

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2014-2090-AP-1130

Date: December 3, 2015

“Case about access to personnel files, competition files, and reference check information”

INTRODUCTION

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into this matter.
2. On July 17, 2014, the Applicant made a request to the Department of Social Development for a copy of the Applicant's own personal employment file for the duration the Applicant was employed by the Department ("the Request").
3. The Department responded by letter dated August 11, 2014, providing copies of all of the records contained in the Applicant's employee file as held by the Department, with redactions in one document on the basis of subsection 21(1), i.e., that the disclosure of personal information might result in an unreasonable invasion of privacy.
4. The Applicant was not satisfied and filed a Complaint with our Office on September 9, 2014. The Applicant believed that at least two pieces of information were missing (records relating to a test that the Applicant had previously taken, as well as records documenting reference checks of the Applicant undertaken by the Department on the basis that the Applicant had applied for other positions within the Department). The Applicant also complained about the redactions.

BACKGROUND

5. The main issue in this case is the question of a person's right to access his or her own reference check information held by a public body.
6. The Applicant applied for positions within the Department, which resulted in the Department conducting reference checks as part of its assessment of the Applicant's suitability for employment. The Applicant was seeking access to this reference check information. A case of this nature was our first opportunity to address the question of whether a person has the right under the *Act* to access his or her own *reference check information*.
7. Reference checks are sought to obtain candid and accurate feedback about a job candidate's suitability for a particular position. The general understanding in the professional world is that reference checks are conducted on a confidential basis with a

view to ensure a frank assessment of the reference provider's views and opinions about the candidate. On the other hand, treating reference check information as absolutely confidential could result in a candidate having no way of knowing whether the reference check was positive or negative, or whether the reference provider was fair in the assessment of the candidate's abilities and attributes for a particular position.

8. During our investigation, we learned that the Department's established practice was to treat all reference check information as confidential as established practice in conjunction with the Province's staffing directives.
9. As a result, when conducting reference checks, Departmental officials inform the reference provider that the information provided about a candidate will be held on a confidential basis.
10. To better understand why the Department had adopted such an approach, we looked to the Department of Human Resources, which is responsible for providing corporate human resource programs and services in the areas of staffing, development, and human resource policies in the New Brunswick public service. As part of its mandate, the Department of Human Resources developed a Staffing Policy Manual, which applies to all Provincial departments and agencies listed in Regulation 93-137 of the *Civil Service Act* (which includes the Department of Social Development).
11. Under Chapter 2 of the Staffing Policy Manual (referred to as the "Staffing Process"), the Policy states that reference providers are to be given assurances that all candidate assessments will remain confidential. The Staffing Process itself notes that reference checks are obtained in confidence and that information must be kept separate from the competition file.
12. Further, under Chapter 6 (referred to as "Feedback to Candidates on Competitive Process"), the Policy further indicates that if reference or validation checks are performed, the details cannot be shared with candidates.
13. With this in mind, we then turned our attention to the access rights granted under the *Act*, which include a person's right to request and receive information held by public bodies about one's self. That right is not absolute, however, and it is subject to limited and specific exceptions specified in the *Act*.

14. Of note, the *Act* includes a specific exception for reference check information under paragraph 32(a). That provision is a discretionary, rather than a mandatory, exception to disclosure. This means that the law does not prohibit a person from being able to access his or her own reference check information, but rather calls upon the public body to make an informed decision as to whether to grant access, and only to refuse access where relevant circumstances exist at the time the request is made.
15. In other words, the *Act* does not automatically bar granting a candidate's who formally requests access to his or her own reference check information, and this is contrary to the Province's established practice of treating reference check information as confidential in all cases, a practice that was followed by the Department in this case.
16. For this reason, this case raised genuine concerns about the dichotomy that exist today between the broad rights of access to one's own personal information afforded under the *Act*, and the Province's established practice based on confidentiality and disseminated to all government departments and agencies through the implementation of its Staffing Policy.

INFORMAL RESOLUTION PROCESS

17. As in all complaint investigations, our Office first seeks to resolve the matter informally to the satisfaction of both parties and in accordance with the rights and obligations set out in the *Act*. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner's work remains the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the *Act*.
18. The Commissioner's authority to investigate and resolve complaints is established under section 68, with subsection 68(2) delineating the parameters of an informal resolution of a complaint "*in a manner consistent with the purposes of the Act*". This means that the resolution cannot be a mediated settlement or an outcome obtained by the parties' compromise. The Commissioner's authority to affect an informal resolution of an access complaint requires that it be done in a manner that respects the law, upholds an applicant's access rights, and fulfills a public body's statutory obligations.
19. A full description of the steps involved in the Commissioner's informal resolution process can be found on our website at <http://info-priv-nb.ca>. Below is a summary of what this process provides:

- to the public body, the benefit of our independent Office's interpretation of the law and an opportunity to correct any error in access that may have been made;
- for the public body, the satisfaction of having complied with its obligations under the *Act*;
- to the requester of the information (the applicant), the benefit of an independent analysis of which information was truly required to be released under the *Act*; and
- for the public in general, the satisfaction of understanding right of access to information and having that right respected under the *Act*.

Informal resolution undertaken in this case

20. In first seeking to resolve this case, we held good discussions with Department officials, reviewed all elements of the Request and the relevant records, and obtained the Department's feedback on how it handled the processing of the Request. We provided our initial findings to the Department, which included our analysis as to why we found that the Applicant was entitled to receive more information, in particular, information found in the Department's competition files where the Applicant was a candidate.
21. In fact, the Department had not recognized those records as relevant to the Request and was amenable to providing the Applicant with much of this additional information as part of the informal resolution process, except for the reference check information that it maintained was protected from disclosure under paragraph 32(a) being treated as confidential, and in keeping with established human resources practices.
22. We agreed for the moment, but when we reviewed the revised response provided by the Department, we noted that the reference check information included reference information that had been provided internally from Departmental officials who had supervised the Applicant's work while the Applicant was employed with the Department. In essence, this type of reference check information constituted the Applicant's past work performance evaluation. We therefore questioned whether reference check information of this nature, i.e., references provided from officials internally and akin to past performance evaluations, could be captured by the exception to disclosure found in paragraph 32(a) of the *Act* regarding confidential reference check information obtained from external sources.

23. We held a further meeting with Department officials to discuss this point, conducted additional research, and provided the Department with our further comments on the interpretation and application of paragraph 32(a). We informed the Department that relying on the Province's established practice of treating reference check information as confidential as a matter of practice was not in keeping with the spirit and intent of the *Act* or the discretionary nature of this exception to disclosure.
24. That being said, we accepted that all reference check information, regardless of whether it was from an external or internal source, falls within the scope of the paragraph 32(a) exception, adding that because paragraph 32(a) is discretionary, rather than mandatory, the Department would have to demonstrate that it had properly exercised its discretion should it decide to maintain its decision to refuse access to any or all of the Applicant's reference check information.
25. We thus encouraged the Department to reconsider its decision to refuse access to all of the reference check information, taking into account that it consists of the Applicant's own personal information and that some of this information could be considered to be past performance evaluation information.
26. The Department was a willing participant during these interactions and we encouraged the Department to consider granting access to the reference check information in this case during our informal resolution process
27. While the Department recognized it as the Applicant's personal information, it was not prepared to deviate from the established practice of treating all reference check information as confidential as in the case of all other Provincial departments and agencies, maintaining its decision to refuse access under paragraph 32(a) of the *Act*.
28. Because reference check information falls within the scope of a discretionary exception to disclosure, our role was to ensure that the Department had taken all relevant considerations into account in arriving at the decision to refuse access, rather than recommending that the Department nevertheless disclose this information. This will be explained in greater detail below.
29. Our process was able to have the Department release additional information to the Applicant, including additional explanations for redactions to records provided with the Response, as well the disclosure of additional records found in competition files for employment positions for which the Applicant had applied, with the exception of some minor redactions to protect other people's privacy as well the Applicant's reference

- check information. We were satisfied that this represented a full disclosure of all of the information to which the Applicant was entitled to receive.
30. The Applicant informed us that this additional information was not a satisfactory resolution to the Complaint, as the Applicant did not agree with the Department's stated reasons for refusing access to the Applicant's reference check information.
31. We understood that the Department was not in a position to address the underlying issue of such established human resources practices, which fall under the mandate of the Department of Human Resources. We therefore have decided to address this particular question directly with the Department of Human Resources outside the parameters of this Complaint.
32. As we were unable to affect an informal resolution to the satisfaction of both parties, we are concluding our work with the present Report of Findings.

LAW AND ANALYSIS

Records initially identified as relevant—personnel file

33. We reviewed the records contained in the Applicant's personnel file, which contained the following information:
- Hiring documentation (oaths of office and confidentiality, tax forms, benefits forms, direct deposit information, the Applicant's résumé, vulnerable persons and criminal records checks),
 - Salary information and salary adjustment information,
 - Performance review information,
 - Leave sheets and summaries, and
 - Other related documentation throughout the time period the Applicant was employed by the Department.
34. We were satisfied that the Department retrieved all of the relevant information from the Applicant's personnel file. The only information that was redacted was found on a 2-page internal email correspondence between Department employees in relation recent promotions. The redacted information was about another employee's promotion (name and date of eligibility for the promotion). We agree that this information was properly protected from disclosure under paragraph 21(2)(e) (*third party employment information*) and paragraph 21(2)(g) (*third party financial*

circumstances) and the Department was correct in making this redaction. As such, we are satisfied that the Department provided a full disclosure of all the information to which the Applicant was entitled to receive in relation to the Applicant's personnel file.

Records not initially identified as relevant—competition information

35. As explained above, during the Complaint investigation, Departmental officials verified with its internal Human Resources Branch and discovered that the Applicant had participated in two employment competitions, and that the information in these competition files was also relevant to the Applicant's Request.
36. It is the Department's standard practice to provide people with access to the information in their competition files, with the exception of reference check information, which the Department treats as confidential. For this reason, the Department was prepared to provide most of this information to the Applicant.
37. Both of the Applicant's competition files were provided in full for our review. The documentation in the two competition files (Competition No. 1 and Competition No. 2 files) include:
- the Applicant's application and related email correspondences between the Applicant and the Department,
 - the Department's interview letter to the Applicant and related email correspondence between the Applicant and the Department about the Behavioral Event Interview,
 - the Completed Competition/Interview Guide,
 - details of the Applicant's reference checks conducted as part of the assessment, and
 - the completed Applicant Rating Guide.
38. The records in the Competition No. 1 file constitute the Applicant's own personal information, but we add that the Applicant's references were not checked for Competition No. 1 so no reference check information exists in that case. Given our review, we found that the Competition No. 1 file documentation should have been disclosed in its entirety to the Applicant in response to the Request, which the Department provided during the resolution process. As such, the Applicant has received a full disclosure of this information.

39. As for the Competition No. 2 file, it contains information of a similar nature as the Competition No.1 file, plus reference check information. All of the information contained in this competition file is also the Applicant's own personal information, with the exception of the information contained in one email that relates to another person seeking employment with the Department, which is protected from disclosure under subsection 21(1)—*unreasonable invasion of privacy*. During our review, we found that the Competition No. 2 file should have been disclosed to the Applicant, with the exception of the information about another person and the reference check information, which we found was properly protected from disclosure under paragraph 32(a) for the reasons that follow. The Department included this additional information with the revised response, and as such, has provided a full disclosure of all of the information to which the Applicant was entitled to receive.
40. Our findings with regards to the Applicant's reference check information are explained below.

Reference check information and Confidential evaluations: Paragraph 32(a)

41. Reference check information is directly addressed in paragraph 32(a) of the *Act*:
- 32 The head of a public body may refuse to disclose to an applicant, personal information that has been provided in confidence, explicitly or implicitly, for purposes of determining the applicant's suitability, eligibility or qualifications for
- (a) employment or for the purpose of awarding a contract...
42. Reference check information is personal information about the person to whom the reference relates and is provided to a public body for the purpose of determining that person's suitability, eligibility, and qualifications for employment.
43. To properly rely upon paragraph 32(a) to refuse access to a person's own personal information, a public body must first determine if the information falls within the scope of the exception, based on the following three considerations:
- the information is the applicant's personal information (not someone else's),
 - the personal information was provided in confidence, either explicitly or implicitly,
and
 - the information was provided for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or the award of a contract.

44. Paragraph 32(a) serves as an exception to the general rule that a person has the right to access his or her own personal information held by a public body:
- 7(2) ...[E]very individual is entitled to request and receive personal information about himself or herself.
45. In the present case, the Department relied on paragraph 32(a) as grounds to refuse access to all of the reference check information, on the basis that the reference check information had been provided to the Department on the understanding of confidentiality and in keeping with the Province's established human resources practice.
46. While our Office had previously considered the paragraph 32(a) exception in the context of an employment competition in a previous Report of Findings (**2013-1437-AP-748, 2013-1438-AP-749, 2013-1439-AP-750, 2013-1440-AP-751, 2013-1441-AP-752**), we did not have the opportunity at that time to consider how the law applied to reference check information gathered during an employment competition.
47. In applying the three-part test to the reference check information in the present case, we found that all of the reference check information was the Applicant's own personal information, thus meeting the first part of the test. We also found that the reference check information was collected by the Department for the purposes of assessing the Applicant's suitability and qualifications for the position in question, thus meeting the third part of the test.
48. As for the second part of the test, it has two elements: that the information be *provided* and in a *confidential manner*.
49. As to the element of confidentiality, we found that the reference check information in this case was given on the understanding of confidentiality. All of the reference providers were informed by Department officials that their input would be treated as confidential, thus there was an explicit understanding of confidentiality and assurances from Department officials that the reference check information would not be shared with the Applicant.
50. As we indicated earlier in this Report, we questioned whether this blanket practice of treating all reference check information as confidential and refusing access on this basis in all cases was in keeping with the discretionary nature of this exception to disclosure, as well as the spirit and intent of the *Act*.

51. As to the element of whether all of the reference check information had been “provided” to the Department, we found that not all of the reference providers were external to the Department and we questioned whether the references given by former supervisors of the Applicant’s work while employed with the Department could be considered to be “provided” to the Department so as to meet the second part of the test.
52. As for the reference check information from a source external to the Department, however, we had concerns about whether internal reference providers to the Department could be “providing” information to the Department in that context.
53. As such, the main focus of our investigation became whether the second part of the test had been met in relation to all of the Applicant’s reference check information and whether the Department had properly exercised its discretion in making the decision to refuse access. We address each point in turn below.

Does paragraph 32(a) apply to reference check information provided by internal sources?

54. While paragraph 32(a) clearly captures reference check information provided by a source external to a public body, one of the main issues in the present case is whether reference check information given by Department officials who previously supervised the Applicant is also captured by this exception.
55. We look to how paragraph 32(a) specifically, and the statute generally, treats this kind of personal information.

Past performance evaluations used as reference check information

56. Reference check information can include references provided by current or former supervisors, which may include an employee’s past work performance evaluation or a current or former supervisor’s views on an employee’s suitability for a new position for which he or she has applied.
57. This is addressed in the Province’s **Staffing Policy Manual**, Reference Checks portion of Chapter 2, Step 5:
For employees, past performance evaluations may substitute the reference check process.

58. Without question, an employee is entitled to access work performance evaluation as found in his or her own personnel file as a right to access one's own personal information. A person has an unequivocal right of access information of this nature, particularly as it concerns his or her previous work performance.
59. Having said this, however, when past performance information or a reference given by a source internal to the Department is used in the context of a reference check, information of that nature will fall within paragraph 32(a) for purposes of determining access rights to that information under the *Act*.
60. The reason for this: Department officials conducting the reference checks do not have the means to obtain information of this nature without asking that it be provided for the purpose of assessing a candidate's suitability for a particular position. In the Applicant's case, the facts show that reference check included as that of a former supervisor within the Department, who provided feedback on the Applicant's suitability to the Department for that purpose on the understanding of confidentiality.
61. We considered whether it would be appropriate to treat internal reference sources differently than references from external sources as determinative of access rights. In the final analysis, we determined that it would not be practical to create two different sets of rules for reference check information based on the source, as this would be confusing for public bodies in applying different standards and rules depending on source of the reference. Rather, we found that all of these considerations can be fully addressed in the public body's exercise of discretion. This means that a public body must ensure that all of the appropriate relevant considerations are identified and considered in determining whether to grant access to information of this nature, including whether there is greater consideration for disclosure of information that is akin to past performance evaluation of the Applicant.
62. Having determined that all of the reference check information, from sources both internal and external to the Department, are *provided* to the Department for the purposes of assessing a person's suitability for a particular position, we find that all three elements of the test have been met so as to fall within the scope of the paragraph 32(a) exception.
63. We now look to the *discretionary nature* of the paragraph 32(a) exception to disclosure and the Department's exercise of discretion in making the decision to refuse access to all of the Applicant's reference check information.

Relevant considerations when applying a discretionary exception to disclosure

64. As paragraph 32(a) is a discretionary exception to disclosure, this means that all the information that falls within its scope cannot automatically be refused.
65. Rather, this means that where a public body determines that the requested information falls within paragraph 32(a), the public body must then consider whether or not it would be appropriate to grant access to that information, based on relevant considerations at play at the time the request is made. Again, the information should be not be refused automatically, and this is carried out by *exercising discretion* in deciding whether there is any reason why the information should not be provided to the applicant.
66. There are a number of factors to consider whenever exercising discretion to determine access under the *Act*, and they include:
- the specific wording of the discretionary exception and the interests the exception attempts to balance;
 - whether the request can be satisfied by providing as much information as is reasonably practicable (severing the record);
 - the public body's past practices regarding the release of similar information;
 - the nature of the record and its significance to the public body;
 - whether the disclosure of the information will increase public confidence in the operation of the public body;
 - the age of the record;
 - whether there is a sympathetic or compelling need to release the information;
 - whether previous orders of the Access to Information Commissioner have ruled that similar types of records or information should or should not be subject to disclosure;
 - in a case where the "advice or recommendations" exception is claimed, whether the decision to which the advice or recommendation relates has already been made; and,
 - whether the requested information is already publicly available elsewhere.
67. Therefore, to meet the burden of proof for having properly applied a discretionary exception to disclosure, a public body must be able to establish that the information in question fell within the scope of the exception, and that the decision to refuse access was based on a consideration of relevant factors in existence at the time of the request.

68. Our role in reviewing discretionary exceptions is two-fold. We point out that we cannot recommend disclosure where the information falls within a discretionary exception.
69. First, we determine whether information falls within the scope of the exception, and if so, we look to whether the public body properly exercised its discretion by taking into account all relevant factors at play in arriving at the decision to refuse access. If we find that the public body did not identify and consider all of the relevant factors at play, we will recommend that the public body reconsider its decision in light of this.

Proper exercise of discretion in this case

70. We therefore proceeded to review the Department's exercise of discretion when applying paragraph 32(a) in arriving at its decision to refuse access to the Applicant's reference check information in this case.
71. In doing so, we found there were two competing interests on this question, namely:
- a) the broad general right of an individual or employee to have access to his or her own personal information under the *Act*, subject only to limited restrictions, and,
 - b) the desire for employers generally, including the government as an employer, to obtain candid references for the assessment of an individual's suitability for employment and thereby forming the basis for treating reference check information as confidential.
72. With these in mind, we found that the following factors would be considered relevant in considering disclosure of reference check information:
- the right of access to the Applicant's own personal information,
 - the fact that some of the information can be considered to be akin to past performance evaluation information (references provided by any former supervisors while employed with the Department), and
 - the Province's established past practice of treating reference check information as strictly confidential.
73. While past practice is a relevant factor, we nonetheless encouraged the Department to reconsider on the basis of the right of access to the Applicant's own personal information. The fact that the established practice of keeping reference check

information as absolutely confidential was not in keeping with the discretionary nature of the paragraph 32(a) exception and the Department should reconsider on that basis.

74. While the Department did reconsider its decision, including the possible disclosure of the reference check information to the Applicant in this case, in the end, the Department was not prepared to deviate from its established practice, one that has also been followed by all other Provincial departments and agencies.
75. Given these circumstances, and recognizing that the Department is not in a position to address the Province's established reference check practice found in the Province's Staffing Policy Manual, we were satisfied that in this case, the Department had properly exercised its discretion and had considered all relevant factors in making the decision to refuse access to the reference check information.
76. We thus find that the Department's decision to refuse access to this information under paragraph 32(a) was proper and we have no recommendation to issue on this point.

CONCLUDING COMMENTS and NO RECOMMENDATION

77. This case has brought to light an overarching concern that Provincial public bodies, in following the established practice to always treat reference check information as confidential, that direct them not to allow individuals access to their own reference check information. It follows, that this practice and established Government policy may not be compliant with statutory obligations to respect a person's right of access to his or her own information, as set out in the *Act*.
78. As explained above, the *Act* does not create an absolute right to one's personal information, but likewise, the *Act* does not create an absolute bar to a person receiving this kind of information either. In our view, the Province's established human resource practices may have confused these principles, as it was established prior to the coming into effect of the *Act*.
79. Given our desire to address this important question, and as indicated earlier in this Report, we will be addressing this separately and directly with the Department of Human Resources.

80. Based on all of the above, we find that the Department's revised response issued to the Applicant in this Complaint investigation provided additional information and full disclosure of all of the information to which the Applicant was entitled to receive under the law. As for the Applicant's reference check information, access was reconsidered by the Department, based on relevant considerations, and we found that the exercise of discretion was proper in this case.
81. Consequently, we have no recommendation to issue to the Department in this matter.

Dated at Fredericton, NB, this _____ day of December, 2015.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner