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

ORDER PO-2942

Appeal PA08-164-2

Wilfrid Laurier University

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BACKGROUND:

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. In this case, the request was submitted to Wilfrid Laurier University (the university) and sought:

> E-mail communications between, on the one hand, a member of SSHRC[1] Selection Committee No. 15 (2007/8 competition) from W Laurier University, [named individual and email address] and, on the other hand, SSHRC officials, other members of this committee and other interlocutors in which my name … is mentioned. The period covered, October 15, 2007 – April 18, 2008. …

The university's response was to issue a decision letter advising the requester that although it had identified two responsive email records, it would not issue an access decision on the basis that it did not have custody or control of the records under section 10(1) of the *Act*. The university's explanation was that the emails were created by the named professor when that individual was acting as a volunteer member of a SSHRC committee external to the university. The requester was advised to submit his request to the SSHRC under the federal *Access to Information Act*.[2]

The university's decision was appealed to this office, which opened Appeal PA08-164 to address the issue of custody or control over the records identified by the university as responsive to the appellant's request. Following an inquiry, during which I sought and received representations from the university and the appellant, I issued Order PO-2836 on October 28, 2009.

In the order, I described the context of section 10(1) of the *Act* in the following manner:

> Section 10(1) of the *Act* identifies that the issue of whether or not a record is in the custody or under the control of an institution (in this case, the University) is the threshold for determining whether that record is subject to the access provisions in the *Act*. Section 10(1) states, in part:
>
> > Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless . . .
>
> Under section 10(1), therefore, 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

[1] 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."

[2] R.S. 1985, c. A-1.

> 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 [emphasis added].

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].
>
> In conclusion, I will reiterate that my finding that the responsive records are in the custody of the University will not compromise the confidentiality of a faculty member's "scholarly activities" or the independence of the SSHRC peer review process. As the University acknowledged in its decision letter to the appellant, "were records of proposed research reviews deemed to be in the custody and control of the university, we would need to consider other exemptions and exceptions, such as those in section 49 and 65 of [the *Act*]." Accordingly, reliance on the exclusions and exemptions of the *Act* for such records is unaffected by my finding and remains available to the University in response to this order.

I ordered the university to issue a decision letter to the appellant regarding access to the records at issue in accordance with the provisions of the *Act*.

NATURE OF THE APPEAL:

In response to Order PO-2836, the university issued a decision letter to the appellant denying access to four records identified as responsive to the request.[3] The university's decision letter claims that section 65(8.1)(a) (university research records) operates to oust the jurisdiction of the *Act* and, therefore, this office. The university also relies on the exemptions in section 49(c.1)(i) (requester's evaluative information), section 49(f) (research or statistical record), section 15(b) (relations with other governments) and section 17(1) (third party information), as well as section

[3] It is not entirely clear why the university's access decision identifies four responsive records, when the original searches in 2008 appear to have identified only two records, which were said not to be in the university's custody or control. For the purposes of this inquiry, however, I have concluded that the unexplained discrepancy would not alter the outcome.

21(1) (personal privacy). The university provided an index of records to the appellant with the decision letter.

The appellant appealed the university's access decision to this office and Appeal PA08-164-2 was opened to address the issues. Although a mediator was appointed to explore resolution of the issues, it was not possible to resolve the appeal in this manner. Accordingly, the appeal was transferred to the adjudication stage and assigned to me to conduct an inquiry.

I sent a Notice of Inquiry to the university initially, seeking representations on the jurisdictional exclusion and exemption claims. I received the university's representations, which addressed only the possible application of section 65(8.1) of the *Act*. The university explained that it was seeking a preliminary ruling from this office with respect to the application of section 65(8.1) on the facts of this appeal.

As 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 it. In the Notice of Inquiry I sent to the appellant, I stated:

> Please note that if the records are found to fall within the ambit of section 65(8.1), they are excluded from the *Act* and, therefore, from the jurisdiction of this office. In my view, the determination of the application of this jurisdiction-limiting provision is central to your appeals with this office. In this context, I find that it is appropriate to proceed with this preliminary determination.

I provided the appellant with a copy of the university's submissions on the issue. I advised that I had not yet notified SSHRC in order to seek its views in this appeal (PA08-164-2), but that I had sought and received submissions from SSHRC in the other related appeals.[4]

It should be noted that in SSHRC's submissions in the related appeals, it claimed confidentiality over the representations in their entirety. However, without disclosing confidential submissions, it may be stated 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, instead stating that it "defers to the views of the IPC in consideration of the arguments of the parties."

In view of my conclusion in this order that the records are excluded from the scope of the *Act* under section 65(8.1)(a), it has not been necessary to address the exemptions in sections 49(f), 15(b), 17(1) and 21(1), which were claimed by the university in the alternative.

RECORDS:

There are four records (18 pages) at issue, consisting of emails and other documents in table format, which were sent between SSHRC staff and the university faculty member named in the request.

[4] Appeal PA09-129-2 (University of Western Ontario) and Appeal PA09-331 (Carleton University).

ISSUES:

1. Do the responsive records fit within the exclusion for "research records" in section 65(8.1)(a) of the *Act*?

2. If the answer is yes, are the records brought back under the *Act* by virtue of the operation of either of the exceptions to section 65(8.1)(a) in section 65(9) or 65(10)?

DISCUSSION:

ARE THE RESPONSIVE RECORDS 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).

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 and PO-2825).

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

The university's representations on the possible application of section 65(8.1)(a) begin with an introduction describing the SSHRC and its activities. The introduction reads, in part, as follows:

> The purpose, mandate, and actions of SSHRC are grounded in research. SSHRC funding invests in inquiry and supports research outcomes that are used to develop new knowledge and facilitate innovation.
>
> Effective peer review is fundamental to the granting process.
>
> > The standard of expert adjudication has been and will remain at the heart of the granting process at SSHRC. SSHRC research grants and fellowships are awarded through an independent peer review process designed to ensure the highest standards of excellence and objectivity. Peer review is universally recognized as the most objective and effective way to allocate public research funds.[5]
>
> …
>
> Research processes are built on the peer review process and the use of expert reviewers is understood and accepted to be the most objective and effective way to assess research.
>
> …
>
> Peer review is completed by … volunteer committee members [who] evaluate research proposals based on established selection criteria and provide written assessments of proposals to assist the selection committee in making funding decisions.
>
> …
>
> Applicants have an opportunity to access their personal information, as well as assessor reports, which may assist them in preparing future funding requests. SSHRC has established a process to facilitate requesting a copy of an applicant's file or assessments. The university has been informed by SSHRC that the appellant did request a copy of the assessments relating to his 2008 application for SSHRC funding. In response to that request, SSHRC provided the appellant a copy of the external assessors' reports, with the names and any information that might identify the assessor or other applicants omitted.

Referring to Order PO-2825, the university notes that the exclusion has previously been found to apply to a peer review report of a research proposal, and it argues that the records at issue in this appeal similarly "fall squarely within the intent and application of the exclusion." The university states that:

[5] Credited in the university's representations to the SSHRC website: http://www.sshrc.ca/funding/peer_review-evaluation/index.

> … all of the documents in question (i.e. spreadsheets with names and numerical scores for all of the applications reviewed by the committee member, comment forms with a review of the application, and list of all applicants including names, affiliation and SSHRC file number) meet the criteria to be applied to determine the application of section 65(8.1)(a).

The university explains that the SSHRC application process requires the submission of a specific research proposal for peer review as part of the grant program, and this is what the appellant did in order to be considered for research funding. The university also argues that the comparative survey that formed part of the appellant's research proposal fits within the definition of "research" accepted by this office. The university adds that the appellant was employed by a Canadian post-secondary education institution at the relevant time.

In support of its argument that the records at issue are "respecting or associated with" the appellant's research, the university provides the following additional description of the process followed by the faculty member in carrying out the peer review function for SSHRC.

> The work of the committee was to complete a detailed review of the actual research project. … This assessment included a review of a number of factors including the originality and contribution of the research, methodology, and theoretical framework of the research proposal. …
>
> [V]olunteer committee members for peer review are made up of Canadian and international scholars and experts, many of whom will be employed by or associated with post-secondary institutions … [just as the] individual … committee member [was] a Professor at Wilfrid Laurier University and a full-time employee of an Ontario educational institution.

The university's representations on section 65(8.1)(a) are rounded out by describing the "chilling effect" on the peer review process by SSHRC and other agencies if the *Act* were to apply to records of the type at issue in this appeal. The university emphasizes the importance of anonymity, confidentiality and independence to the effectiveness and integrity of the peer review process.

In his representations, the appellant also seeks to provide context, including the values underpinning academic freedom and scientific enterprise, an understanding of which, he argues, is essential to properly interpreting the issues at stake in this appeal.[6] The appellant takes the position 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

[6] This part of the appellant's representations includes references for several scholarly articles and/or books offered in support of his arguments. For the sake of brevity, these references are not provided here.

subject to the exclusion and removal from the *Act* because they "do not contain any hypothesis to be tested."

The appellant argues that "pure cases" of research records rarely exist due to the variety of records produced during the research process, which must be individually considered for the context in which they were each created and the "intentions of the parties involved" in creating them.

The appellant offers observations about potential problems with the review of SSHRC funding applications, including his own, advancing arguments related to 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).[7] 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.

The appellant also points out that one of the other individuals who submitted the SSHRC grant application is not associated with an educational institution, but is, rather, a private sector participant in the process. Accordingly, the appellant argues, the research is not "referable to a specific, identifiable research project that has been conceived by a specific faculty member, employee or associate of the University," as contemplated by Order PO-2693.

In concluding his representations regarding the preliminary determination to be made on section 65(8.1)(a), the appellant raises concerns respecting the adequacy of the university's search for responsive records, specifically with respect to the search of the back-up email server which formed part of his request.

Analysis and Findings

To begin, I think 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 records at issue in this appeal, they are totally excluded from the access and privacy provisions of the *Act* (Orders MO-2024-I and PO-2825).[8]

[7] 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).

[8] This also eliminates any consideration of the public interest override in section 23 of the *Act*, which states: "An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption."

Turning to the exclusion, I note that Orders PO-2693, PO-2694 and PO-2825 by Senior Adjudicator John Higgins represent the only interpretations of section 65(8.1)(a) by this office.[9] In these reasons, I review and adopt the senior adjudicator's interpretation of the exclusion, with the important proviso that the meaning given to "respecting or associated with" in section 65(8.1)(a) must now respond to a recent judicial pronouncement on like terms that appear in the exclusion for records related to an ongoing prosecution in section 65(5.2).[10]

In the orders identified above, Senior Adjudicator Higgins emphasized the importance of considering the purposes of the *Act* as a context for the interpretation of section 65(8.1)(a). I agree with the senior adjudicator's reasons on the *Act*'s purposes at pages 6 and 7 of Order PO-2693, and adopt them without repetition here. Respecting the legislative intent behind the exclusion in section 65(8.1)(a), 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[11], 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.

These comments, which were also reproduced by the university in its submissions, 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 and PO-2825).

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[12], and taking into account the modern rule of statutory interpretation[13], Senior

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[9] Section 65(8.1)(a) was mentioned in Order PO-2557, issued by Adjudicator Colin Bhattacharjee in March 2007. However, the adjudicator 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 had not been in force at the time of the appellant's access request.

[10] *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div.Ct.) (*Toronto Star*).

[11] 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*.

[12] 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.

[13] In discussing this rule, the senior adjudicator reviews *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'

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.[14]

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*.

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

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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.

[14] 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.

member employed by an educational institution other than the one that received his access request.

Further, I am satisfied that my finding that the appellant's proposal qualifies as "research" for the purpose of section 65(8.1)(a) ought not to be affected by the involvement of a co-applicant who may not be associated with an educational institution. In my view, the appellant's own role as proponent of the proposed research is sufficient for the purpose of my determination under section 65(8.1)(a) of the *Act*.

To continue with my analysis of section 65(8.1)(a), I must consider the records at issue and determine whether they are "respecting or associated with" the appellant's specific and identifiable proposed research, thereby triggering the application of the exclusion.

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:
>
> > 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.[15]

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."

In reviewing the records at issue in this appeal, I will begin by expressing 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."[16]

Specifically, I am satisfied that all of the records at issue were created through the SSHRC peer review process, including the evaluation of grant applications and the awarding of research grants. In my view, it is reasonable to conclude that there is some connection between all four of the records and the peer evaluation of the appellant's proposed research. In the circumstances of this appeal, therefore, I find that the records qualify as "respecting or associated with" the appellant's proposed research for the purpose of the exclusion in section 65(8.1)(a). Accordingly, subject to my discussion of sections 65(9) and 65(10) below, I find that the records at issue in this appeal meet the requirements of section 65(8.1)(a), and that they are excluded from the *Act*.

[15] *Toronto Star*, paras. 42-46.
[16] 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) 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."

The university submits that the exception is intended to apply to research that has already received funding so as to promote transparency and accountability with respect to such awards of funding. The university notes that the appellant's funding proposal is not directed at obtaining funds from the university, which is the institution covered by the *Act*, but rather from SSHRC, which itself has adequate mechanisms in place for public access to information about research funding to meet the transparency and accountability objectives of this exception. Accordingly, the university submits that the exception does not apply because "… the records do not contain any reference to funding received or the subject matter and amount of funding with respect to the research described in section 65(8.1)(a)."

The appellant's representations only briefly address this exception. The appellant submits that the spreadsheets created in the course of SSHRC peer review evaluations contain columns with information relating to amounts requested, modified and recommended. The appellant takes the position that section 65(9) should apply because the scrutiny of competitions for public money should "prevail over components related to research records."

On my review of the records at issue in this appeal, it is evident that they do not contain the type of information that would qualify for the exception to section 65(8.1) found in section 65(9) because there are only funding recommendations, not specific information about funds awarded by SSHRC. I agree with the university that 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. Accordingly, I find that section 65(9) does not apply to the records in this appeal.

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

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. In this appeal, one of the university's alternate claims is that section 49(c.1)(i) applies and permits it to refuse to disclose evaluative or opinion material, as described in that provision, to the appellant.

Respecting section 65(10), however, the university submits that, as in Order PO-2825, the "views or opinions in the records are about the research proposal and not about an individual in his/her personal capacity." The university submits that the information about the faculty member who reviewed the appellant's research proposal is also about that individual in a professional capacity. The university argues that because the information in the record is not personal

information, section 49(c.1)(i) does not apply and, consequently, neither does the exception to section 65(8.1)(a) provided by section 65(10).

The appellant submits that section 65(10) applies because the records relate to a competition for public funds. The appellant offers representations on section 49(c) in keeping with this theme of competition for public funds,[17] but this appears to be in error, as section 49(c) has not otherwise been raised in this appeal. 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 to section 49(c.1)(i) regarding the assessing of teaching materials or research.

In any event, and with regard to the circumstances surrounding the creation of the records at issue in this appeal, I find that section 49(c.1)(i) does not apply. As the university points out, in Order PO-2825, Senior Adjudicator Higgins found 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 in that case because it did not contain his personal information. In concluding that the information in the record did not constitute "personal information" for the purpose of the definition in section 2(1) of the *Act*, the senior adjudicator stated:

> 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 personal information of the requester, in this case, the appellant (see Order M-352).[18]

[17] Section 49(c) provides 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.

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

I agree with the findings of the senior adjudicator in Order PO-2825, and I adopt them for the purposes of my review in this appeal. In my view, the records at issue in this appeal were "created and exist in an entirely professional context," relating as they do to the SSHRC grants process generally and, in the case of records 2 to 4, to the peer review of the appellant's research proposal more specifically. Indeed, as the university points out, the first record in the series does not contain any reference to the appellant individually although it features some connection to the evaluation of his research proposal more generally. Overall, I find that the records do 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 records, 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, I find that section 65(8.1)(a) applies to the records and that they are excluded from the *Act*. Given my finding that the records at issue are not subject to the *Act* due to the operation of section 65(8.1)(a), it is not necessary for me to address the appellant's concerns about the adequacy of the university's search for records responsive to his request. In my view, any further responsive records that may be identified through additional searches ordered would also fall outside the scope of the *Act* by virtue of section 65(8.1)(a).

ORDER:

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

Original signed by: January 13, 2011
Daphne Loukidelis
Adjudicator