

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3244

Appeal PA12-262-2

University of Ottawa

August 27, 2013

**Summary:** The appellant sought access to records from the offices of specified officials and departments of the University of Ottawa that related to the Western Woodlark Basin in Papua New Guinea. The university located two responsive records and relied on the research exclusion in section 65(8.1)(a) of the *Act* to deny access to them. The appellant appealed the university's decision. This order upholds the university's decision.

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

**Orders and Investigation Reports Considered:** PO-2693, PO-2694, PO-2942, PO-2946, PO-3084 and PO-3161.

**Cases Considered:** *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

### OVERVIEW:

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

[C]opies of all records related to the Western Woodlark Basin, Papua New Guinea and sent to/by and/or received to/by and/or in the possession physically and /or electronically of

- The Office of the President
- The Office of the Vice-President, Governance, formerly known as the Office of the Secretary, including legal Counsel
- The Office of the Vice President, Academic
- The Office of the Vice President, Resources
- The Communications Office (a.k.a. The Communications Directorate)
- The Office of the Dean of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Assistant Dean and Secretary of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Vice Dean of the Faculty of Graduate and Postdoctoral Studies
- The Office of the Dean of the Faculty of Science
- The Office of Marketing and Development of Telfer School of Management
- The Office of Administrative Services of Telfer School of Management
- The Office of the Department of Earth Sciences
- Mark Hannington in his role as Goldcorp Chair in Economic Geology
- The Office of the Dean of the Faculty of Social Sciences
- The Office of the Department of Economics
- The Office of the School of Political Studies
- The Office of the School of International Development and Global Studies
- The Office of the Graduate School of Public and International Affairs

Between, March 1, 2007 and present.

The Western Woodlark Basin, Papua New Guinea is also known as the Western Woodlark Basin and Woodlark Basin. This list is non-exhaustive. [sic]

[2] Initially, the university notified the requester that it was extending its time to respond to the request by 30 days pursuant to section 27(1) of the *Act*.

[3] At the end of the 30-day extension period, the requester, now the appellant, filed a deemed refusal appeal, as no access decision had been issued by the university. Appeal PA12-262 was opened to review the deemed refusal, however, that appeal was resolved by the subsequent issuance of the university's access decision.

[4] In its access decision, the university advised that it had searched all of the offices mentioned in the request and identified two responsive records. The university

denied access to the records in their entirety, asserting that they were excluded from the application of the *Act* by virtue of the research exclusion in section 65(8.1)(a) of the *Act*.

[5] The appellant appealed the university's decision and appeal file PA12-262-2 was opened.

[6] During mediation, the appellant advised that he is not pursuing access to any personal information which may be contained in the records. Accordingly, any personal information in the records is not at issue in this appeal.

[7] Mediation did not resolve the remaining issues in the appeal, and it was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*.

[8] I sought and received representations from the university and the appellant that I shared with the parties in accordance with section 7 of this office's *Code of Procedure and Practice Direction Number 7*.

[9] After I concluded my inquiry, the appellant submitted correspondence to this office in which he questioned the reasonableness of the university's search for records in this appeal. Because the appellant raised this issue after I had received representations from the parties and completed my inquiry, I did not reopen my inquiry to include this new issue. Accordingly, I will not address the issue of the reasonableness of the university's search in this order.

[10] In this order, I uphold the decision of the university.

## **RECORDS:**

[11] The records at issue consist of two emails.

## **ISSUES:**

- A. Does section 65(8.1)(a) exclude the records from the application of the *Act*?
- B. Does either of the exceptions to section 65(8.1) found in sections 65(9) and 65(10) apply to bring the records back under the *Act*?

## **DISCUSSION:**

### **A. Does section 65(8.1)(a) exclude the records from the application of the *Act*?**

[12] 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; . . .

[13] This office has defined research 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.” This office has also held that 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.<sup>1</sup>

[14] Section 65(8.1)(a) applies where it is reasonable to conclude that there is “some connection” between the record and the specific, identifiable “research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution.”<sup>2</sup>

### ***Representations***

[15] In their representations, both parties refer me to the legislative intent of section 65(8.1)(a) and the following comments of Member of Provincial Parliament Wayne Arthurs at the third reading of the bill which introduced section 65(8.1)(a) into the *Act*:

. . . this 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.

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<sup>1</sup> See Order PO-2693.

<sup>2</sup> Order PO-2942; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.). (*Toronto Star*).

[16] The university provides these additional comments from MPP Arthurs which follow the above quote:

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.

[17] Both parties also rely on the same definition of research that was articulated in Orders PO-2693 and PO-2694, and noted in paragraph 13 above.

[18] The university submits that the email records at issue are excluded from the scope of the *Act* by section 65(8.1)(a) because they directly relate to research activities carried out by a professor employed by it. The university provides confidential representations on how the information contained in the records satisfies the criteria for exclusion of the records under section 65(8.1)(a). The university asserts that the records are linked to a specific, identifiable research project that has been conceived by one of its faculty members, and thus, the requirement that there be "some connection" between the records and the research of the professor is satisfied. The university stresses the important purpose of section 65(8.1)(a) to protect academic freedom, and relies on the following excerpt from Order PO-3084 issued by Commissioner Ann Cavoukian:

[. . .] academic freedom is of vital importance to our society. It permits the free-flow of information and academic opinion and encourages critical debate and the engagement of this country's best minds in causes, issues and policies, even when such debate and criticism may be politically unpopular. Academic freedom protects our free and democratic society by allowing our scholars and academics to investigate controversial issues and unpopular views, without interference or scrutiny by the government or the public. It is with this in mind that I will analyze the application of section 65(8.1)(a) to the records at issue in this appeal.

[19] The university concludes by stating that "disclosure of the records could potentially reveal important details of the research being conducted and impinge on the academic freedom of the professors to pursue that research."

[20] The appellant relies on Order PO-2694 to argue that the words "respecting or associated with" in section 65(8.1)(a) require that there be "a substantial connection between the records and actual or proposed research." The appellant asserts that the records in this appeal must refer to a specific research project while a "substantial connection" must be established between the records and the "conducted or proposed" research for section 65(8.1)(a) to exclude the records from the application of the *Act*.

[21] The appellant suggests that the records may contain information that may be related to research, but that is not excluded under section 65(8.1)(a) of the *Act*. The appellant states Order PO-2694 held that records relating to the design, construction and cost of a wind tunnel to be built by a university for research purposes, were not substantially connected to the research to establish that section 65(8.1)(a) applied to them. The appellant relies on this finding in Order PO-2694 to assert that section 65(8.1)(a) should not be applied in a rigid and strict manner, but rather, should be interpreted in a liberal manner that is conducive to transparency.

### ***Analysis and findings***

[22] In their representations, the parties agree on the legislative intent of section 65(8.1)(a), and how the word "research" found therein, is defined. I too agree with the parties on these points.

[23] The parties' representations diverge however on how the words "record respecting or associated with research" are to be interpreted. The appellant relies on Order PO-2694 and the requirement that the records have a "substantial connection" to the "conducted or proposed" research in order to be excluded under section 65(8.1)(a). I do not accept the appellant's argument on this point as it represents an interpretation of the phrase "respecting or associated with" that conflicts with more recent judicial decisions and orders of this office.

[24] In 2010, the Divisional Court issued its decision in *Toronto Star*, in which it defined the words "relating to" in section 65(5.2) of the *Act* as requiring "some connection" between the records and the subject-matter of that section. While section 65(5.2) of the *Act* relates to ongoing prosecutions, this office has accepted that the definition in *Toronto Star* equally applies to the interpretation of "respecting or associated with" in section 65(8.1), in that the existence of "some connection" between the records and the research will be adequate to exclude a record from the application of the *Act*. Orders issued by this office after *Toronto Star* interpreting the exclusionary provision in section 65(8.1)(a) have accepted that some connection between the records and the research conducted or proposed is sufficient to engage the exclusion.<sup>3</sup> I agree with and adopt this interpretation in this appeal.

[25] Based on my review of the emails at issue and the representations of the parties, I am satisfied that the records are associated with research conducted or proposed by an employee of the university, namely, research on the Western Woodlark Basin in Papua New Guinea conducted or to be conducted by one of the university's professors. The emails both contain details about the nature of the research, specific research activities to be conducted and a corresponding timeline for these activities, along with

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<sup>3</sup> Orders PO-2942, PO-2946, PO-3084 and PO-3161.

other information about the researcher; this information satisfies the requirement that the research be specific and identifiable.

[26] Accordingly, I find that the records are excluded from the scope of the *Act* by virtue of the exclusion in section 65(8.1)(a), subject to my consideration of the exceptions to this section below.

**B. Does either of the exceptions to section 65(8.1) found in sections 65(9) and 65(10) apply to bring the records back under the *Act*?**

[27] Sections 65(9) and 65(10) create exceptions to the exclusion found at section 65(8.1). These sections state:

- (9) 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.
- (10) Despite subsection (8.1), this Act does apply to evaluative or opinion material compiled in respect of teaching materials or research only to the extent that is necessary for the purpose of subclause 49(c.1)(i).

[28] The exception to section 65(8.1) found in section 65(9), requires the institution to “disclose the subject-matter and amount of funding being received with respect to the research referred to in that subsection.”

[29] The exception in section 65(10) requires a consideration of section 49(c.1)(i), which creates an exemption to the general right of access to an individual’s own personal information held by an institution. Pursuant to section 49(c.1), an institution may refuse to disclose evaluative or opinion material in certain circumstances.

***Representations***

[30] The university submits that the section 65(9) exception does not apply because the records do not contain information about the subject-matter of the research and the amount of research funding being received. It similarly submits that because the records do not contain any personal information of the appellant, the exception in section 65(10) does not apply.

[31] The appellant argues that the section 65(9) exception should be interpreted in a liberal manner that is conducive to the *Act’s* primary objective of transparency. He asserts that section 65(9) requires the university to disclose the subject-matter of the records. He also argues that this section requires the university to disclose the amount of funding if the records contain financial records pertaining to the research.

***Analysis and findings***

[32] Based on my review of the records, I accept the submissions of the university that neither of the exceptions in sections 65(9) or 65(10) applies in this appeal.

[33] The records do not refer at all to the amount of funding being received with respect to the research. They arguably refer to the subject-matter, in a context that is not about funding, and they reveal more about the nature of the research than is already known to the appellant (based on the terms of his request). I do not read section 65(9) to require disclosure of this information, which I have found covered by the exclusion, divorced of the context of funding. As an exception to the research-related exclusion in section 65(8.1)(a), the intent of section 65(9) appears to be directed at transparency with respect to the amount of funding received for research. The transparency purpose of this provision would not be served by an interpretation that required disclosure either of the subject-matter of research, without reference to funding, or the amount of funding, without reference to its subject-matter. I find that the exception in section 65(9) does not apply to the information in the records.

[34] Similarly, the records do not contain any evaluative or opinion material compiled in respect of teaching materials or research, as contemplated by the exception in section 65(10). For this reason, I find that this exception is also inapplicable.

**ORDER:**

I uphold the university's decision that the records are excluded from the *Act* under section 65(8.1)(a) and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

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August 27, 2013