Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2946

Appeal PA09-331

Carleton University

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NATURE OF THE APPEAL:

This appeal is related to a group of ongoing appeals with this office, in which similar requests were submitted to Ontario universities under the *Freedom of Information and Protection of Privacy Act* (the *Act*) by the same individual.[1] The request submitted to Carleton University (Carleton) read:

> Copies of all e-mail messages, including attachments and CC, in which my name … is mentioned, sent from/received to the institutional accounts used by [a named individual] (e.g., [specific email address] during the period of his service at the SSHRC[2] adjudication committee No 15, i.e. from October 15, 2008 to April 5, 2009. Please note that I request the search for the responsive documents on the Carleton U back-up e-mail server (not the retrieval of responsive documents from the above mentioned faculty member's desktop). … I also trust you [will] undertake all necessary measures to prevent destruction of responsive documents.

Carleton identified one responsive record and, in the initial decision letter, denied access to it in its entirety, claiming that it was exempt under sections 21(1) (personal privacy) and 49(c.1) (discretion to refuse requester's evaluative information) of the *Act*.

The appellant appealed Carleton's decision to this office, and a mediator was appointed to explore the possibility of resolution. During mediation, Carleton issued a revised decision letter to the appellant, adding a claim that the record is excluded from the operation of the *Act* pursuant to section 65(8.1)(a) (records respecting or associated with research).

As resolution of the appeal was not possible, it was transferred to the adjudication stage, where an adjudicator conducts an inquiry under the *Act*. Due to matters transpiring with other related appeals, this appeal was temporarily placed on hold. Once the appeal was reactivated, I sent a Notice of Inquiry to Carleton, initially, outlining the issues and seeking representations, which I received.

Although Carleton had not initially disputed whether responsive records would be in its custody or under its control, its representations included submissions on the issue for the first time. The issue of custody or control over records of the same nature as the one at issue in the present appeal was addressed and determined in three companion orders issued in 2009: Orders PO-2836, PO-2842 and PO-2846. Indeed, Carleton's representations addressed Order PO-2836 directly, challenging my finding in that order (and by implication, the others as well) that the emails generated by university faculty members in the course of carrying out their SSHRC

[1] The first set of requests resulting in appeals to this office related to the 2007-2008 SSHRC grant year, while the second set related to the 2008-2009 year. To date, the orders issued for this group of appeals include Orders PO-2836 (Wilfrid Laurier University), PO-2842 (University of Ottawa), and PO-2846 (University of Guelph), which address the issue of custody or control of responsive records; and Order PO-2942 (Wilfrid Laurier University), dealing with the application of section 65(8.1)(a) of the *Act*.

[2] Created by an act of Parliament in 1977, the Social Sciences and Humanities Research Council of Canada (SSHRC) is a federal agency that promotes and supports university-based research and training on social, cultural and economic issues. According to the SSHRC website, SSHRC's grant and fellowship programs and policies enable "knowledge sharing and collaboration across research disciplines, universities and all sectors of society."

adjudication committee responsibilities were in the custody or under the control of the university. I am not persuaded that there is a basis for departing from my finding in those orders regarding the issue of whether this type of record is in the custody or under the control of the university. Moreover, in view of my finding in this order that section 65(8.1)(a) applies to the sole responsive record, I have concluded that it is not necessary to further address the university's submissions respecting the issue of custody or control.

In my view, however, it would be useful to set out an excerpt from my reasons in Order PO-2836, describing the relationship between a finding of custody or control and the question of access to records.

> Under section 10(1), … the *Act* applies only to records that are in the custody or under the control of an institution.
>
> A finding that a record is under the custody or control of an institution does not necessarily mean that a requester will be provided access to it. In this appeal, I advised the parties in the Notice of Inquiry that a record found to be in the custody or control of the University may or may not be subject to the *Act* pursuant to section 65 (see Orders PO-2693 and PO-2825). I note that the question of whether records in the custody or under the control of the University are *excluded* from the application of the *Act* pursuant to section 65 (including sections 65(8.1) – 65(10)) is a matter that could be dealt with at a later point, if necessary. Furthermore, a record under an institution's custody or control *and* subject to the *Act* may be withheld if it falls within one of the exemptions under sections 12 to 22.

In the concluding paragraphs of Order PO-2836, I reached the following conclusions respecting section 10(1) of the *Act*:

> In the context of the circumstances under which the records at issue were created and maintained, I find that the University has both the right and responsibility to deal with the records, and that they are in the custody of the University for the purpose of section 10(1) of the *Act*. In view of my finding that the named professor's SSHRC-related emails are in the University's custody, the University is required to deal with them in accordance with all applicable laws, including the provisions of the *Act* [Order PO-1725].

Shortly after submitting its first set of representations, Carleton provided brief supplementary representations on the possible implications of a recently released Divisional Court decision, *Ontario (Attorney General) v. Toronto Star* (*Toronto Star*).[3]

Next, and based in part on representations received from another Ontario university, I decided that it was necessary to seek representations from SSHRC, as I concluded that it was an organization whose interests may be affected by the outcome of the appeals. Under section 13.01 of the *IPC Code of Procedure*, this office may invite submissions from "any individual or

[3] 2010 ONSC 991.

organization who may be able to present useful information to aid in the disposition of an appeal." For this purpose, I sent a letter Notice of Inquiry to SSHRC, which outlined the issues. I also provided excerpts from representations submitted by Carleton, as well as by the University of Western Ontario (Western) in Appeal PA09-129-2. As I stated,

> SSHRC's functions and its position respecting the circumstances of these appeals figure predominantly in these representations. For example, I note the indication in Western's representations that:
>
> > Upon receipt of this access request, the University contacted SSHRC staff at the request of [the named Western faculty member]. SSHRC advised the University that the agency would be very concerned if an applicant were able to obtain SSHRC records pursuant to provincial legislation that would not have been accessible to him or her under the federal legislation applicable to SSHRC's records.

SSHRC provided submissions in response to my request, but asserted a claim of confidentiality over the correspondence, in its entirety. I did not share SSHRC's correspondence with any of the parties in this appeal or the other related appeals. However, in my view, it would not disclose confidential information to state that SSHRC's representations contained a description of its activities supporting university-based training and research in the humanities and social sciences. It may also be said that SSHRC declined to offer representations on the possible application of section 65(8.1)(a) (and other exemptions in the *Act*) to the records at issue, instead stating that it "defers to the views of the IPC in consideration of the arguments of the parties."

At this same time, I received a request from the institution in one of the related appeals (Wilfrid Laurier) for a "preliminary ruling" on the possible application of section 65(8.1)(a). On my review of the submissions from Wilfrid Laurier, and because the application of section 65(8.1) would remove the records from the scope of the *Act*, I decided to seek representations from the appellant respecting this issue alone. I sent a Notice of Inquiry to the appellant, along with a copy of Wilfrid Laurier's representations. I advised the appellant that I considered the determination of the application of section 65(8.1)(a) to be central to all of his appeals with this office and that, accordingly, it would be appropriate to proceed with the determination requested by Wilfrid Laurier as a preliminary matter. I also advised the appellant that although I had not sought SSHRC's views respecting the Wilfrid Laurier appeal, I had sought and received submissions from SSHRC in the related appeals. Subsequently, I received representations from the appellant.[4]

On January 13, 2011, I issued Order PO-2942. In Order PO-2942, I made the finding that section 65(8.1)(a) applies to the records identified by Wilfrid Laurier as responsive to the appellant's

[4] The appellant's submissions in Appeal PA08-164-2 on section 65(8.1)(a) and its exceptions represent the only ones provided by him on this issue, as I did not seek his submissions on the issue again in the present appeal (PA09-331) or in Appeal PA09-129-2 with Western. Some aspects and themes contained in the appellant's representations from Appeal PA08-164-2 are referred to in this order, along with comments provided at the time the appellant filed his appeal in Appeal PA09-331.

request and that they are, therefore, excluded from the scope of the *Act*. In my view, my analysis and reasons in Order PO-2942 are applicable to the present appeal with Carleton. In this order, therefore, I have concluded that the responsive record is excluded from the scope of the *Act* pursuant to section 65(8.1)(a). Accordingly, it is not necessary for me to address the possible application of the mandatory exemption in section 21(1), together with section 21(3)(g), although Carleton's claim of section 49(c.1) is addressed below in relation to the exception to section 65(8.1)(a) contained in section 65(10).

RECORDS:

The sole record at issue is a five-page email exchange between the identified Carleton faculty member and a SSHRC program officer, dated January 16 to January 21, 2009.[5]

DISCUSSION:

IS THE RESPONSIVE RECORD EXCLUDED FROM THE *ACT* PURSUANT TO SECTION 65(8.1)(a)?

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 section 65(10) are met.

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; …

The exceptions to section 65(8.1) in sections 65(9) and (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).

[5] Counsel for Carleton submitted that the five-page email string identified as responsive ought to be considered as three separate email records; Carleton took the position that only the first and third emails contained references to the appellant and were, therefore, responsive to the request. Given my finding in this order that the entire email record is excluded from the *Act*, however, I do not find it necessary to address this submission by Carleton further.

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 (Order PO-2693).

The purpose of the provision is to protect academic freedom and competitiveness (Orders PO-2693, PO-2825 and PO-2942).

The parties' representations on section 65(8.1)(a)

Referring to the reasons in Order PO-2836, Carleton submits that:

> In order not to "compromise the confidentiality of a faculty's member's 'scholarly activities' or the independence of the SSHRC peer review process", to which the records at issue are intimately linked … the exclusion in section 65(8.1)(a) must apply … [to] the records at issue … which contain the name of the Appellant and that are "respecting or associated with" the SSHRC application process. …

For my review, Carleton provided representations and additional enclosures related to the SSHRC grant application process, such as an application form and instructions. Carleton refers to the terms and conditions of the grant application, including the requirement that the applicant sign to indicate that he/she "has read and understands the [federal] *Access to Information Act* and the *Privacy Act*[6] as they pertain to grant application information." In another part of its submissions, Carleton also seeks to emphasize the importance of confidentiality to the integrity of the peer review process.

Carleton submits that there ought to be no doubt that the SSHRC records at issue in this appeal concern "research" as that term has been defined in Order PO-2693, which adopted the definition of the term contained in the *Personal Health Information Protection Act*.[7] Expanding on this argument, Carleton draws my attention to SSHRC website descriptions about its research and training activities.[8] According to Carleton, SSHRC's description of the endeavours supported through its funding program meets the definition of "research" as described by the *Act* and past decisions of this office, such as Orders PO-2825 and PO-2693.

Regarding the specific and identifiable nature of the records, Carleton states:

> The records previously identified as responsive in this appeal consist of emails that pertain to arrangements for the adjudication of specific, identifiable applications to the SSHRC for research funding under Standard Research Grants (Committee #15 – Interdisciplinary Studies). …

[6] R.S. 1985, c. A-1 and R.S., 1985, c. P-21, respectively.
[7] S.O. 2004, c.3.
[8] Credited in the university's representations to the SSHRC website: http://www.sshrc.ca/site/about-crsh/about-crsh-eng.aspx

> Comments made by the Carleton University faculty member … are made in reference to specific, identifiable research projects that are referred to by both the name of the lead researcher and the application number. Moreover, the connection to the research is substantial given that the information in the records is intrinsic to the peer review process.

According to Carleton, the responsive records are also about research "conducted or proposed" in that they reflect the appellant's SSHRC research proposal, which must undergo peer review for the purpose of the SSHRC funding approval process. In this way, Carleton argues, the appellant and his research proposal is "associated" with a Carleton faculty member for the purpose of the exclusion in section 65(8.1)(a). As I understand it, Carleton's argument supposes that the "educational institution" referred to in section 65(8.1)(a) must be Carleton, as the recipient of the request. In my view, this explains Carleton's additional argument on this point, which apparently seeks to establish a connection between the Carleton faculty member who is named in the request and the appellant's research proposal. For the reasons outlined in my decision below, however, I have reached a different conclusion about the interpretation of "an educational institution" in section 65(8.1)(a), and it is not therefore necessary to reproduce the remainder of Carleton's representations on this aspect of the exclusion.

Carleton submits that the application of the exclusion to the records at issue in this appeal promotes the legislative purpose of protecting academic freedom and competitiveness, as discussed in Order PO-2693 by Senior Adjudicator John Higgins. In Order PO-2693, the senior adjudicator highlighted comments made in the Ontario Legislature upon introduction of the legislation that added universities as institutions under the *Act*. Further, Carleton submits that:

> The purpose of the *Act* is to promote the transparency and accountability of publicly funded institutions but not to compromise academic freedom. This principle has been reinforced by IPC Order PO-2825. That order further noted that records pertaining to peer evaluations of research proposals such as the records that are at issue in this appeal "are precisely the type of record at which section 65(8.1)(a) is aimed, and their exclusion from the *Act* is clearly related to the legislative objectives of academic freedom and competitiveness … beyond question, section 65(8.1)(a) was intended by the Legislature to apply to this type of record…" (IPC Order PO-2825, p. 11).

In its supplementary representations respecting *Toronto Star*, Carleton submits that the Divisional Court's decision regarding "the meaning of the words, 'relating to' and 'in respect of' in section 65(5.2) of the *Act* ought to considered in the interpretation of section 65(8.1)(a). Carleton notes that the court held that words should be afforded the "broadest scope" and that:

> "some connection" is all that is required and not, as the IPC has found in the past, a substantial connection. … Accordingly, we respectfully submit that the words "respecting or associated" with research, in section 65(8.1)(a), be given the broadest scope reflecting "some connection."

In the related appeal, the appellant argues that access to the requested information would "strengthen responsibility, a necessary complement of freedom, in evaluation of research." The appellant submits that the evaluation of research demands a greater level of transparency because it may be equated with "quality control" in science. The appellant argues that records containing "specific hypotheses to be tested using scientific methods" or listing of research participants should fall under the exclusion claimed in this appeal, but that records relating to peer review or evaluation ought not to be subject to the exclusion and removal from the *Act* because they "do not contain any hypothesis to be tested."

The appellant expresses concern about problems with the review of SSHRC funding applications, including his own, and he alludes to certain potentially problematic factors said to underlie decisions on, and processes followed for, the funding of research proposals. He argues that SSHRC's use of public funds ought to influence the characterization of the peer review and grant process for the purpose of contextualizing the exclusion in section 65(8.1)(a).[9] The appellant submits that due to the "distribution of public money… the application of Clause 65.8.1.a [is] highly questionable and unjustifiable." Picking up on his previous "quality control" argument, the appellant suggests that in view of the *Act's* purpose of shedding light on the operations of government, the public interest in promoting the accountability of the SSHRC peer review process should outweigh the reasons for applying the exclusion.

Analysis and Findings

This order represents the second issued in relation to this particular group of appeals respecting the access decisions of a number of Ontario universities. The records identified as responsive in these three appeals are all referable to the appellant's SSHRC grant application and the resulting peer review of it. In my view, it is important to promote a consistent approach to the type of record identified as responsive in each of the three appeals, notwithstanding minor variations in the content of those records due to their creation by different members of the identified SSHRC adjudication committee in two separate grant application years.[10] Accordingly, the review and analysis in this order necessarily dovetails with my reasons in Order PO-2942.

It is important to emphasize the significance of a finding that section 65(8.1)(a) applies. It 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*. If section 65(8.1)(a) applies to the record at issue in this appeal, it is totally excluded from the access and privacy provisions of the *Act*.[11]

In Order PO-2942, I observed that Orders PO-2693, PO-2694 and PO-2825 (issued by Senior Adjudicator John Higgins) represented, at that point, the only interpretations of section

[9] The appellant mentions by name the *Social Sciences and Humanities Research Council Act* (R.S. 1985, c. S-12) and the *Financial Administration Act* (R.S. 1985, c. F-10). The relevance of these statutes is also suggested for the interpretation of section 49(c.1).

[10] Appeals PA08-164 and PA08-164-2 (Orders PO-2836 and PO-2942); PA08-165 (Order PO-2842); and PA08-166 (PO-2846) relate to the 2007-2008 SSHRC grant year, while Appeals PA09-129-2 and PA09-331 relate to the 2008-2009 SSHRC grant year.

[11] Orders MO-2024-I, PO-2825 and PO-2942.

65(8.1)(a) by this office.[12] The analysis in Order PO-2942 relied on a review and adoption of the senior adjudicator's interpretation of the exclusion, but involved a new construction for the meaning given to "respecting or associated with" in section 65(8.1)(a) based on *Toronto Star*. I note that Carleton's supplementary representations suggest an approach consistent with that taken in Order PO-2942.

In developing his analysis on section 65(8.1)(a), Senior Adjudicator Higgins emphasized the importance of considering the purposes of the *Act* as a context for the interpretation of the provision. I agree, and adopt without reproducing them, the senior adjudicator's reasons regarding the *Act*'s purposes at pages 6 and 7 of Order PO-2693. In the early part of my review of section 65(8.1)(a) in PO-2942, I stated the following with respect to past consideration of the legislative intent behind the exclusion:

> I agree with the senior adjudicator that the 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 in this analysis. At third reading[13], Mr. Arthurs stated:
>
> > . . . [T]his bill proposes to make Ontario's universities subject to the provisions of the *Freedom of Information and Protection of Privacy 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.

As I remarked in Order PO-2942, M.P.P. Arthurs' comments had been included in the university's submissions in that appeal and were also drawn to my attention in the instant appeal. In my view, these comments have been accepted as embodying the legislature's intention to protect academic freedom and competitiveness while creating a general right of access to information held by universities (see Orders PO-2693, PO-2825 and PO-2942).

I continued my review of the exclusion in Order PO-2942 by turning to the definition of "research." I stated (starting at page 8):

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[12] Section 65(8.1)(a) was mentioned in Order PO-2557 (March 2007). However, Adjudicator Colin Bhattacharjee was not required to address the exclusion because although section 65(8.1)(a) had been enacted prior to the date of the order, it was not in force at the time of the appellant's access request.

[13] This refers to the third reading in the legislature of Bill 197, the *Budget Measures Act*, through which universities were added as institutions under the *Act*.

For the purpose of determining the reach of the exclusion in section 65(8.1)(a), the term "research" must be defined. Notably, the *Act* contains no such definition. In Order PO-2693, however, after reviewing older orders of this office that addressed the term as it related to certain exemptions[14], and taking into account the modern rule of statutory interpretation[15], Senior Adjudicator Higgins settled upon the following definition from Ontario's *Personal Health Information Protection Act* for "research" under section 65(8.1)(a):

> "research" means 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.[16]

Order PO-2693 also recognized the significance of the remaining words of section 65(8.1)(a) in assigning meaning to the term "research." The senior adjudicator addressed the phrase "conducted or proposed by an employee of an educational institution or a person associated with an educational institution" as follows:

> Seen in the context of the purpose of this provision, that is, to protect academic freedom and competitiveness, the use of the words, "conducted or proposed", and the inclusion of specific references to employees or persons associated with the University, leads me to conclude that "research" must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of the University (at page 9).

In the present appeal, and based on my own review of the records, I am satisfied that the appellant was seeking funding through SSHRC for an identifiable cross-comparative research study, or systematic investigation, which was intended to establish facts or generalizable knowledge within a specific subject area. Accordingly, I find that the appellant's SSHRC proposal, and the evaluation of it, fits within the definition of "research" as that term has been interpreted by this office for the purpose of section 65(8.1)(a) of the *Act*.

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[14] Sections 13(2)(h) (advice or recommendations) and 21(1)(e)(ii) (personal privacy), as discussed in Orders P-666, P-763 and P-1371.

[15] In discussing this rule, the senior adjudicator reviewed *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27; *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Ct.), and *Sullivan and Driedger on the Construction of Statutes*, 4th ed., by Ruth Sullivan (Toronto: Butterworths, 2002). Senior Adjudicator Higgins' discussion of the definition of "research," including Sullivan's three principles of plausibility, efficacy and a reasonable and just outcome, appears at pages 7-11 of Order PO-2693.

[16] S.O. 2004, chapter 3, section 2. The senior adjudicator also considered BC Order 00-36, a decision of former British Columbia Commissioner, David Loukidelis, in which a provision in that province's statute [section 3(1)(e)] similar to Ontario's section 65(8.1)(a) was interpreted as "intend[ing] to protect academic endeavour." In two recent BC orders [F10-42 and F10-43 issued December 17, 2010], Adjudicator Michael McEvoy adopted and applied the interpretations of these two similar provisions provided by Senior Adjudicator Higgins in Order PO-2693 and the former BC Commissioner in Order 00-36.

In the facts of the present appeal, and as already suggested, the nature of the responsive record identified by Carleton in this appeal is akin to the responsive records identified in Order PO-2942. In this appeal, I am satisfied that the record is related to the appellant's SSHRC application for grant funding to assist him in carrying out an identifiable cross-comparative research study, or systematic investigation, intended to establish facts or generalizable knowledge within a specific subject area.

In Order PO-2942, I decided that I should comment on the part of the finding in Order PO-2693 that implied that the application of the exclusion in section 65(8.1)(a) demanded that the research be connected with faculty of the university (institution) receiving the request under the *Act*. At page 9, I stated:

> I note that in the section from Order PO-2693 excerpted directly above, the senior adjudicator refers to "research projects that have been conceived by a specific faculty member, employee or associate of *the* University [emphasis mine]." The actual wording of section 65(8.1)(a) makes reference to "*an* educational institution," a distinction that bore no relevance in the appeal leading to Order PO-2693, but which is significant to the facts of the appeal before me where the appellant is a faculty member at a post-secondary institution in another Canadian province. The definition of "educational institution" in section 2 of the *Act* is "an institution that is a college of applied arts and technology or a university." In my view, in its plain and ordinary meaning, the use of the word "an" (as opposed to "the") in section 65(8.1)(a) supports an interpretation of the provision that may lead to it applying to the research proposed or conducted by an employee of another educational institution. Accordingly, I am satisfied that my finding regarding the appellant's proposed research in this appeal is not affected by the appellant's status as a faculty member employed by an educational institution other than the one that received his access request.

In this appeal, Carleton provided submissions on the basis that the exclusion requires there to be a connection between the faculty member named in the request and the proposed research. As stated above, however, for the purpose of section 65(8.1)(a), I am satisfied that the appellant's employment or association with another Canadian "educational institution" is sufficient. Accordingly, in the circumstances, I find that the appellant's research is "… proposed by an employee of an educational institution or a person associated with an educational institution," as contemplated by section 65(8.1)(a).

Next, in Order PO-2942, I acknowledged that the concluding part of my analysis of section 65(8.1)(a) required me to consider the records before me to determine whether they were "respecting or associated with" the appellant's specific and identifiable proposed research, thereby triggering the application of the exclusion. The same task is required of me in this appeal. Therefore, I will review the analysis from Order PO-2942 regarding the implications of the Divisional Court's decision in *Toronto Star* for the interpretation of the "connecting words" in section 65(8.1)(a). Starting at page 10 of Order PO-2942, I stated:

In *Toronto Star*, the Ontario Divisional Court defined "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. This judgment signalled 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. Explaining this approach in *Toronto Star*, the Court stated:

> Section 65(5.2) contains the phrases "relating to" and "in respect of." The Supreme Court of Canada has interpreted these phrases: *Canada (Information Commissioner) v. Canada (Commissioner, RCMP)*, 2003 SCC 8, [2003] 1 S.C.R. 66, at para. 25; *Markevich v. Canada*, 2003 SCC 9, [2003] 1 S.C.R. 94. In *Markevich*, the Court held the following, at para. 26:
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> > The appellant's submission turns on whether these proceedings are undertaken "in respect of a cause of action". The words "in respect of" have been held by this Court to be words of the broadest scope that convey some link between two subject matters. See *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39, per Dickson J. (as he then was):
> >
> > > The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
> >
> > In the context of s. 32, the words "in respect of" require only that the relevant proceedings have some connection to a cause of action.
>
> Accordingly, the words "relating to" in s. 65(5.2) require some connection between "a record" and "a prosecution." The words "in respect of" require some connection between "a proceeding" and "a prosecution."
>
> The Adjudicator erred when he interpreted the words "relating to" in s. 65(5.2) to mean "for the purpose of, as the result of, or substantially connected to." The Adjudicator erred when he read-in a "substantial connection" requirement between the record and the

> prosecution. The Adjudicator further erred when he relied upon a restricted purpose for the provision in deciding whether the connection is sufficient to justify the application of this exclusion.
>
> 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**.**
>
> The Adjudicator's interpretation of the phrase "relating to" is also discordant with the intention of the Legislature. There are no pragmatic 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.[17]

Given the clear reasons provided by the court in *Toronto Star* regarding the interpretation of the connecting words "relating to" in section 65(5.2), I am satisfied that the principles enunciated there ought to be applied to interpreting the words, "respecting or associated with" in section 65(8.1)(a) of the *Act*. Accordingly, in order 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" [emphasis mine].

In reaching my conclusion that the records at issue in Order PO-2942 fit within the scope of section 65(8.1)(a), I expressed my agreement with Senior Adjudicator Higgins' conclusion in Order PO-2825 that peer evaluations "are precisely the type of record at which section 65(8.1)(a) is aimed, and [that] their exclusion from the *Act* is clearly related to the legislative objectives of academic freedom and competitiveness."[18]

The record at issue in this appeal belongs to the same grouping of records created by the individual SSHRC adjudication committee members in carrying out their peer evaluations of the appellant's grant application. Accordingly, I am satisfied that the record was created through the SSHRC peer review process, including the evaluation of grant applications and the awarding of research grants (see Order PO-2942). In my view, it is reasonable to conclude that there is some connection between the records and the peer evaluation of the appellant's proposed research.

I find, therefore, that the record is "respecting or associated with" the appellant's proposed research for the purpose of section 65(8.1)(a). Subject to my review of sections 65(9) and 65(10) below, I find that the record meets the requirements of section 65(8.1)(a).

[17] *Toronto Star*, paras. 42-46.
[18] Order PO-2825, at p. 11.

ARE THE RECORDS BROUGHT BACK UNDER THE *ACT* BY THE OPERATION OF SECTIONS 65(9) or 65(10)?

Section 65(9) – research subject matter and funding amount

Section 65(9), which is set out in its entirety on page 4 above, creates an exception to the exclusion 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."

Carleton argues that the exception in section 65(9) does not apply in this appeal because the responsive records do not contain information regarding either the subject matter of the proposals or funding received since the records "pre-date any final determinations about which proposal will go forward and obtain funding."

In the related Wilfrid Laurier appeal, the appellant briefly addressed this exception by arguing that section 65(9) should apply because the scrutiny of competitions for public money should "prevail over components related to research records."

I have reviewed the record at issue in this appeal. In my view, it does not contain the type of information that would qualify for the exception to section 65(8.1)(a) in section 65(9) because it contains neither the subject matter of the appellant's research, nor any specific information about funding that may ultimately have been awarded by SSHRC. As I noted in Order PO-2942, "the use of the word 'received' carries with it an intention that the exception will apply to records containing information about research funding amounts already awarded." Indeed, at the point in the SSHRC process for peer review of research proposals when the responsive records were created, there could not yet be any funding awarded. Accordingly, I find that section 65(9) does not apply to the record.

Section 65(10) – evaluative or opinion material and section 49(c.1)(i)

As outlined on page 4 of this order, section 65(10) creates an exception to the exclusion set out in section 65(8.1) and requires consideration of section 49(c.1)(i), which itself creates an exemption to the general right of access to an individual's own personal information held by an institution.[19]

Carleton submits that section 65(10) does not apply in the context of this appeal. Carleton relies on Order PO-2825 in support of the assertion that the information in the records is not "personal information" because the peer review context relates exclusively to the appellant in his professional capacity and because the content of the records reveals nothing of a personal nature about the appellant. Carleton points out, as Senior Adjudicator Higgins did in Order PO-2825, that section 49(c.1)(i) can only apply to records containing the personal information of the requester which, in Carleton's submission, is not the case here.

[19] Section 49(c.1)(i) states: "A head may refuse to disclose to the individual to whom the information relates personal information, … if the information is supplied explicitly or implicitly in confidence and is evaluative or opinion material compiled solely for the purpose of, … assessing the teaching materials or research of an employee of an educational institution or of a person associated with an educational institution."

In the submissions provided in the Wilfrid Laurier appeal, the appellant argues that section 65(10) applies because the records relate to a competition for public funds. In that appeal and in the present appeal (on his appeal form), the appellant suggests that section 49(c) is relevant, because the SSHRC grant process constitutes a competition for public funds.[20] As noted in Order PO-2942, however, this appears to be an erroneous reference because although section 49(c), like section 49(c.1)(i), contains the phrase "evaluative or opinion material", the former provision is inapplicable to an analysis of the exception in section 65(10), which refers specifically only to section 49(c.1)(i) regarding the assessing of teaching materials or research. Carleton did not rely on section 49(c) as a basis for denying access in this appeal.

With regard to the circumstances of the creation of the record, I find that section 49(c.1)(i) does not apply. As in Order PO-2942, I find support for this conclusion in the reasons of Senior Adjudicator John Higgins in Order PO-2825. In that order, the senior adjudicator determined that section 49(c.1)(i) did not apply to a peer review report on a research proposal submitted to the University of Guelph by the appellant because he concluded that it did not contain the appellant's personal information according to the definition of the term in section 2(1) of the *Act*. I provided the following excerpt from Senior Adjudicator Higgins' reasons in Order PO-2942 and it is, in my view, equally relevant in the present appeal:

> Applying the approach of former Assistant Commissioner Tom Mitchinson in Order PO-2225, and having carefully reviewed the record, I also find that the record was created and exists in an entirely *professional context*. It includes information relating to the proposed professional scientific work of the appellant as an employee of the University and the comments of the affected party are made in his or her professional capacity as a peer reviewer. I also find that disclosure of the record would not reveal anything of a *personal nature* about the appellant because there is nothing in the record that would relate to the appellant in his personal capacity and the comments of the affected party about the research proposal do not reach into the personal realm.
>
> Accordingly, I find that the record does not contain any information of the appellant that qualifies as his personal information.
>
> Because of the wording of the preamble of section 49 ("[a] head may refuse to disclose to the individual to whom the information relates personal information…"), section 49(c.1)(i) can only apply to records containing the

[20] In the appeal form for Appeal PA09-331 and in his representations in Appeal PA08-164-2, the appellant refers to the *Financial Administration Act* (R.S. 1985, c. F-11) and suggests its relevance to section 49(c). The full text of section 49(c) states that "a head may refuse to disclose to the individual to whom the personal information relates personal information,

> that is evaluative or opinion material compiled solely for the purpose of determining suitability, eligibility or qualifications for employment or for the awarding of government contracts and other benefits where the disclosure would reveal the identity of a source who furnished information to the institution in circumstances where it may reasonably have been assumed that the identity of the source would be held in confidence.

> personal information of the requester, in this case, the appellant (see Order M-352).[21]

Carleton's submissions on section 65(10) also refer to Orders PO-2225 and PO-2825 in support of the position that the exception does not apply. I adopt the analysis in those orders for the purposes of my review in this appeal. The record at issue in this appeal was "created and exist[s] in an entirely professional context," relating as it does to the SSHRC grants process and the peer review of the appellant's research proposal, more specifically. As with the responsive records in the related appeals, I find that the record identified as responsive here does not contain information that would qualify as the appellant's "personal information," as that term is defined in section 2(1) of the *Act*. Rather, where information about the appellant appears in the record, I find that it is about the appellant only in his professional capacity. Accordingly, I find that section 49(c.1)(i) does not apply. The consequence of this finding is that the exception to section 65(8.1)(a) in section 65(10) of the *Act* is inapplicable in the circumstances of this appeal.

In conclusion, as neither of the exceptions applies to the record, I find that it falls within the ambit of section 65(8.1)(a), and that it is therefore excluded from the *Act*.

ORDER:

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

Original signed by: January 26, 2011
Daphne Loukidelis
Adjudicator

[21] Order PO-2825, at p. 6.