

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4061

Appeal PA17-160

University of Waterloo

August 25, 2020

Summary: The University of Waterloo (the university) received a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to any agreements and related documents between the university and five entities (Hydro One and four named companies) regarding the Waterloo Institute for Sustainable Energy. The university identified four responsive records, and took the position that each of them was 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 University of Waterloo (the university) received a request made under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following:

... any agreements between [the university] and Hydro One,¹ [and four named companies] regarding the Waterloo Institute for Sustainable

¹ Hydro One is identified in this order because it is an institution under the *Act*.

Energy. This would include, but is not limited to, contracts, memorandums of understanding, or notes spelling out terms of partnership.

[2] The university located four responsive records but denied access to them on the basis that they are excluded from the scope of the *Act* under section 65(8.1)(a) (records respecting or associated with research).

[3] The requester contacted the university and suggested that the exception to the exclusion found in section 65(9) of the *Act* may apply. In light of the requester's suggestion, the university agreed to review its decision. The university emailed the requester providing information about the subject matter and the funding received for the research agreements. However, it continued to withhold the agreements at issue.

[4] The requester, now the appellant, appealed the university's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] During mediation, the university confirmed its position that no further information or records would be disclosed. Since mediation did not resolve the issues, the appeal was moved to the adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry under the *Act*.

[6] 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, which were shared with the appellant. The adjudicator then sought representations from the appellant providing a Notice of Inquiry and a copy of the university's representations. The appellant advised staff from this office that her representations were the contents of a letter previously sent, as the letter included the arguments that she still stood by.²

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

RECORDS:

[8] There are four records at issue. For ease of reference, I will describe them as Records 1, 2, 3, and 4. Records 1, 2, and 3 are the agreements with Named Company 1, Named Company 2, and Named Company 3, respectively. Record 4 is the agreement with Hydro One.

[9] No responsive records were found in relation to the fourth company named in the request.

² The letter also indicated that the university did not provide information pursuant to the section 65(9) exception, however during the inquiry, the appellant clarified that although vague, the subject matter and funding that the university provided is sufficient for her.

[10] This office was not provided with a copy of the records, but the university described the records in detail through its representations and provided some publicly available supporting documentation as well.

DISCUSSION:

[11] The sole issue in this appeal is whether the records are excluded from the application of the *Act* under section 65(8.1). The university's position is that they are, and for the reasons that follow, I agree.

[12] 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[.]

[13] 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.

[14] The purpose of section 65(8.1) is to protect academic freedom and competitiveness.³

[15] 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.⁴

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

Respecting or associated with research

[17] The university provided detailed representations, which were shared with the appellant, describing the nature of the research institute named in the request, and each responsive record.

Institute named in the request is a research institute

[18] The research institute named in the request is the Waterloo Institute for Sustainable Energy (WISE). The university provided supporting documentation about its institutes. This documentation states that the university's institutes are formed to

³ See, for example, Orders PO-2942 and PO-3713.

⁴ Order PO-2693.

promote and encourage research and related activity in an area that is not accommodated conveniently within a single academic unit, and the function of an institute at the university is to facilitate the development and promotion of the particular academic area. In pursuit of this objective, an institute may establish links inside and outside of the university. The university states that, as with its other institutes, WISE's only work is in relation to research. Its only standing with the university is as a research facility, and its records relate entirely to that enterprise, particularly records relating to agreements with external bodies.

[19] I find that the fact that the records all relate to this research institute weighs towards finding that they are records respecting or associated with research. The fact that each of the records relates to a specific area of research, as summarized below, adds further support to this.

Specific areas of research

[20] The university submits that the records "definitely relate to systematic investigations designed to develop or establish principles, facts or generalizable knowledge." It provided details about the subject matter of research for each record, as I will summarize below.

[21] The research agreement with Named Company 1 (Record 1) concerns an evaluation of a particular vehicle in Canada under actual driving conditions, to receive driving data relating to the vehicle, and for WISE to test the feasibility, efficiency and reliability of dedicated electric vehicles within the Region of Waterloo.

[22] The research agreement with Named Company 2 (Record 2) relates to using advanced information technology to create a fully integrated "smart energy network", including natural gas, renewables and, in the future, new fuels such as hydrogen. The deliverables on this research project were a series of white papers, to which the university provided publicly available internet links.

[23] For the research agreement with Named Company 3 (Record 3), the research concerns the full integration of information science and technology concepts for power grid in order to enhance its security, reliability and effective performance of key components such as storage and renewable resources. The university stated that this research would help define the next generation electricity grid, or 'future grid', in terms of concepts, techniques and technologies and their capabilities to drive collaboration, productivity and efficiency in the energy sector in Canada.

[24] The research agreement with Hydro One (Record 4) has to do with smart grid power distribution and management, alternative energy and sustainability projects, along with graduate student investigations. The university explained that the chair will contribute significantly to work on how to integrate clean energy technologies into the grid as well as address specific issues of the electricity sector through research,

development and deployment projects.

[25] The appellant submits that the intent of her request is not to obtain “proprietary research” or “research results” but to obtain “the terms and conditions governing [the research agreements].”

[26] 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.

[27] All that is required for the exclusion at section 65(8.1)(a) to apply is that there be “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.”⁵

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

- the intent of her request is not to obtain research results, rather the terms and conditions governing the research; and
- she 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.

[29] In my view, the appellant’s representations, on their face, acknowledge that the records she is seeking have “some connection” to records respecting or associated with research.

[30] Based on the wording of the request, the description of the responsive records, and the description of the research institute involved, I find that there is “some connection” between a specific field of research and each record. Accordingly, each of these records qualifies as being “respecting or associated with research” under section 65(8.1)(a).

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

⁵ Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

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

[32] As set out below, I accept the university's submissions that the research described in each record satisfies the requirement in section 65(8.1)(a) and that the research is being conducted or proposed by an employee of, or person associated with, an educational institution.

[33] Under the terms of Record 1 (a "zero dollar" mutual confidentiality agreement with Named Company 1), the university states that its researchers assist Named Company 1 in the research relating to the evaluation of the particular vehicle described above. In light of this, I find that Record 1 concerns research conducted or proposed by the university's faculty, employee(s), and/or associates.

[34] Record 2 is described by the university as a purchase order with confidentiality provisions, the deliverables of which were a series of white papers. As mentioned, the university provided internet links to these white papers, which I reviewed. On the basis of that evidence, I find that Record 2 concerns research conducted or proposed by the university's faculty, employee(s), and/or associates.

[35] The university stated that Record 3 funds a research chair. The name of the university professor who is that research chair was included in a news release relating to an agreement between Named Company 3 and the university. Based on my review of the university's evidence, I find that Record 3 relates to research conducted or proposed by the university's faculty.

[36] The university explained that Record 4 is a Memorandum of Agreement (MOA) with Hydro One, funding the Hydro One Research Chair. The university's representations included an online link to a news release about this, which names a specific individual as research chair. Furthermore, the university explained that one of the purposes of this MOA is to "continue support for the training of 'highly qualified personnel (HQP),'" a term used by universities to describe the mentorship and supervision of graduate students. Having considered the evidence before me regarding Record 4, I find that Record 4 relates to specific, identifiable research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution.

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

[38] 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

[39] 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).

[40] The university's position is that it has met its responsibility under section 65(9) and that section 65(10) does not apply in the circumstances.

[41] The appellant does not challenge the university's position on section 65(9), and did not mention section 65(10) in her representations (despite specifically being invited to provide any reasons why this exception would be applicable).

[42] On the basis of the evidence before me, I find that the university met its obligation under section 65(9): the appellant acknowledged the university's provision of this information, and this office received a copy of the information sent to the appellant.

[43] 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 records at issue in this appeal are research agreements, not evaluative or opinion materials. Accordingly, the exception at section 65(10) has no relevance in this case.

Conclusion

[44] Since the university has demonstrated that the records are respecting or associated with research conducted by an employee of, or person associated with an educational institution, the records are excluded from the application of the *Act* under section 65(8.1)(a). As a result, each 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

[45] 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 records. However, the public interest override can only apply to those records which are covered by the *Act*. As the records at issue are excluded from the *Act*, the public interest override cannot apply to them.

ORDER:

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

Original signed by: _____
Marian Sami
Adjudicator

August 25, 2020 _____