

Issues

- [4] The issues in this review are:
- a. Were the three pre-conditions in section 22 met?
 - b. Did Education properly exercise its discretion?

Facts

[5] The Applicant is a teacher in Nunavut. After resigning one position, they applied for a position in a different school. They received a verbal offer, pending a reference check.

[6] The Applicant did not want their former principal to be one of their references because the Applicant had been in conflict with the former principal. (The details of the conflict are not relevant to this decision and so, despite the urging of the Applicant, I omit them.) However GN policy requires that a reference must be obtained from an applicant's direct supervisor, which in this case was the former principal.

[7] Following the reference check, Education withdrew the verbal offer.

[8] The Applicant applied for a copy of the reference that caused the verbal offer to be withdrawn. (The request, which I will not reproduce here, was worded more confusingly than that, but that is how Education interpreted it. It was a reasonable interpretation.)

[9] Education disclosed four pages of records to the Applicant. The reference itself, on pages 2 and 3, is redacted in full. The other two pages are unredacted.

[10] In its disclosure letter to the Applicant, Education cites section 22(b)(i) of the ATIPPA and continues as follows:

The information you requested was related to a reference given in confidence. In order to protect the confidentiality of Department of Education's hiring and [reference] process, including the ability for us to get open and honest [references] in the future, information has been redacted.

[11] The Applicant requested review. Both the Applicant and Education have had an opportunity to make a written submission.

[12] In accordance with the usual practice, Education has provided to me an unredacted copy of the disclosure package. I cannot, of course, reveal what is in the reference from the former principal. What I can say is that the information is on a pre-printed form headed “Department of Education – Telephone Reference Check – Teaching Positions”. The following sentence is pre-printed below the heading:

The following must be shared with all referees. *“Please be advised that all information obtained within this reference check is subject to ATIPPA regulations.”*
(Access to Information and Protection of Privacy Act)

Law

[13] Section 22 of the ATIPPA reads as follows:

22. The head of a public body may refuse to disclose to an applicant personal information that

- (a) is evaluative or opinion material;
- (b) is compiled solely for the purpose of
 - (i) determining the applicant's suitability, eligibility or qualifications for employment, or
 - (ii) awarding government contracts or other benefits; and
- (c) has been provided to the public body, explicitly or implicitly, in confidence.

[14] In *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII), also known as Review Report 21-195, I reviewed the law on section 22. I will not repeat that analysis here, but I adopt it in full for purposes of this decision.

[15] In summary:

- a. For section 22 to apply, all three conditions must be met.
- b. In a given case, it is a question of fact whether the three conditions have been met.

- c. Section 22 is a discretionary exemption (“...may refuse...”). Even if the three pre-conditions of section 22 are met, the public body may choose to release the record anyway.

[16] In Review Report 21-195, I indicated that I would not endorse all of the reasoning in a decision by the former Commissioner about reference checks: *Review Report 17-124 (Re)*, 2017 NUIPC 11 (CanLII) at paragraph 73.

[17] In that case, the Minister of Human Resources rejected the former Commissioner’s analysis and recommendations. I summarized the Minister’s response as follows (2021 NUIPC 14 at paragraphs 38 to 40):

[38] The minister wrote that the HR policy on reference checks was the result of extensive consultation, and he believed the right balance had been struck. “I feel strongly that the directive is supported by Section 22... and balances the needs of individuals, referees and hiring departments and does not need to be amended at this time.”

[39] He noted the problems that are created when reference checks are not forthright. He acknowledged some of the issues raised by the Commissioner, such as the possibility of a biased supervisor, but insisted that there were checks and balances in the system that could catch and correct any problems. “The GN never hires an individual based on one reference check,” wrote the minister.

[40] The minister acknowledged the Commissioner’s recommendation that referees be informed that their references could be released even if they asked for confidentiality, but asserted the existing wording already did that. “The Department uses it discretion...,” wrote the minister, “to withhold information that has been explicitly given in confidence to aid in making the best hiring decisions.”

[18] I will, later in this decision, return to these comments by the Minister of Human Resources.

Analysis

[19] When a GN employee is unsuccessful in a job competition, naturally they want to know why. That is especially true if they suspect that a reference was bad. But how much information are they legally entitled to see? The answer is in section 22.

[20] If any one of the three pre-conditions in section 22 is not met, section 22 does not apply and the reference should be disclosed.

[21] If the three pre-conditions in section 22 are met, then the department may withhold a reference provided the department turns its mind to the residual discretion to disclose. As long as that discretion is exercised according to the guidelines re-affirmed in *Department of Health (Re)*, 2021 NUIPC 12 (CanLII), I do not believe I can or should second-guess the way the discretion is exercised.

Were the three pre-conditions of section 22 met?

[22] The easy question in this case is whether the three pre-conditions of section 22 are met. I find that they are:

- a. The reference is the referee's evaluation of, and opinions about, the Applicant. This satisfies the condition in paragraph (a).
- b. The information was compiled solely for the purpose of the job competition. This satisfies the condition in paragraph (b).
- c. Education gives referees what I will call "conditional confidentiality". Education treats references as presumptively confidential, but that promise is subject to the ATIPPA. This satisfies the condition in paragraph (c).

[23] That is not the end of the section 22 analysis. The more difficult question is whether Education properly exercised its discretion.

Exercise of discretion

[24] Section 22 does not require that references be withheld. It says they may be withheld. Education can choose to release a reference even if all three conditions of section 22 are met. As the former Commissioner and I have explained in dozens of decisions stretching over almost 20 years, a public body must at least think about whether to release information covered by a discretionary exemption, and explain its decision to the applicant. That’s what it means to “exercise discretion”.

[25] In this case, I find that Education did not properly exercise its discretion.

[26] In its letter to the Applicant dated May 31, Education explained its decision this way:

In order to protect the confidentiality of Department of Education’s hiring and [reference] process, including the ability for us to get open and honest [references] in the future, information has been redacted.

[27] In its letter to me dated June 14, Education explained its decision this way:

We made the decision to redact the reference to protect the integrity and confidentiality of our hiring and [reference] processes. As a department, we believe that ensuring confidentiality can help us to obtain open and honest [references] from our staff.

[28] These explanations, which are essentially the same, have the character of an inflexible rule: Education is saying, in effect, “We never release references”. But inflexible rules are not legally allowed. The Legislative Assembly has decided that section 22 is discretionary. Education cannot, by inflexible administrative policy, turn a discretionary exemption into a mandatory exemption.

[29] I am going to send this file back to Education with a recommendation that it reconsider its exercise of discretion. When it does so, it should take into account the following circumstances:

- a. The Minister of Human Resources, in his written response to Review Report 17-124, recognized that there can be problems if reference checks are not forthright: see paragraph 17 above. The Minister wrote that there are checks and balances to mitigate this risk. For example, wrote the Minister, hiring (and presumably non-hiring) is “never” done based on a single reference check. In the present case, it is apparent that the verbal offer was withdrawn based on a single reference.
- b. The Applicant argues that it is not fair for there to be a mandatory reference from their former principal, given the known conflict between them.
- c. In the internal correspondence released to me by Education’s ATIPP office, the former principal objects to disclosure not because of a general claim to confidentiality, but because the reference form does not accurately reflect the words they used during the telephone interview.

[30] I am not suggesting that Education must exercise its discretion in a particular way, e.g. in favour of disclosure. What Education must do is exercise its discretion properly. It must take all relevant circumstances into account, including those listed in the previous paragraph, and then provide a meaningful explanation to the Applicant of why the discretion has been exercised the way it has.

[31] I encourage Education to be creative and thoughtful in how it approaches the exercise of its discretion. It might, for example, be an acceptable exercise of Education’s discretion if it were to provide a summary of the former principal’s reference. Moreover, as I explained in *Department of Human Resources (Re)*, 2021 NUPIC 14 (CanLII) at paragraphs 76 to 93, there is room here for the sensitive application of Inuit Qaujimajatuqangit (traditional knowledge) and Inuit Piqqusingginnik (societal values).

[32] The one thing Education cannot lawfully do is deny disclosure based on an inflexible rule that is more restrictive than section 22 itself.

Conclusion

[33] Education concluded correctly that the three pre-conditions in section 22 were met.

[34] Education did not properly exercise its discretion.

Recommendation

[35] I recommend that Education reconsider the exercise of its discretion, especially in light of the circumstances listed in paragraph 29.

Graham Steele

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