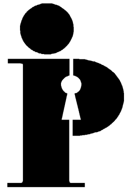

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2825

Appeal PA08-147

University of Guelph

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NATURE OF THE APPEAL:

Under the *Freedom of Information and Protection of Privacy Act (*the *Act*), the University of Guelph (the University) received a request for information about a research proposal that the requester had submitted. In particular, the requester sought access to a negative report, or "peer review for scientific merit" (the report) concerning the proposal, including the name and signature of the author of the report. The requester provided a copy of the body of the report with his request, which did not include the name, signature and position title of the author.

The University denied access to the identifying information, claiming that this information was exempt pursuant to the discretionary exemption found at section 49(c.1) of the *Act*. This section applies to personal information supplied implicitly or explicitly in confidence that is evaluative or opinion material compiled solely for the purpose of, amongst other things, assessing the research of an employee or associate of an educational institution.

The requester (now the appellant) appealed the decision denying access.

The appeal was assigned to a mediator to see if the issues could be resolved. During mediation, the appellant clarified that he was only seeking access to the identity of the author of the report. The mediator contacted this individual (the affected party), who stated that he or she did not consent to this information being disclosed.

As the appellant wished to pursue access to the identity of the affected party and no further mediation was possible, this file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry into the issues.

I began my inquiry into this matter by issuing a Notice of Inquiry to the University and the affected party inviting them to submit representations on the issues in the appeal, and in relation to any other issues that they may consider relevant. I received representations and an affidavit from the University. The affected party did not provide representations. I also received a letter from the appellant at this stage of the proceedings, which I have considered in reaching my decision in this appeal.

Although the University's initial decision letter to the appellant (referred to above) did not raise the possible application of section 65(8.1)(a) of the *Act*, the University did so in its representations. Section 65(8.1)(a) excludes records respecting or associated with research conducted or proposed by an employee or associate of an educational institution from the scope of the *Act*. If section 65(8.1)(a) applies, then the *Act* does not apply and this office would not have the authority to order that the record be disclosed.

As this raises the question of whether the record is accessible under the *Act*, section 65(8.1)(a) must be considered in this appeal. Accordingly, after I received the University's representations, I added it as an issue. Section 65(10) provides an exception to the section 65(8.1)(a) exclusion, and for this reason, would also have to be considered if the exclusion at section 65(8.1)(a) would otherwise apply.

After receiving the University's representations, I issued a modified Notice of Inquiry to the appellant, provided him a copy of the non-confidential portions of the University's representations and affidavit, and invited him to submit representations on the issues in the appeal, including sections 65(8.1)(a) and 65(10). In response, I received representations from the appellant.

RECORDS:

The portion of the report consisting of the identity (i.e. the name) of the author is at issue in this appeal.

DISCUSSION:

ISSUES ADDRESSED IN THIS ORDER

The University initially relied on the exemption at section 49(c.1) in this appeal. The University subsequently indicated that, if section 49(c.1) does not apply, the record is excluded from the application of the *Act* by section 65(8.1)(a). As I have noted above, and as outlined in more detail later in this order, section 65(8.1)(a) excludes certain records from the application of the *Act*. As will become apparent from the discussion below, section 65(10) creates an exception to the section 65(8.1) exclusion "only to the extent that it is necessary for the purpose of subclause 49(c.1)(i)".

The net effect of this set of legislative provisions is that if a record qualifies for exemption under section 49(c.1)(i), then it remains subject to the *Act* even if it otherwise meets the requirements for exclusion from the scope of the *Act* under section 65(8.1). The effect of section 65(10) is, therefore, to preserve the application of the *Act* to records that are subject to this discretionary exemption.

In order to address these somewhat circular provisions, I will begin by addressing the possible application of section 49(c.1)(i), and will then turn to sections 65(8.1)(a) and 65(10).

PERSONAL INFORMATION

Section 49(c.1) appears in section 49, which is intended to address requests for one's own personal information, and in order to be exempt, the undisclosed information must, itself, qualify as "personal information". In the context of this appeal, section 49(c.1)(i) would appear to be the only possible relevant portion of this section. Section 49(c.1)(i) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of …

> assessing the … research of an employee of an educational institution or of a person associated with an educational institution,

I will therefore begin my consideration of the application of section 49(c.1)(i) with an analysis of whether the record as a whole contains personal information, whether the information at issue (the affected party's name) qualifies as personal information, and if so, whose personal information it is.

"Personal information" is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) 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;

Section 2(3) also relates to the definition of personal information. It states:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225]. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

In Order PO-2225, former Assistant Commissioner Tom Mitchinson, set out the following two-step process applicable to a determination of whether information is "about" an individual in a business rather than a personal capacity, and therefore does not constitute personal information:

> …the first question to ask in a case such as this is: *"in what context [does the information] of the individuals appear"*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
> …
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual"*? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature? [Emphasis added]

Representations and Analysis

As noted above, the report is a peer review of a research proposal relating to a research project proposed by the appellant. Although there is some discrepancy between the parties' representations about the processes that are followed in obtaining peer review of research proposals and Animal Use Protocols (AUP's), the parties are in agreement about the following relevant facts:

- The University is a research-intensive university and the appellant is an employee and faculty member of the University. The affected party is also an employee and a faculty member of the University.

- Federal funding for the proposed research is contingent on compliance with the guidelines of the Canadian Council on Animal Care which is responsible for setting and maintaining standards for the care and use of animals used in research, teaching and testing in Canada. It mandates that scientific merit must be demonstrated by appropriate peer review of research proposals and AUPs before the use of animals in research can be approved.

- The appellant prepared a research proposal and an AUP relating to that research in his capacity as an employee of the University. The research that was proposed by him was within his area of expertise and related to his academic and professional qualifications and responsibilities.

- The affected party was selected to conduct a peer review of the appellant's research proposal because the area of proposed research related to his or her area of expertise and academic and professional qualifications.

The University submits that the record contains the personal information of the appellant because it includes the views or opinions of another individual about the appellant (paragraph (g) of the definition of personal information). It also submits that the record contains the personal information of the affected party because it consists of correspondence sent to an institution that is implicitly or explicitly of a private or confidential nature (paragraph (f) of the definition) and it includes the individual's name along with other personal information relating to the individual (paragraph (h) of the definition).

With respect to the submission that the record contains the personal information of the affected party, the University relies on a number of previous orders of this office. In particular, the University refers to Orders P-235 and P-669, which both involved drug reviews, and Order P-611 which involved two individuals who reviewed a screenplay and prepared reports on the artistic merits of the work. The University states:

> While reviewers may be asked to provide such reviews because of their expertise and professional qualifications in a particular field relevant to the matter being reviewed, the identity of reviewers has been treated by the IPC as personal information, not merely as business identity information, where it would allow the reviewer to be linked with a particular review. Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if it reveals something of a personal nature about the individual. It is submitted that the identity of the third reviewer at issue in this case, when linked with the fact and content of the review he provided, reveals something of a personal nature about the reviewer and is not simply business identity information within the meaning of ss. 2(3) and 2(4) of *FIPPA*.

The appellant claims that the record at issue does not include his personal information and does not include any personal information of the peer reviewer. The appellant submits generally that written reports from peer reviewers or referees should be viewed as part of a professional's "service work for which he/she is being paid" and that neither the researcher's nor the referee's name should be protected by exclusions and exemptions under the *Act*.

Referring to section 2(3) of the *Act*, cited above, the appellant states that the affected party's name is not personal information. He also submits that the name, if disclosed with the peer review report, would reveal nothing of a personal nature about the affected party. He refers to Order PO-2401 and states that as a general rule information associated with an individual in a professional capacity will not be considered to be about the individual. He argues that as the peer review at issue was written by a University faculty member in a professional capacity and it did not contain "private information" about the affected party, it follows from previous orders that the identity of the reviewer should be disclosed.

Appellant's Information

As noted above, the University submits that paragraph (g) of the definition of personal information, quoted above, applies to the information in the record relating to the appellant. I do not agree. In my view, paragraph (g) of the definition of personal information does not apply

because the views or opinions of the affected party in the record are not "about the [appellant]". The views or opinions of the affected party in the record at issue are about the research proposal, and are not about the appellant in his personal capacity.

Applying the approach of former Assistant Commissioner Tom Mitchinson in Order PO-2225, and having carefully reviewed the record, I also find that the record was created and exists in an entirely *professional context*. It includes information relating to the proposed professional scientific work of the appellant as an employee of the University and the comments of the affected party are made in his or her professional capacity as a peer reviewer. I also find that disclosure of the record would not reveal anything of a *personal nature* about the appellant because there is nothing in the record that would relate to the appellant in his personal capacity and the comments of the affected party about the research proposal do not reach into the personal realm.

Accordingly, I find that the record does not contain any information of the appellant that qualifies as his personal information.

Because of the wording of the preamble of section 49 ("[a] head may refuse to disclose to the individual to whom the information relates personal information …"), section 49(c.1)(i) can only apply to records containing the personal information of the requester, in this case, the appellant (see Order M-352). I therefore find that it does not apply in this appeal. However, for the sake of completeness, I will also include the following analysis concerning whether the affected party's name qualifies as personal information.

Affected Party's Information

As noted above, the University submits that the affected party's name qualifies as that individual's personal information pursuant to paragraphs (f) and (h) of the definition. However, I agree with the appellant that the name of the affected party is not personal information because section 2(3) applies and, as a result, I find that it does not qualify as personal information.

The previous orders [Orders P-235, P-611 and P-669] referred to by the University relating to drug reviewers and the reviewers of a screenplay are distinguishable from the circumstances of this appeal because those orders involved requests that predated the inclusion of section 2(3) in the *Act* on April 1, 2007.

These previous orders were distinguished by Adjudicator Diane Smith in Order PO-2773 on the same basis in circumstances that were similar to those in this appeal. In that order, Adjudicator Smith found that the names of affected parties who were retained by the Ministry of Health to review drugs, and consider them for reimbursement pursuant to Ontario's drug benefit plan, did not qualify as the personal information of the drug reviewers because of section 2(3) of the *Act*. I agree with this approach and will adopt it here.

Applying the approach taken in Order PO-2773, I find that the affected party's name identifies the affected party in a professional or official capacity and, therefore, section 2(3) applies with the result that this information does not qualify as his or her personal information. I arrive at the

same conclusion if I apply the approach taken by former Assistant Commissioner Tom Mitchinson in PO-2225. I find that, in the context of the record as a whole, the name of the affected party is information associated with that individual in a professional capacity because he or she was acting in a professional capacity in reviewing the appellant's research proposal, and the information therefore appears in an entirely *professional context*. I also find that the disclosure of the affected party's identity in the context of the peer review report would not reveal something of a *personal nature* about the affected party.

In summary, I find that the record does not contain the appellant's personal information. I also find that the name of the affected party does not qualify as personal information. Because the record at issue does not contain personal information, section 49(c.1)(i) cannot apply.

RESEARCH

I now turn to consider whether the record is excluded from the scope of the *Act* under section 65(8.1)(a) and whether the exception to the exclusion in section 65(10) applies.

Sections 65(8.1)(a) and (10) of the *Act* state:

> (8.1) This Act does not apply,
>
> > (a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; …
>
> (10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49 (c.1) (i).

Research is defined as "… a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." [See Order PO-2693]

The research must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of the University. [See Order PO-2693]

The University submits, referring to Order PO-2693, that records dealing with the initial approval of a research project or study, events that occur during that project or study and the ongoing reporting of the research project or study have been held to qualify as records that are "respecting or associated with" research conducted or proposed by an employee of an educational institution under section 65(8.1)(a). On that basis, the University submits that if the record at issue here does not fall within section 49(c.1), then it is excluded by section 65(8.1)(a).

The appellant's representations state that he is an employee of the University, and that the research proposal and the AUP discussed in the record were directly related to research which he planned to conduct.

The remainder of appellant's representations largely relate to why the record should be accessible under the *Act* for reasons of transparency. He argues that the *Act* applies to the record and that no useful purpose would be served by excluding the record from accessibility under the *Act*. He states that the peer review system should be "open" and that the peer review process should be seen as part of "a professional's service work." Nevertheless, section 65(8.1)(a) is an exclusionary provision, and if it is found to apply, the outcome is that the *Act* does not provide a means of obtaining access to the record.

Section 65(8.1)(a) was applied for the first time in Orders PO-2693 and PO-2694. In Order PO-2694, I found that section 65(8.1)(a) does not apply to records relating to the design and RFP processes for a facility that was to be used for research after its construction.

In Order PO-2693, I found that section 65(8.1)(a) applies to records concerning medical research, including application forms and other materials submitted to McMaster University's Research Ethics Board. In my view, the records in Order PO-2693 are of a similar character to the record containing the information at issue in this case.

In Order PO-2693, I stated that the interpretation of section 65(8.1)(a) should be guided by the purposes of the *Act* as set out in section 1 and the legislative purpose that underlies the addition of section 65(8.1) to the *Act*. Section 1 states:

> The purposes of this Act are:
>
> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) decisions on the disclosure of government information should be reviewed independently of government; …

With respect to the legislative purpose of section 65(8.1), in Order PO-2693 I stated:

> This amendment was made by means of the *Budget Measures Act, 2005* (Bill 197), and was addressed by M.P.P. Wayne Arthurs on both the second and third readings. Mr. Arthurs was, on both occasions, the Parliamentary Assistant to the Minister of Finance and spoke on behalf of the government in relation to the provisions aimed at adding Ontario universities as institutions under the *Act*. His

comments clearly address the purpose of section 65(8.1). At third reading on November 21, 2005, he stated:

> . . . [T]his bill proposes to make Ontario's universities subject to the provisions of the Freedom of Information and Protection of Privacy Act and ensure that Ontario's publicly funded post-secondary institutions are even more transparent and accountable to the people of Ontario. That will be both our universities and our colleges of applied arts and science. *So as not to jeopardize the work being done at these institutions, though, the freedom-of-information provision would take into account and respect academic freedom and competitiveness. Clearly we understand the importance of the university post-secondary sector when it comes to doing research and innovative study programs.* Thus we wouldn't want to jeopardize that academic freedom, or the competitive environment that is created accordingly. [My emphasis.]

I acknowledge the importance of these principles in the interpretation and application of section 65(8.1)(a). However, bearing in mind the purposes of the *Act* in section 1 and the stated legislative purpose of this amendment, I have concluded that the Legislature did not intend to create an exclusion from the application of the *Act* whose reach would be broader than is necessary to accomplish these stated objectives. It is important to note, in that regard, that section 65(8.1)(a) only relates to the question of whether the *Act* applies to the records. If the *Act* is found to apply, this does not automatically lead to disclosure. Where the *Act* applies, the records could be subject to one of the mandatory and/or discretionary exemptions from the right of access, which are found in sections 12 through 22 of the *Act*.

I will now consider whether the various criteria set out in section 65(8.1)(a) that are required for it to apply are present in this case.

"Research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution"

My interpretation and analysis of the application of section 65(8.1)(a) in Order PO-2693 began with a consideration of the definition of "research." In Order PO-2693, I adopted the definition noted above and I will apply the same definition in this appeal. Having considered the parties' representations, and applying the definition referred to above, I find that the appellant's proposal was to conduct "research" as that term is used in section 65(8.1)(a) because it was a proposal to conduct "a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them."

I also found in Order PO-2693 that the "research" must be referable to specific, identifiable research projects that have been conducted or proposed by a specific faculty member, employee or associate of the University. Adopting the same approach in this appeal, in my view the parties' representations and the record itself supports a finding that the appellant's research was specifically identifiable. As well, the research was proposed by a specific faculty member or employee of the University, namely, the appellant. There is no dispute that he is an employee of the University, nor that the University is an "educational institution".

Accordingly, I find that these criteria for the application of section 65(8.1)(a) have been met.

"Respecting or associated with"

I must now determine whether the record at issue is "respecting or associated with" research. In Order PO-2693, I reviewed the legislative history of the section, the plain and ordinary meaning of the words used, the French language version of these words and I considered the interpretations of the same words by the courts and this office in the context of section 65(6) of the *Act*. I then arrived at the following interpretation:

> Having considered all the authorities referred to above, including the dictionary definitions cited, and the French version of the provision, I conclude that "respecting or associated with" has a similar meaning to "in relation to" in previous decisions of this office. All these phrases describe a similar degree of connection. In my view, like "in relation to", "respecting or associated with" should be interpreted to mean "for the purpose of, as a result of, or substantially connected to." Also, and similar to the cautionary note in Order MO-2024-I, meeting this definition requires more than a superficial connection between the records and the research in question. Whether or not the records at issue are "respecting or associated with" research turns on an examination of the records. To justify a finding that records are "respecting or associated with" research, there must be a substantial connection between the content of a particular record, on the one hand, and specific, identifiable research actually conducted or proposed by an employee of the University or a person associated with the University.
>
> This interpretation is supported by the purposes of both the *Act* and this particular amendment. Applying an overbroad definition would frustrate the fundamental purpose of the *Act* to provide a right of access to information in the custody of institutions, without any justification referable to the stated purpose of adding this section to the *Act*, namely the protection of academic freedom and competitiveness. In this regard, I am mindful of the similar concerns expressed by Justice Swinton in *Ministry of Correctional Services v. Goodis* (cited and quoted more fully above) that "[i]f the interpretation were accepted, it would potentially exclude a large number of records and undermine the public accountability purpose of the *Act*."
>
> I also find that this interpretation meets the requirements of the modern principle, which requires an appropriate interpretation, that is, one that can be justified in

> terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just. In my view, there is no doubt that an interpretation requiring a substantial connection between the records and actual or proposed research is one that the words of the statute can reasonably bear, and is therefore plausible. As I have just observed, it promotes the purpose of the *Act* as a whole, while respecting the intent of the Legislature to protect academic freedom and competitiveness. Accordingly, in my view, it is "efficacious." There is nothing to suggest that the outcome of this interpretation would violate legal norms, and in my view, it is a just and reasonable approach, and therefore acceptable.

I adopt the same approach in this appeal and find that the record at issue here is a record "respecting or associated with" research. The record containing the information at issue in this case is a peer review analysis, which comments on the scientific merit of a research proposal. This document is an integral part of the conduct of a particular research project or study because, as both parties have explained, without the peer review of the research proposal and the AUP, the appellant would not be entitled to proceed with the research.

On that basis, I find that the peer review process and the report that is prepared as a result of that process is "substantially connected to" research. The report includes detailed and technical reviews of the proposed research on the basis of its originality, justification for the use of animals and its experimental design.

Given the nature of the record, it is clearly a record that must be described as "respecting or associated with" research and this criterion for the application of section 65(8.1)(a) has therefore been met.

To summarize, I have found that the record is respecting or associated with research proposed by the appellant, an employee of the University, an educational institution. Accordingly, subject to the discussion of the exception to the section 65(8.1) exclusion found at section 65(10) (below), I find that the record meets all the requirements for the application of section 65(8.1)(a), and is, therefore, excluded from the scope of the *Act*.

In reaching this conclusion, I have considered the appellant's arguments about transparency and the desirability of the record being accessible under the *Act*. However, like the records at issue in Order PO-2693, I find that peer evaluations such as the record containing the information the appellant seeks in this appeal are precisely the type of record at which section 65(8.1)(a) is aimed, and their exclusion from the *Act* is clearly related to the legislative objectives of academic freedom and competitiveness. While I acknowledge the appellant's arguments on this point, I have concluded that, beyond question, section 65(8.1)(a) was intended by the Legislature to apply to this type of record, and it applies here.

Section 65(10)

As already discussed, section 65(10) creates an exception to the exclusion set out in section 65(8.1)(a) and refers to 49(c.1)(i). For ease of reference, I repeat the text of section 65(10):

> Despite subsection (8.1), this Act *does apply* to evaluative or opinion material compiled in respect of teaching materials or research *only to the extent that is necessary for the purpose of subclause 49 (c.1) (i)*. [Emphases added.]

As noted under the heading, "Issues Addressed in this Order," above, the net effect of section 65(10) is that, if a record qualifies for exemption under section 49(c.1)(i), then it remains subject to the *Act* even if it otherwise meets the requirements to be excluded from the operation of the *Act* under section 65(8.1).

I have found, above, that the record does not qualify for exemption under section 49(c.1)(i), and for that reason, section 65(10) does not apply. Because of that finding, section 65(10) provides no basis for concluding that the *Act* applies to the record.

Accordingly, my conclusion, above, that the record is excluded from the scope of the *Act* by virtue of section 65(8.1)(a) is confirmed.

In view of my finding that the *Act* does not apply to the record, it is not necessary for me to comment on or to make a finding regarding the application of the public interest override in section 23 and the University's exercise of discretion.

ORDER:

I uphold the University's decision.

Original signed By: September 15, 2009
John Higgins
Senior Adjudicator