

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **ORDER PO-3161**

Appeal PA11-565

University of Western Ontario

February 13, 2013

**Summary:** The appellant requested a specific record relating to a research grant providing funding for a named professor employed by the university. The university claimed that the record was excluded from the jurisdiction of the *Act* pursuant to section 65(8.1)(a). The appellant appealed this decision, claiming that the exception to the exclusion at section 65(9) applied. In this order, the adjudicator finds that the record at issue falls within the exclusion at section 65(8.1)(a). She finds further that the exception to the exclusion at section 65(9) is not applicable to the information remaining at issue once the university disclosed the title of the research project and the current and cumulative totals of the funding received.

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

**Orders and Investigation Reports Considered:** Order PO-3084

### **OVERVIEW:**

[1] The appellant submitted the following access request to the University of Western Ontario (the university), pursuant to the *Freedom of Information and Protection of Privacy Act*:

Research Grant Statement ending 30 Apr 11 of the NIH Grant (National Institute of Health Grant) for [named professor]: Non-human primate transplantation.

[2] The university located one responsive record (an invoice) and issued a decision denying access to it on the basis that the invoice is a document "respecting or associated with research conducted by an employee or personnel associated with (the university)," and therefore falls outside the purview of the *Act*, as a result of section 65(8.1)(a) of the *Act*.

[3] The appellant appealed the university's decision on the grounds that section 65(8.1)(a) is not applicable and that the research grant statement simply describes the current balances of the research account and discloses no information regarding the research being performed.

[4] During the mediation stage of the appeal, the appellant indicated that the invoice was not the record it was seeking and clarified that its request was for a specific record referred to on the university's website, which is a computer screen shot, containing budgeted and actual amounts for specific items (including salaries, benefits, purchased services) relating to research grants. The university subsequently located a one page print-out titled "Research Grant Detail as of April 30, 2011". The university described the record as follows:

The project title of the research grant is "Induction of Renal Allograft Tolerance in Monkeys with Anti-CD45RB Base Therapy". This is the only research grant statement on PeopleSoft which references both [named professor] and the National Institutes of Health. Research accounting has given us a one page summary document containing the following subheadings:

- Account
- Account description
- Actual revenue current month
- Cumulative actual revenue this budget period
- Budget actual expenses current month
- Cumulative actual expenses that budget period
- Encumbrances to end of budget period
- Funds available (overspent)

[5] The appellant confirmed that this is the record it is seeking.

[6] The university then issued a new access decision on March 22, 2012. It indicated that the new record falls outside the purview of the *Act*, by virtue of section 65(8.1)(a),

since it is respecting or associated with peer reviewed research conducted by a faculty member at the university. The university went on to state in its decision:

[named professor's] research is part of a research project led by a researcher at the University of Pittsburgh which has received annual research grants from the National Institutes of Health (NIH), a U.S. granting agency, from 2007 to 2011. Further information about these annual grants, including the project title and amount of funding awarded each year to the University of Pittsburgh, is publicly available on the NIH website ...The annual award to the University of Pittsburgh includes a specific amount allocated to fund the research conducted at Western by [named professor].

The PeopleSoft system assists researchers in the management of their research funds, including the processing of expense associated with those funds, such as salaries, research equipment and supplies. The system records the financial transactions associated with the research, the money received for the research project and the expenses incurred in relation to that project. It is a detailed record of how funds are being used by researchers for their research activities. The printout you have requested sets out detailed financial information related to [named professor's] research activities. It includes a list of PeopleSoft Account codes and financial activity relating to the listed accounts. The information recorded on this record includes revenue, budget, and expenses incurred in the conduct of his research.

[7] The university further stated that certain information in the requested record may be disclosed pursuant to section 65(9) and advised the following:

In my view, the project title on the printout refers to the subject matter of this research project and should be disclosed. That Project Title is "Induction of Reno Allograft Tolerance in Monkeys with Anti-CD45RB based Therapy". Similarly, I consider that the total amounts appearing on the printout under "Actual Revenue Current Month" and "Cumulative Period" refer to the amount of funding being received with respect to this research project and should be disclosed. Those amounts are \$129, 263.61 and \$308, 784.66 respectively.

[8] The appellant advised the mediator that it objects to the university's application of section 65(8.1)(a) to the record. The appellant is of the view that the record describes only the current balances of the research account and does not disclose information regarding the research being performed. The appellant contends that section 65(9), rather than section 65(8.1)(a), applies to the record.

[9] As the appeal could not be resolved during the mediation stage it was forwarded to the adjudication stage of the appeal process. I sought representations from the university, initially. The university submitted representations in response and they were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*.

[10] In its representations, the university added the application of the exclusion at section 65(6)(3) and the mandatory exemption at section 21(1) to the exclusion already claimed. This information was communicated to the appellant. However, given my findings in this appeal, it is not necessary to consider these sections further.

[11] The appellant did not submit representations, but chose to rely on information it provided during the mediation stage of the appeal. Accordingly, I will review and consider this information in determining the issues on appeal.

[12] In this order, I find that the record at issue falls within the exclusion at section 65(8.1)(a). I find further that the exception to the exclusion at section 65(9) is not applicable to the information remaining at issue once the university disclosed the title of the research project and the current and cumulative totals of the funding received.

## **RECORDS:**

[13] The sole record at issue comprises the withheld portions of a one-page document entitled "University of Western Ontario Research Grant Detail" as of April 30, 2011.

## **ISSUE:**

[14] The sole issue considered in this order is whether the record at issue is excluded from the scope of the *Act* pursuant to section 65(8.1)(a).

## **DISCUSSION:**

**A: Does section 65(8.1)(a) exclude the record from the *Act*?**

[15] 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;

[16] Section 65(9) creates an exception to the exclusion found at section 65(8.1). This section states:

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.

### **Section 65(8.1)(a)**

[17] 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.<sup>1</sup>

[18] This section applies where it is reasonable to conclude that there is "some connection" between the record and the specific, identifiable "research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution."<sup>2</sup>

[19] During the inquiry stage of this appeal, Dr. Ann Cavoukian issued Order PO-3084 in which she found that section 65(8.1)(a) applies to expense reports submitted by two named professors of the University of Ottawa. In her order, she discussed in some detail the intent of the Legislature in enacting this section of the *Act*. As well, she discussed the relationship between funding information and the conduct of research. Although the records at issue in that appeal are not the same as that in the current appeal, the nature of the information at issue is similar. In concluding that the records at issue in that appeal are excluded from the jurisdiction of the *Act*, the Commissioner stated:

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."

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<sup>1</sup> See Order PO-2693.

<sup>2</sup> Order PO-2942; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*) and Order PO-3084.

[20] In seeking representations on the issues in the current appeal, I invited the parties to comment on the implications of this decision on the issues in the current appeal.

### **Representations**

[21] Referring to previous orders of this office and the criteria that must be met in order for the exclusion to apply (noted above), the university submits that the record at issue meets all of the criteria. The university reiterates the description of the record it provided in its access decision, as outlined above, and adds:

The requested record is a one-page financial statement that gives details of expenditures of the funds received for the particular research project conducted by [named professor]. There is, therefore, a direct connection between the content of the record and the research conducted by [named professor] and the record clearly meets the test of having "some" connection with specific identifiable research conducted by a faculty member at Western.

[22] In its letter of appeal, the appellant disagreed with the university's position that the record at issue meets the criteria established in previous orders. It takes the position that "[t]he research grant statement simply details the current balances of the research account and discloses no information regarding the research being performed."

[23] Responding to this statement, the university states that there is no requirement in section 65(8.1)(a) that a record must "disclose information regarding the research being performed." Referring to *Toronto Star* and Order PO-3084, the university states:

The criteria for the application of the exclusion in section 65(8.1)(a) are clear when read in their grammatical and ordinary sense. There is no need to incorporate an additional requirement for the application of the exclusion which is inconsistent with the plain, unambiguous meaning of the words of the statute. Moreover, the interpretation suggested by the appellant is discordant with the intention of the legislature. There are no pragmatic or policy reasons to impute an extra requirement for the application of this exclusion...The Commissioner has stated that the purpose of this exclusion is to protect the principle of academic freedom and foster competitiveness. Those purposes would be severely undermined if the IPC were to accept the appellant's argument and limit the application of section 65(8.1) only to those records that actually disclose information regarding the research being performed.

[24] The university goes on to compare the information at issue in this appeal with the information at issue in Order PO-3084 and submits that they are similar. In particular, the university states:

[T]he research account was created to manage the use of research funds received by a faculty member at [the university] for a specific pier-reviewed research project.<sup>3</sup> The information in the account, including the information that appears on this record, is entered and maintained in response to granting agency requirements and [the university's] internal requirements relating to the management of research funds. Only allowable expenses as stipulated by the NIH, the granting agency, could be charged to the account...

[25] The university also notes that "[i]n her analysis of the connection between these records and the research activities, [the Commissioner] accepted the evidence provided by the university and other affected parties that the records at issue relate to the use of research funds held in research accounts at the university."

### **Analysis and findings**

[26] After reviewing the submissions made by the university, the record and the appellant's position as stated in its letter of appeal, I find that the record at issue falls within the exclusion at section 65(8.1)(a). In arriving at this decision, I have also considered the Commissioner's analysis and the records at issue in Order PO-3084. Although the form of the records in the two appeals is different, I find that the substantive content of the information at issue in the current appeal is very similar to the type of information contained in the records at issue in Order PO-3084.

[27] In Order PO-3084, Commissioner Cavoukian reviewed the appropriate tests that must be met in order to bring a record within the exclusion and the legislative intent behind the exclusion, which I will not repeat here, and concluded:

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."<sup>4</sup>

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<sup>3</sup> According to the university, the research project is part of a larger pier-reviewed research project conducted at the University of Pittsburgh and at the university. The research project has received multi-year funding from the National Institutes of Health (NIH), with the annual award going to the University of Pittsburgh. A portion of that funding is allocated to fund the research being conducted by the named professor at the university.

<sup>4</sup> Emphasis in the original.

[28] The Commissioner accepted the university's description and use of the records as follows:

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

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.

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.

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.<sup>5</sup>

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

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<sup>5</sup> 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).



conferences, collaborative trips, archival work and historical research, for professors, research personnel, students and colleagues working with professors.

[29] The record at issue in the current appeal contains the same type of information described above. I agree with the analysis of this issue conducted by the Commissioner and find that her conclusions similarly apply to the record at issue in the current appeal. I agree with the university that there is no requirement in section 65(8.1)(a) that the records disclose information regarding the research being conducted. As noted by Commissioner Cavoukian, "it must be reasonable to conclude that there is **some** connection between the record and the specific , identifiable research..."

[30] I am satisfied that the record at issue documents the "expenditure of research funds and grants in furtherance of research activities," and accordingly, has some connection to research.

### **Section 65(9) – Exception to the Exclusion**

[31] 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."

[32] The appellant argues that the exception applies to the record, in its entirety, stating that "[t]he research grant statement simply details the current balances of the research account and discloses no information regarding the research being performed." The university disagrees.

[33] The university notes that the record at issue contains the title of the research project and two columns that indicate the "Actual Revenue Current Month" and "Cumulative Actual Revenue the Budget Period" that relate to this research project. The university submits that it has disclosed both the "subject-matter" and "amount of funding being received" as required under section 65(9), and that the remaining portions of this record do not fall within the exception to the exclusion. The university takes the position that "[t]his limited exception does not require the institution to provide details as to how the grant moneys are being expended nor does it mean that this record no longer falls within the purview of section 65(8.1)(a)."

[34] I agree with the university. The exception in section 65(9) does not refer to an entire document, but only to the types of information specified. The university has provided that very information, being the title of the research project, which identifies the subject matter of the project and the total amounts of the funding received for the month and the cumulative total. The information at issue does not refer to this amount of funding, but rather, how the funding was used by the professor in conducting his research.

**Summary**

[35] I find that the record at issue is excluded from the *Act* as it falls within the scope of section 65(8.1)(a) and section 65(9) is not applicable to it.

[36] Because of this decision, it is not necessary for me to consider the other exclusion and exemptions claimed by the university.

**ORDER:**

I uphold the university's decision.

Original signed by: \_\_\_\_\_  
Laurel Cropley  
Adjudicator

\_\_\_\_\_ February 13, 2013