



Information and Privacy
Commissioner/Ontario

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

ORDER P-822

Appeal P-9400426

Ontario Criminal Code Review Board



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Ontario Criminal Code Review Board (the Board) received a request from a patient in a psychiatric facility for all records in its possession which contain his personal information. The Board located 33 records which are responsive to the request and disclosed 28 of these documents in full to the requester. The Board decided, however, to deny access to one of the remaining five records in its entirety under the following exemption contained in the Act:

- solicitor-client privilege - section 19

The Board also declined to grant access to one record claiming that, under section 52(9) of the Act, it was not subject to the Act as it was a document produced in the course of an inquiry by the Commissioner's office. In addition, the Board claimed that three records fell under section 65(2)(a) of the Act. This provision excludes from the application of the Act records which are **clinical records** as defined by section 35(1) of the Mental Health Act (the MHA).

The Board also advised the requester that copies of the tape recordings made at his Board hearing on June 8, 1994 are not in the Board's custody or within its control. The Board indicated that the tape recordings are in the custody of the court reporter engaged for the hearing, who is not a Board employee.

The requester appealed the Board's decision to deny access to the records. During the mediation stage of the appeal, the appellant agreed to limit the scope of the request to copies of tape recordings of his June 8, 1994 hearing before the Board.

A Notice of Inquiry was provided to the appellant and the Board. As it appeared that the determination of this appeal might impact upon the rights of court reporting firms, the service which provided the court reporter for the June 8, 1994 hearing and the Chartered Shorthand Reporters Association of Ontario were also asked to make representations to the Commissioner's office. The issue upon which these submissions were sought was whether the tapes of Board proceedings recorded by outside court reporting services fall within the custody or control of the Board. Representations were received from all four parties.

During the inquiry stage of the appeal, the Board determined that the June 8, 1994 hearing involving the appellant was not tape recorded by the court reporter present that day. The reporter who attended this hearing transcribed the Board's proceedings using the Pitman shorthand method rather than by employing a stenographic mask or other tape recorded means.

The Board further indicated that the court reporter has refused to release copies of her shorthand notes to the Board. The reporter has taken the position that the notes are her property and that no one, including any party to the hearing, has a right of access to them unless a certified transcript is ordered to be prepared.

The Board notes, however, that this transcript may be ordered by either party on the understanding that the reporter will be paid a transcription fee. It has been the policy of the Board that its consent is required before a transcript of a hearing may be ordered to be produced, though this consent has never been withheld.

DISCUSSION:

CUSTODY OR CONTROL OF RESPONSIVE RECORDS

The sole issue to be determined in this appeal is whether the Board exercises the requisite degree of custody or control over the shorthand notes within the meaning of section 10(1) of the Act.

The appellant argues that section 672.52(1) of the Criminal Code, which sets out, in part, the Board's procedures, requires the Board to "cause a record of its proceedings be kept." The appellant submits that as the Criminal Code requires that a record be kept by the Board, in whatever format, it follows that the shorthand notes are a Board record within the meaning of the Act.

The Board submits that it does not have the authority to direct independently-engaged court reporters who are not Board staff to make copies of their shorthand notes and disclose them to the appellant. It argues that the actual ownership of the notes resides with the court reporter and not with the Board.

In the representations received from the Chartered Shorthand Reporters Association of Ontario, the historical role of the court reporter in Ontario is canvassed. The Association also quotes from the Ministry of the Attorney General's Manual of Court Reporting, Part 1:1:1, which states that:

Court reporters are instructed that they hold all tapes, dockets and court material as trustees on behalf of the court, the Attorney General of Ontario and the Crown in Right of Ontario, and that accordingly, any possession or custody of the aforementioned articles must be surrendered to an authorized court official on demand.

In this appeal, the shorthand notes were created in the course of a Board hearing, as opposed to a court proceeding. In my view, however, the principles which should apply to the property rights as between the parties are similar.

In Order 52, former Commissioner Sidney B. Linden held that:

The question of who has "**control**" of notes or tape recordings of a private court reporter of a hearing conducted by the institution involving the appellant (requester) turns on the question of who is able to obtain a transcript. Clearly, if persons other than the institution and parties to the hearing can independently obtain a transcript from the reporting service, it would be difficult to argue that the institution has "**control**" over these records. On the other hand, if the production and distribution of transcripts requires the approval of the institution, this is sufficient to establish "**control**" as envisioned by subsection 10(1) of the *Act*.

I find that the reporter simply acts as the trustee or repository of the notes or tape recordings which he or
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she creates as a result of an engagement with the Board. The right of control over such records remains with the Board, particularly as the Board's consent is required before a transcript may be ordered by any party to a Board proceeding. This view is in accordance with that expressed by Commissioner Linden in Order 52.

Following my review of the representations of all of the parties to this appeal, I find that the Board exercises the requisite degree of control over the subject records within the meaning of section 10(1) of the Act.

I understand the reluctance of the reporter to relinquish a copy of the shorthand notes. I would point out, however, that the reporter is the only individual capable of creating a certified copy which may be used in an appellate or other proceeding. Accordingly, the reporter's ability to derive a fee from the transcription of such notes will not be impaired by their disclosure to the appellant.

The Board is under no obligation to have the notes transcribed by the court reporter as the appellant's request is sufficiently broadly worded so as to include records such as shorthand notes.

ORDER:

1. I order the Board to obtain from the court reporter copies of her shorthand notes taken at the appellant's June 8, 1994 Board hearing within fifteen (15) days of the date of this order.
2. I order the Board to issue a decision letter to the appellant regarding access to the records which it obtains from the court reporter under Provision 1 within ten (10) days of the date following receipt of the notes from the reporter.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the decision letter which is provided to the appellant pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ December 20, 1994