

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-4561

Appeal PA23-00144

The Hospital for Sick Children

October 11, 2024

**Summary:** The appellant, a member of the media, made a request under the *Act* for access to an email chain relating to an academic review of an article published by the Lancet. The hospital denied the appellant access to the email chain, claiming it is excluded from the scope of the *Act* due to the research exclusion. The hospital also withheld certain emails within the chain, claiming they are not responsive to the appellant's request. In this decision, the adjudicator finds the research exclusion applies to the entire email chain. The appeal is dismissed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31. section 65(8.1)(c).

**Orders and Investigation Reports Considered:** Orders PO-2825 and PO-4393.

### OVERVIEW:

[1] The Hospital for Sick Children (the hospital) is a pediatric teaching and research hospital in Toronto affiliated with the Faculty of Medicine of the University of Toronto. In April 2006, *The Lancet*, a weekly peer-reviewed general medical journal, published a research study titled: "Pharmacogenetics of morphine poisoning in a breastfed neonate of a codeine-prescribed mother" (the Lancet Study). The research findings indicated a serious risk associated with breastfeeding while taking codeine.

[2] At the time the Lancet Study was published, one of the authors was employed as a laboratory director and physician at the hospital (the physician). In 1985, the physician

founded the Motherisk Drug Testing Laboratory (Motherisk), which was a research and clinical program at the hospital providing evidence-based safety information on exposures in pregnancy and lactation.

[3] In 2014, the hospital launched an internal review along with a government-commissioned review in response to concerns raised about the physician's research. These reviews concluded that the Motherisk hair testing was "inadequate and unreliable" for use in criminal or child protection proceedings and identified five questionable studies conducted between 2000 and 2009. Ultimately, Motherisk was closed in 2015.

[4] In May 2020, the Lancet received a complaint and request to retract the Lancet Study. The Lancet referred the complaint to the University of Toronto in August 2020. However, the University of Toronto transferred the inquiry to the hospital because the physician was employed and affiliated with the hospital at the time of the study.

[5] The appellant submitted a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) to the hospital for email records between an identified individual and officials at The Lancet regarding the Lancet Study from April 4 to April 9, 2021 and March 23, 2022 to January 16, 2023 (the date of the request).

[6] The hospital issued an access decision to the appellant denying her access to any responsive records. The hospital claimed the records were outside the scope of the *Act* pursuant to the research exclusion in section 65(8.1)(c).

[7] The appellant appealed the hospital's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[8] During mediation, the hospital confirmed it located one record responsive to the request. The hospital confirmed the record is an email chain with five emails. The hospital stated the entire email chain is subject to the exclusion in section 65(8.1)(c) and the first, fourth, and fifth emails are not responsive to the appellant's request. The appellant confirmed her interest in the entire record except for the first email.

[9] A mediated resolution was not reached, and the appeal was transferred to the adjudication stage of the appeals process. I am the adjudicator and sought and received representations from the hospital and the appellant in response to a Notice of Inquiry.

[10] In the discussion that follows, I find the record is excluded under the *Act*. I uphold the hospital's decision and dismiss the appeal.

## **RECORD:**

[11] There is an email chain at issue. The first email in the chain is not at issue, but the remaining four emails are.

## DISCUSSION:

### **Does the section 65(8.1) exclusion for records respecting or associated with research or teaching apply to the email chain?**

[12] Section 65(8.1) of the *Act* excludes certain records relating to research and teaching from the *Act*. In other words, the *Act's* access scheme does not apply to these types of records. The IPC has consistently taken the position that the application of the exclusions in the *Act* is record and fact specific. This means that when determining whether an exclusion applies, the record is examined as a whole rather than by individual pages, paragraphs, sentences or words. This whole-record method of analysis has also been described as the "record by record approach."<sup>1</sup> Therefore, while the hospital appears to have considered the application of the exclusion in relation to each email in the record chain, I will consider whether the email chain is excluded from the *Act* as a whole.

[13] The purpose of section 65(8.1) is to protect academic freedom and competitiveness.<sup>2</sup> The hospital claims the exclusion in section 65(8.1)(c) applies to the email chain. Section 65(8.1)(c) states,

This Act does not apply to a record respecting or associated with research, including clinical trials, conducted or proposed by an employee of a hospital or by a person associated with a hospital[.]

[14] The IPC has found the term *research* to mean "a systematic investigation designed to develop or established principles, facts, or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research." The research must be able to be linked to specific, identifiable research projects conducted or proposed by a specific faculty member, employee or associate of an educational institution.<sup>3</sup>

[15] The research exclusion is to be narrowly construed, and legislative intent must be kept in mind when interpreting the meaning of the word *research* in the exclusion. This section applies where there is "some connection" between the record and the specific, identifiable "research, including clinical trials, conducted or proposed by an employee of a hospital or by a person associated with a hospital."<sup>4</sup>

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<sup>1</sup> See, for example, Orders M -352, PO- 3642, MO-3798-I, MO-3927 and MO-3947.

<sup>2</sup> Order PO-2693, *Carleton University v. Information and Privacy Commissioner of Ontario and John Doe, requester*, 2018 ONSC 3696.

<sup>3</sup> Order PO-2693.

<sup>4</sup> Order PO-4393, applying Order PO-2942 to section 65(8.1)(c); see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

## ***Parties' representations***

### *Hospital's representations*

[16] The hospital submits the appellant seeks access to email communications "related to an academic paper." The hospital submits the only responsive record is a chain of email communications regarding a matter of research integrity relating to a research study subject to the Hospital's Responsible Conduct of Research Policy. Given this context, the hospital claims the email is excluded under section 65(8.1)(c).

[17] The hospital submits the inquiry into the Lancet Study was conducted in accordance with the Responsible Conduct of Research Policy (the Policy). The hospital submits the Policy applies to all researchers at the hospital. The hospital submits the term *researcher* is broadly defined to include "any individual who conducts research at or under the auspices of the Hospital." The hospital submits email communications relating to an inquiry or investigation under the Policy are confidential. The hospital states the Policy requires that all persons involved in the inquiry or investigation maintain the confidentiality of records and communications throughout the process.<sup>5</sup> The hospital submits it has maintained the confidentiality of the record in accordance with the Policy.

[18] The hospital submits the Lancet Study is the product of research and the physician was employed or associated with the hospital in conducting the research. Further, the hospital submits the emails have "some connection" with the research. As such, the hospital claims the emails are subject to the exclusion.

[19] The hospital submits there must only be "some connection" between the record at issue and the relevant research for the exclusion to apply. The hospital claims the test for "some connection" is not onerous. The hospital refers to *Ontario (Attorney General) v. Toronto Star*,<sup>6</sup> which found the phrase "in respect of" "is probably the widest of any expression intended to convey some connection between two related subject matters."

[20] The hospital submits the exclusion applies to the record because of the following reasons:

- The Lancet Study falls under the IPC's definition of the research. The hospital submits the research was conducted by the physician concerning potential risks relating to codeine and breastfeeding in the context of a particular case study.
- The research was conducted and published by the physician when they were employed and associated with the hospital.
- There is some connection between the research and the record, which is an email chain regarding the physician's research into risks relating to codeine and

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<sup>5</sup> Section 4.3 of the Responsible Conduct of Research Policy, available [online](#).

<sup>6</sup> 2010 ONSC 991 (Div. Ct.).

breastfeeding and the Hospital's research integrity inquiry of this research under the hospital's Policy.

[21] In addition, the hospital argues this matter "engages the purpose of the research related records exclusion", which is to protect the principles of academic freedom and foster competitiveness. The hospital submits that research integrity matters are governed by academics who enjoy academic freedom to allow them to freely engage in research and academic exploration. The hospital submits matters concerning academic freedom are distinct from institutional administrative matters and must be handled confidentially and are "well within the special zone of academic activity that the Legislature meant to insulate from the public right of access."

*Appellant's representations*

[22] The appellant submits that in 2018, an investigation of the physician's papers identified possible problems with more than 400 articles they co-authored, including that they were inadequately peer-reviewed, failed to declare conflicts of interest, and contained lies about the methodology used to test hair for drugs. In response to this investigation, the appellant submits the hospital launched a systemic review of the physician's published work.

[23] At that time, the appellant submits the Lancet Study came under renewed scrutiny. Specifically, in 2020, the appellant submits the head of clinical pharmacology and toxicology at Sunnybrook Hospital and the University of Toronto, published a re-examination of the Lancet Study and concluded the physician's explanation for his findings were "implausible."<sup>7</sup> Further, the appellant submits the CEO of the hospital and the hospital's former interim CEO were among the signatories on letters to the editors of the Lancet and two other journals that published the research claiming it was flawed and should be retracted. Despite this, the appellant submits the Lancet did not retract the article claiming a retraction was "not warranted."<sup>8</sup>

[24] Given this context, the appellant submits they seek access to the records in the public interest, to hold the institution to account for its decision that a retraction is not warranted.

[25] The appellant acknowledges section 65(8.1) is intended to protect academic freedom and intellectual property. However, they claim the exclusion should not apply to the record at issue because the research in the paper was published more than 15 years ago. The appellant confirms they do not seek access to the underlying data, which has

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<sup>7</sup> The appellant refers to the following article: Rachel Mendleson, "Should breastfeeding mothers take codeine for post-partum pain? Doctors re-examined a 2005 tragedy and found new information about what regulators have been telling us." Toronto Star. (8 June 2020). Available [online](#).

<sup>8</sup> The appellant refers to the following article: Rachel Mendleson, "A 'flawed' medical journal article on postpartum pain was targeted for retraction from The Lancet. Here's why that didn't happen." Toronto Star. (3 July 2023). Available [online](#).

long been a matter of public record and discussion. The appellant submits the appeal does not relate to the research itself, but to the potential damage to the institution due to the controversy that resulted from the Motherisk program.

### *Hospital's reply representations*

[26] The hospital submits research matters are self-governed by the academy, which is an aspect of academic freedom the legislature intended to protect due to the important public interest in health research and innovation at Ontario hospitals. The hospital submits the legislature intended to protect academic freedom and the exclusion supports hospital research that advances health care in the province and beyond. To this end, the hospital submits that it and other research institutions have established and maintained internal frameworks to govern research. The hospital refers to its Policy as a tool it uses to govern research.

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

[27] I have reviewed the record and the parties' representations. Based on that review, I find the email chain is excluded under section 65(8.1)(c) of the *Act*.

[28] Section 65(8.1)(c) applies where there is "some connection" between the record and the specific, identifiable research conducted or proposed by an employee of a hospital or by a person associated with a hospital.<sup>9</sup> As stated above, research is "... 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.<sup>10</sup>

[29] Legislative intent must also be considered when interpreting the meaning of the word "research" in section 65(8.1). In Order PO-4393, the adjudicator found the requirement that the research must relate to specific, identifiable research projects respects the intent of the exclusion (protecting research at hospitals and educational institutions)<sup>11</sup> while also respecting the accountability purpose of the *Act*.

[30] The hospital claimed the application of the exclusion in section 65(8.1)(c) to the record at issue, claiming it has "some connection" to the specific research conducted by the physician in relation to the Lancet Study. The hospital describes the record as an email chain regarding a matter of research integrity relating to the Lancet Study, which

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<sup>9</sup> Order PO-2942; see also *Ontario (Attorney General) v. Toronto Star*, 2010 ONSC 991 (Div. Ct.).

<sup>10</sup> Order PO-2693.

<sup>11</sup> The legislative intent of section 65(8.1)(a) has been found in past IPC orders to protect academic freedom and competitiveness while creating a general right of access to information held by universities (see Orders PO-2693, PO-2825, PO-2942, and PO-2946 for example). Concerning section 65(8.1)(c), the same can be inferred with respect to the legislature's intent to protect the academic freedom and competitiveness of hospital-based research (see for example, Order PO-3365).

was subject to the hospital's Responsible Conduct of Research Policy.

[31] Upon review of the record, I find it relates to the hospital's review of the integrity of the Lancet Study that was conducted in accordance with its Policy. As such, I find there is some connection between the hospital's review and the Lancet Study itself. While the record is not the actual review of the Lancet Study, the third email contains specific details regarding the methodology and data underlying the research and the rationale for certain portions of the published article. As such, I find the record is referable to a specific identifiable research project and the establishment of generalizable knowledge or principles.<sup>12</sup>

[32] In my view, the email chain relates to the research because it contains an academic integrity review of the research conducted in the Lancet Study. As discussed above, the author of the third email summarizes the academic review conducted in relation to the Lancet Study and considers whether a retraction of the study is warranted. Upon review, I find the email chain, and in particular, the third email, contains specific details relating to the research and therefore, has some connection to the research itself. I find the type of information included in the third email, which contains the substance of the review, is akin to a peer review, which was considered in Order PO-2825. In that decision, the adjudicator found as follows:

... [I] find that the record at issue here is a record "respecting or associated with" research. The record containing the information at issue in this case is a peer review analysis, which comments on the scientific merit of a research proposal. This document is an integral part of the conduct of a particular research project or study because, as both parties have explained, without the peer review of the research proposal and the [Animal Use Protocol], the appellant would not be entitled to proceed with the research.

[33] I agree with and follow this analysis for the purposes of this appeal. In the record before me, the parties are considering whether the Lancet Study should be retracted due to academic integrity issues. Therefore, while the physician's research plans are not in jeopardy as they were in Order PO-2825, the results of the physician's research could be retracted. I acknowledge the research was completed and resulted in the publication of the Lancet Study in 2006. Nonetheless, the fact the research is now complete is not a reason for finding the research exclusion does not apply. The only requirement is that the record has "some connection" to research. Section 65(8.1)(c) does not include any time limits or requirement that the research be ongoing to apply.

[34] I appreciate the appellant has not had the ability to review the record and is therefore unable to comment on the information contained therein. However, I confirm the record does not relate to the potential reputational damage to the institution as she

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<sup>12</sup> See Order PO-3576.

claims. Rather, the record contains information regarding the integrity of the research conducted in the Lancet Study.

[35] In light of the above, I find the hospital established the email chain at issue has “some connection” to specific, identifiable research conducted by the physician. Accordingly, I find the email chain is excluded under section 65(8.1)(c) of the *Act*.

[36] As stated above, the IPC takes a record-by-record approach to considering records subject to an exclusion claim. Therefore, the entire email chain at issue is excluded from the jurisdiction of the *Act* and it is not necessary for me to also consider whether the fourth and fifth emails are responsive to the appellant’s request.

**ORDER:**

I uphold the hospital’s decision and dismiss the appeal.

Original Signed by: \_\_\_\_\_  
Justine Wai  
Adjudicator

\_\_\_\_\_ October 11, 2024