

**ALBERTA**

**OFFICE OF THE INFORMATION AND PRIVACY  
COMMISSIONER**

**ORDER F2020-33**

November 2, 2020

**CALGARY BOARD OF EDUCATION**

Case File Number 004911

**Office URL:** [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** An individual was an employee of the Calgary Board of Education (the Public Body) when he made a correction request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). He requested that particular information in his Employee Health Resources file be removed.

The Public Body refused to correct the information, stating that it consisted of opinions. The Public Body annotated the Applicant's file.

The Applicant requested a review of the Public Body's response and subsequently an inquiry.

The Adjudicator determined that the information the Applicant requested be corrected consisted primarily of statements made by third parties. Such statements can be corrected only if they were inaccurately recorded. The Applicant had argued that the statements and facts underlying the statements were not true. The Adjudicator found that the statements needn't be true to have been accurately recorded. The Adjudicator found that the Public Body properly refused to correct the information.

**Statutes Cited:** **AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 36, 72

**Authorities Cited: AB:** Order 97-020, F2007-018, F2013-04, F2017-40, F2017-37, F2018-78

**Cases Cited:** *Alane Davis v. Alberta (Information and Privacy Commissioner) Jill Clayton*, Alberta Court of Queen’s Bench oral decision, February 28, 2018 (Court File Number 17090095)

## **I. BACKGROUND**

[para 1] An individual was an employee of the Calgary Board of Education (the Public Body) when he made a correction request to the Public Body under the *Freedom of Information and Protection of Privacy Act* (FOIP Act). He requested that particular information in his Employee Health Resources file be removed. In this request, the Applicant argued that the information is inaccurate and defamatory. The Applicant specified five items of information he identified as inaccurate. (In his correction request and correspondence with this Office, the Applicant states he requested correction to four items of information but one identified item has two distinct elements.)

[para 2] The information subject to the correction request is all contained in progress notes written by a nurse employed by the Public Body’s Employee Health Resources Centre (EHRC).

[para 3] The Public Body refused to correct the information, stating that it consisted of opinions. The Public Body annotated the Applicant’s file pursuant to the requirement in section 36(3) of the Act.

[para 4] The Applicant requested a review of the Public Body’s decision, and subsequently an inquiry.

## **II. ISSUES**

[para 5] The Notice of Inquiry dated March 11, 2020, lists the issue as follows:

Did the Public Body respond properly to the Applicant’s request for correction of his/her personal information made under section 36 of the Act (right to request correction of personal information)?

## **III. DISCUSSION OF ISSUES**

### **Preliminary issue – scope of inquiry**

[para 6] In his request for inquiry, the Applicant raised several concerns about what information was collected by the Public Body, and the purpose for that collection. The Applicant also raised several concerns about the professional conduct of Public Body employees. I have jurisdiction to consider the conduct of public body employees only insofar as the conduct relates to a duty under the FOIP Act. Allegations relating to the

propriety of the Public Body's return-to-work process does not fall within my jurisdiction.

[para 7] Additional issues relating to the Public Body's duties under the FOIP Act, such as the authority to collect the Applicant's personal information, are not part of this inquiry. This inquiry only deals with the Public Body's response to the Applicant's request for correction, as identified in his request for review. If the Applicant wishes to make a complaint about the Public Body's collection, use or disclosure of his personal information by the Public Body he may do so.

[para 8] To the extent that the Applicant's submissions relate to this issue, will consider them in this inquiry. Arguments that relate to issues other than this will not be considered.

**Did the Public Body respond properly to the Applicant's request for correction of his personal information (as contained in the doctor's report) under section 36 of the Act (right to request correction of personal information)?**

[para 9] Section 36 of the Act states:

*36(1) An individual who believes there is an error or omission in the individual's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.*

*(2) Despite subsection (1), the head of a public body must not correct an opinion, including a professional or expert opinion.*

*(3) If no correction is made in response to a request under subsection (1), or if because of subsection (2) no correction may be made, the head of the public body must annotate or link the personal information with that part of the requested correction that is relevant and material to the record in question.*

*(4) On correcting, annotating or linking personal information under this section, the head of the public body must notify any other public body or any third party to whom that information has been disclosed during the one year before the correction was requested that a correction, annotation or linkage has been made.*

*(5) Despite subsection (4), the head of a public body may dispense with notifying any other public body or third party that a correction, annotation or linkage has been made if*

*(a) in the opinion of the head of the public body, the correction, annotation or linkage is not material, and*

*(b) the individual who requested the correction is advised and agrees in writing that notification is not necessary.*

*(6) On being notified under subsection (4) of a correction, annotation or linkage of personal information, a public body must make the correction, annotation or linkage on any record of that information in its custody or under its control.*

*(7) Within 30 days after the request under subsection (1) is received, the head of the public body must give written notice to the individual that*

*(a) the correction has been made, or*

*(b) an annotation or linkage has been made pursuant to subsection (3).*

*(8) Section 14 applies to the period set out in subsection (7).*

[para 10] The initial burden of proof lies with the Applicant to show that section 36 of the Act is engaged. Two requirements must be met in order for section 36 of the Act to apply:

1. There must be personal information about an applicant; and
2. There must be an error or omission in the applicant's personal information.

[para 11] If these two pre-requisites are met, the burden then shifts to the public body to show why it did not correct the information and instead chose to annotate or link the personal information to the requested correction (see Order F2013-04 at para 14).

[para 12] In Order F2018-78 I considered past precedence defining "opinion" for the purposes of section 36(2) of the Act (at para. 37):

Section 36(2) of the Act states that a public body cannot correct an opinion, including a professional or expert opinion. "Professional" means a belief or assessment based on grounds short of proof, a view held as probable (Order H2004-004). "Observation" means a comment based on something one has seen, heard, or noticed, and the action or process of closely observing or monitoring (Order H2004-004). Although these precedents relate to Orders under the *Health Information Act*, I find them to be applicable under the FOIP Act. They are also consistent with Orders F2013-04 and F2017-37, which found that information having a subjective or evaluative component may be an opinion and not subject to correction under section 36 of the FOIP Act.

[para 13] The Applicant identified five items of information he believes contain inaccurate information. These items of information occur in five progress note entries written by two nurses – J and C – employed in the Public Body's EHRC. The Public Body has described the records as follows (initial submission at para. 17):

The Records at Issue are comprised of case/clinic progress notes entered into a human management system used by CBE, Medgate, by two different registered nurses employed by CBE's Employee Human Resource Center (EHRC), and tasked with assessing the Applicant's request for and progress in the course of a medical leave, including the Applicant's return to work plan. Much of the notations made in this system are comprised of clinical or interview-based observations, and professional assessments of the health and work readiness of CBE employees.

[para 14] The information at issue all appears to have been taken during, or as a result of, meetings with Public Body employees about the Applicant.

[para 15] All five items of information consist of statements made about the Applicant by other individuals. Four items of information consist of statements made to the author (J or C) by other Public Body employees about the Applicant:

- J recorded a statement made by C. C's statement was that it had been reported that the Applicant had been building a fence and that there were pictures.
- J recorded that they met with two other Public Body employees about the Applicant. J recorded statements made by these other employees about the Applicant's medication requirements and his relationships at work.
- C recorded that they received a call, presumably from someone working at the school the Applicant worked at. C recorded that "the school [is] concerned with [the Applicant's] health."
- J recorded that C called Public Body employees about the Applicant. The note records several statements made by P (a Public Body employee): that the Applicant had spoken disrespectfully about particular staff; that P felt threatened by the Applicant; and that P had made a report to the Alberta Teachers' Association about feeling threatened by a colleague.

[para 16] One item of information consists of a statement made by C in a call about the Applicant. J made the record of the call, stating that C called an employee with the Alberta School Employee Benefit Plan (who was involved in the Applicant's return to work) about the Applicant and that C expressed concern regarding the Applicant's health.

[para 17] The Public Body cites Order F2017-40, arguing that accurately recorded statements made by third parties cannot be corrected. Order F2017-40 follows Order F2007-018, which states (at paras. 29-30):

In Order 97-020 (at para. 127), the former Commissioner provided the following explanation for not correcting a third party statement:

That reason involves maintaining the integrity of the record in certain situations, such as investigations in which a third party's statements have been recorded. In investigations, there is a need to record statements accurately, in order later to make a decision relating to what was said, and to understand the basis on which a decision was made. Accordingly, a third party's statement of fact cannot be corrected, even if that statement of fact is in error. The statement does not appear for the truth of it; it appears for the fact that it is what was said, truthful or not.

If information is a record of a statement by a third party about an individual, it cannot be concluded that the information is inaccurate unless there is evidence that the third party's statement was not accurately recorded (Order 97-020 at para. 128; Order F2003-019 at para. 37). This is so whether the third party statement is a fact or an opinion (Order 97-020 at para. 133), and whether a recorded statement is right or wrong (Order 97-020 at paras. 122 and 127; Order 2000-001 at para. 16).

[para 18] Order F2017-40, following Orders F2007-018 and 97-020, was upheld on judicial review (*Alane Davis v. Alberta (Information and Privacy Commissioner) Jill Clayton*, Alberta Court of Queen's Bench oral decision, February 28, 2018 (Court File Number 17090095)).

[para 19] The Applicant has provided, for each first four items of information, reasons why the statements made by the third parties (the other Public Body employees) to J and C were inaccurate. The Applicant argues that the information recorded by J and C are "lies" and therefore cannot be opinions. However, following the precedent cited above, the statements cannot be corrected unless they were inaccurately *recorded*.

[para 20] It is not clear that the Applicant believes any of the statements made by third parties to J or C were inaccurately recorded. Regarding the first item of information, stating that the Applicant had been reported building a fence, the Applicant argues that the allegation is untrue. I have no reason to doubt the Applicant's statement that he did not build a fence. However, the question here is not whether it is true that the Applicant *had* built a fence or had been seen building a fence. Rather, the question is whether it is true that someone *reported* that the Applicant had built a fence. I have no reason to expect that this statement was not made to C or J or that it was inaccurately recorded.

[para 21] The same is true regarding the existence of pictures. The issue here is *not* whether pictures exist; it is about whether the statement made by C, that she was told there were pictures, was accurately recorded. C may have been told that there are pictures of the Applicant building a fence, in which case that statement was accurately recorded, even if no pictures exist in fact. Nothing before me indicates that the statement was inaccurately recorded.

[para 22] Regarding the second and fourth items of information, the statements were recorded as being made by a Public Body employee, P. The Applicant states that P was investigated for unprofessional conduct in relation to some of these comments. The Applicant states that evidence of unprofessional comments was found and documented. This indicates that the Applicant is aware that these statements were in fact made to J and/or C; in other words, that the statements were accurately recorded (even if the statements themselves were not factually accurate).

[para 23] Regarding the third item of information, that "the school" is concerned with the Applicant's health, the Applicant argues that that "[t]he 'school' has never been and in fact is not able to be concerned about ones health and should be removed as such" (attachment to request for review, at page 2). The Applicant also argues that the inclusion of comments of concern indicate that there is an issue to be concerned about. The Applicant argues that is factually incorrect.

[para 24] The record does not indicate which employee at the school expressed concern about the Applicant's health. Other than doubting the sincerity of such a statement it is not clear why the Applicant believes no such statement was made. While the Applicant might have good reason to doubt the sincerity of the concern expressed,

this is not sufficient for me to find that the statement was not made or that it was recorded in error.

[para 25] The last item of information is the record of C expressing concern about the Applicant's health to a third party. The Applicant argues that C has not demonstrated any reason to be concerned about his health. He states that neither C nor J have provided him any health services, nor do they have reason to have access to his medical information. The Applicant further argues that C and J subsequently placed him in an unsafe work environment without appropriate accommodations, undermining any concern they might have had for his health.

[para 26] The Applicant's assertions that neither C nor J would express concern about his health is partly based on the fact that they have limited access to his health information. However, C and J were both involved in his return to work following a medical leave. The Applicant's health was directly related to their work with him, regardless of how much medical/health information they had access to. The statement that C expressed concern over the Applicant's health may indicate that C expressed doubts about his ability to return to work.

[para 27] The Applicant's assertions that this statement is inaccurate are also partly based on his doubts as to C and/or J's actual concern for him, given their actions in the return-to-work process. While the Applicant might have good reason to doubt the sincerity of any concern expressed, this is not sufficient for me to find that the statement was not made or that it was recorded in error. C need not have felt concern for Applicant and yet may have made the statement.

[para 28] It is also my view that whether the statements were in fact made by C or any of the other individuals, and accurately recorded, are facts that cannot be ascertained through this inquiry process. Past orders have found that it is appropriate to refuse to correct information where a factual determination cannot be made. Order F2013-04 follows Order F2005-008 on this point (at para. 25):

As cited by the Public Body, it is not sufficient, for the purpose of section 36(1), to allege that information is wrong or missing, without establishing the correct or complete facts or the true version of events (Order F2007-018 at para. 63). It notes that a public body exercises its discretion properly if it does not correct a disputed fact, provided that it has acted in good faith (Order 97-020 at para. 123). It further notes that there is reason to refuse a correction request in circumstances where it is not possible to make a factual determination about the matter through the inquiry process (Order F2005-008 at para. 52). I find that this is one of those cases.

[para 29] My finding with respect to all of the five statements the Applicant has objected to, is that there is insufficient information for me to find that any of them were inaccurately recorded. Again, whether any of the statements are 'true' is not the issue before me, only whether they were accurately recorded.

[para 30] Where a Public Body does not correct the personal information as requested, it must annotate the personal information with the requested correction (section 36(3)). By letter dated November 29, 2016, provided to me by both the Public Body and the Applicant, the Public Body confirmed to the Applicant that it had performed this annotation. It also explained to the Applicant that “the only access to your Medgate record would be an EHRC Health Advisor who is assigned to your file. Every time these notes are accessed, your written submission will be evident as it is linked to the information for which a correction was sought” (Appendix II, Part A of the Public Body’s initial submission).

[para 31] The Applicant argues that it is insufficient to annotate these statements; he argues that they are so injurious to his reputation (as well as being inaccurate) that their continued inclusion has a negative effect, even with an annotation.

[para 32] The Applicant argues that anyone viewing the information would take it as fact. He states (attachment to request for inquiry, at page 3):

A nurse of the Health Resource Centre stating that there are photos and a report of me building a fence does not leave any room for any doubt of whether or not these inclusions are fact or opinion. There was a report of photos or there wasn't, this doesn't leave any room for interpretation. (As noted, these statements have no bearing of truth and can be proven otherwise as per documentation provided).

[para 33] Whether a reader would mistake the recording of third party statements as verified facts does not change the actual character of the information. The information the Applicant seeks to be corrected is not recorded as a true fact; it is recorded as what was said to the author.

[para 34] I understand that the Applicant objects to statements remaining on the Public Body’s file that he believes are falsifications designed to prevent his successful return to work. Unsubstantiated statements made about individuals do not become substantiated facts by virtue of their retention in the files. While I understand that it must be frustrating for the Applicant, the FOIP Act does not prohibit the retention of this information.

[para 35] Further, as stated in Order F2017-37, correcting official public body documents by removing or altering information – even inaccurate information – may destroy the integrity of public body documents. The adjudicator said (at paras. 20-21):

As I noted in Order F2016-34, I agree with the reasoning in Order 01-23 that correcting personal information by obliterating information deemed incorrect in an original document is not the only means by which personal information may be corrected. In addition, I agree that correcting information by replacing incorrect information with correct information in a document is a step that should be taken only rarely, (such as in the case where information is inaccurately entered into a database with the result that an individual is, for example, incorrectly billed or refunded as a result) as doing so may destroy the integrity of the original record. An original record, even one containing inaccurate information, may be an important part of the history of a matter for which the document was prepared. If inaccurate information is destroyed and not preserved, then a

significant part of the history of a matter could also be destroyed. If the matter in question is a legal matter, then the public body's action of altering information in an original document, even for the purpose of correcting it, may have adverse legal consequences for a public body or for others.

From my review of the foregoing cases and the terms of section 36, I interpret section 36 as giving an individual some control over the personal information about the individual in the custody or control of government institutions. While this provision does not permit an individual to dictate what may be said or written about the individual, or to require the deletion of information the individual considers inaccurate or misleading, it does permit the individual to provide the individual's own views of information by requiring a public body to link or annotate correction requests to the records.

[para 36] I agree with this reasoning; there are many factors to consider when determining how to address a requested correction. Deleting or significantly altering records may not be the preferred approach in certain circumstances and ought to be done in clear cases, such as the examples provided in the excerpt above. This is not such a case.

[para 37] Here, the Applicant has mentioned that several Public Body employees involved in his file were disciplined for their actions. If this is the case, and the information in the Applicant's files were used in taking disciplinary measures, the Public Body may have a legal requirement to maintain the information in the files.

[para 38] The Applicant hasn't disputed that the Public Body performed the annotation as required by the Act.

[para 39] I am satisfied that the Public Body met its duty under section 36 of the Act.

## **V. ORDER**

[para 40] I make this Order under section 72 of the Act.

[para 41] I find that the Public Body fulfilled its duty under section 36 of the Act.

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Amanda Swanek  
Adjudicator