Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-3057-I

Appeal PA10-152

University of Toronto

February 28, 2012

Summary: This interim order disposes of three preliminary issues raised as a result of an access request to the University of Toronto for records relating to the appellant's application to a graduate program at the university. Three preliminary issues were identified for determination in this interim order: scope of the request, responsiveness of the records and mootness. In this interim order, the adjudicator found that the scope of the request does not include third party records relating to the appellant and that portions of the records at issue are non-responsive to the request. In addition, the adjudicator determined that the issues of whether a third party is part of the university for purposes of the *Act* and whether the university has custody and control of a third party video are moot.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, ss. 17, 24.

Orders and Investigation Reports Considered: MO-1770, MO-2049-F, P-134, P-880, PO-1295, PO-1897-I, PO-2046.

Cases Considered: *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

OVERVIEW:

[1] This interim order disposes of the preliminary issues raised by the parties in this appeal. The requester made an access request to the University of Toronto (the

university) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

- Complete OISE university file including all applications and letters of reference (see [named individual]);
- Access to all CAPA (Coalition Against Psychiatric Assault) tapes, cassettes and videos with me or my information on them; and
- Access to all written CAPA documentation referring to me.

[2] During the processing of the request, the university contacted the requester and clarified the request. In a letter dated April 21, 2010 to the requester, the university confirmed that the request was for:

- Entire 2005 and 2009 PhD Registrar's application file including all materials submitted and used, and all reasons for the decision; and
- Video of you or with your information on the video taken by a University of Toronto PhD or Masters student at a CAPA event at Nathan Philip's Square in 2004 or 2005. If the university has the video, you stated your desire that you would like it expunged.

[3] The university then located 150 pages of records responsive to the first part of the request and granted partial access to them. The university granted access, in full, to 134 pages, but denied access to 10 pages of records, in part, and to six complete pages of records. The university relied on section 49(c.1)(ii) (evaluative material determining admission to an academic program) of the *Act* in denying access. The university also advised the requester that portions of some of the records that were withheld were not responsive to the request.

[4] The university further advised the requester that it did not have records in its custody or control that were responsive to the second part of the request. The university explained that CAPA is an independent organization that is not part of the university.

[5] The requester (now the appellant) appealed the university's decision to this office.

[6] During the mediation of the appeal, the appellant advised the mediator that she wished to pursue access to all of the withheld information contained within the responsive records and was also of the view that the university has custody and control of records relating to CAPA.

[7] The university subsequently agreed to disclose some of the withheld information contained in Records 7, 8, and 9 to the appellant. In addition, the university arranged for CAPA to send the appellant a copy of the video related to the second part of the request.

[8] The appellant then confirmed with the mediator:

- that she was pursuing access to all of the withheld portions of the records including the portions claimed by the university to be non-responsive;
- that she still wanted portions of the video containing her information expunged;
- that CAPA is part of the university and therefore, the university has custody and control of CAPA records;
- that she wanted access to all CAPA records containing her information; and
- that she wanted all CAPA documents containing her information expunged.

[9] In response, the university took the position that the request had been clarified as documented in its letter of April 21, 2010 to the appellant, and that the appellant had agreed not to pursue records relating to the third part of the original request, which was for all CAPA documents referring to her. The appellant disputed this position and continued to seek access to these records. Accordingly, scope of the request was added as an issue in this appeal. The university also took the position that the issues of custody and control and whether CAPA is part of the university were now moot, as the appellant has obtained a copy of the video that is responsive to the second part of the request.

[10] This appeal raises a number of issues. Some of these issues are dependent on a finding regarding other issues. As an example, if I find that CAPA records are included in the scope of the request, then it will be necessary for me to determine whether CAPA is part of the university or whether the university has custody or control of those records. In order to simplify the processing of this appeal, the adjudicator originally assigned decided to issue a Notice of Inquiry that addressed only three preliminary issues, namely; scope of the request, responsiveness of certain portions of the records and mootness of issues relating to CAPA.

[11] The adjudicator sought representations on the preliminary issues from both parties. The university's representations were shared with the appellant in accordance with the IPC's *Practice Direction 7*. The appeal was then transferred to me for final

disposition. The appellant requested that her representations be withheld due to confidentiality concerns. As a result, I have considered the appellant's representations, but will not be referring to them in this order.

[12] For the reasons that follow, I find that:

- the scope of the request does not include CAPA records relating to her;
- portions of the records are non-responsive to the request; and
- the issues of whether CAPA is part of the university for purposes of the *Act* and whether the university has custody and control of the video are moot.

RECORDS:

[13] The records consist of letters, charts, forms, tables and a report.

ISSUES:

A. What is the scope of the request?

B. Are the portions of the records the university claims are non-responsive actually responsive to the request?

C. Is it necessary for me to decide whether CAPA is a part of the university for the purposes of the *Act* and whether the university has custody and/or control of the CAPA video that is responsive to part two of the request?

DISCUSSION:

A: What is the scope of the request?

[14] Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;

> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] The university submits that at the request stage, a staff member from the university contacted the appellant by telephone and clarified the request with her, as the university was of the view that the original request was vague. After this conversation, the university sent a letter to the appellant, setting out the clarified request as follows:

- Entire 2005 and 2009 PhD Registrar's application file including all materials submitted and used, and all reasons for the decision; and

- Video of you or with your information on the video taken by a University of Toronto PhD or Masters student at a CAPA event at Nathan Philip's Square in 2004 or 2005. If the university has the video, you stated your desire that you would like it expunged.

[16] The university states that it then processed the above request, issued a decision, received a request for and granted a fee waiver, provided an index of records to the appellant and the IPC, and participated in mediation, all based on the clarified request.

[17] The appellant, the university argues, did not mention or raise any objection to the clarified wording for several months, until the end of mediation, when she indicated that her request should include all CAPA documents referring to her, as described in the original request. The university submits that the appellant's conduct through all of the events in the request and appeal was inconsistent with her unexpected and late wish to return to the original wording of the request.

[18] The university further submits that it expended considerable resources and effort in clarifying the request with the appellant and made a good faith attempt to process the request as thoroughly as possible, grant reasonable access to records, and to assist the appellant by asking CAPA to provide a copy of the video to her.

[19] Although Orders P-134 and P-880 support the proposition that ambiguity in a request should generally be resolved in the requester's favour, the university argues, there is no ambiguity in the request, as it was clarified by the appellant and did not include CAPA records, other than the video.

[20] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[1]

[21] In particular, in Order P-880, Adjudicator Anita Fineberg determined that records must "reasonably relate" to the request in order to be considered "responsive". She went on to state:

> ... the purpose and spirit of freedom of information legislation is best served when government institutions adopt a liberal interpretation of a request. If an institution has any doubts about the interpretation to be given to a request, it has an obligation pursuant to section 24(2) of the *Act* to assist the requester in reformulating it. As stated in Order 38, an institution may in no way unilaterally limit the scope of its search for records.

[22] In Order P-134, former Commissioner Sidney B. Linden also commented on the proper interpretation of section 24(2), stating, among other things:

> ...the appellant and the institution had different interpretations as to what this meant: the institution felt that the files were outside the scope of the original request and should be the subject of a new one; and the appellant thought he was seeking information which he expected to receive in response to his initial request. While I can appreciate that there is some ambiguity on this point, in my view, the spirit of the *Act* compels me to resolve this ambiguity in favour of the appellant. The institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, in my view, it cannot rely on a narrow interpretation of the scope of the request on appeal.

[23] In Order PO-1897-I, commenting on the above orders, Adjudicator Sherry Liang noted that in the appeal under consideration in Order P-134, the request was somewhat vague, and that the institution had genuine difficulty in interpreting its scope. She pointed out, however, that "even there, the former Commissioner resolved the ambiguity in favour of the appellant's view of the request."

[24] However in this case, upon receiving the request, the university contacted the appellant to clarify the request. The evidence submitted by the university indicates that there was discussion between the university and the appellant regarding narrowing the scope of the request, and that the appellant was in agreement that her request was limited to a particular set of records and a videotape. The majority of the records that

[1] Orders P-134 and P-880.

were responsive to the narrowed request were then disclosed to her. The records or portions of records that were not disclosed to the appellant form the subject matter of this appeal. During the mediation of this appeal, the video was disclosed to the appellant by CAPA.

[25] The appellant now takes the position that her request also included CAPA records relating to her.

[26] I do not accept the appellant's position that CAPA records are caught within the scope of the request. I find that in her discussion with the university staff at the request stage, the appellant clearly narrowed the scope of her request to include only the specific records that were disclosed to her, the records that are the subject matter of this appeal, and the video. This conversation was then confirmed by way of a letter sent to the appellant by the university.

[27] Therefore, I uphold the university's position that only the records at issue and the video fall within the scope of the request and that any CAPA records relating to the appellant are not included in the scope of the request.

B: Are the portions of the records the university claims are non-responsive actually responsive to the request?

[28] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
>
> . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[29] The university states that those portions of the records it claims are non-responsive consist of lists that indicate application and admission results for a large number of students, including the appellant. These lists reflect the outcome of the

application processes and, the university argues, are not responsive to the request for the appellant's Registrar application files. However, the university did disclose portions of these records, which reflect the outcome of the appellant's applications in order to be as thorough as possible in providing information that could be considered to be "reasonably related" to the request. The university submits that because the undisclosed information is not part of the appellant's Registrar's application files, the portions of the records relating to other individuals cannot reasonably be considered to be responsive to the request.

[30] The university also submits that the information that it claims are non-responsive to the request relate directly and only to other individuals who also applied to the university. The portions of the list relating to the appellant have either been disclosed in whole or in part[2] to the appellant.

[31] In addition, the university submits that personal information about other individuals was never intended to be captured by the request and is not part of the clarified request wording. If there was any ambiguity, the university argues, this would have been discussed with the appellant during clarification. If the appellant had then asserted a desire to request other individuals' personal information, the university would have carefully assessed whether disclosure of that information would be a possible unjustified invasion of the personal privacy of those individuals. Lastly, the university submits that in all communications between the university and the appellant, the request was strictly for the appellant's information and not the information of others.

[32] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.[3]

[33] To be considered responsive to the request, records must "reasonably relate" to the request.[4]

[34] One of the issues in Order MO-1770 was responsiveness of records, in which then Senior Adjudicator David Goodis stated:

> As has been noted in many orders, the determination by an institution of which records are relevant to a request is a fundamental first step in responding to a request under the *Act*. Further, as was stated in Order P-880, it is the request itself that "sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being

[2] The university is relying on section 49(c.1)(ii) in denying access to some of the information about the appellant contained in the list.
[3] Orders P-134 and P-880.
[4] Orders P-880 and PO-2661.

> responsive to the request." In applying the notion of "responsiveness", prior orders have generally looked to whether information in the records is "reasonably related" to the request. Further, it is well established that a record may contain information that is responsive to a request alongside information which is non-responsive, the latter which may properly be withheld (Order P-880).

[35] I agree with Senior Adjudicator Goodis' analysis and adopt it for the purposes of this appeal.

[36] As previously set out, the appellant's request, in part, was for:

- Entire 2005 and 2009 PhD Registrar's application file including all materials submitted and used, and all reasons for the decision

[37] The university's position is that while the lists did not form part of the appellant's Registrar's application file, the portions of the lists relating to her could be considered to be "reasonably related" to the request. I agree with that position and reiterate that the majority of the information relating to the appellant contained in the lists was disclosed to her, with one exception for which an exemption has been claimed.

[38] The university also takes the position that the portions of the list relating to other individuals do not form part of the appellant's Registrar's application file, do not relate to her, were not included in the request and are not "reasonably related" to the request.

[39] When a record contains information that is responsive to a request alongside other information which is non-responsive, the latter may properly be withheld. Accordingly, I find that the information in the lists relating to individuals other than the appellant is not responsive to her request. The appellant's request was for her own Registrar's application file, including all materials submitted and used, and all reasons for the decision. Having reviewed the portions of the records the university claims are non-responsive, I find that they do not relate to the appellant's application nor do they contain the reasons for the university's decision in regard to her application.

[40] Consequently, I find that the information in the lists relating to other individuals is not responsive to the request.

C: Is it necessary for me to decide whether CAPA is a part of the university for the purposes of the *Act* and whether the university has custody and/or control of the CAPA video that is responsive to part two of the request?

[41] Because I have already found that any CAPA records relating to the appellant fall outside the scope of her request, the issue of mootness arises in the context of the custody and control of the CAPA video[5] and the appellant's desire to have the video "expunged."

[42] The university submits that the issue of whether CAPA is a part of the university for the purposes of the *Act* and whether the university has custody and/or control of the CAPA video is moot because the appellant already has the video and her wish to have the video "expunged" is a remedy that is not available under the *Act*.

[43] The university submits that the test for mootness and its application to appeals under the *Act* was set out in *Borowski v. Canada (Attorney General)*.[6] The court stated:

> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[44] With respect to this appeal, the university submits that there is no "live controversy" as the appellant already has obtained a copy of the video from CAPA as arranged by the university during the mediation of this appeal. In addition, the university argues that there is no tangible and concrete dispute because the appellant seeks a remedy that is beyond the IPC's jurisdiction, namely expunging the video. While there is a statutory right to seek correction of personal information, the university states, there is no statutory right to remove information from a record, including a video. In addition, the university states, the appellant has not asserted or provided evidence that the video is not a true record of what occurred and that it was somehow tampered with.

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[5] The appellant has a copy of the video.
[6] [1989] 1 S.C.R. 342.

[45] Further, the university submits that even if there was a tangible and concrete dispute, the IPC should exercise its discretion and decline to adjudicate it. The appellant, the university states, had provided no evidence to support her view that CAPA is somehow under the control of the university. It goes on to state that CAPA is a completely separate and distinct organization with no operational links to the university. The university states that CAPA describes itself on its website as:

> [A] coalition of people committed to dismantling the psychiatric system and building a better world. Radical and visionary, we are comprised of activists, psychiatric survivors, dramatists, academics and professionals.

[46] The university then states that although one of CAPA's members is a university academic, this fact does not make CAPA a university controlled or directed organization. The academic's involvement in CAPA, the university states, is a private matter. Specifically, she is not required by the university to undertake any activities in respect of CAPA and is not accountable to the university in any way for what she does or does not do at CAPA. The university states:

> Academics, like other employees, may have a range of private activities that might give rise to records. This does not bring those records within the custody and control of the university.[7]

[47] In addition, the university states that CAPA is not directed by, funded by, or accountable to the university. The university concludes that it does not have custody or control of CAPA records and, therefore, a *prima facie* case is made for me to exercise my discretion to decline to adjudicate this issue, even if a tangible and concrete dispute was found to exist.

[48] As previously stated, I have already found that any CAPA records relating to the appellant are not part of the scope of her request. Consequently, the issue of mootness arises in the context of the CAPA video, and the appellant's desire to have the video "expunged".

[49] In appeals where the record has previously been disclosed by the institution, or in another context, the issue of mootness is raised. The issue before me, therefore, is whether the appeal is moot with respect to the CAPA video that is already in the appellant's possession. In addition, I am also asked to determine whether CAPA is a part of the university for the purposes of the *Act* and whether the university has custody or control of the video. In the circumstances, I conclude that I should not proceed with such a determination.

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[7] *City of Ottawa v. Ontario*, 2010 ONSC 6835 (CanLII).

[50] In Order P-1295, former Assistant Commissioner Irwin Glasberg considered the question of when an appeal under the *Act* could be considered moot.[8] He stated:

> The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada* [(1989), 57 D.L.R. (4th) 231]. There, the court commented on the topic of mootness as follows:
>
> > The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...
>
> In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[51] An appeal could be moot where, for example, the requester already has obtained unrestricted access to the record at issue.[9]

[52] I find that the live controversy, which might have been said to exist between the parties relating to the video, is now at an end because it has already been made available to the appellant, meeting the first part of Justice Sopinka's mootness test.

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[8] See also Order PO-2046.
[9] See Order MO-2049-F.

[53] Under the second part of the test, I have considered whether the question of access to the video is of sufficient public interest or importance to merit reviewing it regardless of its mootness. I have concluded that it does not and that no useful purpose would be served by proceeding with my inquiry in relation to it. I will not, therefore, proceed with a determination of whether CAPA is a part of the university for the purposes of the *Act* and whether the university has custody and/or control of the CAPA video.

[54] With respect to the appellant's wish to have the video "expunged" I find that this is not a remedy that is available to the appellant under the *Act* and I, therefore, have no jurisdiction to make such an order.

[55] Therefore, I find that the issues of whether CAPA is part of the university for the purposes of the *Act* and whether the university has custody or control of the CAPA video are moot.

ORDER:

1. I find that:

    - the scope of the request does not include CAPA records relating to the appellant;
    - portions of the records are non-responsive to the request; and
    - the issues of whether CAPA is part of the university for the purposes of the *Act* and whether the university has custody or control of the CAPA video are moot.

2. I remain seized of this matter to dispose of the issues raised by the exemption claimed by the university and will be seeking representations from the parties on the exemption.

Original Signed by: February 28, 2012
Cathy Hamilton
Adjudicator