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

ORDER PO-2694

Appeal PA07-176

The University of Western Ontario

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BACKGROUND:

The University of Western Ontario (the University) has decided to construct a research facility known as Advanced Facilities for Avian Research (AFAR). AFAR will include a Bird Migration Wind Tunnel (the tunnel). A press release issued by the University's department of Media Relations describes the tunnel as "the first hypobaric climatic wind tunnel, for studying the physiology and aerodynamics of high altitude migratory flight." *Western News*, whose banner describes it as the University's "newspaper of record," indicates that the tunnel will allow researchers "… to control everything from moisture and humidity to temperature and altitude."

A named company was retained by the University, following a Request for Quotations process, to prepare a "design study" for the tunnel. The design study was undertaken in support of the University's application for funding for AFAR from the Canada Foundation for Innovation (CFI), an independent corporation established by the federal government to provide funding for research infrastructure.

Funding for the construction of the bird wind tunnel was then granted by CFI. The Ministry of Research and Innovation (the Ministry) agreed to match the funds granted by CFI. Subsequently, the University issued a Request for Proposals (RFP) relating to the construction of the wind tunnel. The University states:

> The RFP sought designs for the Tunnel based on the specifications set out in the RFP. The specifications in the RFP were developed specifically for, and relate directly to, the research needs of the researchers who will be using the Tunnel.

A number of bids were received in response to the RFP, and the contract for the construction of the wind tunnel was subsequently awarded.

NATURE OF THE APPEAL:

The University received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the proposal to build the tunnel. Following discussions between the requester and the University, the request was clarified as follows:

1. A copy of all communications, requirements and/or guidelines sent to [a named company] from the University with respect to the preparation of the design study. That is…copies of all information given to [the named company] to enable that company to prepare the design study.

2. A copy of the design study prepared by [the named company].

3. Technical and commercial submittals to CFI relating to this project.

4. Minutes of any meetings between [the named company] and the University and copies of all communications between [the named company] and the University that relate to the bid for the design, supply and installation of a bird wind tunnel from the time of the award of the design study to March 6, 2007.

5. The [named company's] bid.

6. UWO internal documents that show the evaluations of the [named company] and the [appellant's company] bids.

7. A copy of the envisaged contract between [the named company] and the University with respect to the bird wind tunnel project… especially…the technical requirements and the provisions for damages and penalties.

8. Letter of intent from the University to [the named company] relating to the design, supply and installation of a bird wind tunnel.

The University issued a decision denying access to the requested records. The decision letter stated:

> [a]fter a detailed examination of the records and based on my understanding of the context in which they were created and used, I have determined that the records meet the criteria for the exclusion set out in section 65(8.1)(a) and therefore are outside the purview of the *Act*. Therefore your access request is denied.

The University explained:

> [t]he requested records relate to the Bird Wind Tunnel that will be installed within the proposed Advanced Facilities for Avian Research (AFAR) at the University. The wind tunnel will be a globally unique research system – the first hypobaric climatic wind tunnel for research on bird flight. It is specifically designed to facilitate new innovative research into areas that have been previously unattainable, and will be used solely for research purposes.
>
> Because the wind tunnel is essential to proposed research projects and is inextricably linked to research that will be conducted by our researchers, records relating to the design and supply of this system are clearly "respecting" or "associated with" research proposed by employees of the University.

The requester (now the appellant) appealed the decision of the University to this office. During mediation, the Mediator requested a copy of the responsive records from the University. However, the University declined to provide the Mediator with a copy of the records. Instead, it provided an index of records to the Mediator. No further mediation was possible and this matter was moved to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*.

I began my inquiry into this matter by issuing a Notice of Inquiry to the University, and inviting it to submit representations on the facts and issues set out in the notice. I also requested the

production of copies of the records at issue in this appeal. The University responded by providing me with copies of the records, its representations and an affidavit sworn by an Assistant Professor in the University's Faculty of Science (the affidavit).

In the cover letter provided with its representations, the University claimed that portions of the records relating to parts 1 and 3 of the request are non-responsive, as well as two previously identified sets of minutes.

After receiving these materials from the University, I issued a modified Notice of Inquiry to the appellant inviting him to submit representations on the issues in the appeal. These were: (1) whether the exclusion at section 65(8.1) applies to the records, and (2) the responsiveness of the records and portions identified as non-responsive in the University's cover letter (see above). I quoted the parts of the University's cover letter relating to responsiveness in the Notice of Inquiry sent to the appellant, and also I enclosed a complete copy of the University's representations. At the University's request, the affidavit was not initially provided to the appellant.

The appellant provided representations in response to the Notice of Inquiry. These were then provided to the University, which was invited to submit representations in reply. I received reply representations which the University agreed could be shared with the appellant. Because the University's reply representations refer to the affidavit, I decided that portions of the affidavit should be shared with the appellant. Following discussions with the University on that point, it agreed to share most of the affidavit except certain portions which I agreed should not be shared for confidentiality reasons.

I then shared with the appellant the University's reply representations in their entirety and the non-confidential portions of the affidavit, and invited the appellant to provide sur-reply representations in response. I subsequently received sur-reply representations from the appellant.

RECORDS AND ISSUES:

In its representations, the University included an index identifying the records. What follows is a simplified version of this index. I have added the minutes identified as non-responsive in the cover letter to the University's initial representations at the end of the chart. They are identified as record 12. The italicized references to "Part 1," etc. in the simplified index below refer to the eight-part clarified request reproduced above.

Record Number	Description of Records	Page numbers
Part 1		
1	Request for Quotation	1-1 to 1-8
2	Emails	1-9 to 1-10
Part 2		
3	Conceptual Design of Bird Wind Tunnel	2-1 to 2-25
Part 3		
4	Canadian Foundation for Innovation Grant Application	3-1 to 3-4
Part 4		
5	Emails and other correspondence	4-1 to 4-46
Part 5		
6	Named Company's Proposal	5-1 to 5-81
Part 6		
7	Evaluation	6-1
Part 7		
8	Request for Proposal	7-1 to 7-19
9	Letter from named company to University	7-20 to 7-21
10	Revised Proposal	7-22 to 7-100
Part 8		
11	Letter of Intent	8-1 to 8-2
Part 1 (Claimed as Non-Responsive)		
12	Meeting minutes (2 sets)	7 pages in all – not numbered

One or more records may be included in each "record number" in the chart. Any reference to a record number in this order should be interpreted as a reference to all of the records included under that record number, unless otherwise stated.

In this order, I will initially consider all responsiveness issues raised by the University, followed by the University's claim that section 65(8.1)(a) applies.

DISCUSSION:

RESPONSIVENESS OF RECORDS

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; and
>
> . . . . .
>
> (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).

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 [Orders P-134, P-880]. Previous orders and decisions of the courts have found that for a record to be responsive to a request, it must be reasonably related to the request. [see Order P-880 and *Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197]

As noted, the cover letter that accompanied the University's initial representations takes the position that, among other parts of the records, the two sets of minutes it had previously identified are non-responsive. The cover letter states:

> The two records that are not responsive to the request are two sets of Minutes. The University submits that the two sets of Minutes originally listed in the original Index under the first part of the request are not "communications, requirements and/or guidelines sent to [named company] from the University". These Minutes are of meetings conducted at [named company] premises and cannot reasonably be characterized as communications, requirements or guidelines sent to [named company] from the University. Nor are these Minutes relevant to any other portion of the request. Accordingly, the University submits that these records are not responsive to the request. …

The cover letter also takes the position that the following additional portions of the records are non-responsive:

- under part 1 of the request, parts of record 2 consisting of e-mails from the named company to the University found at pages 1-9 and 1-10;
- under part 3 of the request, parts of record 4 found at pages 3-1 (also identified as page 4E) and 3-4 (also identified as page 4H).

With respect to these portions of the records, the cover letter that accompanied the University's initial representations states:

> Non-responsive portions of records are noted on the covering pages respecting each portion of the request. The University submits that the lower portions of two email pages relating to the first part of the request as well as the upper portion of page 4E and the lower portion of page 4H regarding the third portion of the request are not responsive to the request. The University submits, with respect to the emails, that they are not from [named company] and are therefore unresponsive. The University also submits that with respect to the third portion of the request regarding the CFI submission, these paragraphs do not deal with …the Bird Migration Wind Tunnel or "technical or commercial submittals to CFI"; rather, they deal with the larger infrastructure of the *Advanced Facilities for Avian Research* (AFAR) and with other than technical or commercial submittals to CFI. However, should the IPC find otherwise, then the University requests that the Representations and material enclosed be considered in determining that the record is excluded as "respecting or associated" with research.

The appellant's initial representations refer to these arguments, which were provided to him in the Notice of Inquiry. He refers, in part, to information contained in the detailed index of records contained in the University's initial representations, and states:

1. We obviously, at the present time, cannot ascertain the completeness of the records. For example, documents could refer to other documents that have not been included.

2. We find it inconceivable that there is a letter from [the named company] to the University (February 19, 2007, record 9), in the midst or at the end of the tender process, without a prior or responding communication from the University to [the named company]; unless it is somehow in relation to the issuance of the letter of intent of the same date (record 11).

3. With the background of years of multi-million dollar contracting in diverse fields, including wind tunnels, we find it inconceivable that there has not been any communication whatsoever between the closing of the bid and the issue of the letter of intent.

4. We have a strong indication that there has been communication from the University to [the named company], in some form, between the date of bid closing (January 31) and February 28; our indication is specific on the subject of hypobaric capability.

5. In general we find it inconceivable that there was no communication between the issuance of the letter of intent (record 11) and a revised proposal (record 10).

6. We suspect that the date of record 10 has been misspelled. (March 5, 2005 probably should be March 5, 2007)

In reply, the University argues that these representations are speculative. With respect to item 2 of the appellant's representations just quoted, the University states that categories of records disclosed in the index of records do not appear chronologically. In relation to items 3, 4, and 5, the University notes that record 5 refers specifically to communications that took place during the time period mentioned by the appellant. The University agrees with item 6, and states that the date of record 10 is March 5, 2007.

With respect to the minutes that the University described as non-responsive in the cover letter that accompanied its initial representations, the University states:

> Other than asserting it is highly likely that the minutes are responsive, the Appellant does not explain how the records are responsive to the specific wording of his requests. The University reiterates that the Minutes from discussions held in August and September 2005 relating to the proposed design study are not responsive to any part of the request.

In sur-reply representations, the appellant states that, without knowing the contents of the records that the University has identified as non-responsive, it is not possible for his arguments to be more than speculative, and he does not accept the University's arguments concerning non-responsiveness.

Having reviewed the records in detail and the representations provided by the parties, I agree with the University that some of the identified portions are non-responsive. However I have reached a different conclusion about the two sets of minutes now identified as record 12. In my view, these two sets of meeting minutes record communications from university staff to the company that prepared the design study, and they relate to the preparation of the study. In part 1 of the request, the appellant sought access to "communications … sent to [a named company] from the University with respect to the preparation of the design study. That is…copies of all information given to [the named company] to enable that company to prepare the design study." Given that record 12 sets out communications of this nature, I find that the meeting minutes comprising record 12 are "reasonably related" to part 1 of the request (see Order P-880) and are therefore responsive.

I agree with the University that e-mails from the named company to the University in record 2 are not responsive to part 1 since they are not communications sent to the named company. Nor are they responsive to the remainder of the request.

In addition, I find that the identified portions of record 4 are not responsive to part 3 of the request. The request was for information about the design and construction of the tunnel, and the parts of record 4 claimed as non-responsive do not pertain to the tunnel.

That is sufficient to deal with the issues of responsiveness raised by the University. The appellant's comments that it is "inconceivable" that certain records do not exist are directed more to the possible existence of additional records than to the responsiveness of the records already identified. The possible existence of additional records was not an issue in this appeal. However, having reviewed the appellant's position in that regard, I conclude that he has not established a sufficient basis for finding that additional records are likely to exist.

SECTION 65(8.1)(a)

As noted above, the University claims that section 65(8.1)(a) excludes the responsive records from the application of the *Act*. Sections 65(9) and (10) set out exceptions to the exclusion at section 65(8.1). These sections state:

> (8.1) 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;
>
> . . .
>
> (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).

This provision was enacted when the University, along with other universities in Ontario, became institutions under the *Act*. As explained in more detail below, the purpose of the provision is to protect academic freedom and competitiveness.

The University argues that the words of section 65(8.1)(a) must be given their ordinary meaning and they must be interpreted to comport with the legislative intent of the section, and not to achieve a "policy objective of openness and public access." It argues that the principles relating to the right of access only apply to records governed by the *Act*.

In this regard, the University relies on a passage from *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal dismissed [2001] S.C.C.A. No. 509. In that case, the Court was addressing another exclusion in section 65 of the *Act*, namely section 65(6), which deals with labour relations and

employment-related records. In *Solicitor General*, the Court rejected an interpretation that placed time limits on that exclusion. In doing so, the Court stated:

> As for the time element introduced into subsection 6, I note that in dealing with the request for access to the Police Complaints Commission file, the Assistant Privacy Commissioner acknowledged the stated purpose of the package of amendments by which Section 65(6) was added to the Act in 1995 and articulated a purposive approach to the interpretation of the section[.] … [para. 36]
>
> …
>
> In my view, the time sensitive element of subsection 6 is contained in its preamble. The Act "does not apply" to particular records if the criteria set out in any of sub clauses 1 to 3 are present when the relevant action described in the preamble takes place, i.e. when the records are collected, prepared, maintained or used. Once effectively excluded from the operation of the Act, the records remain excluded. The subsection makes no provision for the Act to become applicable at some later point in time in the event the criteria set out in any of sub clauses 1 to 3 cease to apply. [para. 38]
>
> …
>
> In my view, therefore, the Assistant Privacy Commissioner was wrong to limit the scope of the exclusions in the way that he did. [para. 40]

Significantly, in reaching its conclusions, the Court mentions the Commissioner's reference to the stated legislative purpose of section 65(6), but does *not* indicate that this reference was inappropriate. In fact, elsewhere in the judgment (at para. 20), the Court quotes the purposes of the *Act*, which are set out in section 1, under the heading, "Other Relevant Provisions of the *Act*".

The passage quoted by the University appears in the section of the judgment dealing with the standard of review to be applied to the Commissioner's decisions on judicial review, in relation to the relative expertise of the Commissioner and the Court. The full text of the paragraph quoted by the University reads as follows:

> While acknowledging the relative expertise of the Privacy Commissioner in matters requiring it, in my view the very wording of s. 65(6) indicates her expertise is not engaged in its interpretation. By using the words "this Act does not apply", the legislature has distinguished exclusions from exemptions, and has declared that the "delicate balanc[ing] between the need to provide access to government records and the right to protection of personal privacy", which engages the expertise of the Privacy Commissioner, plays no role in relation to the enumerated records. Accordingly, relative to the court, the Privacy Commissioner possesses no particular expertise that is significant to the interpretation of the

> section. In my view, this wording also signifies the legislature's intention that the Privacy Commissioner not have a determinative say in the interpretation of the section. Had it viewed the matter otherwise, it would not have excluded the enumerated records from the operation of the Act.

In my view, neither this passage nor any other portion of the judgment in *Solicitor General* stands for the proposition that it is inappropriate to consider the purpose of the statute in interpreting the exclusions found in section 65, including section 65(8.1)(a). Indeed, the Supreme Court of Canada has stated that this approach is essential to statutory interpretation. For example, in *Rizzo v. Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, Justice Bastarache states as follows (at para. 21):

> Although much has been written about the interpretation of legislation [citations omitted], Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense *harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament*. [My emphasis.]

This approach is commonly referred to as the "modern" principle of statutory interpretation. I will refer to it in more detail in my consideration of the meaning of section 65(8.1)(a), below.

Before leaving this point, however, I would also note that, in *Ontario (Ministry of Correctional Services) v. Goodis*, [2008] O.J. No. 289 (Div. Ct.), Justice Swinton (writing for the panel) expressly applied this approach to the interpretation of section 65(6) (the same exclusion referred to in *Solicitor General*) and specifically referred to the modern principle as reflected in *Rizzo Shoes* (at para. 21). The Ministry had argued that section 65(6) applied to records describing employee actions, on the basis that those actions could give rise to vicarious liability on the part of the Crown. After setting out the purposes of the *Act* at section 1, Justice Swinton rejected this approach, stating (at para. 26):

> *The interpretation suggested by the Ministry in this case would seriously curtail access to government records and thus undermine the public's right to information about government.* If the interpretation were accepted, it would potentially apply whenever the government is alleged to be vicariously liable because of the actions of its employees. Since government institutions necessarily act through their employees, this would potentially exclude a large number of records and undermine the public accountability purpose of the *Act (Ontario*

> *(Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* [2005] O.J. No. 4047 (C.A.) (at para. 28). [My emphasis.]

Thus, in my view, the purposes of the *Act* as set out in section 1 are important in the interpretation and application of its provisions, including section 65. Section 1 states, in part, as follows:

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

In applying the modern principle of interpretation to section 65(8.1)(a), it is equally important to consider the legislative purpose that underlies the addition of this provision to the *Act*. This amendment was made by means of the *Budget Measures Act, 2005* (Bill 197), and was addressed by M.P.P. Wayne Arthurs on both the second and third readings. Mr. Arthurs was, on both occasions, the Parliamentary Assistant to the Minister of Finance and spoke on behalf of the government in relation to the provisions aimed at adding Ontario universities as institutions under the *Act*. His comments clearly address the purpose of section 65(8.1). At third reading on November 21, 2005, he 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. [My emphasis.]

I acknowledge the importance of these principles in the interpretation and application of section 65(8.1)(a). However, bearing in mind the purposes of the *Act* in section 1 and the stated

legislative purpose of this amendment, I have concluded that the Legislature did not intend to create an exclusion from the application of the *Act* whose reach would be broader than is necessary to accomplish these stated objectives. It is important to note, in that regard, that section 65(8.1)(a) only relates to the question of whether the *Act* applies to the records. If the *Act* is found to apply, this does not automatically lead to disclosure. Where the *Act* applies, the records could be subject to one of the mandatory and/or discretionary exemptions from the right of access, which are found in sections 12 through 22 of the *Act*.

I will begin my analysis of section 65(8.1)(a) by considering the meaning of several of the terms found in the section.

"Research"

To determine whether the records are respecting or associated with research, it is necessary to determine how "research" should be defined.

Although the University did not submit representations to support a particular definition of "research" over any other possible definition, it refers to the definition that this office has applied in relation to section 21(1)(e) of the *Act*. In essence, the University argues that whatever definition of "research" is adopted by this office, the records at issue are "respecting or associated with research."

The appellant makes no specific representations in this regard.

Although "research" is not a defined term under the *Act*, another statute within the jurisdiction of this office, the *Personal Health Information Protection Act* (*PHIPA*), contains a definition at section 2:

> "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.

This definition is similar to the interpretation of "research" that has been developed in jurisprudence of this office under sections 13(2)(h) and 21(1)(e)(ii) of the *Act* (both of which also mention this term):

> . . . [T]he systematic investigation into and study of materials, sources, etc. in order to establish facts and reach new conclusions [and] ... an endeavour to discover new or to collate old facts etc. by the scientific study or by a course of critical investigation.
>
> (Orders P-666, P-763, and P-1371)

In determining the meaning of "research", I must consider the modern rule of statutory interpretation, referred to in the *Rizzo Shoes* judgment of the Supreme Court of Canada, and the Divisional Court judgment in *Ontario (Ministry of Correctional Services) v. Goodis* (see above). A more recent articulation of the rule appears in *Sullivan and Driedger on the Construction of Statutes*, 4th ed., by Ruth Sullivan (Toronto: Butterworths, 2002) at p. 3:

> [A]fter taking into account all relevant and admissible considerations, the court must adopt an interpretation that is appropriate. An appropriate interpretation is one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just.

(a) Plausibility or Compliance with Legislative Text

Sullivan states (at p. 123) that to be plausible, an interpretation must be "one the words can reasonably bear." As noted, section 65(8.1) includes the word "research" without any other language to qualify or restrict the plain and ordinary meaning of that word. In Order P-666, Assistant Commissioner Irwin Glasberg turned to the Concise Oxford Dictionary (8th edition) to aid in formulating a definition for "research". In my view, his formulation of the definition of "research" is accurate. However, I have concluded that the definition found in section 2(1) of *PHIPA*, which had not been enacted at the time of Order P-666, is a better articulation of the same concept. As well, it has the advantage of appearing in a statute devoted to privacy and access to information, and also administered by this office. In my view, it is a "plausible" definition.

(b) Promotion of Legislative Intent

I have already referred to the comments made by M.P.P. Wayne Arthurs during the third reading debate on the *Budget Measures Act, 2005* (Bill 197), which enacted section 65(8.1). This extract from the legislative debates makes it clear that academic freedom and competitiveness must be respected in any interpretation of section 65(8.1)(a) that is adopted, including the meaning ascribed to "research".

It is also evident, based on the legislative text of section 65(8.1), that universities' academic freedom and competitiveness is intended to be protected by the exclusion of certain records from the scope of the *Act*. In my view, an interpretation of "research" that recognizes its ordinary meaning is in keeping with the intention of the Legislature to protect the academic freedom and competitiveness of educational institutions. Given its specificity and comprehensiveness, I have concluded that the definition in *PHIPA* is best suited to achieve this purpose.

(c) Outcome must be Consistent with Legal Norms and be Reasonable and Just

In my view, the definition of "research" in *PHIPA* meets this requirement as well. With respect to the meaning of "legal norms", Ruth Sullivan states as follows in *Sullivan and Driedger* (cited above):

> These norms are found in Constitution Acts, in constitutional and quasi-constitutional legislation and in international law, both customary and conventional. …

This portion of the analysis under the modern principle requires that the *outcome* of the interpretation must meet the expressed standard. Given the stated legislative purpose of respecting academic freedom and competitiveness, I am satisfied that adopting the definition of "research" in *PHIPA* produces a result that is consistent with legal norms and is both reasonable and just. I do not believe that it produces any unfairness, or that any violations of constitutional or quasi-constitutional principles would result. Nor is it inconsistent with the purposes of the *Act* as a whole, as stated in section 1 (reproduced above).

For all these reasons, I conclude that "research" in the context of section 65(8.1) should be 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."

Before leaving this subject, however, I would also note that the meaning of "research" in the context of section 65 (8.1)(a) is informed by the remaining words of the section. In particular, the section requires that the research be "conducted or proposed by an employee of an educational institution or a person associated with an educational institution." 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.

In my view, this approach to "research" also complies with the modern rule, as it is an interpretation the words of section 65(8.1)(a) can reasonably bear, and promotes the legislative purpose of protecting the freedom and competitiveness of the University's faculty members and associated individuals. It does not produce an outcome that violates legal norms, and because it protects academic freedom and competitiveness, it is reasonable and just.

In addition, this interpretation finds support in the approach taken to the related provision found at section 3(1)(e) of British Columbia's *Freedom of Information and Protection of Privacy Act*, which excludes "a record containing … research information of employees of a post-secondary educational body" from the application of that statute. This section is discussed further below, but for the purpose of this analysis, I note that Commissioner David Loukidelis stated (in Order

00-36) that "[s]ection 3(1)(e) *is intended to protect individual academic endeavour*." I agree, and in my view, notwithstanding the different wording of the British Columbia exclusion, this approach is equally applicable to section 65(8.1)(a) of the *Act*.

Thus, while it is clear that the tunnel will be used for research in a general sense, this is not sufficient to establish that section 65(8.1)(a) applies. In particular, it does not automatically mean that records relating to the design or construction of the tunnel, or to the RFP process used to select a firm to build it, are records "respecting or associated with research conducted or proposed by an employee of [the University] or by a person associated with [the University]…" as required by this section. The design and construction of equipment used to conduct research does not necessarily equate with the research for which the equipment will be used. The question is whether the records meet all the qualifications set out in section 65(8.1)(a), including whether they are "respecting or associated with" specific, identifiable research projects.

"Respecting or Associated with"

The University makes a number of submissions regarding the meaning of these words. The appellant makes no specific representations in this regard.

In my view, as with the meaning of research, it is appropriate to determine the meaning of these words bearing in mind the purposes of the *Act* as a whole, and the specific purpose for which this provision was added to the *Act*, all of which are canvassed above. As well, in keeping with the modern principle, the interpretation must be plausible, efficacious and acceptable, as articulated in the extract from *Sullivan and Driedger*, above.

According to the University, in using the words "respecting or associated with", the Legislature deliberately adopted language that is broader than the equivalent provisions in other jurisdictions in Canada. It states:

> The exclusion for research in British Columbia's *Freedom of Information and Protection of Privacy Act* and Newfoundland and Labrador's *Access to Information and Protection of Privacy Act*, provides that the legislation does not apply to:
>
> > A record containing … research information of [an employee/employees] of a post secondary educational [institution/body].
>
> Similarly, the Alberta *Freedom of Information and Protection of Privacy Act* and the Manitoba *Freedom of Information and Protection of Privacy Act* provide an exclusion for:
>
> > Research information of an employee of a [post secondary] educational [body/institution].

The University also refers to the "presumption against tautology" and argues that the words "respecting" and "associated with" should be given different meanings. According to the University, the word "respecting" has a broader meaning than "associated with". The University argues that this is evident from a review of the following dictionary definitions of these words:

> The Canadian Oxford Dictionary provides the following definitions of the word "associate": "connect in the mind; join or combine; a thing connected with another; allied; in the same group or category."
>
> In contrast, the word "respecting" is defined in the Canadian Oxford Dictionary as "with reference or regard to; or concerning."

The University submits that the French version of section 65(8.1)(a) also supports a broad interpretation of the section. The French version of the section uses the word "concernant" which translates into English as "concerning, relating to, regarding" (for which the University cites the Collins Robert French-English Dictionary, 1993 as its source).

As stated previously, the purpose of section 65(8.1)(a) is to protect academic freedom and competitiveness. While the words "respecting or associated with research" may have broader implications than the requirement that records "contain" research information, I do not accept that the Legislature intended the broad scope apparently ascribed to them by the University.

For the reasons that follow, I have concluded that the words "respecting or associated with" require that there be a substantial connection between the records and actual or proposed research. In my view, the purpose of the section must be considered in assessing whether the connection between the records and the actual or proposed research is sufficient to establish the necessary substantial connection in a particular case.

As well, guidance as to the interpretation of this section can be found in other provisions of the *Act*. When the Legislature enacted section 65(8.1)(a) it did so in the context of the *Act* and it is presumed that the intention was that it would be read in the context of the *Act* as a whole. While the words "respecting or associated with" do not appear elsewhere in the *Act*, some aid in their interpretation can be found in previous orders of this office that interpret the words "in relation to" used in section 65(6), referred to above in my discussion of the *Solicitor General* and *Ministry of Correctional Services v. Goodis* cases.

Section 65(6) states:

> Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution *in relation to* any of the following:

> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

In my view, although the language of section 65(6) is different, an analogy is possible because the words "in relation to" are close enough in meaning to "respecting or associated with," and a finding that these sections apply to a record has the same effect as section 65(6), that is, the records are excluded from the application of the *Act*. Moreover, as noted above, the French language version of section 65(8.1)(a) uses the word "concernant," which may be translated as "relating to." Given that both "relating to" and "in relation to" share a common verb base and preposition, the meaning of "in relation to" in section 65(6) is relevant here.

In Order MO-2024-I, I reviewed the jurisprudence of this office on the meaning of "in relation to" in section 52(3) of the *Municipal Freedom of Information and Protection of Privacy Act* (the municipal *Act*), the equivalent of section 65(6) of the *Act*. The appellant in that appeal sought access to the total amount paid by the City of Toronto to a law firm defending a lawsuit brought by a former employee. The City denied access on the basis that the records were excluded by section 52(3)1 of the municipal *Act*. I stated:

> The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.
>
> …
>
> As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial

> connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.
>
> I therefore find that requirement 2 is not met, and section 52(3)1 does not apply.

Turning to the argument that the words, "respecting or associated with" must be given different meanings because of the presumption against tautology, I am not satisfied that doing so is as easy a task as the University suggests. The University claims that "respecting" has a broader meaning than "associated with." I disagree. In my view, the dictionary definitions cited above do not necessarily result in that conclusion. Based on those definitions, and common usage of these words, one might equally argue the opposite. I note, as well, that the French version of the *Act* uses only one word to describe this concept, namely, "concernant." I would expect that if two significantly distinct concepts were intended, this would have to be indicated in the French version as well.

The presumption against tautology is rebuttable. Ruth Sullivan comments on this as follows (at p. 162 of *Sullivan and Driedger*, cited above):

> Repetition or superfluous words may also be introduced to make the legislation easier to read or work with or, in the case of bilingual legislation, to preserve parallelism between the two language versions. Repetition is not an evil when it serves an intelligible purpose. When tautologous words are deliberately included in legislation for reasons such as these, the courts say they are added *ex abundanti*

> *cautio*, out of an abundance of caution, and the presumption against tautology is rebutted."

Significantly, there is another principle of interpretation to consider in relation to words of similar meaning, namely the "associated words" rule. In upholding a single interpretation of "advice or recommendations" in section 13 of the *Act*, the Court of Appeal applied that rule:

> The Commissioner submits, correctly in my view, that the principle of interpretation to be applied is the associated words rule. The rule is explained in R. Sullivan, *Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworth's, 2002) at 173:
>
> > The associated words rule is properly invoked when two or more terms linked by "and" or "or" serve an analogous grammatical and logical function within a provision. This parallelism invites the reader to look for a common feature among the terms ... Often the terms are restricted to the scope of their broadest common denominator.

In my view, the words, "respecting or associated with" are intended to modify one another, and as their definitions (quoted above) make clear, they do in fact "serve an analogous grammatical and logical function" in section 65(8.1)(a). I therefore find that the presumption against tautology is rebutted and the "associated words" rule applies instead.

Having considered all the authorities referred to above, including the dictionary definitions cited, and the French version of the provision, I conclude that "respecting or associated with" has a similar meaning to "in relation to" in previous decisions of this office. All these phrases describe a similar degree of connection. In my view, like "in relation to", "respecting or associated with" should be interpreted to mean "for the purpose of, as a result of, or substantially connected to." Also, and similar to the cautionary note in Order MO-2024-I, meeting this definition requires more than a superficial connection between the records and the research in question. Whether or not the records at issue are "respecting or associated with" research turns on an examination of the records. To justify a finding that records are "respecting or associated with" research, there must be a substantial connection between the content of a particular record, on the one hand, and specific, identifiable research actually conducted or proposed by an employee of the University or a person associated with the University.

This interpretation is supported by the purposes of both the *Act* and this particular amendment. Applying an overbroad definition would frustrate the fundamental purpose of the *Act* to provide a right of access to information in the custody of institutions, without any justification referable to the stated purpose of adding this section to the *Act*, namely the protection of academic freedom and competitiveness. In this regard, I am mindful of the similar concerns expressed by Justice Swinton in *Ministry of Correctional Services v. Goodis* (cited and quoted more fully

above) that "[i]f the interpretation were accepted, it would potentially exclude a large number of records and undermine the public accountability purpose of the *Act*."

I also find that this interpretation meets the requirements of the modern principle, which requires an appropriate interpretation, that is, one that can be justified in terms of (a) its plausibility, that is, its compliance with the legislative text; (b) its efficacy, that is, its promotion of the legislative intent; and (c) its acceptability, that is, the outcome complies with legal norms; it is reasonable and just. In my view, there is no doubt that an interpretation requiring a substantial connection between the records and actual or proposed research is one that the words of the statute can reasonably bear, and is therefore plausible. As I have just observed, it promotes the purpose of the *Act* as a whole, while also respecting the intent of the Legislature to protect academic freedom and competitiveness. Accordingly, in my view, it is efficacious. There is nothing to suggest that the outcome of this interpretation would violate legal norms, and in my view, it is a just and reasonable approach, and therefore acceptable.

"Conducted or Proposed by an Employee or Person Associated with an Educational Institution"

In my view, the inclusion of the words, "conducted or proposed by an employee of an educational institution or a person associated with an educational institution" in this section is significant. Those same words inform my conclusion, above, that the term "research" must be referable to specific, identifiable research projects that have been conceived by a specific faculty member, employee or associate of the University.

As well, the inclusion of these words requires consideration of whether research has actually been conducted, or is being conducted, or alternatively, whether the research has been proposed. In some instances, research will be proposed by means of an application to an overseeing body such as an ethics board, while in other cases, such approval may not be required. Where research has not yet begun, the question of whether it has been "proposed" will therefore depend on the facts and context of a particular request.

In addition, where the other elements of the section are satisfied, it may be necessary to analyze the relationship between those conducting or proposing the research to determine whether they are employees of, or associated with, the University.

In this case, it is clear that because the tunnel has not been completed, it does not relate to any actual research that is being conducted, or has been conducted in the past. In the context of this appeal, therefore, the question is whether the records have a substantial connection with specific, identifiable research projects that have been "proposed" by an employee or person associated with the University.

Does Section 65(8.1)(a) apply?

The University provides detailed argument regarding each portion of the request and the responsive records. It states:

> The first portion of the request seeks specified records "with respect to the preparation of the design study". This design study was created to meet the needs of researchers and is central to the creation of the Bird Migration Wind Tunnel; the Tunnel was designed for, and will only be used for, research purposes. Any records dealing with the design or funding for the project are, it is submitted, "respecting or associated" with the research.
>
> The second portion of the request deals with the design study itself. The design study is central to the development of the Bird Migration Wind Tunnel and the research specifications therefor and is accordingly "respecting or associated" with research.
>
> The third portion of the request deals with a portion of the submission to CFI for funding. It is specifically requesting the "technical and commercial submittals." The portions of the records at issue are "respecting or associated" with research. Not only do the records contain technical and commercial information about the Tunnel, the CFI submission was integral to receiving the funding necessary to allow the proposed research to take place. Accordingly, these records are "respecting or associated" with research.
>
> Records that are in respect of the fourth part of the request deal with records related to the bid for the design, supply and installation of the Tunnel from September 7, 2005, when the award of the design study was made, to March 6, 2007. All such communications between [the named company] and the University were "respecting or associated" with research in that the bid for the design, supply and installation of the Tunnel, and any communications thereof, concerned the research. In order for the Tunnel to be built and the research to go forward an RFP was required and the communications either dealt specifically with the research and building requirements or with issues related to the bid.
>
> The portions of the request reflecting the successful bid, the evaluation, the "envisaged contract" and letter of intent (portions 5-8) all are "respecting or associated" with research in that they deal with the design for the Tunnel or with the RFP which was necessary in order to allow the proposed research to take place.

In the affidavit provided by the University, the Assistant Professor who signed it argues that "an important aspect of the research process is to develop innovative ideas for equipment…." From my review of the records and other materials provided to me, it is clear that the records do

disclose details of the design and capabilities of the tunnel. However, this in itself does not establish a substantial connection between the records and any specific research project, including research to be conducted by the Assistant Professor himself.

Later in the affidavit, the Assistant Professor indicates that the tunnel design is intended to provide "… the unique features required for my research and the research of collaborators from Western and other academic institutions." This confirms the multi-purpose nature of the tunnel construction project. By way of analogy, records that relate to the construction and/or design of a laboratory, or a multi-purpose piece of laboratory equipment – which could be used for any number of research projects – are not for that reason alone records "respecting or associated with" the eventual research for which they are used.

Similarly, I am not satisfied that the use of the records to obtain funding from CFI to construct the tunnel is sufficient to establish that they are "respecting or associated with research" within the meaning of section 65(8.1)(a). Funding applications for research facilities cannot be equated with actual research projects that will be carried out in those facilities.

I have reviewed the University's submissions, the affidavit and all of the records, in detail. I find that the records lack the substantial connection required for me to find that they are "respecting or associated with" research, within the meaning of section 65(8.1)(a). The records were not prepared for the purpose of conducting a specific research project, nor do they result from such a project. Significantly, as well, they do not disclose, either directly or by inference, the particulars or even the broad objectives of any specific proposed research project or projects. I have scoured the records for that kind of information and have not found it. At most, they disclose the design and capabilities of the tunnel, which might lead to speculation about the type of research that might be conducted. In my view, as outlined above, that is quite a different thing.

Examples of information about specific, proposed research, while notably absent from the records at issue, do appear in the confidential portions of the affidavit provided with the University's representations. Less detailed, but similar, information of this nature also appears in publicity materials about AFAR provided with the University's representations. The following example is published on www.canada.com:

> Tony Williams, head of the biological sciences department at Simon Fraser University, wants to find out what climate change is doing to the world's bird populations. So he's helping to build Canada's first bird wind tunnel [at AFAR] to find out.
>
> …
>
> The purpose of these studies – which will be performed on a variety of species including the western sandpiper, white-crowned sparrow or American robin – is to study the mechanics of bird flight and migration to understand how changes to

> the earth's climate may affect a bird's physiology. That is, its physical ability to keep on flying and migrating under different and possibly deleterious conditions.

Similarly, an article published on the website of the University's Faculty of Engineering (www.eng.uwo.ca) refers to a professor who "is interested in learning how birds use their fat as fuel during migration, a high performance exercise." It goes on to state that "[t]he centre will also study birds that stay put instead of migrate and how they have adapted."

I include these examples to illustrate the kind of information that might be excluded if it were directly or inferentially disclosed in the record. That is not the case here, as already discussed. Nor have I found any other basis for concluding that the records at issue are "respecting or associated with research conducted or proposed by" a person specified in the exclusion.

By way of contrast, an excellent example of records respecting or associated with research is found in Order PO-2693, issued concurrently with this order. In that decision, I found that section 65(8.1)(a) applies to records submitted to and/or maintained by McMaster University's Research Ethics Board (REB) about specific clinical studies being conducted by persons associated with McMaster, at Hamilton Health Sciences and St. Joseph's Health Centre. These records relate to actual ongoing clinical trials and include:

- Application form for review by REB
- Database of Studies maintained by REB (showing the REB number and name of each study, as well as the names of the sponsor and principal researcher)
- Annual Progress Report to Research Ethics Board
- Suspect Adverse Reaction Report to Research Ethics Board
- Local (or Non-Local) Serious Adverse Event Report to Research Ethics Board
- Study Completion Report to Research Ethics Board.

It is evident that these records are substantially connected to the research projects themselves, since they deal with the initial approval of the project or study, events of interest to the REB that occur during it, and ongoing reporting. They are clearly distinguishable from records about the design or construction of laboratories or other tools to be used in a multiplicity of research projects, such as the records at issue in the appeal before me.

In addition, absent any direct or inferential disclosure of the substance of specific research conducted or proposed by the individuals mentioned in section 65(8.1)(a), namely employees or persons associated with the University, it is difficult to comprehend how the application of the *Act* to the records could possibly affect the academic freedom or competitiveness of these individuals in the context of this appeal. The fact that one could assess the capabilities of the tunnel and speculate as to possible research is not sufficient to establish the application of this section.

Before concluding this discussion, however, I will address one further argument submitted by the University. With respect to the information relating to the tender, the University also refers to

the language of section 65(10), and argues that it is "evaluative or opinion material compiled in respect of … research." The University states:

> The meaning of the exclusion for research information in subsection 65(8.1)(a) is informed and, the University submits, embellished by subsection 65(10). It states that FIPPA applies to evaluative or opinion material compiled "in respect of" research "only to the extent necessary for the purpose of subclause 49(c.1)(a).
>
> Subsection 65(10) thereby expands the breadth of the exclusion for research information to include all "evaluative or opinion material compiled in respect of …research", with only one caveat, that the individual about whom the evaluative or opinion material relates may make an access request for the information. That exception does not apply to this appeal since the appellant is not seeking his or her own personal information.

Section 49(c.1)(a) is an exemption intended to protect confidential information assessing teaching materials or research, qualifications or suitability for admission to a program, or receipt of an award, all in the context of educational institutions. Section 65(10) indicates that this information remains subject to the *Act*. I have already adopted a definition of research that expressly includes "evaluation of research". Accordingly, in my view, section 65(10) does not expand this definition of "research" in any way. In addition, although record 7 is an evaluation of the bids, I have already found that the records, including record 7, are not records "respecting or associated with research" within the meaning of this section. In my view, section 65(10) has no impact on the definition of research I have adopted, nor does it affect the outcome of this appeal in any other way.

Accordingly, based on the foregoing analysis, I have concluded that the responsive records at issue do not qualify as records respecting or associated with research conducted or proposed by an employee or associate of the University, and I find that section 65(8.1)(a) does not apply. The responsive records are therefore subject to the *Act*. I will order that the University issue an access decision under the *Act*.

ORDER:

1. I find that record 12 is responsive to part 1 of the request. I uphold the University's claims that parts of records 2 and 4 are not responsive.

2. I order the University to issue an access decision under the *Act* concerning the records at issue that I have found to be responsive, including record 12, treating the date of this order as the date of the request, subject to all provisions of the *Act* applicable to requests, including but not limited to sections 26, 28 and 29 of the *Act*.

3. I further order the University to provide me with a copy of the decision referred to in order provision 2 when it is sent to the appellant.

Original signed by: July 16, 2008
John Higgins
Senior Adjudicator