

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4060

Appeal PA17-205

McMaster University

August 21, 2020

Summary: McMaster University (the university) received a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any agreements between the university and specified individuals and/or companies or institutions regarding the McMaster Institute for Energy Studies, including any related records such as notes or memoranda of understanding. No personal information was being sought. The appellant later narrowed his request to currently active agreements entered into during a specified ten-year period. The university identified one responsive record, and took the position that it is excluded from the scope of the *Act* under section 65(8.1)(a) (records respecting or associated with research). The appellant appealed the university's decision. In this order, the adjudicator upholds the university's decision and dismisses the appeal.

Statute Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, sections 65(8.1), (9), and (10).

OVERVIEW:

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

any agreements between [the university] and [specified individuals and/or companies or institutions] regarding the McMaster Institute for Energy Studies. This would include, but is not limited to, contracts,

memorandums of understanding, or notes spelling out terms of partnership.

[2] The appellant specified that he is not seeking personal information that may be contained in the records. He later narrowed his request to cover currently active agreements that were entered into during a specified ten-year period.

[3] The university identified one agreement as being responsive to the request and took the position that the record is excluded from the scope of the *Act* by virtue of section 65(8.1)(a) (records respecting or associated with research). As required by section 65(9) of the *Act*, the university disclosed to the appellant the subject-matter and the amount of funding associated with the agreement.

[4] The appellant appealed the university's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office). Since mediation did not resolve the dispute, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[5] The adjudicator initially assigned to this appeal began the inquiry by seeking the university's representations in response to a Notice of Inquiry, setting out the facts and issues on appeal. The university provided representations in response, which were shared with the appellant. The adjudicator then sought representations from the appellant. The appellant did not provide representations, but asked that the adjudicator rely on a letter he had sent to the IPC earlier, during the Intake process. The appeal was then transferred to me.

[6] For the reasons that follow, I uphold the university's decision and dismiss the appeal.

RECORD:

[7] There is one record at issue in this appeal. It is described by the university as a sponsored research agreement between the university and a number of named parties, which provides for the funding of research in the area of nuclear safety.

DISCUSSION:

[8] The sole issue in this appeal is whether the record is excluded from the application of the *Act* under section 65(8.1). The university takes the position that the record is excluded from the operation of the *Act* as a result of section 65(8.1)(a), and for the reasons that follow, I agree.

[9] Section 65(8.1)(a) says:

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[.]

[10] The effect of an exclusion is different from the effect of an exemption. If a record is found to be excluded under the *Act*, that means that *Act* does not apply to the record. However, the institution can still disclose outside of the *Act* if the exclusion is found to apply.

[11] The purpose of section 65(8.1) is to protect academic freedom and competitiveness.¹ By way of background, the university states that Canadian researchers compete for funding in a highly competitive market, whether it be through government grants or private sector funding. In such a competitive environment, the university states that the disclosure of a particular researcher's specific proposals, and agreements resulting from such proposals, could reasonably be used by competing researchers to the detriment of the first researcher and the institution she or he represents.

[12] 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 conducted or proposed by a specific faculty member, employee or associate of an educational institution.²

[13] I will address each component of the legal test for section 65(8.1)(a) below.

Respecting or associated with research

[14] The university explains that the record at issue is a sponsored research agreement entered into by the university and specified entities funding research in the area of nuclear safety.

[15] In its detailed representations, which were shared with the appellant, the university highlights the following parts of the agreement:

- The recitals of the agreement refer to the university's research in the area of nuclear safety under a Natural Sciences and Engineering Research Council ("NSERC") Industrial Research Chair (IRC) Program;
- Section 2 of the agreement expressly provides that the university shall conduct a research program under the direction of a specific faculty member in the university's Department of Engineering Physics; and

¹ See, for example, Orders PO-2942 and PO-3713.

² Order PO-2693.

- Schedule A (as referred to in Section 2 of the agreement) expressly refers to and incorporates by reference a specific research program proposal [of a specified date], as submitted by university researchers to NSERC.

[16] The university submits that these provisions in particular show that there is “some connection” between the agreement and a specific research project. Furthermore, the university submits that the program described in the agreement and funded pursuant to its terms involves systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, in the field of nuclear safety.

[17] The appellant submits that the intent of his request is not to obtain “proprietary research” or “research results” but to obtain “the terms and conditions governing research,” and goes on to discuss the “intent” behind his request.

[18] In my view, however, the intent behind a request is not relevant to the question of whether the exclusion at section 65(8.1)(a) applies.

[19] All that is required for the exclusion at section 65(8.1)(a) to apply is that it be 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.”³

[20] While the appellant disagrees that the exclusion applies, this does not mean that he challenges the fact that the record at issue is “respecting or associated with research.” To interpret his position that way would be to ignore a plain reading of his representations. Specifically, he argues that:

- the intent of his request is not to obtain research results, but rather the terms and conditions governing research; and
- he is trying to “access research agreements at a public institution in the hopes of evaluating any provisions that may affect academic integrity at the institution,” and that much money has been invested in research at the university and the public should know how or if “that research meets the standards of academic integrity.”

[21] In my view, the appellant’s representations, on their face, acknowledge that the record he is seeking has “some connection” to research.

[22] Based on the wording of the request, the parties’ representations, and my review of the record itself, I find that there is “some connection” between a specific field of research and the record. Accordingly, the record qualifies as being “respecting or associated with research” under section 65(8.1)(a).

³ Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

[23] As a result, I will move on to the next part of the test of whether section 65(8.1)(a) has been met.

Conducted or proposed by an employee of an educational institution or by a person associated with an educational institution

[24] As mentioned, the university explained that section 2 of the record refers to a specific research program being conducted under the direction of a specific faculty member in the university's Department of Engineering Physics. Therefore, the university submits that the research described in the record satisfies the requirement in section 65(8.1)(a) that the research is being conducted or proposed by an employee of or person associated with an educational institution.

[25] The appellant did not address this aspect of the test under section 65(8.1)(a).

[26] Having reviewed the record, I find that it relates to specific, identifiable research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution.

[27] I find, therefore, that the elements of the section 65(8.1)(a) exclusion have been established. I will now turn to the exceptions to the exclusion.

Exceptions do not apply

[28] Sections 65(9) and (10) create exceptions to the section 65(8.1)(a) exclusion. These sections say:

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

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

[29] As mentioned in the overview, the university disclosed to the appellant the subject-matter and the amount of funding associated with the agreement, as required by section 65(9) of the *Act*. The appellant has not disputed this. Therefore, I find that the university met its obligation under section 65(9).

[30] Furthermore, I accept that the exception at section 65(10) does not apply. That exception relates to evaluative or opinion material compiled in respect of teaching materials or research under certain circumstances. However, the record at issue in this appeal is a research agreement, not evaluative or opinion materials. Accordingly, the exception at section 65(10) has no relevance in this case.

Conclusion

[31] Since the university has demonstrated that the record is respecting or associated with research conducted by an employee of or person associated with an educational institution, the record is excluded from the application of the *Act* under s. 65(8.1)(a). Since the exclusion applies, the record as a whole is removed from the scope of the *Act* and a severed portion of it cannot be provided under the *Act*.

No public interest override

[32] The appellant argues that even if the exclusion applies, the public interest override at section 23 of the *Act* would apply to allow for disclosure of the record. However, the public interest override can only apply to a record that is covered by the *Act*. As the record at issue is excluded from the *Act*, the public interest override cannot apply to it.

ORDER:

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

Original signed by: _____

Marian Sami
Adjudicator

August 21, 2020