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Nunavut Information and Privacy Commissioner

Nunavunmi Tuhagtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina

Commissioner's Final Report

[1] The Applicant was unsuccessful in a job competition at Nunavut Arctic College. The Applicant applied to see records from the competition, including reference checks. NAC disclosed two of three reference checks, without redactions. NAC later disclosed the third reference check, with redactions. The Applicant requested review of the redactions. The Commissioner finds that NAC correctly concluded that the three pre-conditions in section 22 were met. The Commissioner also finds that NAC did not properly exercise its discretion under section 22, and recommends reconsideration.

Nature of Review and Jurisdiction

[2] This is a request by the Applicant for review of disclosure by Nunavut Arctic College (NAC). The request was filed under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 31(1).

[3] I have jurisdiction over Nunavut Arctic College: ATIPPA, section 2, definition of “public body”; and ATIPP Regulations, section 1(2) and Schedule A, column 1, item 6.

Issues

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

Facts

[5] The Applicant, a NAC employee, applied for an advertised position at NAC. The Applicant was unsuccessful. They were told it was due to a poor reference.

[6] The Applicant was surprised. They knew who their three referees were. The Applicant says they had no reason to believe any of their referees would submit a poor reference. The Applicant had other reasons for being surprised at the outcome of the competition, but I will omit them because they would tend to identify the Applicant.

[7] The Applicant filed an ATIPP request for records relevant to the job competition. They received a package of records, with some redactions. The package included two reference forms. These two forms were unredacted. There was no indication from NAC that a third reference form was being withheld.

[8] Later, after the Applicant made further inquiries, NAC disclosed the third reference form, with redactions. It is relevant to note that this third reference form was written by the Applicant's former supervisor.

[9] NAC used a reference form from the GN Human Resources Manual, Directive 511: Reference Checks. This form contains the following statement, on page 1 under the heading "Overall performance/evaluative questions":

The remaining questions are more evaluative, or opinion based, as a result you have the option to request that this information be held in confidence if requested through Access to Information and Protection of Privacy Act (ATIPP).

Would you like to do so? Yes [] No [].

[10] On the third reference form, the “Yes” box is highlighted. (On the first reference form, the “No” box is highlighted. On the second, the “No” box is marked with an “x”.)

[11] The Applicant now seeks review of the redactions on the third reference form. The Applicant is not seeking review of the other redactions in the first disclosure package.

Law

[12] This is the third Review Report I have written about the disclosure of reference checks.

[13] The law applicable to this case is the same as in *Department of Education (Re)*, 2024 NUIPC 12 (CanLII), also known as Review Report 24-148, and *Department of Human Resources (Re)*, 2021 NUIPC 14 (CanLII), also known as Review Report 21-195. I will not repeat the legal analyses from those decisions, but I adopt them in full.

[14] 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.

[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] There is one more important piece of context. 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 (*Department of Human Resources (Re)*, 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 public body may withhold a reference provided the public body 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 will not usually 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. The GN reference check form used by NAC gives referees what I will call "conditional confidentiality". If the "Yes" box is checked, the public body can treat references as presumptively confidential, but that promise is subject to the ATIPPA. In this case, the "Yes" box was highlighted. This satisfies the condition in paragraph (c).

[23] As usual, I have obtained from NAC copies of their internal correspondence on the ATIPP file. It is apparent that at least some NAC staff started with the assumption that the third reference check was so-called "ATIPP Exempt" because

the referee had requested confidentiality. That appears to be why the initial disclosure package did not include the third reference form.

[24] That was an error. Reference checks are not automatically “ATIPP Exempt” if the referee requests confidentiality. A referee’s expressed desire for confidentiality is a factor that a public body can take into account, but it can never be taken as conclusive on its own.

[25] The idea that certain categories of HR records are “ATIPP Exempt” – meaning they do not have to be disclosed to an applicant nor even given to the public body’s ATIPP Coordinator – has a deep hold within the GN. The idea has no foundation in the ATIPPA but it has proven hard to shake.

[26] Eventually, after some prodding from the Applicant and further internal discussion, NAC corrected its error and released to the Applicant a redacted version of the third reference form.

[27] I find that the three pre-conditions in section 22 are met, but that is not the end of the section 22 analysis. The more difficult question is whether NAC properly exercised its discretion.

Exercise of discretion

[28] Section 22 does not require that references be withheld. It says they may be withheld. NAC 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 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 is what it means to “exercise discretion”.

[29] In this case, NAC’s explanation for the redactions leaves me uncertain whether or not it has correctly exercised its discretion. For example:

- a. The Exemption Rationale is hard to understand. I have read it several times and still have trouble understanding NAC’s thought process.

- b. The Exemption Rationale appears to be based on an inflexible rule, rather than on the facts of the case.
- c. The Exemption Rationale did not change between the two releases, even though the third reference form (the second release) is distinctly different from the other records (the first release).
- d. The Exemption Rationale, and the redacted form itself, repeatedly cites section 22(a-d) of the ATIPP Act. There is no section 22(d).
- e. The Exemption Rationale says that section 22 is a mandatory exemption. It is a discretionary exemption.

[30] I am going to send this file back to NAC with a recommendation that it reconsider its exercise of discretion. When it does so, I recommend that it 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 decision not to offer the position to the Applicant was based on the contents of a single reference check.
- b. One of the primary purposes of the ATIPP Act is “to make public bodies more accountable to the public”. It is important that GN hiring processes be fair, and be seen to be fair. That may imply a higher expectation of accountability for referees who are GN employees.
- c. The Applicant says the performance reviews written by their supervisor were uniformly positive. The redacted reference form was also written by their supervisor. If there is a misalignment between the performance reviews and the reference form, that is relevant to a fair determination of the Applicant’s employment rights.

[31] To be clear, I am not suggesting that NAC must exercise its discretion in a particular way. What NAC 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 clear and meaningful explanation to the Applicant of why the discretion is being exercised in the way it is being exercised.

[32] I encourage NAC to be creative and thoughtful in how it approaches the exercise of its discretion. Full disclosure is possible and perhaps desirable, but it is only one possibility. It might, for example, be an acceptable exercise of NAC's discretion if it were to provide a summary of the third 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).

Conclusion

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

[34] NAC did not properly exercise its discretion.

Recommendations

[35] I recommend that NAC reconsider the exercise of its discretion, especially in light of the circumstances listed in paragraph 30.

Graham Steele

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