



Information and Privacy
Commissioner/Ontario

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

ORDER P-912

Appeals P-9500002, P-9500003 and P-9500004

Ontario Criminal Code Review Board



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NATURE OF THE APPEALS:

These are appeals under the Freedom of Information and Protection of Privacy Act (the Act). The Ontario Criminal Code Review Board (the Board) received three requests for copies of tape recordings made at the requesters' Board hearings on July 19 and July 21, 1994. The Board responded that it could not provide access to the tape recordings as they are not within the Board's custody or control.

The requesters appealed the Board's decision on the basis that the tape recordings are records which are under the Board's control within the meaning of the Act.

A Notice of Inquiry was provided to the appellants and the Board. As it appeared that the determination of these appeals might impact upon the rights of court reporting firms, the service which provided the court reporter for the hearings (the court reporter) and the Chartered Shorthand Reporters Association of Ontario (CSRAO) were also asked to make representations to the Commissioner's office. Submissions were sought on the issue of 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 the court reporter and CSRAO as well as the Society of Ontario Adjudicators and Regulators (SOAR), supplementing those received from the Board.

DISCUSSION:

CUSTODY OR CONTROL OF RESPONSIVE RECORDS

The sole issue to be determined in these appeals is whether the Board exercises the requisite degree of custody or control over the audio tape recordings within the meaning of section 10(1) of the Act.

I dealt with a similar issue, involving shorthand notes taken by a court reporter at a Board hearing, in Order P-822. In that Order, I found that the reporter simply acts as the trustee or repository of the notes or tape recordings which he or 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.

The Board submits that the circumstances in the present appeals are different, in that the "official" record which was created by the court reporter with respect to the Board's hearings were stenographic notes and not tape recordings. The Board explains that even though the court reporter did also create tape recordings at these hearings, they are considered "backup audio tapes" which act as an "aide memoire" for the court reporter when preparing a typed transcript of the Board's proceedings. The Board argues that it is the stenographic notes and not the tape recordings which are the "official" record of the Board's proceedings and that, therefore, the tape recordings are not under the control of the Board.

The court reporter, CSRAO and SOAR support the Board's position that the Board does not have either physical custody or control of the tape recordings. The court reporter also submits that the tape recordings

may be incomplete and contain only portions of the hearings. She further argues that the use of the record at issue is strictly limited to her own personal purposes.

In its representations, SOAR argues that backup audio tapes of Board hearings should not be considered to be "records" containing the personal information of the requesters within the definition of a "record" in the Act. Rather, it submits that such tapes should be considered to be "general institutional records" and, as such, are outside the purview of the Act. In my view, the Act makes no distinction between records containing an individual's personal information and general institutional records. I find that, in a situation where the requests specifically address only access to audio tapes, all such tapes made at the appellants' hearings are at issue.

SOAR has also raised the issue of whether the Board is obligated to create a record in response to a request, specifically whether there exists an obligation on the part of the Board to create a transcript from the tape recordings. In my view, the Board is only obliged to make a decision on access to records which exist at the time of the request. If the Board's records consist only of tape recordings, there is no obligation on its part to create a transcript, as the tape recordings themselves are responsive records.

I have carefully reviewed all of the representations in these appeals. I find that the fact that the tape recordings are not the primary or the "official" record used to record a Board hearing, and the fact that they may not necessarily include the entire hearing, are not relevant considerations. In the same manner as with stenographic notes, tape recordings are created by the court reporter as a result of an engagement with the Board and, in my view, both these records, particularly when taken together, constitute the Board's record of proceedings.

I also do not accept the argument that the tape recordings were created for the court reporter's personal purposes. In her representations, the court reporter herself acknowledged that this record is being held by her for the purposes of her duties as a maker of the official record.

In my view, for the reasons elaborated in Order P-822, the reporter simply acts as the trustee or repository of the tape recordings at issue and that the right of control over such records remains with the Board. Accordingly, 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.

ORDER:

1. I order the Board to obtain from the court reporter copies of the tape recordings created at the three appellants' July 19 and July 21, 1994 Board hearings within fifteen (15) days of the date of this order.

2. I order the Board to issue decision letters to the appellants 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 tape recordings 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 letters which are provided to the appellants pursuant to Provision 2.

Original signed by: _____
Donald Hale
Inquiry Officer

_____ April 21, 1995