

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-3243

Appeal PA12-297-2

University of Ottawa

August 27, 2013

Summary: The appellant sought access to records from the offices of specified officials and departments of the University of Ottawa that related to two named associations. The university located responsive records and granted partial access to them. It relied on the research exclusion in section 65(8.1)(a) of the *Act* to argue that some records were excluded from the application of the *Act*. It also relied on the discretionary exemption in section 18(1)(c) (economic and other interests) of the *Act* to deny access to some records. The appellant appealed the university's decision. This order does not uphold the university's decision, and orders the university to disclose the records to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 18(1)(c) and 65(8.1)(a).

Orders and Investigation Reports Considered: Orders PO-2693, PO-2694, PO-2942, PO-2946, PO-2947, and PO-3084.

OVERVIEW:

[1] The University of Ottawa (the university) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

[C]opies of all records related to [two named associations] and sent to/by and/or received to/by and/or in the possession physically and/or electronically of

- The Office of the President
- The Office of the Vice-President, Governance, formerly known as the Office of the Secretary, including legal Counsel
- The Office of the Vice President, Academic
- The Office of the Vice President, Resources
- The Communications Office (a.k.a. The Communications Directorate)
- The Office of the Dean of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Assistant Dean and Secretary of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Vice Dean of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Dean of the Faculty of Science
- The Office of the Dean of Telfer School of Management
- The Office of Marketing and Development of Telfer School of Management
- The Office of Administrative Services of Telfer School of Management
- Mark Hannington in his duties as Goldcorp Chair in Economic Geology
- The Office of the Department of Earth Sciences
- The Office of the Dean of the Faculty of Social Sciences
- The Office of the Department of Economics
- The Office of the School of Political Studies
- The Office of the School of International Development and Global Studies
- The Office of the Graduate School of Public and International Affairs

Between, March 1, 2007 and present. [*sic*]

[2] Initially, the university notified the requester that it was extending its time to respond to the request by 30 days pursuant to section 27(1) of the *Act*.

[3] At the end of the 30-day extension period, the requester, now the appellant, filed a deemed refusal appeal, as no access decision had been issued by the university. Appeal PA12-297 was opened to review the deemed refusal, however, that appeal was resolved by the subsequent issuance of the university's access decision.

[4] In its access decision, the university advised that it had searched all of the offices mentioned in the request and identified 25 responsive records. The university granted complete access to records 11 through 18, and 20 through 25. The university granted partial access to records 4 and 5, relying on the discretionary exemption in section 18 (economic and other interests) to withhold portions of these records. The university also relied on section 18 to deny access to records 6 through 10, in their entirety. Finally, the university claimed that the *Act* did not apply to records 1, 2, 3 and 19, by virtue of the research exclusion in section 65(8.1)(a) of the *Act*. It also claimed the application of section 18(1)(c) as the basis for denying access to these records, in their entirety.

[5] The appellant appealed the university's decision and appeal file PA12-297-2 was opened.

[6] During mediation, the university agreed to disclose records 4 through 10, in their entirety. Accordingly, these records are no longer at issue in this appeal.

[7] Mediation did not resolve the remaining issues in the appeal, and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] I sought and received representations from the university and the appellant. I shared these with the parties in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[9] After I concluded my inquiry, the appellant submitted correspondence to this office in which he questioned the reasonableness of the university's search for records in this appeal. Because the appellant raised this issue after I had received representations from the parties and completed my inquiry, I did not reopen my inquiry to include this new issue. Accordingly, I do not address the issue of the reasonableness of the university's search in this order.

[10] In this order, I do not uphold the decision of the university. I find that the records are not excluded under section 65(8.1)(a), and they are not exempt under section 18(1)(c) of the *Act*. I order the university to disclose the records.

RECORDS:

[11] The records that remain at issue, numbered 1, 2, 3 and 19, consist of emails.

ISSUES:

- A. Does section 65(8.1)(a) exclude the records from the *Act*?
- B. Does the discretionary exemption at section 18(1)(c) apply to the records?

DISCUSSION:

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

[12] 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; . . .

[13] 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.” This office has also held that 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.¹

[14] Section 65(8.1)(a) 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.”²

Representations

[15] The university adopts the definition of “research” noted above, and the requirement that the research be “referable to specific, identifiable research projects that have been conceived by a specific faculty member.” The university submits that the records are linked to research that falls within the scope of this definition because they are associated with research conducted or proposed by an employee of the university or by a person associated with it. It further asserts that it is more than reasonable to conclude that there is “some connection” between the records and the research conducted by the professor. The university argues that disclosure of the records “could

¹ Order PO-2693.

² Order PO-2942; see also *Ontario (Attorney General) v Toronto Star*, 2010 ONSC 991 (Div. Ct.). (*Toronto Star*).

potentially reveal important details and strategy of the research and impinge on the academic freedom of the professors to pursue that research and funding for it.”

[16] The university relies on Orders PO-2693 and PO-3084 to stress the importance of protecting academic freedom, and it argues that disclosure of the records would be inconsistent with the purpose of the *Act* and would have a chilling effect on academic freedom, competitiveness and research at Canadian universities.

[17] The university concludes by asserting that the exceptions to section 65(8.1)(a), sections 65(9) and 65(10), do not apply because the records do not contain information on the subject matter and amount of funding being received, and do not contain any personal information of the appellant.

[18] The university also provides confidential representations on this issue.

[19] The appellant relies on Order PO-2694 for most of his submissions. He states Order PO-2694 provides guidance on how the word “research” should be interpreted for the purposes of the exclusion in section 65(8.1)(a), and that the word “research” must be referable to “specific, identifiable research projects” conceived by a specific university faculty member, employee or associate. The appellant provides additional representations on this issue, however, due to my finding below, it is not necessary to refer to these in this order.

Analysis and Findings

[20] Having reviewed the records and considered the parties’ representations, including the confidential representations of the university, I find that the records do not satisfy the criteria for exclusion from the application of the *Act* under section 65(8.1)(a) because they do not refer to “specific, identifiable research projects.”

[21] Previous orders of this office have established that records must relate to specific, identifiable research projects in order to be excluded under section 65(8.1)(a) of the *Act*.³ In adopting this approach, I note that the email records in this appeal are communications aimed at organizing the preparation of future research project proposals in compliance with certain timelines. The emails discuss possible research initiatives, potential research partnerships and prospective avenues of research funding. While the emails refer to academic disciplines and related research funding options, they do not refer to any “specific, identifiable research projects that have been conceived.”⁴ Because the records do not reveal any specific, identifiable and conceived research project, they do not satisfy the requirement that the research be “conducted or proposed” in order to qualify for exclusion under section 65(8.1)(a). Therefore, I find that the records are not excluded from the *Act* by section 65(8.1)(a).

³ Orders PO-2693, PO-2694, PO-2942, PO-2946, PO-2947, and PO-3084.

⁴ Orders PO-2693 and PO-3084.

[22] Having found that the records are not excluded under section 65(8.1)(a), I will now consider whether they are exempt from disclosure under section 18(1)(c).

B. Does the discretionary exemption at section 18(1)(c) apply to the records?

[23] Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[24] The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[25] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.⁵

[26] For section 18(1)(c) to apply, the university must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the university must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.⁶

⁵ Orders P-1190 and MO-2233.

⁶ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[27] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 18.⁷ Parties should not assume that harms under section 18 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁸

Representations

[28] The university states that the purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace in recognition of the fact that institutions may have economic interests and may compete for business with other public or private sector entities. The university states that it expends much energy and many resources to compete with other universities each year to attract the best students. It explains that well-funded research projects attract both students and desirable professors from the given field of research, who in turn, raise the profile of the university through increased employment opportunities for students, higher levels of instruction, and high quality publications. The university submits that these factors also increase its opportunities to obtain more funding for research.

[29] The university provides confidential representations on this issue and asserts that disclosure of the information in the records would lead to a reasonable expectation of prejudice to its economic interest and/or competitive position.

[30] The appellant submits that the university has not provided the detailed and convincing evidence needed to justify withholding the records under the section 18(1)(c) exemption. The appellant relies on Order PO-2861 to argue that section 18(1)(c) sets a high burden of proof for the university to meet, and evidence amounting to speculation of possible harm is not sufficient to establish the application of the exemption.

Analysis and findings

[31] I do not agree with the university’s position that the records are exempt under section 18(1)(c). The university has not convinced me that disclosure of the emails, most of which are over five years old, could reasonably be expected to prejudice the university’s economic interests or competitive position.

[32] The university’s submissions on this issue, including those found in its confidential representations, are general assertions and speculation. The university asserts that revealing information on suggested research funding initiatives from five years earlier and from two and a half years earlier, will prejudice its economic interests and competitiveness; however, it does not explain why it is reasonable to expect this

⁷ Orders MO-1947 and MO-2363.

⁸ Order MO-2363.

outcome. The university provides no information on whether the suggested research initiatives mentioned in the records were undertaken successfully, if at all, and what their current status, if any, is. Such information could have assisted the university in demonstrating that it has real economic interests worthy of protection that could be affected by disclosure of the records.

[33] I find that the university has not provided sufficiently detailed and convincing evidence to establish that the harm it asserts could reasonably be expected to occur. It has therefore, not established the application of this exemption. As noted above, the emails comprise communications between university faculty regarding possible research initiatives and potential funding partners and sources; the records do not contain sufficiently detailed information about any particular research initiative or funding source, nor has the university satisfied me that the information that is contained in the records could be exploited by a competitor to the detriment of the university. Accordingly, I find the records are not exempt under section 18(1)(c).

[34] As I have found that the records do not qualify for exemption under section 18(1)(c), I need not consider the university's exercise of discretion.

ORDER:

1. I order the university to disclose the records at issue in this appeal to the appellant by **October 2, 2013**, but not before, **September 27, 2013**.
2. In order to verify the university's compliance with order provision 1, I reserve the right to require the university to provide me with a copy of the records it discloses to the appellant.

Original signed by: _____
Stella Ball
Adjudicator

_____ August 27, 2013