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

ORDER PO-2947

Appeal PA09-129-2

University of Western Ontario

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NATURE OF THE APPEAL:

This appeal is related to a group of appeals with this office, in which similar requests were submitted to Ontario universities under the *Freedom of Information and Protection of Privacy Act* (the *Act*) by the same individual.[1] The request submitted to the University of Western Ontario (Western) read:

> All records, including e-mails sent from/received to (including CC and attachments) the institutional account(s) of the above mentioned person [named individual], in which my name … is mentioned. The period covered: October 15, 2008 to March 14, 2009. [The named individual] was a member of the SSHRC[2] IOF adjudication committee that evaluated my submission. ….
>
> I request the search on the [Western] back-up-e-mail server to be conducted with the parameters specified above. I also trust you [will] undertake all necessary measures to prevent the destruction of responsive documents as soon as possible.

Western conducted a search and identified 10 records as responsive to the request. However, in the decision letter sent to the appellant, Western denied access to the records, in their entirety, claiming that the records were not in its custody or under its control. The decision was appealed to this office, which opened Appeal PA09-129 and appointed a mediator to seek resolution of the issues. As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*.

At that point, I was concurrently responsible for conducting inquiries into the issue of custody or control in three other appeals filed by the same appellant against other Ontario post-secondary institutions, all featuring requests for records created as a result of participation in the SSHRC grant application review process by faculty members. As the release of orders in the other appeals was imminent, I placed Appeal PA09-129 on hold pending the release of those orders.

On October 28, 2009, I issued Order PO-2836 to Wilfrid Laurier University. I found that the responsive records were in Wilfrid Laurier's custody or under its control for the purpose of section 10(1) of the *Act*, and I ordered that institution to issue an access decision. In Order PO-2836, I described the relationship between a finding of custody or control and the question of access to records in the following manner:

> Under section 10(1), … the *Act* applies only to records that are in the custody or under the control of an institution.

[1] The first set of requests resulting in appeals to this office related to the 2007-2008 SSHRC grant year, while the second set related to the 2008-2009 year. To date, the orders issued for this group of appeals include Orders PO-2836 (Wilfrid Laurier University), PO-2842 (University of Ottawa), and PO-2846 (University of Guelph), which address the issue of custody or control of responsive records. Orders PO-2942 (Wilfrid Laurier University) and PO-2946 (Carleton University) deal with the application of section 65(8.1)(a) of the *Act*.

[2] Created by an act of Parliament in 1977, the Social Sciences and Humanities Research Council of Canada (SSHRC) is a federal agency that promotes and supports university-based research and training on social, cultural and economic issues. According to the SSHRC website, SSHRC's grant and fellowship programs and policies enable "knowledge sharing and collaboration across research disciplines, universities and all sectors of society."

> A finding that a record is under the custody or control of an institution does not necessarily mean that a requester will be provided access to it. In this appeal, I advised the parties in the Notice of Inquiry that a record found to be in the custody or control of the University may or may not be subject to the *Act* pursuant to section 65 (see Orders PO-2693 and PO-2825). I note that the question of whether records in the custody or under the control of the University are *excluded* from the application of the *Act* pursuant to section 65 (including sections 65(8.1) – 65(10)) is a matter that could be dealt with at a later point, if necessary. Furthermore, a record under an institution's custody or control *and* subject to the *Act* may be withheld if it falls within one of the exemptions under sections 12 to 22.

On October 30, 2009, I re-activated Appeal PA09-129 in order to seek Western's representations on the issue of custody or control with reference to my findings in Order PO-2836. I subsequently provided Western with a copy of Order PO-2842 (University of Ottawa), issued on November 10, 2009, in which I made the same finding respecting custody or control.

NATURE OF THE APPEAL:

In response to my request for representations on the issue of custody or control, Western advised this office that it had reconsidered its position upon review of Orders PO-2836 and PO-2842, as well as Order PO-2846, which I issued on November 21, 2009 to the University of Guelph.

Western subsequently sent a revised access decision to the appellant, providing a detailed description of its position that the responsive records are excluded from the operation of the *Act* pursuant to section 65(8.1) (records respecting or associated with research). Western claimed, alternatively, that the records are exempt under section 49(c.1) (requester's evaluative information), section 49(a) in conjunction with section 15(a) and (b) (relations with other governments) and section 17(1)(a), (b) and (c) (third party information), as well as section 49(b) (personal privacy). With the revised decision, Appeal PA09-129 was closed.

The appellant appealed Western's revised decision to this office and Appeal PA09-129-2 was opened to address the issues. The appeal was streamed directly to the adjudication stage. I commenced an inquiry into the issues by sending a Notice of Inquiry to Western, seeking representations regarding its exclusion and exemption claims. I received representations from Western.

Based, in part, on Western's representations, I decided to seek representations from SSHRC since it appeared to be an organization whose interests may be affected by the outcome of the appeals. Under section 13.01 of the *IPC Code of Procedure*, this office may invite submissions from "any individual or organization who may be able to present useful information to aid in the disposition of an appeal." For this purpose, I sent a letter Notice of Inquiry to SSHRC, which outlined the issues. I also provided excerpts from the representations submitted by Western, as well as those prepared by Carleton University in Appeal PA09-331. I provided the following context for my request for representations from SSHRC:

> SSHRC's functions and its position respecting the circumstances of these appeals figure predominantly in these representations. For example, I note the indication in Western's representations that:
>
> > Upon receipt of this access request, the University contacted SSHRC staff at the request of [the named Western faculty member]. SSHRC advised the University that the agency would be very concerned if an applicant were able to obtain SSHRC records pursuant to provincial legislation that would not have been accessible to him or her under the federal legislation applicable to SSHRC's records.

SSHRC provided submissions in response to my request, but asserted a claim of confidentiality over the correspondence, in its entirety. I did not share SSHRC's correspondence with any of the parties in this appeal or the other related appeals. However, in my view, it would not disclose confidential information to state that SSHRC's representations contained a description of its activities supporting university-based training and research in the humanities and social sciences. It may also be said that SSHRC declined to offer representations on the possible application of section 65(8.1)(a) (and other exemptions in the *Act*) to the records at issue, instead stating that it "defers to the views of the IPC in consideration of the arguments of the parties."

At this same time, I received a request from the institution in one of the related appeals (Wilfrid Laurier) for a "preliminary ruling" on the possible application of section 65(8.1)(a). On my review of the submissions from Wilfrid Laurier, and because the application of section 65(8.1) would remove the records from the scope of the *Act*, I decided to seek representations from the appellant respecting this issue alone. I sent a Notice of Inquiry to the appellant, along with a copy of Wilfrid Laurier's representations. I advised the appellant that I considered the determination of the application of section 65(8.1)(a) to be central to all of his appeals with this office and that, accordingly, it would be appropriate to proceed with the determination requested by Wilfrid Laurier as a preliminary matter. I also advised the appellant that although I had not sought SSHRC's views respecting the Wilfrid Laurier appeal, I had sought and received submissions from SSHRC in the related appeals. Subsequently, I received representations from the appellant.[3]

On January 13, 2011, I issued Order PO-2942. In Order PO-2942, I made the finding that section 65(8.1)(a) applied to the records identified by Wilfrid Laurier as responsive to the appellant's request. Accordingly, I found that those records were excluded from the scope of the *Act*. In my view, my analysis and reasons in Order PO-2942 are applicable to the other appeals in which section 65(8.1)(a) has been relied on, including this appeal. On January 26, 2011, I issued Order PO-2946, resolving the appellant's appeal with Carleton. Finally, in this order relating to the

[3] The appellant's submissions in Appeal PA08-164-2 on section 65(8.1)(a) and its exceptions represent the only ones provided by him on this issue, as I did not seek his submissions on the issue again in the present appeal (PA09-129-2) or in Appeal PA09-331 with Carleton. Some aspects and themes contained in the appellant's representations from Appeal PA08-164-2 are referred to in this order, along with comments provided at the time the appellant filed his appeal in Appeal PA09-129-2.

appellant's appeal of Western's access decision, I have also concluded that the responsive records are excluded from the scope of the *Act* pursuant to section 65(8.1)(a). Accordingly, it is not necessary for me to address the possible application of the exemptions claimed in the alternative by Western, with the exception of section 49(c.1), which is necessarily raised in the review of the exception to section 65(8.1)(a) found in section 65(10) of the *Act*.[4]

RECORDS:

The records at issue in this appeal consist of 10 emails, with attachments, exchanged between the identified Western faculty member and a SSHRC program officer, dated variously between January 13 and March 10, 2009 (61 pages in total).[5]

DISCUSSION:

ARE THE RESPONSIVE RECORDS EXCLUDED FROM THE *ACT* PURSUANT TO SECTION 65(8.1)(a)?

The access and privacy provisions of the *Act* were extended to universities in Ontario by statutory amendments that came into force on June 10, 2006. These provisions include section 65(8.1)(a), which excludes research records from the scope of the *Act* in prescribed circumstances, unless either of the exceptions in section 65(9) or section 65(10) are met.

Section 65(8.1)(a) states:

> This Act does not apply,
>
> > 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; …

The exceptions to section 65(8.1) in sections 65(9) and (10) state:

> Despite subsection (8.1), the head of the educational institution shall disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.

[4] The appellant also provided representations related to information he would agree to remove from the scope of the appeals. However, these portions of the appellant's submissions are not reproduced in this order because I have concluded that it is unnecessary to review the possible application of any of the exemptions claimed by Western in the alternative to the exclusion in section 65(8.1)(a).

[5] As a "preliminary issue", Western notes that the appellant's name is not mentioned in any of the 10 emails, but rather only in the attachments to the emails. Consequently, Western submits that only the attachments are responsive to the appellant's request, not each of the covering emails. In my view, each of the emails and its attachments constitute a single, responsive record. However, given my finding in this order that the 10 records are excluded from the scope of the *Act*, in their entirety, it is unnecessary for me to address Western's submission in this regard further.

> 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." The research must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution (Order PO-2693).

The purpose of the provision is to protect academic freedom and competitiveness (Orders PO-2693, PO-2825 and PO-2942).

The parties' representations on section 65(8.1)(a)

Seeking to provide context for the request and appeal, Western included a description of SSHRC and its activities, enclosing a copy of its enabling statute, and directing my attention to SSHRC's website for information about various aspects of SSHRC's operations.[6] Western notes that SSHRC has set up different programs to achieve its research and training objectives, "including research grant programs and strategic research grant programs, one of which is the International Opportunities Fund (IOF)." Western explains that the IOF program is intended to carry out SSHRC's strategic policy goals in promoting international collaborations in research to address "major global issues."

Western outlines the legislative purpose of the exclusion in section 65(8.1)(a) as discussed in Order PO-2693, which includes an excerpt from comments made in the Ontario Legislature during the introduction of the legislation intended to bring universities under the *Act* for the first time. Western emphasizes the stated intention of the bill, particularly the phrase stating that "the freedom-of-information provision would take into account and respect academic freedom and competitiveness."

Regarding the peer review process, Western argues, with considerable elaboration, that maintaining the confidentiality of the process is crucial to its integrity and to its success overall. Western points out that this applies to the reviewers and to the participants; both of whom are required to sign consents aimed at maintaining the confidentiality of the materials used in peer review and SSHRC processes more generally.[7] Western takes the position that SSHRC and the universities that work together with it to award research funds share a mutual interest in protecting the peer review process. Western explains the importance of preserving confidentiality

[6] The SSHRC website is http://www.sshrc.ca/site/about-crsh/about-crsh-eng.aspx. Western cites the website link for information about SSHRC's peer review process. Western also refers to the 2008 review of SSHRC's peer review system and practices by "an international panel of experts… [which] commended SSHRC for its performance in ensuring the fairness and integrity of its peer-review evaluation process. … A copy of that Report is enclosed and is also available at http://www.sshrc.ca/site/about-crsh/publications/peer-pairs_e.pdf."

[7] Western's representations were also accompanied by a lengthy affidavit from the faculty member named in the request, which addresses the confidentiality of the SSHRC peer evaluation process and related process issues. Some portions of the affidavit are reproduced in this order, although they are credited, generally, to Western and not to the affiant personally.

in the peer review process to guard against undue influence, or intimidation, and as a contextual factor in the protection of academic freedom. Western also points out that in Order PO-2825, this office has found that the peer review of a research proposal met the requirements of section 65(8.1)(a).

Western submits that the responsive emails and their attachments fall under the exclusion in section 65(8.1)(a) of the *Act* because they relate specifically to the work of a peer review committee set up to review applications for research funding through SSHRC's IOF program. Western further explains that the records contain information about the deliberations of the committee, including the members assigned to review specific applications, the names of applicants, scores and rankings, financial information about funding recommendations and titles of proposed research.

Western refers to the definition of "research" from the *Personal Health Information Protection Act*[8], as adopted in previous decisions of this office, including Orders PO-2693 and PO-2825. According to Western, "research" of the specific and identifiable type required by the exclusion is contained in the responsive records because:

> The spreadsheets reveal … information about proposed research in the field of social sciences and humanities…, which are organized fields of knowledge. The research will be conducted by researchers affiliated with Canadian postsecondary institutions and their research proposals relate to the observations and testing of a specific hypothesis or conclusion, which is the essence of research.

Western argues that the "covering" email messages were sent by SSHRC staff to support the work of the SSHRC peer review committee established to assess the merits of the submitted research proposals. In addition, Western submits, not only do the applicants' research proposals fall within the definition of "research," but so too does the evaluation of that research by the SSHRC adjudication committee. Western submits that "it is reasonable to interpret the words "evaluation of research" identified in past orders of this office as including evaluations of proposed research, "particularly in light of the stated legislative purpose of this exclusion."

According to Western, the records also meet the second requirement for the application of section 65(8.1)(a) because they identify the specific, identifiable research projects proposed by specific applicants who are named as the principal investigators for the proposed research. Further, Western notes that grant applicants to SSHRC's IOF program must be affiliated with a Canadian postsecondary institution, which satisfies the requirement in this matter that there be a connection to an "educational institution."

Western addresses the connecting words of the exclusion in section 65(8.1)(a) – "respecting or associated with" – in the follow manner:

> All of the records were prepared by SSHRC program staff for the IOF review committee. Every email was associated directly with the committee's work… As in the case of the record that was the subject of Order PO-2825, these records are

[8] S.O. 2004, c.3.

> an integral part of the conduct of a particular research project because without this peer review, the proposed projects would not be eligible for funding by SSHRC… As the adjudicator concluded in Order PO-2825, page 11, "peer evaluations … are precisely the type of record at which section 65(8.1)(a) is aimed, …"

On the appeal form submitted to this office at the time of his appeal of Western's January 2010 access decision, the appellant states his disagreement with Western's claim that section 65(8.1)(a) applies to the records.[9] In the representations provided by the appellant in the related appeal with Wilfrid Laurier, he argues that access to the requested information would "strengthen responsibility, a necessary complement of freedom, in evaluation of research." The appellant submits that the evaluation of research demands a greater level of transparency because it may be equated with "quality control" in science. The appellant argues that records containing "specific hypotheses to be tested using scientific methods" or listing of research participants should fall under the exclusion claimed in this appeal, but that records relating to peer review or evaluation ought not to be subject to the exclusion and removal from the *Act* because they "do not contain any hypothesis to be tested."

The appellant expresses concern about problems with the review of SSHRC funding applications, including his own, and he alludes to certain potentially problematic factors said to underlie decisions on, and processes followed for, the funding of research proposals. He argues that SSHRC's use of public funds ought to influence the characterization of the peer review and grant process for the purpose of contextualizing the exclusion in section 65(8.1)(a).[10] The appellant submits that due to the "distribution of public money… the application of Clause 65.8.1.a [is] highly questionable and unjustifiable." Picking up on his previous "quality control" argument, the appellant suggests that in view of the *Act's* purpose of shedding light on the operations of government, the public interest in promoting the accountability of the SSHRC peer review process should outweigh the reasons for applying the exclusion.

Analysis and Findings

This order represents the third issued in relation to this group of the appellant's appeals respecting the access decisions of a number of Ontario universities. The records identified as responsive in these three appeals are all referable to the appellant's SSHRC grant application and the resulting peer review of it. In my view, it is important to promote a consistent approach to the type of record identified as responsive in each of the three appeals, notwithstanding minor variations in the content of those records due to their creation by different members of the identified SSHRC adjudication committee in two separate grant application years.[11] Accordingly, the review and analysis in this order necessarily dovetails with my reasons in Order PO-2942.

[9] On this form, the appellant also states: "Instead, my request shall be considered under section 49(c)." This submission is further addressed under my discussion of section 65(10), on pages 13 and 14, below.

[10] The appellant mentions by name the *Social Sciences and Humanities Research Council Act* (R.S. 1985, c. S-12) and the *Financial Administration Act* (R.S. 1985, c. F-10). The relevance of these statutes is also suggested for the interpretation of section 49(c.1).

[11] See footnote 1, above.

It is important to emphasize the significance of a finding that section 65(8.1)(a) applies. It is one of the provisions in section 65 of the *Act* that, if found to apply to a record, completely removes that record from the scope of the *Act*. If section 65(8.1)(a) applies to the record at issue in this appeal, it is totally excluded from the access and privacy provisions of the *Act*.[12]

In Order PO-2942, I observed that Orders PO-2693, PO-2694 and PO-2825 (issued by Senior Adjudicator John Higgins) represented, at that point, the only interpretations of section 65(8.1)(a) by this office.[13] My analysis in Order PO-2942 relied on a review and adoption of the senior adjudicator's interpretation of the exclusion, but involved a new construction for the meaning given to "respecting or associated with" in section 65(8.1)(a) based on *Toronto Star*.

In developing his analysis on section 65(8.1)(a) in these orders, Senior Adjudicator Higgins emphasized the importance of considering the purposes of the *Act* as a context for the interpretation of the provision. I agree, and adopt without reproducing them, the senior adjudicator's reasons regarding the *Act*'s purposes at pages 6 and 7 of Order PO-2693. In the early part of my review of section 65(8.1)(a) in PO-2942, I stated the following with respect to past consideration of the legislative intent behind the exclusion:

> I agree with the senior adjudicator that the comments of M.P.P. Wayne Arthurs, speaking on the government's behalf at the time of the relevant amendments to the *Act*, are instructive in this analysis. At third reading[14], Mr. Arthurs 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.

As I remarked in Order PO-2942, M.P.P. Arthurs' comments had been included in the university's submissions in that appeal. Western's representations also included reference to the member's statements. In my view, these comments have been accepted as embodying the

[12] Orders MO-2024-I, PO-2825 and PO-2942.

[13] Section 65(8.1)(a) was mentioned in Order PO-2557 (March 2007). However, Adjudicator Colin Bhattacharjee was not required to address the exclusion because although section 65(8.1)(a) had been enacted prior to the date of the order, it was not in force at the time of the appellant's access request.

[14] This refers to the third reading in the legislature of Bill 197, the *Budget Measures Act*, through which universities were added as institutions under the *Act*.

legislature's intention to protect academic freedom and competitiveness while creating a general right of access to information held by universities (see Orders PO-2693, PO-2825 and PO-2942).

I continued my review of the exclusion in Order PO-2942 by turning to the definition of "research," which, as it turns out, mirrors the submissions of Western in the instant appeal. I stated (starting at page 8):

> For the purpose of determining the reach of the exclusion in section 65(8.1)(a), the term "research" must be defined. Notably, the *Act* contains no such definition. In Order PO-2693, however, after reviewing older orders of this office that addressed the term as it related to certain exemptions[15], and taking into account the modern rule of statutory interpretation[16], Senior Adjudicator Higgins settled upon the following definition from Ontario's *Personal Health Information Protection Act* for "research" under section 65(8.1)(a):
>
> > "research" means 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.[17]
>
> Order PO-2693 also recognized the significance of the remaining words of section 65(8.1)(a) in assigning meaning to the term "research." The senior adjudicator addressed the phrase "conducted or proposed by an employee of an educational institution or a person associated with an educational institution" as follows:
>
> > Seen in the context of the purpose of this provision, that is, to protect academic freedom and competitiveness, the use of the words, "conducted or proposed", and the inclusion of specific references to employees or persons associated with the University, leads me to conclude that "research" must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of the University (at page 9).

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[15] Sections 13(2)(h) (advice or recommendations) and 21(1)(e)(ii) (personal privacy), as discussed in Orders P-666, P-763 and P-1371.

[16] In discussing this rule, the senior adjudicator reviewed *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Ct.), and *Sullivan and Driedger on the Construction of Statutes*, 4th ed., by Ruth Sullivan (Toronto: Butterworths, 2002). Senior Adjudicator Higgins' discussion of the definition of "research," including Sullivan's three principles of plausibility, efficacy and a reasonable and just outcome, appears at pages 7-11 of Order PO-2693.

[17] S.O. 2004, chapter 3, section 2. The senior adjudicator also considered BC Order 00-36, a decision of former British Columbia Commissioner, David Loukidelis, in which a provision in that province's statute [section 3(1)(e)] similar to Ontario's section 65(8.1)(a) was interpreted as "intend[ing] to protect academic endeavour." In two recent BC orders [F10-42 and F10-43 issued December 17, 2010], Adjudicator Michael McEvoy adopted and applied the interpretations of these two similar provisions provided by Senior Adjudicator Higgins in Order PO-2693 and the former BC Commissioner in Order 00-36.

> In the present appeal, and based on my own review of the records, I am satisfied that the appellant was seeking funding through SSHRC for an identifiable cross-comparative research study, or systematic investigation, which was intended to establish facts or generalizable knowledge within a specific subject area. Accordingly, I find that the appellant's SSHRC proposal, and the evaluation of it, fits within the definition of "research" as that term has been interpreted by this office for the purpose of section 65(8.1)(a) of the *Act*.

In the circumstances, and as already suggested, the nature of the records identified as responsive by Western in this appeal is essentially the same as the responsive records identified in Order PO-2942. In this appeal, as with the others, I am satisfied that the records are related to the appellant's SSHRC application for grant funding to assist him in carrying out an identifiable cross-comparative research study, or systematic investigation, intended to establish facts or generalizable knowledge within a specific subject area.

In Order PO-2942, I decided that I should comment on the part of the finding in Order PO-2693 that implied that the application of the exclusion in section 65(8.1)(a) required that the research be connected with faculty of the university (institution) receiving the request under the *Act*. At page 9, I stated:

> I note that in the section from Order PO-2693 excerpted directly above, the senior adjudicator refers to "research projects that have been conceived by a specific faculty member, employee or associate of *the* University [emphasis mine]." The actual wording of section 65(8.1)(a) makes reference to "*an* educational institution," a distinction that bore no relevance in the appeal leading to Order PO-2693, but which is significant to the facts of the appeal before me where the appellant is a faculty member at a post-secondary institution in another Canadian province. The definition of "educational institution" in section 2 of the *Act* is "an institution that is a college of applied arts and technology or a university." In my view, in its plain and ordinary meaning, the use of the word "an" (as opposed to "the") in section 65(8.1)(a) supports an interpretation of the provision that may lead to it applying to the research proposed or conducted by an employee of another educational institution. Accordingly, I am satisfied that my finding regarding the appellant's proposed research in this appeal is not affected by the appellant's status as a faculty member employed by an educational institution other than the one that received his access request.

Accordingly, in the circumstances, I find that the appellant's research is "… proposed by an employee of an educational institution or a person associated with an educational institution," as contemplated by section 65(8.1)(a).

Next, in Order PO-2942, I acknowledged that the concluding part of my analysis of section 65(8.1)(a) required me to consider the records before me to determine whether they were "respecting or associated with" the appellant's specific and identifiable proposed research, thereby triggering the application of the exclusion. I must consider the same point in this appeal, with the benefit of my reasons in Order PO-2942. Therefore, I will review the analysis from

Order PO-2942 regarding the implications of the Divisional Court's decision in *Toronto Star* for the interpretation of the "connecting words" in section 65(8.1)(a). Starting at page 10 of Order PO-2942, I stated:

> In *Toronto Star*, the Ontario Divisional Court defined "relating to" in section 65(5.2) of the *Act* as requiring "some connection" between the records and the subject matter of that section, an ongoing prosecution. This judgment signalled a departure from past orders of this office interpreting the labour and employment records exclusion in section 65(6), where a "substantial connection" had been held to be a requirement. Explaining this approach in *Toronto Star*, the Court stated:
>
> > Section 65(5.2) contains the phrases "relating to" and "in respect of." The Supreme Court of Canada has interpreted these phrases: *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 25; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94. In *Markevich*, the Court held the following, at para. 26:
> >
> > > The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, per Dickson J. (as he then was):
> > >
> > > > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
> > >
> > > In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.
> >
> > Accordingly, the words "relating to" in s. 65(5.2) require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."

> The Adjudicator erred when he interpreted the words "relating to" in s. 65(5.2) to mean "for the purpose of, as the result of, or substantially connected to." The Adjudicator erred when he read-in a "substantial connection" requirement between the record and the prosecution. The Adjudicator further erred when he relied upon a restricted purpose for the provision in deciding whether the connection is sufficient to justify the application of this exclusion.
>
> The meaning of the statutory words "relating to" is clear when the words are read in their grammatical and ordinary sense. There is no need to incorporate complex requirements for its application, which are inconsistent with the plain unambiguous meaning of the words of the statute**.**
>
> The Adjudicator's interpretation of the phrase "relating to" is also discordant with the intention of the Legislature. There are no pragmatic or policy reasons to impute a substantial connection requirement and depart from reading the words in their grammatical and ordinary sense in the context of the Act.[18]

Given the clear reasons provided by the court in *Toronto Star* regarding the interpretation of the connecting words "relating to" in section 65(5.2), I am satisfied that the principles enunciated there ought to be applied to interpreting the words, "respecting or associated with" in section 65(8.1)(a) of the *Act*. Accordingly, in order to conclude that a record is "respecting or associated with" research, it must be reasonable to conclude that there is **some** connection between the record and specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution" [emphasis mine].

In reaching my conclusion that the records at issue in Order PO-2942 fit within the scope of section 65(8.1)(a), I expressed my agreement with Senior Adjudicator Higgins' conclusion in Order PO-2825 that peer evaluations "are precisely the type of record at which section 65(8.1)(a) is aimed, and [that] their exclusion from the *Act* is clearly related to the legislative objectives of academic freedom and competitiveness."[19] I note that Order PO-2825 was brought to my attention in the instant appeal. Further, I accept the position advanced in the affidavit accompanying Western's representations that the protection of academic freedom and competitiveness may be achieved in part by safeguarding peer review processes under this exclusion.

The records at issue in this appeal – created by the individual SSHRC adjudication committee member in carrying out peer evaluations of the appellant's (and others') grant application – are essentially identical in their nature to those before me in Orders PO-2942 and PO-2946. Indeed, I am satisfied that the records were created through the SSHRC peer review process, including the

[18] *Toronto Star*, paras. 42-46.
[19] Order PO-2825, at p. 11.

evaluation of grant applications and the awarding of research grants (see Order PO-2942). In my view, therefore, it is reasonable to conclude that there is some connection between the records and the peer evaluation of the appellant's proposed research.

I find, therefore, that the records are "respecting or associated with" the appellant's proposed research for the purpose of section 65(8.1)(a). Subject to my review of sections 65(9) and 65(10) below, I find that the records meet the requirements of section 65(8.1)(a).

ARE THE RECORDS BROUGHT BACK UNDER THE *ACT* BY THE OPERATION OF SECTIONS 65(9) or 65(10)?

Section 65(9) – research subject matter and funding amount

Section 65(9), which is set out in its entirety on page four above, creates an exception to the exclusion in section 65(8.1). It requires the institution to "disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection."

Western submits that this exception does not apply to the responsive records because it applies only to research that has received funding. Western adds that the exception's purpose:

> … is to ensure continued transparency and accountability on the part of educational institutions with respect to research funding received by their researchers. The records that are the subject of this appeal contain information about recommended funding only. They do not contain information about the amount of funding actually awarded by SSHRC.

In the related Wilfrid Laurier appeal, the appellant's representations briefly addressed this exception. The appellant submits that the spreadsheets created in the course of SSHRC peer review evaluations contain columns with information relating to amounts requested, modified and recommended. The appellant takes the position that section 65(9) should apply because the scrutiny of competitions for public money should "prevail over components related to research records."

Having reviewed the records at issue in this appeal, I have concluded that they do not contain the type of information that would qualify for the exception to section 65(8.1) found in section 65(9) because there are only funding recommendations, not specific information about funds awarded by SSHRC. I agree with Western's submission that the exception is intended to apply to records containing information respecting research that has already received funding (see also Orders PO-2942 and PO-2946). Accordingly, I find that section 65(9) does not apply to the records in this appeal.

Section 65(10) – evaluative or opinion material and section 49(c.1)(i)

As outlined on page five of this order, section 65(10) creates an exception to the exclusion set out in section 65(8.1) and requires consideration of section 49(c.1)(i), which itself creates an

exemption to the general right of access to an individual's own personal information held by an institution.[20]

According to Western's representations, section 65(10) does not apply in the circumstances of this appeal because:

> [It] is clearly intended to cover the research performance of an employee of an educational institution or a person associated with the institution. The words "conducted or proposed" which are expressly included in [section] 65(8.1)(a) were not added after the word "research" in [section] 49(c.1)(i). Therefore, it is reasonable to assume that the Legislature intended this exception to apply only to assessments of an individual's actual research performance as opposed to proposed research that might never be conducted or completed. The clear intention of the Legislature was to address the long-standing internal processes of universities with respect to the assessment of a faculty member's teaching and research record for the purposes of tenure, promotions, appointments and other related purposes. The Legislature carved out a specific exception to the broadly worded research exclusion to ensure that in some cases faculty members would have a right to access such evaluations relating to their research performance unless the educational institution decided to exercise its discretion to deny access to that information.

In the submissions provided in the Wilfrid Laurier appeal, the appellant argues that section 65(10) applies because the records relate to a competition for public funds. In that appeal and in the present appeal (on his appeal form), the appellant suggests that section 49(c) is relevant, because the SSHRC grant process constitutes a competition for public funds.[21] As noted in Order PO-2942, however, this appears to be an erroneous reference. Although section 49(c), like section 49(c.1)(i), contains the phrase "evaluative or opinion material", the former provision is inapplicable to an analysis of the exception in section 65(10), which refers specifically only to section 49(c.1)(i) regarding the assessing of teaching materials or research. I note that Western did not rely on the discretionary exemption in section 49(c) as a basis for denying access in this appeal.

With regard to the circumstances of the creation of the records at issue in this appeal, I find that section 49(c.1)(i) does not apply. As in Order PO-2942, I find support for this conclusion in the

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[20] 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 teaching materials or research of an employee of an educational institution or of a person associated with an educational institution."

[21] The appellant's representations in Appeal PA08-164-2 also refer to the *Financial Administration Act* (R.S. 1985, c. F-11) and suggest that it is relevant to section 49(c). The full text of section 49(c) states that "a head may refuse to disclose to the individual to whom the personal information relates personal information,

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

reasons of Senior Adjudicator John Higgins in Order PO-2825. In that order, the senior adjudicator determined that section 49(c.1)(i) did not apply to a peer review report on a research proposal submitted to the University of Guelph by the appellant because he concluded that it did not contain the appellant's personal information according to the definition of the term in section 2(1) of the *Act*. I provided the following excerpt from Senior Adjudicator Higgins' reasons in Order PO-2942 and it is, in my view, equally relevant in the present appeal:

> 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).[22]

I adopt the analysis in Orders PO-2225 and PO-2825 for the purposes of my review in this appeal. I am satisfied that the records at issue were "created and exist in an entirely professional context," relating as they do to the SSHRC grant and funding process, generally, and the peer review of the appellant's research proposal, more specifically. As with the responsive records in the related appeals, I find that the records identified as responsive here do not contain information that would qualify as the appellant's "personal information," as that term is defined in section 2(1) of the *Act*. Rather, where information about the appellant appears in the records, I find that it is about the appellant only in his professional capacity. Accordingly, I find that section 49(c.1)(i) does not apply. The consequence of this finding is that the exception to section 65(8.1)(a) in section 65(10) of the *Act* is inapplicable in the circumstances of this appeal.

In conclusion, as neither of the exceptions discussed above apply, I find that the records fall within the ambit of section 65(8.1)(a), and that they are therefore excluded from the *Act*.

[22] Order PO-2825, at p. 6.

ORDER:

I uphold the university's decision and dismiss the appeal.

Original signed by: January 27, 2011
Daphne Loukidelis
Adjudicator