Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-3084

Appeals PA12-22 and PA12-24

University of Ottawa

June 7, 2012

Summary: The appellant made a request to the University of Ottawa for all expense reports submitted by two named professors, since January 1, 2006. The University identified records responsive to the request and issued a decision advising that, pursuant to section 65(8.1), the *Act* did not apply to the requested records. Section 65(8.1)(a) is found to apply to the records at issue and the University's decision is upheld.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 65(8.1) and 65(9)

Orders and Investigation Reports Considered: Interim Order PO-2601-I, Order PO-2693

Cases Considered: *Ontario (Attorney General) v. Toronto Star* 2010 ONSC 991 (Div. Ct.), *Ontario (Minister of Health) v. Big Canoe*, [1995] O.J. No. 1277

OVERVIEW:

[1] An individual submitted two requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the University of Ottawa (the University) for access to the following information:

> …copies of all expense reports, including attached receipts, submitted by [named professors], since January 1, 2006.

[2] The University identified the records responsive to the request and issued a decision letter advising the requester that:

> Pursuant to section 65(8.1), the *Act* does not apply to the records associated with your request on the basis that it relates to records respecting or associated with research conducted or proposed by an employee of the University.

[3] The requester (now the appellant) appealed the University's decision to this office. As no useful purpose would be served through mediation, the appeals were transferred to the adjudication stage where a written inquiry is conducted by an adjudicator.

[4] During my inquiry into this appeal, I sought and received representations from the University, two affected parties and the Association of Professors of the University of Ottawa (APUO). I also sought representations from the appellant and shared the representations of the University and the APUO with him in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction Number 7*. The appellant chose not to submit representations.

[5] In the discussion that follows, I find that the records at issue are excluded under section 65(8.1) of the *Act*.

RECORDS:

[6] The records at issue consist of two sets of expense reports, including attached receipts, submitted by two named professors, since January 1, 2006.

[7] The University sent this office a sealed copy of the records at issue. The University requested that the records remain sealed and that this office not view the records.

[8] During the inquiry, I decided to keep the records sealed, but reserved the right to unseal the records and review them, should that become necessary. I informed all parties that I would not open the records without providing advance notice.

[9] After reviewing the representations of all the parties, I find that I have been provided sufficiently detailed descriptions of the records at issue. As such, I have not, and will not, unseal the records and review them. I will be returning the sealed, unopened records to the University, along with this Order.[1]

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[1] Although I decided to keep the records sealed in this appeal, this decision is based on the specific facts and circumstances of this case. This procedure will not necessarily be applicable in other appeals before this office.

PRELIMINARY ISSUE:

The IPC's Jurisdiction

[10] During the inquiry process, one of the affected parties raised the issue of whether I had jurisdiction to conduct an inquiry into these appeals. This party argued that because the records in question in the present appeal are excluded by section 65(8.1) of the *Act*, I am without the statutory jurisdiction under Part IV of the *Act* to inquire into and decide the issues in this appeal.

[11] In Interim Order PO-2601-I, my office confirmed its jurisdiction to consider appeals in which section 65(8.1) was raised. In that case, McMaster University had claimed that this office lacked jurisdiction in respect of the collection, use and disclosure of records falling within section 65(8.1)(a) and therefore, any related administrative process. McMaster University argued that the claim that section 65(8.1)(a) applied was sufficient to extinguish the requester's right to appeal McMaster University's decision to rely on it. In effect, McMaster claimed that the provisions of the *Act* that provided for independent review of such decisions were of no force and effect, based simply on their untested decision to claim that section 65(8.1) applied.

[12] Applying sections 1(a) and 50(1) of the *Act*, this office found that we did indeed have the statutory authority to conduct an appeal on the question of whether a university was entitled to rely on section 65(8.1) to exclude records.

[13] The right to appeal decisions by institutions such as universities is found in section 50(1) of the *Act*. This section states:

> A person who has made a request for,
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> (a) access to a record under subsection 24(1);
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> (b) access to personal information under section 48(1); or
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> (c) correction of personal information under subsection 47(2),
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> or a person who is given notice of a request under subsection 28(1) may appeal *any decision of a head* under this Act to the Commissioner. [Emphasis added.]

[14] In Interim Order PO-2601-I, this office found that section 50(1) is sufficient, in and of itself, to dispose of the argument that the IPC lacks the authority to review a decision to rely on section 65(8.1)(a). As affirmed by Interim Order PO-2601-I, the

decision to exclude records under section 65(8.1) is clearly a decision under the *Act* and is therefore subject to review by this office. In my view, section 50(1) makes it clear that the legislature intended that a head's decision to claim an exemption, or to claim that an exclusion under section 65 applies, would be reviewable by this office.

[15] This view is further supported by the purposes of the *Act*, particularly section 1(a)(iii) which states that "decisions on the disclosure of government information should be reviewed independently of government."

[16] Further, this office noted in Interim Order PO-2601-I that a finding that the IPC does not have jurisdiction to decide the application of section 65(8.1) would have the effect of permitting institutions to make unilateral decisions about the application of the *Act* to particular records, without recourse to an appeal before the Commissioner. A requester who wished to challenge such a decision would therefore be required to bring an application for judicial review rather than utilizing the much more accessible appeal process available under the *Act*. In my view, this interpretation is contrary to the wording of sections 1(a) and 50(1) of the *Act*.

[17] I find further support for this view in the Ontario Court of Appeal's decision in *Ontario (Minister of Health) v. Big Canoe*[2]. In that case, the institution had claimed that the records were excluded from the scope of the *Act* under section 65(2), a provision (now repealed) that applied to certain clinical records as defined under the *Mental Health Act*. If applicable, the effect of section 65(2) was identical to section 65(8.1)(a): the records would be excluded from the scope of the *Act*. The issue before the Court was whether the inquiry powers in section 52 of the *Act*, specifically section 52(4), which permits the Commissioner to require the production of records, were available to the Commissioner in that situation. The Court stated:

> It is our opinion also that s. 52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act. Having regard to the purposes of the Act and the manner in which the section is framed, *the procedures available to the Commissioner under s. 52 in conducting an inquiry to review a head's decision are applicable to inquiries relating to a head's decision that records sought by a requester are excluded by s. 65(2).* [Emphasis added]

[18] Accordingly, my power to conduct an inquiry and all the powers in section 52 of the *Act* are applicable even where an institution seeks to rely on a provision which, if applicable, means that the *Act* does not apply to the records.

[19] The affected party is relying on the decision of the Divisional Court in *Ontario (Attorney General) v. Toronto Star*[3]. In that case, the Court quashed this office's

[2] [1995] O.J. No. 1277
[3] 2010 ONSC 991 (*Toronto Star*)

decision to compel production of records claimed to be excluded under section 65(5.2) of the *Act*, and effectively ended the inquiry. The basis for the court's ruling was that this office, in providing reasons for its decision to order production, had erred in interpreting the meaning of the words "relating to" in that provision. This case is distinguishable, however, since no such interpretive finding will be made on the application of sections 65(8.1) and (9) to the requested records, until the issuance of this order.

[20] Therefore, I confirm that I have the statutory authority to conduct an appeal on the question of whether the University is entitled to rely on section 65(8.1) in this case.

ISSUES:

A. Does section 65(8.1)(a) apply to exclude the records at issue from the *Act*?

B. Are the records brought back under the *Act* by the operation of section 65(9)?

DISCUSSION:

A. Does section 65(8.1)(a) apply to exclude the records at issue from the *Act*?

[21] 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 65(10) are met.

[22] Section 65(8.1)(a) states:

> 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;

[23] The exception to section 65(8.1)(a) in sections 65(9) and 65(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.

> 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).

[24] In this appeal, the institution, the affected parties and the APUO claim that section 65(8.1)(a) applies to exclude the records at issue as these records directly relate to the eligible expenditures for research activities carried out by the affected parties, who are employed by the University. Moreover, the parties claim that the disclosure of these records would be inconsistent with the purposes of the *Act* and would have a chilling effect on academic freedom, competitiveness and research at Canadian universities.

[25] This office has defined research 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 refer to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of an educational institution.[4]

[26] The purpose of the provision is to protect the principles of academic freedom and foster competitiveness.[5]

Academic Freedom

[27] In its representations, the University states that all professors at the University are guaranteed academic freedom by the Collective Agreement between the University and the APUO. The University submits that academic freedom permits professors to pursue their research and teaching endeavours without interference from the University or from outside bodies. While the research is subject to scholarly review, the University submits that it is not subject to review, pressure or direction from the University, the government, or other third parties.

[28] With regard to the research exclusion in section 65(8.1) of the *Act*, the University states:

> On its face, the exclusion in s. 65(8.1) is broad. Narrowing that exclusion will expose the minutiae of research work by professors to public and government … scrutiny in a manner which was never intended by the Legislature under [the *Act*], and which is directly contrary to the principles of academic freedom. A narrowing of the exclusion will impede and therefore jeopardize research conducted by professors at universities. Professors will no longer have an environment within which they will feel

[4] Order PO-2693
[5] Orders PO-2693 and PO-2825

> free to pursue innovative research, given that whatever decisions, activities, or direction they take in their research pursuits may be subject to [the *Act*] at any point in the research cycle, including before it is, in their view, ready for public release.

[29] I agree with the University that academic freedom is of vital importance to our society. It permits the free-flow of information and academic opinion and encourages critical debate and the engagement of this country's best minds in causes, issues and policies, even when such debate and criticism may be politically unpopular. Academic freedom protects our free and democratic society by allowing our scholars and academics to investigate controversial issues and unpopular views, without interference or scrutiny by the government or the public. It is with this in mind that I will analyze the application of section 65(8.1)(a) to the records at issue in this appeal.

Section 65(8.1)(a)

[30] It is important at the outset to emphasize the significance of a finding that section 65(8.1) applies. Section 65(8.1)(a) is one of the specific 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*. In other words, if section 65(8.1)(a) applies to the records at issue in this appeal, they will be totally excluded from the access and privacy provisions of the *Act*.[6]

[31] In the first orders considering section 65(8.1)(a), this office emphasized the importance of considering the purposes of the *Act* as a context for the interpretation of the section. Section 1 of the *Act* states, in part, as follows:

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

[6] Orders MO-2024-I and PO-2825.

[32] Respecting the legislative intent behind the exclusion in section 65(8.1)(a), the following 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:

> … [T]his bill proposes to make Ontario's universities subject to the provisions of the [*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.[7]

[33] These comments have been accepted by this office as embodying the Legislature's intention to protect academic freedom and competitiveness, while creating a general right of access to information held by universities.[8]

[34] In order to be excluded from the scope of the *Act*, the records at issue must be "respecting or associated with" research being conducted by the affected parties. In Order PO-2693, this office interpreted that phrase in section 65(8.1)(a) to require a "substantial connection" between the records and the research.

[35] However, in *Toronto Star*, the Ontario Divisional Court defined the words "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. With *Toronto Star*, the Ontario Divisional Court signaled 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:

> 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.
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> The Adjudicator's interpretation of the phrase "relating to" is also discordant with the intention of the Legislature. There are no pragmatic

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[7] Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, No. 9A (25 October 2005) at 375 (Wayne Arthurs).
[8] Orders PO-2693 and PO-2825.

> 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.[9]

[36] Given this clear statement provided by the court in *Toronto Star* regarding the interpretation of the connecting words "relating to" in section 65(5.2), this office has found that the principles enunciated there should be applied to interpreting the words, "respecting or associated with" in section 65(8.1)(a) of the *Act*.[10] Accordingly, 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."

[37] With regard to the records at issue, the University states that they relate directly to the use by the affected parties of their research funds and consist of the following:

- "RE Forms – Request for Funding", a University form established by the University's policies on the administration of research grants and research contracts and expense claim forms; and

- Expense claim forms and receipts in support of the expenses submitted by the affected parties since January 1, 2006 in connection with research funds held either in the affected parties' general research accounts or in the research accounts established for research funds awarded from research funding agencies.

[38] The University states that the responsibility for research funds begins with the person to whom a research grant or research contract is awarded, in this case, the affected parties:

> The [affected parties] clearly have full responsibility for the conceptualization and conduct of their research, responsibility to set the nature and direction of their research, to train students, to seek and obtain funding for their research activities, and to communicate the results of their research to the public, consistent with any requirements of research sponsors or funding agencies. The [affected parties] also have responsibility for the overall financial management of research funds.

[39] The University states that the records at issue in these appeals concern the affected parties' use of their research funds held either in: (a) their general research account, where the funds are held by the University in trust for the affected parties to

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[9] *Toronto Star*, *supra* note 2, paras. 42-46.
[10] Order PO-2942

further their research endeavours; or (b) the affected parties' research grant accounts established to hold research funds.

[40] The University maintains that funds in the general research accounts can only be used for expenses directly related to research such as travel expenses, equipment, materials or supplies. The University affirms that ineligible expenses, that is, those expenses not relating to research are not charged to the research account. The University states that there are no ineligible expenses at issue in these appeals.

[41] In its representations, the APUO states that all expense claims must be submitted according to specific rules established by the granting agency and institutional policies. The APUO, referring to an affidavit sworn by a professor at the University (which it submitted to this office), states that when a researcher has incurred an expense for which he or she wishes to be reimbursed, he or she must submit a form stating the expenses for which they would like to be reimbursed and identifying the specific research for which these expenses have been incurred.

[42] In addition, the University states that the affected parties manage their general research accounts and/or the research grant accounts established under a specific research grant award in accordance with the University's policies and procedures on the financial management of research grants and trust accounts. The University states that its policies and procedures on financial management of research grants and trust accounts are based on and must comply with the requirements of the Tri-Agency Financial Administration Guide.[11]

[43] The Tri-Agency Financial Administrative Guide requires that all expenses claimed be essential for the research for which the funds were awarded. The Guide recognizes travel and subsistence costs (i.e. meals and accommodation) as eligible expenses under a research grant. Other eligible expenses include out-of-pocket expenses for field work, research conferences, collaborative trips, archival work and historical research, for professors, research personnel, students and colleagues working with professors.

[44] The University states that when the affected parties use their research funds or make expenditures, they submit claims for the expenses incurred and supporting receipts so that the University can then charge or credit the affected parties' individual research accounts.

[45] Therefore, the University argues that the responsive records subject to these appeals arise from and are directly related to the affected parties' research. Further, the records are created in response to granting agency requirements and University

[11] According to the University, this guide was established by the three federal granting agencies, namely the Natural Sciences and Engineering Research Council (NSERC), the Social Sciences and Humanities Research Council (SSHRC) and the Canadian Institutes of Health Research (CIHR).

policies to maintain individual research grant accounts, which record all eligible charges and credits to those accounts.

[46] After reviewing the representations of all the parties in conjunction with section 65(8.1) and the purpose of the *Act*, I find that the records at issue fall within the scope of section 65(8.1)(a). Adopting the interpretation of the Ontario Divisional Court in *Toronto Star*, I find that the documentation of the expenditure of research funds and grants in furtherance of research activities clearly has "some connection" to research. The records were created or compiled for the purpose of seeking reimbursement for, or justification of, expenses incurred as a result of conducting research, which is sufficient to meet the test of "some connection."

[47] Therefore, subject to the following discussion regarding section 65(9), I find that the records at issue in this appeal are excluded from the *Act* through the application of section 65(8.1)(a).

B. Are the records brought back under the *Act* by the operation of section 65(9)?

[48] Section 65(9) creates an exception to the exclusion set out 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."

[49] In its representations, the University states that the requested records do not contain any reference to the amount of funding received by either affected party in respect of the research conducted under section 65(8.1).

[50] Moreover, the University submits that there is a critical distinction between the total amount of funding received for a research project, which is subject to the *Act* pursuant to section 65(9) and the specific uses to which that funding is put, which is excluded from the *Act* pursuant to section 65(8.1). The University argues that, by specifically requesting travel expense records, the appellant has limited the access to information request to the use, rather than the receipt of research funds. Accordingly, the University argues that the exception provided in section 65(9) does not apply to the records at issue.

[51] Having carefully considered the representations of the parties, I am satisfied that the records at issue in this appeal are not brought back under the *Act* by the operation of section 65(9). In this regard, I agree with the position set out by the University that the records do not refer to the amount of funding received by either affected party. Rather, the records relate to how the total amount of funding received by the affected parties was used. I note that the disclosure of how funding was directed by the affected parties may in fact reveal details about the research conducted by the affected parties, information that section 65(8.1)(a) is designed to protect.

[52] In summary, I find that the requested records fall within the scope of section 65(8.1)(a) and are therefore excluded from the *Act*. Further, I find that the exception to this exclusion found at section 65(9) is not applicable to the records.

ORDER:

I find that the records are excluded from the *Act* under section 65(8.1) and uphold the University's decision.

COMMISSIONER'S MESSAGE:

The *Freedom of Information and Protection of Privacy Act*, and its municipal counterpart, set out robust rules for the disclosure of government-held information. These requirements are critical to ensuring the transparency and accountability of government institutions. It is important to note, however, that these rules deal primarily with general records relating to the manner in which government institutions operate, and the need for accountability for taxpayer dollars.

In contrast, this order considers the essential role that academic freedom plays in our society. Academic freedom permits our universities to freely engage in research and the exploration of controversial issues, without the fear of interference by government or the public. In the context of this appeal, the goal of government accountability is unlikely to be furthered by the disclosure of the records at issue. On the other hand, disclosure of those records could potentially reveal important details of the research being conducted by the affected professors and impinge on their freedom to pursue that research without interference. Academic freedom is a critical underpinning of our institutions of higher learning. It is a value that I am delighted to be able to uphold.

Original Signed by: June 7, 2012
Ann Cavoukian, Ph.D.
Commissioner