



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-06-77**

- Report Release Date:** May 03, 2007
- Public Body:** Dalhousie University
- Issue:** Whether the University's decision to refuse to provide the Applicant with a copy of a letter provided as part of the selection process for a University Research Professorship was in accordance with s. 19C of the *Freedom of Information and Protection of Privacy Act*.
- Summary:** An Applicant sought a Review of the University's decision to withhold a letter written by a Dean. The University chose not to release to the Applicant a copy of a letter written by a Dean, citing Section 19C of the *Act*. The Review Officer found that the three conditions required for 19C to apply had been met and therefore the University had the discretion to withhold the record under Section 19C.
- Recommendation:**
1. The University may consider ways in which it can make its policy for Professorships clearer with respect to two issues; confidentiality and the statutory discretion to withhold a record. This may be accomplished in a number of ways, including by making specific reference to s. 19C in the policy; and
 2. The University reaffirm its original decision to the Applicant in writing with a copy provided to the Review Office.
- Key Words:** explicitly or implicitly in confidence, confidentiality, exercise of discretion, evaluative or opinion material, honour or award, compiled solely for the purpose of.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act, s.2(a)(b)(c), s.3(1)(i), s.19C(i)(ii)(iii),*

Case Authorities Cited: *BC Order No. 325-1999, Ontario Order MO-1703.*

REVIEW REPORT FI-06-77

BACKGROUND

On August 17, 2006, the Applicant through his counsel made an application to Dalhousie University for the following:

“A copy of any references submitted by persons other than my designated referees in relation to my nomination for a University Research Professorship.”

On September 20, 2006 the University responded indicating that the only references submitted in relation to the Applicant’s nomination were those of his designated referees. They provided a list of those individuals and advised the Applicant that he had 60 days to exercise his right to seek a Review by this Office.

The initial response from the University to the request for information from the Applicant in their letter dated September 20, 2006, responded solely on the basis of what the Applicant had requested - *any references submitted.*

On September 27, 2006 the Applicant, through his counsel, queried the response of the University and expanded the original request for information by providing further details as to the names of the individuals the Applicant had considered likely sources of references for him.

The Applicant indicated in correspondence with the University what he understood were the particulars about the circumstances surrounding the Professorship terms for his nomination:

1. The Dean who provided the letter was only Acting;
2. There was a person Acting in the position of Director; and
3. There was a person designated Director in whose stead the person referred to in paragraph 2 was “Acting.”

The Applicant submitted that he assumed that letters from these individuals had been provided as part of the process and if these letters were provided to the Selection Committee, they formed the record that was the subject of his request to the University.

On October 6, 2006 the University responded to the expanded request. In its response, the University provided details about the terms contained in Section 5 of the University Research Professorship Program [“the Professorship”] with respect to references. The University indicated that there were two sets of requirements. Section 5 provides as follows:

5. Nominations and Selection

*The Selection Committee shall annually invite nominations of faculty members from departments, schools and faculties. Nominations shall be accompanied by a letter of nomination (namely no longer than two pages in length); a letter from the nominee consenting to the nomination; a current curriculum vitae of the nominee; **a supporting letter from the nominee's Chair or Director (where applicable) and Dean;** and letters from four external referees who can write about the nominee's research accomplishments. **[Emphasis added]***

The University advised the Applicant that in addition to the five reference letters provided by the Applicant himself there was a letter on file from the Dean but no letter from the Director as that position was vacant at the material time. The University's decision letter went on to advise the Applicant that it was electing to not produce a copy of the letter from the Dean. The University's refusal to release the letter was stated as follows:

"Dalhousie elects, pursuant to Section 19 [sic] of the Act, not to produce a copy of [Third Party] letter to your client. [The] letter, which was provided to the University in confidence, constitutes evaluative material compiled solely for the purpose of determining [the Applicant's] suitability for the receipt of a University Research Professorship. The Professorship is in the nature of an honour granted by the University to recognize distinction in scholarship and hence falls within the exclusion set out in Section 19C(a)(iii) of the Act."

On December 11, 2006 the Applicant filed a Form 7, a Request for Review with our Office to initiate a Review of the decision by the University to refuse him access to the letter from the Dean.

RECORD AT ISSUE

A letter from the Dean about the Applicant's nomination for the Professorship is the only record in issue in this Review.

APPLICANT'S SUBMISSION

The Applicant had requested assistance from the Dalhousie Faculty Association ["DFA"] in obtaining the record in issue. He was advised that the Collective Agreement did not apply because a Professorship is an award that requires nominations not an employment appointment that requires applications and that his request for the record perhaps should have more appropriately been sent to the Chair of the Selection Committee.

The Applicant continued to pursue obtaining a copy of the record through other means outside the parameters of the *Act*. When these proved unsuccessful, the Applicant formalized his request to the University by filing a Form 1, Application for Access to a

Record. That resulted in the decision letter from the University electing not to release the record.

The Applicant, through his counsel, provided a submission that largely relates to other avenues of redress such as through the Collective Agreement and has no bearing on a review under the *Act*. In that regard, the following is a brief outline of the points made in his submission to the Review Office with respect to the release of the record:

1. The Applicant counters the University's position that the Collective Agreement does not apply by stating that although not applicable, the Collective Agreement should be used as a guide to determine when such records should be made available.
2. Turning to the Collective Agreement for guidance, the Applicant responds to the University's argument that the letter was provided in confidence and therefore falls under the exception by arguing that paragraph 18.02, when read together with 18.11, creates an exception to when confidential letters or documents of recommendation should be released.
3. The Applicant is correct when he states that Members under the terms of the Collective Agreement do have a right to see documents related to "promotion, tenure, reappointment or appointment" with the identifying factors of the author removed. In the case at hand, the author has already been disclosed and the Applicant argues, therefore, he should be given access to the letter of reference.
4. The Applicant relies on a section of the Collective Agreement [Article 18.11(b)(i)] that applies to reference letters from persons outside the University, which cannot apply on these facts as the record in issue is from an internal source.
5. The Applicant argues that because someone in the Dean's position knows that their comments in relation to an appointment are generally available to the person affected by the outcome that he cannot claim to have provided the letter explicitly or implicitly in confidence.

The submission by the Applicant included copies of emails between himself and the University. The exchange reveals that the Applicant had concerns in how his application for the Professorship would be considered.

PUBLIC BODY'S SUBMISSION

When this matter was referred to Review, the University, along with the Applicant, was invited to make a submission. The essence of the initial submission from the University is best summarized by referring to their initial correspondence to the Review Office:

"As stated throughout Dalhousie's correspondence in this matter, Dalhousie takes the position that the University Research Professorship is in the nature of an honour granted by the University to recognize distinction in scholarship, and hence that this [date] letter falls within the exclusion set out in the Section 19C(a)(iii)."

The University submitted a second brief to the Review Office that made the following points:

1. The Professorship program is an honour or award that was established by the university to recognize distinction in scholarship. The process of selection is set out in a policy outline the terms of nomination and selection.
2. The selection process for this program is separate and unconnected to academic appointment processes that define the relationship between the University and faculty members and that are covered by a Collective Agreement.
3. The record was created by the Dean solely for the purpose of meeting the terms of the selection process in relation to the Applicant's nomination for this scholarship.
4. The author of the record advised the University that he provided the record on a confidential basis for consideration by the members of the Selection Committee only and has sworn an affidavit to that effect.
5. The University states that the record was supplied by the Dean in confidence and argues that because it was supplied on that basis that the University should be able to exercise its discretion and apply the statutory exemption.

Detailed information about the Professorship program was included with the University's submission.

PERSONAL INFORMATION EXEMPTION

Personal information is defined in s. 3(1)(i) of the *Act* as follows:

“personal information” means recorded information about an identifiable individual, including

(viii) anyone else's opinions about the individual . . .

Section 19C of the *Act* grants the discretion to a University to refuse to disclose certain personal information. It provides as follows:

*The head of a university may refuse to disclose to an applicant personal information that is **evaluative or opinion material compiled solely for the purpose of***

*(a) **determining the applicant's suitability for***

(i) appointment, promotion or tenure as a member of the faculty of a university

*(ii) admission to an academic program, **or***

(iii) receipt of an honour or award; . . .

*if the information is provided explicitly or implicitly in confidence.
[emphasis added]*

The *Act* has a primary purpose of holding public bodies to account by granting individuals the right to access person information contained in records held by public bodies. Section 2 of the *Act*, which outlines that overarching purpose of the legislation, also stipulates that the *Act* will provide exceptions to the right of access but those will be both *specified* and *limited*.

s. 2 The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

(i) giving the public a right of access to records, . . .

(iii) specifying limited exceptions to the rights of access [emphasis added]

Section 19C is a clear example of a statutory exception that is both specific and limited.

DISCUSSION

The head of a University is entitled under s. 19C to exercise her or his discretion to refuse to disclose personal information about an applicant.

*s. 19C The head of the university may refuse to disclose...
[emphasis added]*

The conditions for s. 19C to apply are as follows:

1. personal information must be evaluative or opinion;
2. the information was compiled solely for the purpose of determining the applicant's suitability for receipt of an honour or award; and
3. the information must have been provided explicitly or implicitly in confidence.

Clearly a policy that requires a supporting letter from a Dean meets the first part of the three-part test of being subject to the characterization *evaluative or opinion*.

The second part of the test requires that the information is solely for the purpose of determining suitability for an honour or award. The University was specifically asked by our Office to explain the distinction, in their opinion, between an "academic appointment" and an "honour or award." In part, its response provided as follows:

"...University Research Professorships are an honour or award bestowed by the University to recognize distinction in scholarship. The selection process . . . is separate and unconnected with the processes described above [academic appointments and promotion]. There is a small honorarium associated with the

award; however the true benefit to the individual is that their contribution to scholarship is being publicly recognized by the University and their peers. It has no effect on the terms of their employment or the nature of their academic appointment.”

Honour and *award* are not defined in the statute. Merriam-Webster defines these nouns as follows:

Honour

Good name or public esteem; reputation; overall quality or character as seen or judged by people in general; recognition by other people of some characteristic or ability; a place in public esteem or regard; good name; a person of superior standing; one whose worth brings respect or fame; an evidence or symbol of distinction.

Award

A judgment or final decision; something that is conferred or bestowed especially on the basis of merit or need.

The Purpose of the University Research Professorships states:

“The title of University Research Professor is granted to a limited number of individual Dalhousie faculty members who have achieved distinction in scholarship.”

I find that the second criterion, therefore, has been met. The final criterion under s. 19C is whether the letter was provided on a confidential basis. The University advised this office that the Dean believed he was providing the letter on a confidential basis for the Selection Committee only. This has been confirmed by an affidavit from the Dean. The final criterion, which is whether the record is provided explicitly or implicitly in confidence, has been met. The letter of reference from the Dean fits squarely within the requirements of s. 19C.

In s. 19C, the *Act* explicitly provides the University with a choice; a functional exemption to an individual’s general right to access personal information. Enabling a University to operate under such an exemption may, in some circumstances, be important for it to carry on its business when it elects to rely on confidential references. The exemption, which is clear in its legislative intention, provides referees and nominators the opportunity to reply with candour and frankness. The letter withheld was one of the necessary requirements under the terms of the Professorship. This fits squarely within the statutory language in s. 19C.

The only remaining issue is whether or not the head of the University has exercised its discretion under s. 19C appropriately.

EXERCISE OF DISCRETION

Section 19C grants the University the discretion as to whether or not to disclose personal information if it fits within the statutory exception. This is the first case in Nova Scotia to be decided on the basis of s. 19C. There is a similar statutory exception in a few other provinces [Ontario, New Brunswick, Alberta, Saskatchewan] but no cases directly on point could be found.

The onus is on the University to demonstrate that the responsive record qualified for exemption under s. 19C. The University has met that burden. Thereafter, the University has the discretion to disclose or withhold. In this case, the University elected to withhold the record. The University's exercise of discretion to withhold the record is reviewable for error as part of this Review. The question is – has the University properly exercised its discretion under s. 19C? The onus is on the University to demonstrate a proper exercise of discretion under s. 19C.

Any public body in exercising its discretion under one of the statutory exemptions listed in the statute beginning at s. 12 should be mindful of the following factors:

1. The purposes of the *Act* including that individuals have a right to access their own personal information;
2. Exemptions from the right to access should be limited and specific in order to honour the broad purposes of the *Act*; and
3. Privacy of individuals should be protected.

I am assisted in reviewing the University's exercise of discretion by a decision from David Loukidelis, BC's Information and Privacy Commissioner. In his Order No. 325-1999 he outlined a non-exhaustive list of factors for a public body to consider:

In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception....

In exercising discretion, the head considers all relevant factors affecting the particular case, including

- *the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
- *the wording of the discretionary exception and the interests which the section attempts to balance;*
- *whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*
- *the historical practice of the public body with respect to the release of similar types of documents;*

- *the nature of the record and the extent to which the document is significant and/or sensitive 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 materials;*
- *whether previous orders of the Commissioner [or Review Officer] have ruled that similar types of records or information should or should not be subject to disclosure; and*
- *when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.*

In agreeing with Commissioner Loukidelis's approach to this issue, adjudicator DeVries in Ontario added a few other factors to the list:

"I would add to the list of possible factors for the institution to consider the reasons why the requester seeks the records, whether the requester is an individual or an organization, and whether the records have already been created or whether they are created only after receiving a request."
[Ontario Order MO-1703]

From the University's correspondence and submissions, I conclude that it considered the following factors in exercising its discretion:

1. The circumstances surrounding the record fit squarely within s. 19C.
2. The record was created solely for a particular purpose – the Professorship, a record about bestowing an honour or award.
3. The letter was provided in confidence.
4. Balancing the competing issues of the right to access personal information and the ability to solicit opinions on a confidential basis, the University chose to exclude.

An institution will be found to have erred in the exercise of discretion, for example, where it does so in bad faith, for an improper purpose, or takes into account irrelevant considerations, or fails to consider relevant considerations.
[Ontario Order MO-1573]

There is no evidence of bad faith or improper consideration on the part of the University in exercising its discretion. No argument has been made to justify a compelling sympathetic reason to disclose. Indeed, given the nature of the honour bestowed by the Professorship, the balance is in favour of the University in being able to rely on information provided in confidence.

FINDINGS

Having reviewed all of the information provided by both the Applicant and the University, I make the following findings:

1. The record in issue was intended solely for the purpose of providing a supporting letter to the Selection Committee responsible to make a recommendation for the Professorship to the President.
2. The University policy outlining the process for selection of the Professorship honour or award is patently clear that a letter from the Dean – the record in issue – is required.
3. The honour or award is the very kind of extraordinary conferment of a benefit that calls for a supporting letter from a Dean of the nominee.
4. Section 19C is a relatively new amendment to the *Act* and there may still be many individuals in the University community unfamiliar with the discretion granted to universities in this kind of situation. The Applicant is mistaken in his belief that “freedom of information trumps all measures by the University and its agents to withhold it.” The *Act* provides for specific and limited exceptions when access may be denied, such as in the case of this record.
5. The University Research Professorship is a clear example of an honour or award contemplated by s. 19C. The successful nominee is *recognized* at a dinner and receives a *grant*.
6. The Collective Agreement has no application in this case. Even if it could be used as an interpretive aid in deciding the question of access, a submission I do not accept in this case as this is a matter to be decided under the *Act*, the provision relied upon applies only to promotion, tenure, reappointment, appointment without term or continuing appointment and then only for letters of reference that are requested from persons outside Dalhousie University. Neither reference is applicable in this case where it is for an honour or award and the record has been provided from a specified person internal to the University.
7. The University had the discretion under s. 19C to release or refuse to release the Dean’s letter – the record in issue - that was evaluative or opinion material compiled solely for the purpose of determining the applicant’s suitability for receipt of an honour or award if the information is provided explicitly or implicitly in confidence.
8. The University exercised its statutory discretion to refuse the record and met the onus of specifying how it exercised that discretion.
9. There is no evidence that the University exercised that discretion in error.

RECOMMENDATIONS:

1. The University may consider ways in which it can make its policy for Professorships clearer with respect to two issues; confidentiality and the statutory discretion to withhold a record. This may be accomplished in a number of ways, including by making specific reference to s. 19C in the policy; and
2. The University reaffirm its original decision to the Applicant in writing with a copy provided to the Review Office.

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia