



Information and Privacy  
Commissioner/Ontario

Commissaire à l'information  
et à la protection de la vie privée/Ontario

# ORDER P-773

Appeal P-9400162

Ministry of Health



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## **NATURE OF THE APPEAL:**

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The appellant has requested copies of records containing her personal information from the Ministry of Health (the Ministry) relating to a competition in which she was an unsuccessful candidate. At the time of the competition, the appellant was working on a contract basis in the position to which the competition related. The records at issue consist of the following:

Records 40, 41 and 42 - interview questions and handwritten comments made by three interviewers relating to the appellant;

Records 45 and 46 - reference checks from two referees; and

Record 72 - Scoring summary sheet (partial access was granted to the appellant's results and average score and rank of all candidates).

The Ministry relies on the following exemptions to withhold the information contained in the records at issue:

- invasion of privacy - sections 21(1) and 49(b) (Records 40, 41, 42 and 72)
- evaluative or opinion material - section 49(c) (Records 45 and 46)

During the mediation of this appeal, the appellant indicated that she is not interested in receiving the personal information of the other candidates which has been withheld from Record 72. Rather, she is only interested in knowing which interviewer gave her each score. Therefore, only the names of the three members of the interview panel are at issue with respect to this record.

A Notice of Inquiry was provided to the Ministry, the appellant and the three interviewers. Representations were received from the Ministry and one of the interviewers who objected to release of her name. One of the interviewers consented to the release of her name. The appellant did not submit representations, but chose to rely on previous correspondence with the Commissioner's office.

## **DISCUSSION:**

### **PERSONAL INFORMATION**

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual, including the personal views or opinions of the individual and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual.

The Ministry submits that the records at issue contain the personal information of the three individuals who composed the interview panel for this competition. Although the identity of the interviewers is known to the appellant, the connection between each interviewer and the specific score given by that individual is not known. With respect to Records 40, 41 and 42, the Ministry argues that the appellant, as an internal candidate, is familiar with the handwriting of the interviewers. As these records contain the handwritten notes of the interviewers, the appellant would be able to identify them should the notes be disclosed.

The appellant argues that the members of the hiring panel were acting in their professional capacity, and that the information at issue was compiled by them or relates to them as part of their employment duties.

It has been established in a number of previous orders, decided under both the provincial Act and the Municipal Freedom of Information and Protection of Privacy Act, that information provided by an individual in a professional capacity or in the execution of employment responsibilities is not personal information (Orders P-326, P-470 and P-715).

I have reviewed the records at issue. I agree with the appellant that the identities of the interviewers in Record 72 and their assessments of the suitability of the appellant for employment in Records 40, 41 and 42 were provided in their professional capacities. The information at issue in these four records, therefore, does not qualify as the personal information of the interviewers.

Records 40, 41 and 42 consist of the selection panel's notes in respect of the appellant's interview. In my view, these three records contain only the personal information of the appellant based on the definition of personal information in section 2(1)(g) of the Act. On this basis, the Ministry cannot rely on either section 21 or 49(b) of the Act to exempt the information from disclosure. As no other exemptions have been claimed for these three records they should be disclosed to the appellant in full.

Record 72 is the scoring summary sheet. The only part of this record which remains at issue consists of the three interviewers' names at the top of the sheet. I have found that the identities of the interviewers were recorded in their professional capacities. As no other exemptions have been claimed for this portion of the record, the names of the interviewers should be disclosed to the appellant.

Records 45 and 46 consist of reference check information provided by two referees. The reference checks relate to the appellant. I am satisfied that the records contain the views and opinions of the referees about the appellant, in the context of the appellant's previous work history and suitability for new employment. Accordingly, this information qualifies as the personal information of the appellant only pursuant to sections 2(1)(e) and (g) of the Act.

To summarize, I have found that the information at issue in Record 72 does not qualify as personal information. I have also found that the information at issue in Records 40, 41, 42, 45 and 46 qualifies as the personal information of the appellant only.

As I indicated above, the Ministry cannot rely on either section 21 or 49(b) of the Act to exempt information which relates solely to the appellant in Records 40, 41 and 42 from disclosure. The Ministry claims that section 49(c) applies to exempt the information contained in Records 45 and 46 from disclosure.

### **EVALUATIVE OR OPINION MATERIAL**

Section 47(1) of the Act gives individuals a general right of access to their own personal information held by a government body. Section 49 provides a number of exceptions to this general right of access. Section 49(c) of the Act provides:

A head may refuse to disclose to the individual to whom the information relates personal information,

that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;

Section 49(c) of the Act attempts to address two competing interests. These are: (1) the right of an individual to have access to his or her personal information and (2) the need to protect the flow of frank information to provincial or municipal institutions so that appropriate decisions can be made respecting the awarding of jobs, contracts or other benefits (Order M-132).

For a record to qualify for exemption under section 49(c), the institution must satisfy each part of the following four-part test:

1. The personal information is evaluative or opinion material;
2. The personal information was compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits;
3. The information was supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence;
4. The disclosure of the record would reveal the identity of the source of the information.

Each element of the four-part test must be satisfied in order for the exemption to apply. The failure to meet any part of the test means that section 49(c) will not be available to exempt the personal information contained in the record from disclosure.

The appellant provided the Commissioner's office with a copy of a letter signed by the referee mentioned in Record 46 consenting to the release of her reference check material relating to the appellant. The Ministry did not receive a copy of this letter, but indicated in its representations that should the authorization be provided it would have no objection to the record being released to the appellant. Accordingly, Record 46 should be disclosed to the appellant.

Record 45 is a "Reference Check" form, and consists of four parts: a statement of confidentiality; the name of the candidate and the name, title and telephone number of the referee; 16 questions relating to the referee's working relationship with the appellant and her suitability for the particular position, with responses provided; and the signature of the interviewer.

With the nature of the record now understood, the next step is to determine whether the four-part test established for the section 49(c) exemption applies to the information contained in Record 45.

### **Part 1**

It is clear that this record contains the opinions of the referee with respect to the appellant in the context of her suitability for new employment. In my view, therefore, the record contains personal information which is evaluative or opinion material with the result that the first part of the test is satisfied.

### **Part 2**

With respect to the second part of the test, the Ministry submits that the reference check material was compiled by the Ministry solely for the purpose of determining suitability, eligibility or qualifications of the appellant for employment with the Ministry.

The appellant indicates that the referee was her supervisor and the information he provided should be characterized as a performance evaluation rather than a reference check and, therefore, section 49(c) should not apply to this information.

In my view, most reference checks from previous or current employers must necessarily touch on the assessment of the performance of the individual. The characterization of these remarks or evaluations of performance as performance appraisals of current employment, or for the purpose of suitability for employment, depends on the context in which they are given. Regardless of the referee's connection to the appellant, his name was put forward by her as a reference in a job competition. I, therefore, accept the Ministry's submission and I am satisfied that the second part of the test has been met.

### **Part 3**

In Order M-132, Assistant Commissioner Irwin Glasberg stated that the following factors are relevant in determining whether the materials were supplied to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence:

1. The expectations of the provider of the opinion or evaluative material and the institution regarding the confidentiality of the provider's identity at the time that the information was supplied to the institution.
2. The ordinary practice and/or experience of the individual who provided the information and of the institution which sought the information with respect to maintaining the confidentiality of the source of the information.
3. The knowledge of the individual to whom the information relates as to the identity of the provider of the specific opinion or evaluative material and the individual's expectation as to whether the identity of the provider would be held in confidence.
4. The nature of the opinion or evaluative material, itself, insofar as it would identify the provider of the information.

With respect to the question of whether there existed a reasonable assumption that the identity of the source of the reference would be held in confidence, the Ministry states that the opening statement on the Reference Check form relating to confidentiality is read to the prospective referee prior to receiving the reference check. The referee, therefore, furnishes the information on a clear understanding that his or her identity will be held in confidence.

The appellant indicates that she provided the Ministry with the names of the two individuals who supplied the references. She further argues that the referee whose views are set out in Record 45 was a Ministry employee at the time the reference check was given and that section 49(c) should not apply to internal referees.

In my view, there is nothing in section 49(c) which would indicate that only referees external to the government are subject to the protection afforded under this provision.

The Ministry submits that although the names of the referees were originally provided to the Ministry by the appellant, she is not aware of the referee's identity as the provider of particular comments. The Ministry attached documentation from the referee in which he indicates his expectations with respect to the confidentiality of the information he provided.

I have carefully reviewed the record and the representations provided in this appeal. It is my view that, at the time that the reference was provided, both the referee and the Ministry reasonably assumed that the identity of the referee would be held in confidence. This conclusion is also supported by the contents of the record. Therefore, the third and fourth parts of the test have been met.

As all four parts of the test have been met, the information contained in Record 45 qualifies for exemption under section 49(c) of the Act and should not be released to the appellant.

**ORDER:**

1. I uphold the Ministry's decision to deny access to Record 45 in its entirety.
2. I order the Ministry to disclose to the appellant the names of the three interviewers in Record 72.
3. I order the Ministry to disclose to the appellant Records 40, 41, 42 and 46 in their entirety.
4. I order the Ministry to disclose the records or portions of records described in Provisions 2 and 3 within thirty-five (35) days following the date of this order, but not earlier than the thirtieth (30th) day after the date of this order.
5. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant pursuant to Provisions 2 and 3.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Inquiry Officer

\_\_\_\_\_ October 6, 1994