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Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Final Report

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Summary

[1] The Applicant is a GN employee who was unsuccessful in a job competition. They applied to see their reference checks. The reference checks were almost entirely redacted. The Commissioner finds that the department properly applied the exemption in s 22, but recommends the department revisit the case and correctly apply its discretion. The Commissioner also recommends the department consider whether its policy on disclosure of reference checks is in keeping with Inuit societal values.

Nature of Review and Jurisdiction

[2] This is an access review under s 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA).

[3] The Commissioner has jurisdiction over the Department of Human Resources: ATIPPA, s 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Were the three pre-conditions in s 22 met in this case?
b. Did the department properly exercise its discretion under s 22?

Facts

[5] The Applicant is a GN employee who applied for a different position within the same department. There were technically two different job competitions, but they were for two positions with the same title, so I will refer to it as one competition. The new position would have been a promotion for the Applicant.

[6] Two people who had previously supervised the Applicant were asked to give references for the Applicant. To be precise, they were interviewed individually over the telephone by a member of the hiring committee. The interviewer read aloud the standard reference-check script, and wrote down the referees' answers to the questions in the script.

[7] After the first question, the standard form says:

> *The remaining questions are more evaluative or opinion based, as a result the information provided may be held in confidence at the discretion of the Deputy Head of Human Resources if requested through Access to Information and Protection of Privacy Act (ATIPP).*
>
> *Would you prefer to have this information to be exempt upon receipt of an ATIPP request?*

[8] There are then two check-boxes, one for "Yes" and one for "No". For both of the Applicant's referees, there is an X in the "Yes" box.

[9] The standard form then has the following instruction printed in red ink:

> *<u>Information for HR rep/Committee member only:</u> If the referee answers yes, the completed Reference Check form*

must be placed in a sealed envelope and clearly marked as "ATIPP s. 22 exempt and placed in the competition file. It may be subject to ATIPP if requested and approved by the Deputy Head of Human Resources. Consultation with the Director, Staffing is required upon receipt of an ATIPP request.

[10] The Applicant was eventually informed they were not the successful candidate. When they asked why, they were told their references were not good.

[11] The Applicant then asked to see their references, and was told they could apply for them under the ATIPPA. They applied under the ATIPPA. The references were disclosed, but they were almost entirely redacted.

[12] The Applicant knows who was interviewed, and knows the questions they were asked. The Applicant does not know the referees' answers, other than their answers to the first question, which asks for the facts about the referee's working relationship (where, when, in what capacity) with the Applicant.

[13] The Applicant then applied to the Information and Privacy Commissioner for review of the redactions.

Law

[14] The definition of "personal information" in the ATIPPA, s 2, clause (h), says that "anybody else's opinions about the individual" are the personal information of the individual. In other words, opinions about a person are not the personal information of the person who holds the opinion.

[15] 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.

[16] It should be noted that the three clauses in s 22 are joined by the word "and" after clause (b). That means that all three conditions of s 22 must be met before it can be used to withhold information: see *Department of Human Resources (Re),* 2021 NUIPC 4 (CanLII) at paragraph 37; *Review Report 02-03 (Re),* 2002 NUIPC 1 (CanLII).

[17] Prior to 2017, s 22 was worded differently:

> *The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant's suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits when the information has been provided to the public body, explicitly or implicitly, in confidence.*

[18] In my view, there is no substantive difference between the two versions of s 22. It appears that the Legislative Assembly, while amending the ATIPPA in 2017 to deal with other human-resources matters, used the occasion to clarify the grammatical structure of s 22. There is no suggestion in Hansard that a difference in meaning was intended. Moreover, the 'new" s 22 looks almost identical to the way the "old" s 22 was being interpreted, both in Nunavut and in Alberta: see, for example, *Review Report 17-121 (Re),* 2017 NUIPC 8 (CanLII), and *Alberta Health (Re),* 2015 CanLII 57422 (AB OIPC) at paragraphs 5 and 6.

[19] For that reason, I conclude that the older Nunavut cases, as well as cases from other Canadian jurisdictions with similar wording, are still applicable

to the interpretation of s 22. I will have more to say about the interpretation of s 22 in the Analysis section below.

Analysis

[20] When a GN employee is unsuccessful in a job competition, naturally they want to know why. That is especially true if they are told a reference was bad. But how much information are they legally entitled to see?

[21] This case turns on the interpretation of s 22 of the ATIPPA. Section 22 does not use the words "reference checks", but that is essentially what it is about.

[22] Most of the cases on s 22 are straightforward. The section has three conditions. It is a question of fact whether the conditions have been met in a given case: see, for example, *Northwest Territories (Justice) (Re),* 2004 CanLII 66383 (NWT IPC); *Review Report 02-03 (Re),* 2002 NUIPC 1 (CanLII); *Alberta Health (Re),* 2015 CanLII 57422 (AB OIPC); *Alberta Health (Re),* 2014 CanLII 23961 (AB OIPC).

[23] But then there were two Nunavut review reports in 2017, written by the former Commissioner, which took a different view. It is useful to consider those decisions, and the public bodies' response to them, in some detail.

Review Report 17-121

[24] In *Review Report 17-121 (Re),* 2017 NUIPC 8 (CanLII), the Applicant was an unsuccessful candidate for a position with the Nunavut Housing Corporation. They made an ATIPP application for records related to the competition, including the reference checks. The NHC denied access to all documents.

[25] The Commissioner reviewed the form used for the referee interviews, which was different from the form used in the present case. She concluded that much of the information in the form should be released. She did find, however, that the names of the interviewees were "personal information", and need not be released.

[26] Both referees indicated that they understood their answers might be subject to release if there were an ATIPP application and agreed to continue. The Commissioner found there was no expectation of confidentiality, so s 22 did not apply. But some of the answers would tend to reveal the referee's identity, and those could be redacted under s 23 (unreasonable invasion of personal privacy).

[27] The NHC did not accept the Commissioner's recommendations, which is was entitled to do under s 36 of the ATIPPA. The NHC's response to Review Report 17-121 may be viewed on this office's website: www.atipp-nu.ca.

Review Report 17-124

[28] About five weeks later, the Commissioner issued a Review Report that dealt more extensively with the interpretation of s 22*: Review Report 17-124 (Re),* 2017 NUIPC 11 (CanLII).

[29] The Applicant was another unsuccessful applicant for a position within the GN. When they asked for details, they were told one of the references was unfavourable. When they applied under the ATIPPA to see their references, they were told the references were being withheld under s 22.

[30] The Commissioner looked at the redacted documents, and wrote "I am satisfied that the information in question meets all of the criteria for an exception under section 22." Despite this finding, the Commissioner went on to explain why, in her view, the department's withholding of information was legally wrong.

[31] Two things were clear, wrote the Commissioner:

> *1. There cannot be a blanket policy which directs that evaluative information collected on an employment reference check will never be disclosed to an Applicant where there has been a request for confidentiality.*

2. To the extent that the policy is to advise referees that they may "choose" confidentiality that advice is contrary to the provisions of the Access to Information and Protection of Privacy Act.

[32] The Commissioner found that the GN's position was "one sided and frankly illogical". If the objective was to obtain high-quality references, granting confidentiality to referees was not likely to achieve that objective. A supervisor might, under the cloak of confidentiality, say careless or inaccurate or biased things, knowing that they would not be found out. This was especially the case because of the GN policy that previous supervisors had to be consulted for a reference check. Supervisors were generally in a position of power compared to those for whom they were giving references. If there was concern in a particular case that justified protecting the supervisor, that could be done under s 23, which is concerned with unreasonable invasions of personal privacy.

[33] The Commissioner concluded "The way in which the Human Resources division interprets section 22 is, simply, wrong." The department, in its discretion, could consider that the referee wanted confidentiality, but that was only one relevant factor. It should be only in "very unusual circumstances" that a job applicant should be refused access to the opinions expressed about them in a reference check. An opinion about them was, after all, the Applicant's own "personal information".

[34] The Commissioner recommended that the Department of Human Resources review its policy on reference checks to reflect a correct understanding of the law, and that the department reconsider the exercise of discretion in the Applicant's case.

The minister's response to Review Report 17-124

[35] Section 36 of the ATIPPA gives the last word to the head of the public body to which the ATIPP application has been made. For a department, that is the minister. The minister has 30 days to respond to a Review

Report, and may accept the recommendations, or make any other decision the minister considers appropriate.

[36] Often the minister's response to a Review Report is a brief acknowledgement of the Commissioner's recommendations, and a commitment to act on them. That did not happen in the case of Review Report 17-124. The response of the Minister of Finance was a detailed rejection of the Commissioner's analysis and recommendations. The minister's response can, like all ministerial responses, be found on this office's website: www.atipp-nu.ca.

[37] The minister's response to Review Report 17-124 was more consequential than the NHC's response to Review Report 17-121, because the Minister of Finance was, at the time, responsible for the corporate human resources for the GN. He was, in essence, speaking for the entire GN.

[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."

[41] The minister also declined to revisit the department's response to the Applicant in that specific case.

[42] In the end, the minister rejected all the recommendations in Review Report 17-124.

[43] I am therefore left in an uncomfortable position: I have a Review Report from the former Commissioner firmly stating that the GN was wrongly interpreting s 22, and a response from the minister in charge of GN human resources firmly stating that the GN's interpretation was right and would not change. Legally, of course, the minister's view prevails: ATIPPA, s 36. But it is not good for the ATIPP system when the Commissioner and the GN are so out-of-sync on an issue as common and important as the disclosure of reference checks.

[44] Since Review Report 17-124 was issued, there have been no more Review Reports interpreting s 22. Section 22 was later amended, but the amendment was, as I have already noted, more grammatical than substantive. It appears that the reference check form was also amended, because the form's wording in the present case is different than the form in Review Report 17-124. In my view, however, the new wording is substantively the same as the old wording.

[45] I turn now to an examination of how s 22 applies to the present case.

Were the three pre-conditions of s 22 met?

[46] The easiest part of this decision is my finding that the three pre-conditions of s 22 are met in this case. The reference checks are mostly the referees' evaluation of, and opinions about, the Applicant. The information was compiled solely for purposes of the job competition. And when the referees were asked if they would prefer confidentiality, they said yes. (That's not exactly what they were asked, but we will get to that later.)

[47] But the three pre-conditions are not the whole of s 22. There is also a residual discretion implied in the word "may" in the first line. If the

Legislative Assembly had intended the exemption to be automatic, it would have used the word "shall". The word "may" means that the public body can release the information even if the three pre-conditions are met.

[48] But did the department properly exercise its discretion?

The exercise of discretion

[49] Like the previous Commissioner in Review Report 17-124, I find in this case that the department has failed to correctly exercise its discretion, but I make that finding for reasons differing from Review Report 17-124.

[50] In *Department of Health (Re),* 2021 NUIPC 12, at paragraphs 14-24, I considered in detail the issue of discretion. I will not repeat that analysis here, except to repeat that most of the exemptions in the ATIPPA are permissive, meaning that the information may be disclosed even if the factual conditions for withholding are met. Section 22 is one of those permissive exemptions.

[51] I see no indication, on the record before me, that the public body has turned its mind to the question of discretionary release. The department has moved directly from the referees' expressed desire for non-disclosure to a conclusion that the references will not be disclosed. There should be an intermediate step, but in this case the intermediate step is missing.

[52] The form or script followed by the reference-check interviewer uses language that helps to demonstrate why the intermediate step is missing.

[53] The relevant parts of the script have been quoted above. After the first question, the referee is told:

> *The remaining questions are more evaluative or opinion based, as a result the information provided may be held in confidence at the discretion of the Deputy Head of Human Resources if requested through Access to Information and Protection of Privacy Act (ATIPP).*

[54] So far, so good. The scriptwriter is clearly thinking of s 22, where the words "evaluative or opinion" occur. The referee is told the information "may" be held in confidence, with the implication that it also may not, and that the decision is "at the discretion" of the deputy head (i.e. the deputy minister) of Human Resources. If the script stopped there, there would be no problem. But it does not stop there.

[55] The script then asks the referee "Would you prefer to have this information to be exempt upon receipt of an ATIPP request?" This is problematic. The question of whether something is "exempt" under the ATIPPA is a legal question. Answering it requires knowledge of the ATIPPA, principles of interpretation, and precedents. A referee is typically in no position to offer an opinion on whether something is, or ought to be, exempt under the ATIPPA.

[56] The question on which the referee's view is relevant – and what I believe the scriptwriter really intended to ask – is whether the referee is providing the reference with the expectation (or hope or wish) of confidentiality. The answer to that question will help the department decide if the factual pre-condition in s 22(c) has been met. It is a good question to ask a referee because it avoids the kind of disputes that can occur when a referee's expectation is unstated. There is nothing wrong with asking the question about confidentiality provided it is properly phrased. The question in the script is not properly phrased.

[57] (The Applicant has also raised with me the issue that the words "exempt" or "exemption" are difficult words, especially for those who do not have English as a first language, and may be misunderstood by referees. The Applicant told me, and I have no reason to doubt, that one of the referees is an Inuktut first-language speaker. I do not want to dwell on questions of wordsmithing, but I agree the English words "exempt" and "exemption" are difficult words. They do not appear in the ATIPPA, other than the word "exempting" being buried in s 73(h), which is about something entirely different. Such difficult words might well be misunderstood, and a referee

might say “yes” when they really mean “no”, or vice versa. The Department of Human Resources may wish to take this into account if, as I recommend, the script is revised.)

[58] The script then has the following instruction printed in red ink:

> *<u>Information for HR rep/Committee member only:</u> If the referee answers yes, the completed Reference Check form must be placed in a sealed envelope and clearly marked as “ATIPP s. 22 exempt [“] and placed in the competition file. It may be subject to ATIPP if requested and approved by the Deputy Head of Human Resources. Consultation with the Director, Staffing is required upon receipt of an ATIPP request.*

[59] This instruction is not read to the referee. The language in the instruction is also problematic, for several reasons.

[60] First: if the referee answers “yes”, the reference form is placed in an envelope marked “ATIPP s. 22 exempt”. But the document is not yet exempt; that is a conclusion that can only be reached later. At most, the referee has expressed a wish. It would be better if the envelope said “ATIPP s 22 exemption requested” or something similar.

[61] Second: the phrase “subject to ATIPP if requested” is jargon. What it really means is “may be disclosed to the job applicant if requested under ATIPP”. Moreover, the whole sentence is grammatically messy. I am an English first-language speaker with a law degree, and I had to reread the sentence several times to be sure I understood it.

[62] Third: The respective roles of the Deputy Head of Human Resources and the Director of Staffing are unclear, and in any event the interviewer would not likely be involved in the department’s response to an ATIPP request. It appears that the deputy head may exercise discretion to release the information, though it is not said so simply. If only the deputy head can exercise discretion, what is the role of the Director of Staffing? Nothing is clear.

[63] In summary: The interview script appears to allow for the possibility of discretionary release, although it is wrapped in unnecessarily difficult and ambiguous language.

[64] This confusion in the language of the script can be traced back to the wording of Directive 511 (Reference Checks) in the GN Human Resources Manual. The portion of Directive 511 dealing with the ATIPPA reads as follows:

> *17. The representative completing the reference checks must inform a referee that the fact based information given about the candidate is subject to the Access to Information and Protection of Privacy Act (ATIPP) and may be viewed by the candidate. However, information that is evaluative or opinion based may be withheld at the referee's request.*
>
> *18. When requested by the referee, any evaluative or opinion information which is collected concerning a candidate from a referee in confidence must be marked as "ATIPP s.22 exempt" and kept in a sealed envelope clearly marked "Confidential pursuant to ATIPP" for inclusion on the competition file.*

[65] This procedure is not consistent with the ATIPPA. For that matter, it is not consistent with the reference-checking script. There is nothing here about the exercise of discretion, or the role of the deputy minister, or the role of the Director of Staffing. The clear implication is that if a referee requests confidentiality, then the reference check is "exempt" and "confidential".

[66] In any event, I find as a fact that the department in this case did not turn its mind to discretionary release; or if it did, it treated the referees' request for confidentiality to be conclusive.

[67] There is no indication, anywhere in the record before me, that either the deputy minister of Human Resources or the Director of Staffing were consulted after the ATIPP request was received. Neither is there any

indication that discretionary release was considered by anyone, or if it was, why the discretion was exercised to refuse disclosure.

[68] The onus of proof in an access case is on the department: ATIPPA, s 33(1). In other words, it is the department's responsibility to build the evidentiary record on which I can make the findings on which my recommendations are based. If there is nothing in the record on a key point, I am unable to make a finding in the department's favour.

[69] The written "exemption rationale" is brief. In its entirety, it says:

> *The information provided is from a third-party who choose to provide their evaluative and/or opinion for the solely purpose of determining the applicant's suitability, eligibility, or qualification for employment —as a reference— in a confidential manner.*

It is evident that this rationale speaks only to the three pre-conditions in s 22, and not at all to the question of discretion.

[70] Perhaps the department could argue that it is choosing to exercise its discretion by always respecting the express desire of the referees that their comments be kept confidential. That is what I understand the then-Minister of Finance, in his response to Review Report 17-124, to be arguing.

[71] If that were the department's position in this case, it would also be an error. A statutory discretion cannot be limited by a rule that is narrower than the statute itself. To do so is to "fetter discretion", and fettering discretion is contrary to law.

[72] If the Legislative Assembly intended a referee's wishes to prevail, it could easily have written s 22 differently. Indeed the Legislative Assembly amended s 22 in 2017, and could have re-written it then to direct that a reference check be withheld when a referee asks for it to be withheld. The Legislative Assembly did not do so. The discretion is still there, and the

department cannot, in effect, rewrite s 22 by administrative procedure, policy or script.

[73] I should not be taken as endorsing all of the reasoning in Review Report 17-124. It is not my view, for example, that s 22 requires that reference checks should almost always be disclosed, or that the names of referees should be withheld as "personal information", or that referees could if necessary be protected through the application of s 23.

[74] If the three pre-conditions in s 22 are met, then the department may withhold the reference checks provided it 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, I do not believe I can or should second-guess the way the discretion is exercised.

[75] In this case, I find that the three pre-conditions in s 22 are met. I also find that the department has failed to exercise its discretion at all, or has fettered its discretion by applying a rule that is unsupported by the legislation.

Inuit Qaujimajatuqangit

[76] Although I have found that redacting the reference checks is in keeping with s 22, apart from the failure to exercise discretion or the fettering of discretion, the result leaves me uneasy. I believe this same sense of unease lies behind the former Commissioner's Review Report 17-124. Our unease led us in different legal directions, but I share her concern that the result does not seem fair to the Applicant.

[77] I worry that the outcome in this case is not in keeping with Inuit Qaujimajatuqangit, a phrase often translated as "Inuit traditional knowledge" or "what Inuit have always known to be true". I am in no position to speak definitively about Inuit Qaujimajatunqangit, much less to make findings about it that could guide me towards an answer in this case. But from what I know of it, it has something important to tell us.

[78] In a recent criminal case from the Nunavut Court of Appeal, *R v Itturiligaq*, 2020 NUCA 6 (CanLII), the court found that "without any evidentiary record" and "in light of the paucity of evidence as to how, when and in what circumstances Inuit Qaujimajatuqangit might have weighed in" on the relevant circumstances, it was an error for the trial judge to apply his conception of Inuit Qaujimajatuqangit to sentencing. That appears to be the only reported decision in which Inuit Qaujimajatuqangit has been considered by the Court of Appeal.

[79] In the present case, I have no evidence about Inuit Qaujimajatuqangit before me. I take heed of the Court of Appeal's warning in *Itturiligaq* not to overreach. I hope in future cases to develop the evidentiary record from which we might be able to learn how Inuit Qaujimajatuqangit can help in the exercise of interpreting and applying the ATIPPA. That will require the active participation of public bodies individually, and the GN more generally through the Department of Executive and Intergovernmental Affairs, which has overall responsibility for the administration of the ATIPPA.

Inuit Piqqusingginnik

[80] Inuit Piqqusingginnik (Inuit societal values) is another concept with possible application to this case. Inuit societal values overlap with Inuit Qaujimajatuqangit but they are not the same.

[81] The as-yet unproclaimed *Legislation Act*, SNu 2020, c 15, requires every bill and every proposed regulation (with few exceptions) to be accompanied by a statement of how the bill or regulation reflects Inuit societal values: see s 46(2) and s 54(1). That will be of assistance in the interpretation of future statutes and regulations, but it does not help in the interpretation of existing laws like the ATIPPA.

[82] The current Legislative Assembly of Nunavut has adopted a vision document, called Turaaqtavut, to guide its work until the next territorial election. Prominently featured in Turaaqtavut as "guiding principles" are

eight Inuit societal values. A poster featuring these eight values is prominently featured in many GN offices. Those same "core principles" (though written as nine, rather than eight) are also incorporated into the GN Human Resources Manual, in Section 101.

[83] The reference-check policy in the GN Human Resources Manual (Directive 511) has a statement about its relationship to the core values:

> *3. This directive is guided by the following values:*
>
> - *Aajiiqatigiingniq - decision making through discussion and consensus: The reference checking process allows the Selection Committee to discuss and gather information from referees about candidate's suitability for the position being staffed; and*
> - *Havaqatigiingniq/Ikajuqtigiingniq - working together for a common cause: The reference checking process allows the Selection Committee, referees and candidates to collaboratively work together to ensure the GN finds the most suitable candidate for the position.*

[84] In addition to the two Inuit societal values specifically identified in Directive 511, the following values from Turaaqtavut might also apply to the way that job competitions are handled within the GN:

- Inuuqatigiitsiarniq – Respecting others, relationships and caring for people.
- Pillimmaksarniq/Pijariuqsarniq – Development of skills through observation, mentoring, practice, and effort.

[85] Moreover, Article 23 of the Nunavut Land Claims Agreement binds the GN to achieving representative levels of Inuit employment in the GN workforce. The GN is committed to that goal, and efforts to promote Inuit employment is the subject of substantial effort within the GN, and the

subject of numerous reports as well as debates and questions in the Legislative Assembly.

[86] The Applicant in this case has self-identified to me as Inuk.

[87] The dilemma in which the Applicant finds themselves is that they do not know, except in a very general way, why they were unsuccessful in the job competition. The Applicant tells me, and I accept, that there is no obvious employment history, such as discipline, that would explain a negative reference. They do not know in what way the reference was not good, nor do they know what (if anything) they could change, nor do they know what (if anything) they should do differently to improve their chances in a future competition.

[88] Moreover, there is always the possibility that what the committee member wrote down on the reference sheet did not fully or accurately capture what the referee said. The possibility of correction, which is given prominence in the ATIPPA through s 1(b) and s 45, is taken away if the Applicant cannot see the reference.

[89] Finally, I would note that withholding the reference checks does not provide much accountability for the referees. It was this concern that, in Review Report 17-124, appeared to trouble the former Commissioner most. Although confidentiality may allow a referee to be forthright, it is not necessarily the best way to ensure a referee is fair, balanced, and thorough.

[90] For all of these reasons, I worry that a firm policy of not disclosing reference checks to job candidates when the referee has requested confidentiality may not align with Inuit Qaujimajatuqangit or Inuit Piqqusingginnik. I am not suggesting I know the answer. I am raising a question: how do these concepts, which are implicit in Nunavut law and the GN's operations, apply <u>to the exercise of the department's discretion</u> under s 22? That question is not addressed at all in Directive 511.

[91] If ever there was a case in which a public body needed to think consciously and deliberately about its discretion, it is this one. An Inuk has applied for promotion within the GN. The GN is committed to increasing Inuit employment, especially at the higher levels of the public service. Inuit Qaujimajatuqangit and Inuit Piqqusingginnik place emphasis on guidance offered by those who are more senior and more knowledgeable to those who are coming up.

[92] On the other side of the equation, there is no evidence or suggestion that this is a case where the referees need to be protected. To the extent that the referees were asked their preference concerning confidentiality, that goes to whether the pre-condition in s 22(c) is met. It is not, and cannot legally be, an ironclad promise.

[93] In closing, I wish to emphasize that my comments on Inuit Qaujimajatuqangit and Inuit Piqqusingginnik are offered as an additional, important reason why the active exercise of statutory discretion is so important in a well-functioning ATIPP process. My comments are not intended to point to a specific result. As long as the discretion is actively exercised, the final decision belongs to the public body.

Conclusion

[94] The department concluded correctly that the three pre-conditions in s 22 were met.

[95] The department's residual discretion in s 22 was not applied at all, or not applied correctly.

Recommendations

[96] The Department of Human Resources did not exercise its discretion in this case, or else fettered its discretion. **I recommend** the Department of Human Resources take another look at the Applicant's request for information, and actively exercise its discretion under s 22 with respect to disclosure of the reference checks. In exercising that discretion, the

referees' stated preference for confidentiality cannot lawfully be taken as a conclusive answer.

[97] Paragraphs 17 and 18 of Directive 511 (reference checks), as they currently stand, are inconsistent with the ATIPPA. **I recommend** the Department of Human Resources review Directive 511 for consistency with the ATIPPA.

[98] The standard script used to interview referees is unnecessarily complex and confusing, and is at least partly inconsistent with the ATIPPA**. I recommend** the Department of Human Resources review its reference-check script for consistency with the ATIPPA.

[99] **I recommend** the Department of Human Resources, when reviewing Directive 511 and its form/script for reference checks, consider how Inuit Qaujimajatuqangit and Inuit Piqqusingginnik might inform the exercise of the department's discretion under s 22.

Graham Steele
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