfill its duty under section 36(3) of the Act to annotate or link the paper registration file or the National Registration Database.

The Adjudicator also held that the Alberta Securities Commission's disclosure of the Applicant's personal information to its FOIP Office was authorized by section 40(1)(h) of the Act and, pursuant to section 40(4) was necessary and reasonable.

In addition, the Adjudicator found that the Alberta Securities Commission had the authority, pursuant to section 33(c) to collect the Applicant's personal information and pursuant to section 39(1)(a) to use the Applicant's personal information. The Adjudicator, however, found that the Alberta Securities Commission's use of the letter as a means to annotate and link the correction request was not in accordance with section 39(4).

Furthermore, the Adjudicator found that the Alberta Securities Commission had the authority, pursuant to section 33(a), to collect the Applicant's personal information within the National Registration Database.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 1(e), 1(n), 4(1), 33(a), 33(c), 36, 39(1)(a), 40(1)(h), 40(4), 72; *Securities Act*, R.S.A. 2000, c. S-4, s. 84(1)(e)

Authorities Cited: AB Orders: 97-020, 98-010, 99-032, 2000-003, 2000-005, 2000-021, F2002-006, F2002-014.

I. BACKGROUND

[para 1] On September 19, 2003, the Applicant made a request to the Alberta Securities Commission (the "ASC") for information regarding the termination of her employment as filed by her former employer. In response to the request, an ASC employee searched the National Registration Database (the "NRD") for a copy of the termination notice submitted by the former employer. The ASC employee then telephoned the former employer regarding the matter and made several handwritten notes on NRD printouts regarding her discussion.

[para 2] On October 1, 2003, the Applicant made a request under the *Freedom of Information and Protection of Privacy Act* (the "Act") to the ASC for information regarding the termination of her employment.

[para 3] On November 3, 2003, the ASC responded to the request providing the Applicant with 40 unsevered pages of records and one severed page.

[para 4] On August 20, 2004, the Applicant wrote a letter to the ASC requesting that the ASC remove her personal information from the National Registration Database (the “NRD”). In that letter the Applicant also stated that she did not consent to the ASC collecting, using or disclosing her personal information.

[para 5] On September 23, 2004, the ASC informed the Applicant that it would not amend or delete her personal information on the registration file because that information consisted of an opinion. The ASC, however, agreed to annotate those records in accordance with section 36(3) by including a reference to, and a copy of the Applicant’s August 20, 2004 letter. The ASC also stated that it did not have custody or control of the NRD and, in particular, the information that was submitted by the Applicant’s former employer. The ASC did not amend or delete the information within the NRD.

[para 6] On October 5, 2004, the Applicant requested a review of the ASC’s decision.

[para 7] Mediation was authorized but did not resolve the issue.

[para 8] The Applicant requested that the matter proceed to inquiry. The matter was set down for a written inquiry, but was subsequently put into abeyance pending completion of matters on another file that the Applicant had before this Office. The ASC submitted an initial and a rebuttal submission. The Applicant submitted an initial submission but did not submit a rebuttal submission.

[para 9] On April 19, 2007, the Information and Privacy Commissioner gave me the delegated authority to conduct an inquiry and issue an order regarding this matter.

II. RECORDS AT ISSUE

[para 10] The records at issue consist of (a) 41 pages of paper records from the registration file and (b) electronic information within the NRD.

III. ISSUES

[para 11] The issues in this inquiry are:

- A. Does the Public Body have custody or control of the Applicant’s personal information contained in the National Registration Database, for the purposes of the Applicant’s correction request under section 36 of the Act?
- B. If the answer to Issue A is yes, did the Public Body properly refuse to correct the Applicant’s personal information as authorized by section 36 of the Act?
- C. Did the Public Body disclose the Applicant’s personal information in contravention of Part 2 of the Act?

[para 12] In addition, there are two other issues identified within the inquiry notice:

D. Did the Public Body contravene Part 2 of the Act by attaching the Applicant's letter to the registration file?

E. Are opinions registered in the National Registration Database a contravention of Part 2 of the Act?

[para 13] In the Applicant's submission, the Applicant raised several issues that were not identified within the inquiry notice, including issues that arose after the Applicant's request for review to this Office on October 5, 2004. I will not address those issues in this Order as they are not within the scope of this inquiry.

IV. DISCUSSION

A. Does the Public Body have custody or control of the Applicant's personal information contained in the National Registration Database, for the purposes of the Applicant's correction request under section 36 of the Act?

[para 14] The first part of section 4(1) reads as follows:

4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:...

[para 15] In Orders 2000-003 and 2000-005 the Commissioner said that the use of the word "or" in section 4(1) indicates that either "custody" or "control" needs to be established to meet the requirements of the section. It is not necessary for a public body to establish both custody and control.

1. Custody

[para 16] The Applicant states that the ASC has custody and control over the registration file and over the electronic records within the NRD.

[para 17] The ASC states that it has custody of the paper records within the registration file. However, the ASC states that it does not have custody of the electronic information within the NRD system. The ASC states that the NRD is an initiative of the Canadian Securities Administrators (CSA) and the Investment Dealers Association of Canada and not an initiative of the ASC. The ASC states that NRD is operated and administered by CDS Inc. in Toronto Ontario. The ASC states that NRD data is not resident on its computer systems, networks or equipment and states that it merely has web-based access to the NRD and the data contained therein. The ASC states that although it has the right to access and print paper copies of the NRD electronic records, it does not have custody of the NRD electronic records.

[para 18] In Order 2000-003, the Commissioner held that physical possession of a record was sufficient to establish custody of that record. Furthermore, the Commissioner held that a legal right to control the record, over and above simple possession, is not relevant to a determination regarding custody. A legal right of control would be a criterion for control and not custody. The Commissioner held that the capacity or authority under which a person has possession of a record are also criteria for control and not custody.

[para 19] In this inquiry, I find that the 41 pages of paper copies of records located in the registration file are in the physical possession and, pursuant to the reasoning set out in Order 2000-003, in the custody of the ASC.

[para 20] However, I find that the NRD electronic records are not in the possession and, therefore, not in the custody of the ASC. As stated by the ASC, the NRD is operated and administered by CDS Inc. in Toronto Ontario. Although the ASC has the ability to access the electronic records within the NRD, in this case, access does not equate to custody for the purposes of this Act.

2. Control

[para 21] As I have found that the ASC has custody over the 41 pages in the Applicant's registration file, I do not find it necessary to address whether the ASC also has control over those records. I will, however, address whether the ASC has control over the NRD electronic records.

[para 22] In Order F2002-014, the Commissioner said that the word "control" refers to the authority of a public body to manage, even partially, what is done with a record. The Commissioner held that the right to demand possession of a record or to authorize or forbid access to a record points to a public body having control of a record.

[para 23] In Orders 99-032 and 2000-021, the former Commissioner identified a number of non-exhaustive criteria relevant to the issue of control. I have reviewed all of the submissions and the evidence before me regarding each criterion. My decision regarding each criterion is outlined below.

a. Was the record created by an officer or employee of the public body?

[para 24] In coming to my determination under this criterion, I reviewed the submissions of the parties as well as other information available on the NRD website such as the NRD Filer Manual (the "NRD Manual").

[para 25] There are three types of records within the NRD. They consist of "work in progress" records, records that have been "sent to regulators" and "permanent" records. A "work in progress" record consists of submissions that have been created but have not yet been sent to regulators (page 45 of the NRD Manual). A record that has been "sent to regulators" consists of a submission that has been completed and sent to

regulators, but has not yet been processed by regulators (page 45 of the NRD Manual). A “permanent” record includes all information that has been submitted to and approved by the regulator (page 16 of the NRD Manual). In this inquiry, the only records at issue are “permanent” records.

[para 26] The NRD system is used by firms and individuals to electronically submit certain applications, notices and other information to regulators such as the ASC. It is however, important to note that the information submitted will not be considered a “permanent record” on the system unless that information has been approved by the regulator (page 16 of the NRD Manual).

[para 27] The NRD Manual also states that regulators, such as the ASC, input information to the NRD system. This includes information regarding the status of an individual and the details of terms and conditions imposed by the regulator (pages 106 – 107 of the NRD Manual). The NRD Manual also states that if an individual wishes to withdraw a submission that has been sent to regulators using the NRD, the individual must contact the regulators and obtain their approval. Only after approval has been obtained will the submission be identified as “withdrawn” on the system (page 70 of the NRD Manual).

[para 28] Given the foregoing, I find that the ASC, as regulator, is involved in the creation of the records within the NRD. I find that the creation of the records on the NRD is a process which includes (a) individuals, firms and regulators creating information which is placed on the system and (b) the regulator deciding whether to accept the information to create a permanent record.

[para 29] I find that this criterion is fulfilled and therefore weighs in favour of a finding that the ASC has control of the records at issue.

b. What use did the creator intend to make of the record?

[para 30] In coming to a determination under this criterion, I once again reviewed the NRD Manual. An earlier version of the NRD Manual (Version 1.2) clearly indicates that the NRD was created to replace a portion of the paper filing system used by regulators prior to the implementation of the NRD. Page 49 of the NRD Manual (Version 1.2) states that NRD submissions:

“are the NRD equivalent of some of the forms and other documents that applicants or registrants filed or delivered in paper format prior to the effective dates of the registration instruments.”

[para 31] Page 67 of the NRD Manual (Version 1.2) similarly acknowledges this purpose:

“ after a submission has been sent to regulators using NRD, those regulators will proceed to review the submission in the same manner as they would review applications and notices filed or delivered in paper format”.

[para 32] In addition, the forms associated with Multilateral Instrument 33-109 state that the personal information submitted through the NRD is collected on behalf of and used by the securities regulatory authorities, such as the ASC, for the administration and enforcement of certain provisions of securities legislation. For example, the notice found on Form 33-109F1 reads as follows:

Notice of Collection and Use of Personal Information

The personal information required under this form is collected on behalf of and used by the securities regulatory authorities set out below for the administration and enforcement of certain provisions of securities legislation in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon Territory, and Nunavut.

[para 33] The foregoing indicates that the NRD was developed in order to provide the ASC and other securities regulators with the information they need to fulfill their mandate of determining the suitability of registrants and enforcing various provisions of securities legislation. It follows that the creators of the information within the NRD provide information to the NRD for this same purpose.

[para 34] In coming to my determination under this criterion, I took note of the fact that a firm or individual may use the NRD to submit an application to more than one regulator. This does not however detract from my finding regarding this criterion. I also note that the issue of whether the ASC has control of NRD information which is submitted solely to another jurisdiction is not an issue that is before me and not within the scope of this inquiry.

[para 35] I find that this criterion is fulfilled and weighs in favour of a finding that the ASC has control of the records at issue.

c. Does the public body have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?

[para 36] For the reasons previously given, I find that the ASC does not have possession of the NRD electronic records. I find that this criterion weighs against a finding that the ASC has control of the records at issue.

d. If the public body does not have possession of the record, is it being held by an officer or employee of the public body for the purposes of his or her duties as an officer or employee?

[para 37] The issue under this criterion is whether CDS Inc. holds the NRD records as an employee of the ASC.

[para 38] Section 1(e) defines an employee as follows:

I In this Act,

...

(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body; [emphasis added]

[para 39] In the ASC’s submission, the ASC states that the NRD was developed by and is operated and administered on behalf of the CSA by CDS Inc. The ASC states that CDS Inc, the Investment Dealers Association and the principal provincial regulators have entered into a contract regarding the NRD.

[para 40] Given the foregoing, it is apparent that CDS Inc. performs a service in regard to the NRD. I do not, however, have a copy of the contract before me. Without a review of the clauses in that contract, I am not prepared to make a determination as to whether CDS Inc. is an “employee” of the ASC for the purposes of the Act. I therefore find that this criterion neither weighs in favour or against a finding that the ASC has control of the records.

e. Does the public body have a right to possess the record?

[para 41] In Order 2000-021, the Commissioner said that in order to fulfill this criterion, a public body must have some legal authority to exercise a degree of control over the records.

[para 42] After a review of the submissions and all of the information before me, I find that although the ASC does not have physical possession and, therefore, custody of the NRD, per se, there are a number of indicators which suggest that the ASC has the right to possess the information, either as an individual regulator, or in conjunction with other regulators as a member of the CSA.

[para 43] First, the NRD is an initiative of the CSA. The NRD administrator, CDS Inc. is appointed by the CSA (see section 1.1 of Multilateral Instrument 31-102 and NRD form 1, Appendix A)

[para 44] Second, the right, title and interest in the NRD website are owned, in part, by the CSA. Clause 4 of NRD form 1, Appendix A reads as follows:

“All right, title and interest in the NRD website, NRD, all software used on the NRD website and all materials provided on the NRD website including, without limitation, associated information, databases, site design, text and graphics, are owned by the CSA, the NRD administrator or their respective suppliers ...”

[para 45] Third, the NRD administrator may modify, add, change, discontinue or suspend the NRD website, but generally may only do so with the approval of the CSA (clause 11 of NRD form 1, Appendix A).

[para 46] Fourth, the securities regulatory authorities, including the ASC, are responsible to answer questions regarding the collection and use of personal information within the NRD (Multilateral Instrument 33-109 and associated forms).

[para 47] Given the foregoing, I find that this criterion is fulfilled. This criterion weighs in favour of a finding that the ASC has control of the records.

f. Does the content of the record relate to the public body’s mandate and functions?

[para 48] As previously mentioned, the NRD was created to replace a portion of the paper filing system used by regulators prior to the implementation of the NRD. The NRD system is used by firms and individuals to electronically submit certain applications, notices and other information to regulators such as the ASC. Given the foregoing, I find that the records on the NRD relate to the ASC’s mandate and functions.

[para 49] I find that this criterion is fulfilled and weighs in favour of a finding that the ASC has control of the records at issue.

g. Does the public body have the authority to regulate the record’s use?

[para 50] In Order F2002-006, the Adjudicator for this Office defined the word “regulate” to mean “govern or control by law; subject to esp. legal restrictions”.

[para 51] After a review of the submissions and all of the information before me, I find that there are a number of indicators that the ASC has the authority to regulate the use of the NRD records.

[para 52] First, as previously mentioned, the NRD is an initiative of the CSA. The NRD administrator, CDS Inc. is appointed by the CSA (see section 1.1 of Multilateral Instrument 31-102 and NRD form 1, Appendix A). Although the ASC maintains that it does not operate the NRD, it is a member of the CSA.

[para 53] Second, the right, title and interest in the NRD website is owned in part, by the CSA (NRD form 1 Appendix A, clause 4).

[para 54] Third, the NRD administrator may modify, add, change, discontinue or suspend the NRD website. However, this may generally only be done with the approval of the CSA (clause 11 of NRD form 1, Appendix A).

[para 55] Fourth, the securities regulatory authorities, including the ASC, are responsible to answer questions regarding the collection and use of personal information within the NRD (Multilateral Instrument 33-109 and associated forms).

[para 56] I note that the ASC states that the NRD is not operated solely for the benefit of the ASC. This does not detract from my finding that the ASC, in conjunction with other regulators, has the authority to regulate the use of NRD records.

[para 57] I find that this criterion is fulfilled and weighs in favour of a finding that the ASC has control of the NRD.

h. To what extent has the record been relied upon by the public body?

[para 58] The Applicant states that the ASC has relied on the electronic records.

[para 59] The ASC states that it has relied on the NRD electronic records at issue only for the purpose of responding to the Applicant's access request and subsequent request for correction. The ASC states that it has not relied on those records for any other purpose.

[para 60] I accept the ASC's submission that it has relied on the NRD electronic records for purposes of responding to the Applicant's access request and correction request. However, for reasons previously given, it is also clear that the ASC relies heavily on information within the NRD to fulfill its mandate and responsibility under the securities legislation. I find that this factor is persuasive and weighs in favour of a finding that this criterion is fulfilled.

i. How closely is the record integrated with other records held by the public body?

[para 61] The Applicant states that the records are integrated with the records of the ASC.

[para 62] The ASC states that it maintains a set of paper files as well as an electronic document management system called ASCIS. The ASC states that while the paper copies printed off the NRD were placed within its paper files, the NRD electronic records are not integrated with either the paper files or its electronic document management system. The ASC also argues that it merely has "web-based" access to the NRD and the data therein.

[para 63] After a review of the material before me such as the NRD manual, as well as the multilateral instruments and other information which is available on either the ASC website or the NRD website, it is clear that the NRD was meant to replace a portion of

the paper filing system that had existed for many years. The information before me shows that the ASC has active use of the NRD, using it to accept applications, record the status of individuals, detail terms and conditions and even approve the withdrawal of submissions. In fact, as previously mentioned, information submitted to the NRD will not be considered a permanent record until it is approved by the regulator.

[para 64] Given the foregoing, I find that the NRD is an integrated part of the ASC filing process and the ASC is active in its use and application. I find that this criterion is fulfilled and weighs in favour of a finding that the ASC has control of the records within the NRD.

j. Does the public body have the authority to dispose of the record?

[para 65] The ASC states that it does not have the ability to dispose of the NRD electronic records. In the ASC's affidavit to this Office, it stated that the ASC does not have the ability to remove or amend existing data on the NRD. The ASC states that this is an intentional security feature of the NRD to ensure the integrity and continuity of the information in the system.

[para 66] Although the information before me shows that the ASC may add information to the NRD and may approve the withdrawal of submissions from the NRD, there is no evidence before me as to whether guidelines exist for the retention of the NRD records. There is also no evidence before me as to what role the ASC or the CSA may or may not have had in the development and application of these guidelines if they exist. Without further information in this regard, I am not prepared to make a determination as to whether this criterion is fulfilled. I find that this criterion neither weighs in favour or against a finding that the ASC has control over the NRD records.

k. Conclusion

[para 67] Given my findings under each of the above criteria I find that, on balance, the ASC has control of the permanent records within the NRD.

B. If the answer to issue A is yes, did the Public Body properly refuse to correct the Applicant's personal information as authorized by section 36 of the Act?

[para 68] Section 36 reads:

36(1) An individual who believes there is an error or omission in the individual's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.

(2) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.

(3) If no correction is made in response to a request under subsection (1), or if because of subsection (2) no correction may be made, the head of the public body must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.

(4) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.

(5) Despite subsection (4), the head of a public body may dispense with notifying any other public body or third party that a correction, annotation or linkage has been made if

(a) in the opinion of the head of the public body, the correction, annotation or linkage is not material, and

(b) the individual who requested the correction is advised and agrees in writing that notification is not necessary.

(6) On being notified under subsection (4) of a correction, annotation or linkage of personal information, a public body must make the correction, annotation or linkage on any record of that information in its custody or under its control.

(7) Within 30 days after the request under subsection (1) is received, the head of the public body must give written notice to the individual that

(a) the correction has been made, or

(b) an annotation or linkage has been made pursuant to subsection (3).

(8) Section 14 applies to the period set out in subsection (7).

1. Does section 36(1) apply to the information in the Records?

[para 69] The Applicant must meet two requirements for section 36(1) to apply: (i) there must be personal information about the Applicant, and (ii) there must be an error or omission in the Applicant's personal information.

a. Do the records contain "personal information" about the Applicant?

[para 70] "Personal information" is defined in section 1(n) of the Act. The relevant portions read:

1 In this Act,

...

(n) “personal information” means recorded information about an identifiable individual, including

(i) the individual’s name, home or business address or home or business telephone number,...

(vii) information about the individual’s educational, financial, employment or criminal history, including criminal records where a pardon has been given,

(viii) anyone else’s opinions about the individual,...

[para 71] The Applicant requests that the ASC correct three statements within the records.

[para 72] The first statement is a typewritten notation found on page 1 of the paper records and within the NRD electronic records. It reads as follows: “[The Applicant’s] skill sets did not match the job requirements”. The second statement is a handwritten notation which was authored by an ASC employee and which is found on page 1 of the paper records. It reads: “Phoned to request status. Will write for status. If so contact [the Applicant’s former employer]” The third statement is also a handwritten notation which is found on page 2 of the paper records. This notation was authored by an ASC employee following a conversation with the Applicant’s former employer. It reads: “*To (sic) analitical(sic). Wanted for customer service.*”

[para 73] After a review of the records, I find that the first and third statements are the Applicant’s personal information. I find that the information is recorded information about the Applicant, consisting of one or more of the kinds of personal information listed above.

[para 74] I find that the second statement does not consist of the Applicant’s personal information. In the second statement, the ASC employee records the actions she has taken and the future actions she intends to take in order to gather information from the Applicant’s former employer. This information does not, in and of itself, consist of the Applicant’s personal information and, therefore, is not subject to correction under section 36(1).

b. Is there an “error” or “omission” in the Applicant’s personal information?

[para 75] The Applicant states that the statements at issue are incorrect and misleading. The Applicant states that these statements should be corrected pursuant to section 36(1).

[para 76] Section 36(1) states that an individual who believes there is an “error or omission” in the individual’s personal information may request a public body that has the information in its custody or under its control to correct the information. However, section 36(2) states that despite section 36(1), a public body must not correct an opinion.

[para 77] In Order 97-020, the former Commissioner defined an “error” to mean a mistake, or something wrong or incorrect. In that same Order, the former Commissioner defined “omission” to mean something missing, left out or overlooked. Furthermore, the Commissioner stated that a public body is only able to correct an applicant’s personal information if there is an error or omission of “fact” in that information. The former Commissioner defined a “fact” as a thing that is known to have occurred, to exist, or to be true, or an item of verified information.

[para 78] In Order 97-020, the former Commissioner defined an “opinion” to mean a belief or assessment based on grounds short of proof; a view held as probable. He said that although a fact may be determined objectively, an opinion is subjective in nature, and may or may not be based on facts.

[para 79] After a review of the statements at issue and all of the arguments before me, I find that the first and third statements are not subject to correction. I find that the information in these statements consists of an opinion under section 36(1). I find that the first and third statements are a belief or assessment which was made by the Applicant’s former employer regarding the reasons for the Applicant’s termination. Consequently, I find that the ASC properly refused to correct that information under section 36(1).

[para 80] The Applicant also stated that her former employer inappropriately submitted, to the NRD, reasons for the Applicant’s termination of her employment. The Applicant states that the employer was not required to provide this information because she was terminated without cause.

[para 81] Whether the Applicant’s former employer had the duty to provide reasons for the Applicant’s termination of employment is not an issue that falls within the scope of section 36. The issue under section 36 is whether the ASC properly refused to correct the Applicant’s personal information. In coming to this determination, I am limited to determining whether there is an error or omission in the Applicant’s personal information.

2. Did the Public Body correctly apply section 36(3) to the information?

[para 82] Section 36(3) states that if a public body does not correct an applicant’s personal information, or if no correction may be made because of section 36(2), it must annotate or link the personal information with the correction that was requested but not made. In Order 97-020, the former Commissioner defined the word “annotate” to mean “add an explanatory note” to something and the word “link” to mean “connect or join two things or one thing to another”, “attach to”, or “combine”.

[para 83] Furthermore, the former Commissioner said that to “annotate ... the information with the correction that was requested” implies that the correction that was requested is written on the original record, close to the information under challenge by

the applicant. Although there is no requirement to do so, the annotation should also be signed and dated.

[para 84] In addition, the former Commissioner said that to “link the information with the correction that was requested” implies that the correction that was requested is attached to, or joined or connected with, the original record containing the information under challenge by the applicant.

[para 85] In Orders 97-020 and 98-010, the former Commissioner also said that an annotation or linkage must be apparent on the file. A public body must not try to hide or bury an applicant’s request for correction. The correction request should be as visible and accessible as the information under challenge, and should be retrieved with the original file.

[para 86] The ASC states that it fulfilled the requirements under section 36(3) by adding the Applicant’s August 20, 2004 letter to the paper registration file and by amending the records to refer to the letter. The ASC states that adding the letter provided a complete record of the Applicant’s correction request and the reasons for the request. The ASC did not, however, annotate or link the Applicant’s correction request to the NRD.

[para 87] After a review of the records, I find that the ASC did not properly annotate or link the correction request to the paper registration file. Section 36(3) states that a public body must annotate or link the personal information that is part of the requested correction that is relevant and material to the record in question. This limitation ensures that persons who access the annotation or linkage, including those notified under section 36(4), do not inadvertently have access to other information that is unrelated to the correction request.

[para 88] By referencing the Applicant’s entire letter, the ASC linked information within that letter that was neither relevant nor material to the correction request. This extraneous information included information regarding the Applicant’s concern for her future employment as well as her concerns regarding the ASC’s collection, use and disclosure of her personal information.

[para 89] I also find that the ASC did not properly apply section 36(3) to the Applicant’s personal information within the NRD. As such, I intend to order the ASC to annotate or link the Applicant’s correction request with that information. I will leave it to the ASC to decide how that annotation or linkage will occur on the NRD. In doing so, the ASC must take into account the principles regarding annotation and linkage that I mentioned earlier.

[para 90] In the Applicant’s submission, the Applicant requested that the ASC append, to the NRD, a statement authored by the Applicant. The statement consists of what amounts to an entire written page of information and includes information regarding the grades she received in various courses. I do not find that the ASC is required to

annotate or link the NRD with this information in the format requested by the Applicant. As previously mentioned, section 36(3) states that a public body must annotate or link the personal information with that part of the requested correction “that is relevant and material to the record in question.” In order to comply with section 36(3), the ASC must only annotate or link a statement which outlines the substance of the correction request.

3. Section 36(4)

[para 91] The ASC states that it did not disclose information from the 41 pages of paper copies located in the paper registration file to any other public body or third party. Therefore, I find that the ASC was not required to issue a notification pursuant to section 36(4) of the Act in regards to those records. However, it is unclear whether the Applicant’s personal information within the NRD was disclosed to another public body or a third party in the year before the correction was requested. As such, I intend to order the ASC to determine whether this is the case and, if so, provide notification required by section 36(4).

C. Did the Public Body disclose the Applicant’s personal information in contravention of Part 2 of the Act?

1. Was the Applicant’s personal information disclosed?

[para 92] The ASC states that it sent, to its FOIP Office, a copy of the records that were responsive to the Applicant’s access request. I also find that the ASC disclosed, to its FOIP Office, personal information from several of the Applicant’s other letters dated August 20, 2004. The affidavit of ASC’s Corporate Counsel, indicates that she consulted with the FOIP Office regarding these letters.

[para 93] I find that all of these records contain the Applicant’s personal information as defined in section 1(n) of the Act.

[para 94] I note that the Applicant also alleged that, subsequent to her request for review on October 5, 2004, the ASC, once again, disclosed her personal information to the FOIP Office. I will not address whether the ASC’s alleged disclosures to its FOIP Office after the Applicant’s request for review were in contravention of Part 2 of the Act. As previously mentioned, issues that arose after the Applicant’s request for review are not within the scope of this inquiry.

2. Did the Public Body have the authority to disclose the information pursuant to section 40(1) of the Act?

[para 95] The Applicant alleges that the ASC did not have the authority to disclose the Applicant’s personal information to the FOIP Office.

[para 96] The ASC states that it was authorized by section 40(1)(h) of the Act to disclose the Applicant’s personal information to its FOIP Office. This section reads:

40(1) A public body may disclose personal information only

...

(h) to an officer or employee of the public body or to a member of the Executive Council, if the information is necessary for the performance of the duties of the officer, employee or member

a. Are the individuals within the Alberta Finance FOIP Office “employees” of the Public Body?

[para 97] The ASC states that Alberta Finance has provided the ASC with FOIP related services since the FOIP Act was proclaimed into effect on October 1, 1995. The ASC states that at that time a decision was made to have the Treasury department (now Alberta Finance) provide FOIP-related services to the department and to agencies, boards and commissions such as the ASC. The ASC states that its appointed FOIP Coordinator has always been an Alberta Finance employee. The ASC states that those individuals within the FOIP Office, including the FOIP Coordinator and the FOIP Access Advisor, are “employees” of the ASC for the purposes of section 1(e) of the Act.

[para 98] Section 1(e) of the Act defines an “employee” as follows:

I In this Act,

...

(e) “employee”, in relation to a public body, includes a person who performs a service for the public body as an appointee, volunteer or student or under a contract or agency relationship with the public body;

[para 99] After a review of all of the arguments before me, I find that the individuals within Alberta Finance FOIP Office are, for the purposes of the Act, employees of the ASC. Although there is no evidence before me of a contract of employment between the individuals within the FOIP Office and the ASC, I find that those individuals within the FOIP Office are and, continue to, perform a service for the ASC as an agent of the ASC.

[para 100] Blacks Law Dictionary defines an agent as “*a relationship between two persons, by agreement or otherwise, where one (the agent) may act on behalf of the other (the principal) and bind the principal by words or actions.*” In this case, it is clear the FOIP Office within Alberta Finance has been given the authority by the ASC to act on its behalf in regard to FOIP matters including the authority to open a file, generate documentation, initiate a records search, review records and prepare recommendations to be given to the appointed head of the ASC. In the ASC’s affidavit, the ASC states that only in rare situations would the ASC communicate directly with an applicant in order to clarify or attempt to deal with a request on an informal basis. This finding is also supported by section 2.01 of the Finance Administrative Policies and Procedures Manual which clearly outlines the relationship between the FOIP Office and the ASC. In that

Manual, it states that the FOIP Office within Alberta Finance is responsible for the receipt and processing of all applications made under the FOIP Act, and for external communications with respect to FOIP applications, policies and procedures.

b. Was the disclosure necessary for the performance of the duties of the officer, employee or member?

[para 101] I find that the ASC's disclosure of the Applicant's personal information to the FOIP Office was necessary for the performance of the duties of those employees under section 40(1)(h). I accept that the ASC disclosed the personal information to the FOIP Office in order to respond to the Applicant's access request and request for correction. I find that those employees needed access to the information in order to respond to those requests.

3. Did the Public Body disclose only that personal information that was necessary and in a reasonable manner pursuant to section 40(4) of the Act?

[para 102] Section 40(4) states that a public body may only disclose that personal information that is necessary and in a reasonable manner:

40(4) A public body may disclose personal information only to the extent necessary to enable the public body to carry out the purposes described in subsections (1), (2) and (3) in a reasonable manner.

[para 103] After a review of the submissions and all of the information before me, I find that the ASC disclosed the personal information that was necessary in order for the employees within the FOIP Office to respond to the access and correction requests. I also find that the disclosure was completed in a reasonable manner. I find that the ASC properly fulfilled its duty under section 40(4).

D. Did the Public Body contravene Part 2 of the Act by attaching the Applicant's letter to the registration file?

1. Collection of personal information

[para 104] The ASC states that it collected the Applicant's personal information within the Applicant's August 20, 2004 letter pursuant to sections 33(a) and (c) of the Act. Sections 33(a) and 33(c) read:

33 No personal information may be collected by or for a public body unless

(a) the collection of that information was expressly authorized by an enactment of Alberta or Canada,

...

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

[para 105] The ASC states that the collection of the information was authorized by the correction provision within section 36 of the FOIP Act and related directly to and, was necessary for, an operating program or activity of the ASC. The ASC emphasizes that the August 20, 2004 letter to the FOIP Office was placed on its registration file. The letter was not placed on the NRD.

[para 106] After a review of the submissions and all of the information before me, I find that the ASC was authorized, pursuant to section 33(c), to collect the personal information within the Applicant's August 20, 2004 letter. The ASC collected the letter in order to assess and respond to the Applicant's correction request. I find that the information related directly to and was necessary for an operating program of the ASC.

2. Use of personal information

[para 107] The ASC states that it had the authority, pursuant to section 39(1)(a) of the Act, to use the Applicant's personal information within the Applicant's August 20, 2004 letter. The ASC states that it used the personal information for the purpose for which the information was collected or compiled or a use consistent with the purpose.

[para 108] After a review of the submissions of the parties and all of the information before me, I find that the ASC had the authority, pursuant to section 39(1)(a), to use the letter.

[para 109] Section 39(1)(a) reads:

39(1) A public body may use personal information only

(a) for the purpose for which the information was collected or compiled or for a use consistent with that purpose, ...

[para 110] The letter was collected for the purpose of assessing and responding to the correction request. I find that it was similarly used for that purpose.

[para 111] However, I find that the ASC's use of the letter as a means to annotate and link the correction request was not in accordance with section 39(4) of the Act. Section 39(4) reads:

39(4) A public body may use personal information only to the extent necessary to enable the public body to carry out its purpose in a reasonable manner. [emphasis added]

[para 112] I find that it was not necessary to attach the Applicant's entire letter to the file in order to annotate and link the Applicant's correction request. The ASC could

easily have summarized the Applicant's correction request and annotated or linked that summary to the registration file.

E. Are opinions registered in the National Registration Database a contravention of Part 2 of the Act?

[para 113] The Applicant states that the ASC did not have the authority to collect, within the NRD, the Applicant's personal information regarding the reason for her termination from her employment.

[para 114] Section 33 states that a public body may collect personal information only if one of the criteria under that section is fulfilled. The relevant portions of section 33 read as follows:

33 No personal information may be collected by or for a public body unless

(a) the collection of that information is expressly authorized by an enactment of Alberta or Canada,

...

(c) that information relates directly to and is necessary for an operating program or activity of the public body.

1. Express authorization by enactment – section 33(a)

[para 115] After a review of the information before me, I find that the ASC had the authority, pursuant to section 84(1)(e) of the *Securities Act*, to collect, within the NRD, the Applicant's personal information regarding the reason for her termination from her employment. Section 84(1)(e) gave the ASC Executive Director a broad discretion to collect this information. At the time the termination notice was filed in 2003, section 84(1)(e) read as follows:

84(1) Subject to the regulations, every registered dealer shall, within 5 business days of the event, notify the Executive Director of the following:

...

(e) the commencement and termination of employment of every registered salesperson and, if required by the Executive Director, the reason for the termination of employment; [emphasis added]

[para 116] I find that this section gave the ASC the authority it required to collect the Applicant's personal information.

[para 117] In coming to my determination, I took into account the NRD Explanatory Guide No.1., which, although not entirely clear, suggests that an employer is only required to submit a reason for termination if an employee was dismissed for cause. This Explanatory Guide is, however, only a guide, and does not override the broad discretion that was given to the ASC by statute. I also reviewed Notice of Termination Form 33-109 F1. This form similarly suggests that an employer is only required to submit a reason for termination if the employee was dismissed for cause. I find that this form does not, however, override the broad discretion given to the ASC by statute.

2. Operating program or activity – section 33(c)

[para 118] As I have found that the ASC had the authority under section 33(a) to collect the Applicant's personal information, I will not decide whether the ASC also had the authority to collect the personal information under section 33(c).

V. ORDER

[para 119] I make the following Order under section 72 of the Act.

Issue A: Does the Public Body have custody or control of the Applicant's personal information contained in the National Registration Database, for the purposes of the Applicant's correction request under section 36 of the Act?

[para 120] I find that, pursuant to section 4(1) of the Act, the ASC has custody over the 41 pages of records in the paper registration file.

[para 121] I find that, pursuant to section 4(1) of the Act, the ASC has control of the permanent records within the NRD.

Issue B: If the answer to issue A is yes, did the Public Body properly refuse to correct the Applicant's personal information as authorized by section 36 of the Act?

[para 122] I find that the ASC properly refused to correct the personal information at issue under section 36(1).

[para 123] I find that the ASC did not correctly apply section 36(3) to the information at issue in the paper registration file. I order the ASC to remove the reference on the file that refers to the August 20, 2004 letter and replace it with an annotation or linkage that contains only the substance of the Applicant's correction request.

[para 124] I find that the ASC was not required to issue a notification of the Applicant's correction request pursuant to sections 36(4) of the Act in regard to the paper registration file.

[para 125] I find that the ASC did not fulfill its duty under section 36(3) to annotate or link the Applicant's correction request to the Applicant's personal information within the NRD. I order the Public Body to comply with its duty under that section and to give written notice to the Applicant under section 36(7)(b). I order the ASC to determine whether the Applicant's personal information at issue within the NRD was disclosed to another public body or third party in the year prior to the request. If so, I order the ASC to provide those parties with notification pursuant to section 36(4) of the Act.

Issue C: Did the Public Body disclose the Applicant's personal information in contravention of Part 2 of the Act?

[para 126] I find that the ASC's disclosure of the Applicant's personal information to its FOIP Office was authorized by section 40(1)(h) of the Act and that the disclosure was necessary and reasonable pursuant to section 40(4).

Issue D: Did the Public Body contravene Part 2 of the Act by attaching the Applicant's letter to the registration file?

[para 127] I find that the ASC was authorized by section 33(c) to collect the personal information within the Applicant's August 20, 2004 letter.

[para 128] I find that the ASC's use of the personal information within the Applicant's August 20, 2004 letter was in accordance with section 39(1)(a) but not in accordance with section 39(4) of the Act. I order the ASC to stop using the personal information in contravention of Part 2 of the Act.

Issue E: Are opinions registered in the National Registration Database a contravention of Part 2 of the Act?

[para 129] I find that the ASC had the authority, under section 33(a) of the Act, to collect the Applicant's personal information within the NRD.

[para 130] I further order the ASC to notify me, in writing, within 50 days of being given a copy of this Order that it has complied with this Order.

Lisa McAmmond
Adjudicator