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

INTERIM ORDER PO-2601-I

Appeals PA07-76, PA07-77, PA07-78 and PA07-79

McMaster University

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NATURE OF THE APPEALS:

McMaster University (the University) received four requests under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

Request 2006-017 A list of clinical trials involving McMaster staff, facilities or its Research Ethics Board which have been suspended due to safety concerns, such list to cover the last five years. (Appeal PA07-76)

Request 2006-018 The number of deaths which have occurred in clinical trials overseen by McMaster researchers or involving McMaster facilities or McMaster's Research Ethics Board, such list to cover the last five years. (Appeal PA-07-77)

Request 2006-019 The number of adverse events in clinical trials overseen, or supervised by McMaster researchers or involving McMaster facilities or McMaster's Research Ethics Board for the last two years. (Appeal PA07-78)

Request 2006-020 A list of all clinical trials with subjects who are children under 18, aboriginal people, seniors, people who are incarcerated and other vulnerable populations, including an outline of the project or product being tested. (Appeal PA07-79)

The University extended the time for responding to these requests under section 26 of the *Act*, and the requester did not appeal its decision to do so. The University then issued access decisions within the extended time. In its decisions, the University claimed that the requested records fall outside the scope of the *Act* by virtue of section 65(8.1)(a).

The requester (now the appellant) appealed and an appeal file was opened respecting each of the four requests. The appeal file numbers are noted next to the description of each request, above. In addition to seeking a review of the University's decision regarding section 65(8.1)(a), the appellant raised the application of the exception to section 65(8.1) found in section 65(9).

After receiving the appeals, this office sent four separate requests for documentation to the University (one for each appeal file). The requests for documentation directed the University to send specific documents, including copies of the requested records, to this office. In response, the University's legal counsel wrote to this office and raised two concerns. First, the University's counsel stated:

> [t]hat on a plain reading of the legislation the Commissioner lacks jurisdiction *ab initio* in respect to collection, use and discharge of such information and records falling within Section 65(8.1)(a) and accordingly, any administrative process in respect thereof.

The University also claimed that the appeals were not filed within the 30-day time limitation period.

Because of the position taken by the University that the Commissioner lacks any jurisdiction to deal with the appeals, they were streamed directly to adjudication to address this issue. Under the *Act*, adjudication takes the form of an inquiry. I began my inquiry by sending a Notice of Inquiry to the University setting out the background of the appeals and inviting representations on the issue of jurisdiction.

The University responded in writing to the Notice of Inquiry, setting out its reasons for taking the position that the Commissioner lacks jurisdiction to entertain these appeals. The University indicated that:

> "[w]e are not herein providing representations for the purposes of your inquiry. Rather, our position is that the Commissioner lacks the jurisdiction and authority to conduct this inquiry, and therefore, no representations in respect of an inquiry shall be submitted by McMaster until there exists jurisprudence or a court order requiring same.

With respect to the University's expressed concern about the appeals not being filed within the statutory period, I observed in the Notice of Inquiry that based on my review, they appeared to have been filed within the thirty day period stipulated in section 50(2) of the *Act*. The University did not challenge this statement in its response to the Notice of Inquiry.

Having considered the arguments put forward by the University, it was not necessary to seek the appellant's representations in relation to the University's position that the Commissioner has no authority to conduct an inquiry even to determine the question of jurisdiction as a preliminary matter, which is the sole issue being addressed in this order.

DISCUSSION:

JURISDICTION

Section 65(8.1)(a) of the *Act* states:

> This Act does not apply,
>
> (a) 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 University believes that this provision applies to the requested information, and on this basis, takes the position that the records are excluded from the scope of the *Act*. In effect, the

University argues that this claim, in and of itself, is sufficient to extinguish the requester's right to appeal the University's decision to rely on it. In other words, the provisions of the *Act* providing for independent review of such decisions are of no force and effect, based simply on the University's untested decision to claim that this provision applies. The University's position appears to be that the *Act* does not provide any review mechanism for such a decision.

For the reasons that follow, I disagree.

The right to appeal decisions by institutions such as the University is found in section 50(1) of the *Act*. This section states:

> A person who has made a request for,
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> (a) access to a record under subsection 24(1);
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> (b) access to personal information under subsection 48(1); or
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> (c) correction of personal information under subsection 47(2),
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> or a person who is given notice of a request under subsection 28 (1) may appeal *any decision of a head* under this Act to the Commissioner. [Emphasis added.]

In my view, this provision is sufficient, in and of itself, to dispose of the University's argument that the Commissioner lacks the authority to review its decision to rely on section 65(8.1)(a). That is clearly a decision under the *Act* and therefore subject to review by the Commissioner. This view is further supported by section 1(a) of the *Act*, which states:

> The purposes of this Act are,
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> (a) to provide a right of access to information under the control of institutions in accordance with the principles that,
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> (i) information should be available to the public,
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> (ii) necessary exemptions from the right of access should be limited and specific, and
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> (iii) *decisions on the disclosure of government information should be reviewed independently of government*; [Emphasis added.]

In pursuing its argument that, because of its section 65(8.1)(a) claim, the Commissioner has no authority to conduct an inquiry under the *Act*, the University makes three essential points:

- the exclusions in section 65 of the *Act* are different than the exemptions found at sections 12 through 22, and this difference extends to the question of the Commissioner's jurisdiction;

- jurisprudence quoted in the Notice of Inquiry about a tribunal's duty to determine matters affecting its jurisdiction only applies where that is a preliminary matter, not the substance of the issue; and

- the burden of proof in section 53 of the *Act*, referred to in the Notice of Inquiry, only applies to exemptions and not exclusions.

I will deal with each of these arguments in turn.

Under the first bullet point, I agree with the University that the exemptions at sections 12 through 22 (as well as those in section 49) are different than the exclusions from the scope of the *Act* in section 65, including section 65(8.1)(a). If an exemption applies in the circumstances of a particular request, this means that the institution either must refuse access (where the exemption is mandatory) or may refuse access (where the exemption is discretionary). If one of the excluding provisions in section 65 is found to apply, the record is excluded from being accessible to requesters under the *Act* (although access outside the *Act* is not thereby prohibited). However, I disagree with the University with respect to the impact of this distinction. In my view, section 50(1) makes it very clear that the legislature intended that a head's decision to claim an exemption, or to claim that an exclusion under section 65 applies, would be reviewable by the Commissioner.

The jurisprudence referred to in the second bullet point, which I cited in the Notice of Inquiry, is *Re Morgan et al. and Windsor R.C.S.S. Board* (1979), 112 D.L.R. (3rd) 163 (Ont. Div. Ct.). The Notice of Inquiry quoted the following passage (at 168 of the judgment):

> Finally, I wish to turn to Re Ontario Labour Relations Board; Bradley et al. v. Canadian General Electric Co. Ltd., [1957] O.R. 316, 8 D.L.R. (2d) 65, and particularly at pp. 334-5 O.R., p. 81 D.L.R., where in dealing with the jurisdiction of an inferior tribunal, Roach, J.A., for the Court says:
>
> > When the jurisdiction of an inferior tribunal to decide what I will call the main question before it, depends upon a collateral matter it must, of course, decide that preliminary or collateral matter. It can decide it only on evidence. … If there is evidence then the tribunal weighs it and concludes that the facts on which its further jurisdiction depends either have or have not been proven to exist.

> *This passage makes it clear that an inferior tribunal must, as a preliminary to deciding the main question before it, make a decision upon a collateral or preliminary matter affecting its jurisdiction.* [Emphasis added]

Responding to this reference, the University argues as follows:

> … the substantive jurisdictional issue to be determined is not a collateral or preliminary matter. Rather, it is the main question to be determined, and thus, it is beyond the authority of the Commissioner to make such determinations in respect of its own jurisdiction.

Thus the University argues that *Morgan* is distinguishable. It also goes on to assert, based on no authority other than its attempt to distinguish *Morgan*, that since the question of jurisdiction is the main issue, the Commissioner lacks the authority to determine it.

I disagree with the University that the jurisdictional issue before me is necessarily "the main question" rather than a preliminary issue. If I were to find, after hearing argument on the issue, that section 65(8.1)(a) does not apply, then the access process under the *Act* would come into play. In that event, the alternative question of whether exemptions under the *Act* apply would become the primary issue, and the question of jurisdiction would, in fact, be a preliminary matter.

In any event, this analysis is not, in my view, definitive. The matter has already been effectively determined by the Ontario Court of Appeal in *Ontario (Minister of Health) v. Big Canoe*, [1995] O.J. No. 1277. In that case, the Ministry had claimed that the records were excluded from the scope of the *Act* under section 65(2), a provision (now repealed) that applied to certain clinical records as defined under the *Mental Health Act*. If applicable, the effect of section 65(2) was identical to section 65(8.1)(a): the records would be excluded from the scope of the *Act*. The issue before the Court was whether the inquiry powers in section 52 of the *Act*, specifically section 52(4), which permits the Commissioner to require the production of records, were available to the Commissioner in that situation. The Court stated:

> It is our opinion also that s. 52(4) must be construed as being applicable to all inquiries conducted pursuant to the Act. Having regard to the purposes of the Act and the manner in which the section is framed, *the procedures available to the Commissioner under s. 52 in conducting an inquiry to review a head's decision are applicable to inquiries relating to a head's decision that records sought by a requester are excluded by s. 65(2).* [Emphasis added]

Accordingly, it is clear that the Commissioner's power to conduct an inquiry, and all the powers in section 52 of the *Act*, are applicable even where an institution seeks to rely on a provision which, if applicable, means that the *Act* does not apply to the records.

As well, I note that the position taken by the University would have the effect of permitting institutions to make unilateral decisions about the application or non-application of the *Act* to

particular records, without recourse to an appeal before the Commissioner. Any requester who wished to challenge such a decision would therefore be required to bring an application for judicial review rather than utilizing the much more accessible appeal process under the *Act*. In my view, such an interpretation would be neither just nor efficacious. It also flies in the face of the wording of sections 1(a) and 50(1) of the *Act*. I therefore categorically reject the University's contention that this office lacks the statutory authority to conduct an appeal on the question of whether the University is entitled to rely on section 65(8.1)(a) in this case.

With respect to the argument concerning burden of proof in the third bullet point, above, it is clear that section 53 applies to the burden in relation to exemptions. However, it is also axiomatic in law that a party seeking to rely on a factual assertion bears the onus of proving it, and this is the case with all of the exclusions in section 65. Moreover, in any event, this question has no bearing on the Commissioner's power to review the University's decisions in this case.

To conclude, I find that the Commissioner has the authority to conduct an inquiry into the University's decision to rely on section 65(8.1)(a) in these appeals, and to invoke all the inquiry powers under the *Act* including those in section 52. Section 52(4) permits the Commissioner to order the production of documents, including but not limited to records at issue. Pursuant to that section, I will order the University to produce the responsive records and other materials requested in the requests for documentation, to this office. I will then proceed to issue a Notice of Inquiry on the substantive issues raised by these appeals.

ORDER:

I order the University to produce all materials required by the Requests for Documentation in these appeals, including all records responsive to the four requests, to this office on or before **August 15, 2007**.

Original signed by: July 31, 2007
John Higgins
Senior Adjudicator