

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Decision 02-03
February 28, 2002
Review File: 01-212-5

A. BACKGROUND

On September 4th, 2001, the Applicant applied under the *Access to Information and Protection of Privacy Act* (the "Act") to the Department of Human Resources for

All information on my personal record. Copy of all sent received, copied, verbal references from present and past employers. Copies of all interviews: outcome of same. Copy of Performance Appraisals. All information contained. Letter of employment and any comments in regard to employment. Copy of any correspondence sent by anyone to any other potential employer by Human Resources or any employee of Nunavut Government or Government Agency.

By letter of October 4, 2001, the Department of Human Resources wrote a letter to the Applicant requesting clarification and further information in order to enable them to properly address the request. The information was, apparently, clarified by means of a telephone discussion between the Applicant and the Department and, by letter of October 15, 2001, the Applicant received a bundle of materials responsive to her request. In the same letter, the Applicant was advised that she was being denied access to the "reference checks" pursuant to Section 22 of the Access to Information and Protection of Privacy Act (ATIPP).

In a letter dated October 23rd, 2001 and received in my office on October 28th, the Applicant asked me to review the decision by the Department of Human Resources to refuse access to her reference checks. There was also an indication in her correspondence that she felt that some information on her file had been improperly given to other potential employers.

The Department was asked for a detailed explanation as to why these records were refused and that explanation was provided on January 14th. A copy of the Department's response was provided to the Applicant for her further comments on February 1st, 2002 and her reply was received by e-mail on February 14th.

In conducting my review, I requested and received from the Department of Human Resources a copy of all of the records responsive to the Applicant's request, including the records to which she was refused access.

B. RECORDS AT ISSUE:

There are two records in question, both of them entitled "Reference Checking". They are forms, apparently completed by a government employee while speaking with two different individuals on the telephone who provided information about the Applicant's work habits and suitability for employment - in other words, reference checks. The name of the person completing the forms is not indicated. The name of the person giving the reference is indicated on the top of each form.

C. ISSUES AND DISCUSSION

In its reply to this office, the Department of Human Resources relies on Section 22 of the Access to Information and Protection of Privacy Act, which reads as follows:

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 has been provided to the public body, explicitly or implicitly, in confidence.

In order to be protected from disclosure under section 18, the information in question must meet a three part test. First of all, it must be personal information that is evaluative or opinion material. Secondly, it must have been compiled **solely** for the

purpose of determining the applicant's suitability, eligibility or qualifications for employment, or for the awarding of a government contract or other benefits. Thirdly, the information must have been provided to the public body explicitly or implicitly, in confidence. All three tests must be met for the exception to apply.

a) **Does the record in question contain personal information that is evaluative or opinion material?**

Section 2 of the Act sets out a definition of "personal information" which includes, among other things:

- a) the individual's name, home or business address or home or business telephone number;
- h) anyone else's opinions about the individual;
- i) the individual's personal opinions, except where they are about someone else.

Under this definition, the records in question contain the personal information of both the applicant in this case and the Third Parties (one third party is identified in each of the two records in question). In the case of the Applicant, the information includes opinions expressed about her by other people. By definition, these opinions are the Applicant's personal information. In the case of the Third Parties, their names and any reference to their place of employment (including telephone numbers) constitute their personal information.

b) **Does the record contain 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?**

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".

Clearly, an "opinion" would include a subjective statement as to the individual's suitability for a particular position or his or her work habits. Opinion is, by definition, subjective and may or may not be based on facts.

I have reviewed the personal information contained in the two records in question. They reflect the interviewer's interpretation of the Third Parties' comments and remarks about the work habits, personality and qualifications of the Applicant, both in the context of previous employment situations. In my view, therefore, the records both contain personal information, which is evaluative or opinion material. Furthermore, it is clear on the face of the records that the opinions were obtained solely for the purpose of assessing the applicant's suitability for employment in a position she had applied for. I am satisfied, therefore, that the records in question meet the second part of the test.

c) **Were these opinions/evaluations given by the Third Parties in explicit or implicit anticipation of confidentiality?**

The two records in question take the form of a two page standard "question and answer" type format, in which specific questions are outlined to be asked of references with blank spaces left for the interviewer to write in the answers given. There is nothing on the form itself which indicates that the interviewees were advised that their answers were being given in confidence and would remain confidential. Nor did the government agency in question advise me in its submissions that there was any verbal assurances given that the information given was given in confidence.

In this case, the public body has not given me enough information for me to conclude that the references were given with the understanding on the part of the Third Parties that they would be confidential. One cannot assume, solely from the nature of the interview itself, that there was an expectation of confidentiality. There must be something more. For example, might there be some consequence to the person giving the opinion if not kept confidential? What is the nature of that possible consequence and how significant might that be to the individual? Would others refuse to give candid and forthright answers to questions posed if the responses are not kept confidential?

Were the interviewees in a position of relative strength or weakness insofar as the applicant was concerned. For example, if the applicant actually got the job applied for, would she be in a position of superiority to the interviewee such that it could affect the interviewee's working relationship with the Applicant if the record were released?

Unfortunately, I do not have the answers to any of these questions. That having been said, I think it can also be said that, generally speaking, when one is asked to give an evaluation or opinion as to another's work habits, personality and suitability for a particular job, there is some expectation that there will be some level of confidentiality.

For the purpose of this recommendation, I am prepared to find that the two individuals giving references expected that those references would be confidential. The fact that both references are generally positive does not change the fact that, if such reference checks are to have any value to an employer at all, the references must feel free to express their opinions freely without fear that the comments made will get back to the person about whom the reference relates.

D. RECOMMENDATIONS

In this case I would make a number of specific recommendations which relate specifically to this request. However, these recommendations may also be instructive in the future in dealing with similar requests.

Section 22 is permissive in that it leaves the question of whether or not to release "confidential evaluations" to the discretion of the head of the public body. It reads "the head of a public body **may** refuse to disclose" evaluative and opinion material. When, as in this case, the public body is undecided as to whether or not to release the information, the first step, in my opinion, is to give notice to the Third Parties who gave the references that they are considering the release of the evaluations. If there is an objection, then the public body at least has something to base its exercise of discretion on. If there is no objection from the Third Party it seems to me that there is no obvious reason for the public body to exercise its discretion by not releasing the information. I

therefore make the following recommendations:

1. I would recommend that the two “third parties” who gave references about the Applicant be given notice pursuant to Section 26 of the *Access to Information and Protection of Privacy Act* that the public body is considering giving access to the evaluations to the Applicant;
2. In the event that either of the Third Parties objects to the release of the information, they will have the opportunity to object to the disclosure. If such an objection is received from either of the Third Parties, the public body will then be in a position to exercise its discretion, based on the objections received, to release the information or not as the case may be. The review provisions of the Act are open to either the Third Parties or to the Applicant in the event that any of those parties are unhappy with the public body’s decision.
3. If neither of the Third Parties objects to the release of the information, I would suggest that there is an implied consent and there is no longer any reason to withhold the information from the Applicant and the documents in question should be released to the Applicant

Quite apart from this Request for Review, the Department of Human Resources has requested that I provide them with my comments pursuant to Section 67 of the *Access to Information and Protection of Privacy Act* on a new procedure they are proposing for obtaining future references. I will be glad to address this broader issue within the context of that request and do not feel that it is appropriate to address those general issues here. I am encouraged, however, to see that the Department is cognizant of the issues and is doing what it can to address the concerns so that this kind of question can be avoided in the future.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner