



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

INTERIM ORDER P-1200

Appeal P-9500588

Ontario Criminal Code Review Board



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

Web site: <http://www.ipc.on.ca>

416-326-3333

1-800-387-0073

Fax/Téloc: 416-325-9195

TTY: 416-325-7539

<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ontario Criminal Code Review Board (the Board). The request was for any notes, letters and computer storage information gathered and compiled by the five Board members who presided over the appellant's hearing on June 6, 1995. The request included any information pertaining to any investigations carried out into allegations or statements made by or against the appellant. The appellant also sought access to the tape recording of the hearing and requested that, upon receiving responsive records, each of the five Board members provide him with a letter stating that they have no other records and they have no knowledge of any other Board employees having any further records responsive to the request.

The Board located records it determined were responsive to the request and granted partial access to them. For those parts not disclosed, the Board claimed the application of the exemptions under sections 21 and 49(b) of the Act (invasion of privacy).

The Board advised the appellant that the audio tape recordings of the hearing are not in the Board's custody or control and that this issue is currently the subject of a Judicial Review application filed in relation to Order P-912.

The appellant filed an appeal of the Board's decision claiming that further responsive records exist and that the Board's decision does not comply with the provisions of the Act. Specifically, the appellant claims that the Board's decision did not respond to that portion of his request dealing with the personal notes and records of the five Board members and any investigative notes or records pertaining to the allegations made by or against him. The appellant also maintains that the Board has improperly addressed the issue of the audio tape recordings and has failed to provide him with letters from the Board members respecting their knowledge of existing records.

During mediation, the Board stated that no responsive records exist regarding the Board members' personal notes or records of the hearing.

This office sent a Notice of Inquiry to the Board and to the appellant. Representations were received from both parties. In his representations, the appellant reiterated his position that, regardless of whether the issue of the Board's custody or control of the tape recordings of a hearing was the subject of a Judicial Review application, the Board did not properly fulfill this portion of **his** request.

Accordingly, this office sent a Supplementary Notice of Inquiry to the appellant and the Board. The Supplementary Notice invited both parties to provide their submissions on whether the issue of the Board's custody or control of the tapes in this appeal should be deferred pending the outcome of the Judicial Review application of Order P-912. Supplementary representations on this issue were received from the appellant only. The Board advised this office that it did not object to the issue being placed "on hold".

To summarize, the issues I will address in this order are as follows:

- (1) the Board's response to that portion of the request dealing with letters from the Board members respecting their knowledge of the existence of responsive records;
- (2) the reasonableness of the Board's search for responsive records; and
- (3) the manner in which the issue of the appellant's request for access to the tape recordings of his hearing should be dealt with.

DISCUSSION:

LETTERS FROM THE BOARD MEMBERS

One portion of the appellant's request reads as follows:

I further request that upon providing the information I have requested herein, or as much of that information as is available, that the five said individuals [the Board members] each provide a letter stating that they have no further information in their possession or control in respect of my request, and that they have no knowledge of any other person employed with the Ontario Criminal Code Review Board having any further information in respect of my request.

In its decision letter, the Board did not respond to this portion of the request. In his submissions, the appellant maintains that the Board has failed to comply with this aspect of his request.

As is apparent from the nature of the information sought, the appellant is specifically requesting that the Board create responsive records. That is, after the Board has provided the appellant with the other information sought, its members are to provide him with a letter including the information set out above.

An individual's right of access to information under the Act relates to information already recorded, whatever its physical form. In the absence of existing recorded information, the Act does not require the creation of a new record. The Legislative intent of the Act does not impose a specific duty on an institution to transcribe oral views, comments or discussions (Order 17).

In my view, the Board has no statutory obligation to create the letters from the Board members setting out their knowledge of information responsive to his request. Accordingly, I will not consider this issue further in this order.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and the Board indicates that such a record does not exist, it is my responsibility to ensure that the Board has made a reasonable search to identify any records which are responsive to the request. The Act does not require the Board to prove with absolute certainty that the requested record does not exist. However, in my view, in order to properly discharge its obligations under the Act, the

Board must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

The Board has submitted an affidavit from its Freedom of Information and Privacy Co-ordinator. The affidavit states that all records responsive to the request found in the appellant's file have been provided to him, with the exception of the severances which were made. The affidavit goes on to state that there are no additional notes or records, subsequent to the appellant's hearing, in the file. Attached to the affidavit is correspondence from the five Board members stating that after searching their personal files they have no notes, records or any other written materials in their possession pertaining to the request.

The appellant states that the Chair of the Board, in a letter dated June 23, 1995, requested that each Board member provide the Chair with any comments in relation to a draft of the Board's findings regarding the appellant's hearing. The appellant submits that none of the Board members could have provided any comments in the absence of personal notes and records compiled by them at the hearing. In addition, the appellant further submits that the Board members were required by law to investigate his allegations of impropriety and, therefore, records must exist in relation to the investigation.

I have considered the representations of the parties and I find that, with respect to any notes or other records in the possession of the Board members, the Board's search for these records was reasonable in the circumstances of this appeal. However, it is my view that I have not been provided with sufficient information to establish that the Board has made a reasonable effort to locate records relating to any investigations into allegations made by or about the appellant at his hearing, and as described in paragraphs two and three of his request dated July 24, 1995. Accordingly, I will order the Board to conduct another search for any records responsive to this part of the request.

CUSTODY OR CONTROL

The Board has claimed that the audio tapes of the appellant's hearing are not in its custody or under its control. In its decision letter, the Board stated that this same issue was addressed in Order P-912 which is currently the subject of a Judicial Review application before the Divisional Court. It provided no further submissions on this matter. However, as I have indicated, the Board does not object to the issue of custody or control of the audio tapes being placed "on hold" at this time pending the resolution of the Judicial Review of Order P-912. The appellant, on the other hand, wishes this matter to proceed.

To place this issue in some context, it is necessary to review the relevant details of Order P-912.

Order P-912 involved three requests for access to copies of the tape recordings made at the requesters' hearings before the same institution as is involved in this appeal. The requesters appealed the decision of the Board that the tape recordings were not within the Board's custody or under its control. In the inquiry held to determine this issue, representations were received from the service which provided the court reporter for the hearings, the Chartered Shorthand Reporters Association of Ontario, and the Society of Ontario Adjudicators and Regulators. All of these organizations had an interest in this issue.

Inquiry Officer Donald Hale rejected the Board's arguments that the tape recordings were not in its custody or under its control. He found that the fact that the tape recordings are not the "official" record of the Board's proceedings and the fact that they may not necessarily include the entire hearing were not relevant considerations. He also rejected the argument that the tape recordings were created for the court reporter's personal purposes.

Based upon his finding in Order P-822 with respect to the court reporter's shorthand notes, Inquiry Officer Hale determined that the reporter simply acts as the trustee or repository of the tape recordings and that the right of control over these records remains with the Board. In the result, he concluded that the Board exercises the requisite degree of control over the records within the meaning of section 10(1) of the Act. Accordingly, he ordered the Board to obtain copies of the tape recordings from the court reporter and to issue decision letters to the appellants regarding access to the recordings pursuant to the Act.

Order P-912 was issued on April 21, 1995. On May 4, 1995, the Board filed a Notice of Application for Judicial Review of the order. On May 23, 1995, the order was stayed until the disposition of the judicial review. At the present time, the record of proceedings has been filed but no date has been set for the hearing of the matter.

In the present appeal, the appellant maintains that the issue of custody or control of the tapes should proceed now. He bases his submission on sections 672.21 and 672.52 of the Criminal Code. These sections respectively provide that all matters raised and discussed during a hearing before the Board pertain to "protected statements" and that the Board is required to keep a record of proceedings taken during disposition hearings. In my view, the appellant's argument addresses issues related to the proceedings before the Board and may have a bearing on whether the Board has custody or control of the tapes. However, it is not relevant to whether I should proceed to adjudicate on the custody or control issue at this time.

The statutory procedures that govern inquiries under the Act are those which appear in sections 52 and 54 of the Act. These provisions, however, do not address the full spectrum of issues which might reasonably arise during the course of an inquiry. Section 52(1) of the legislation in effect when this appeal was filed, merely stated that if an appeal was not settled, the Commissioner was required to conduct an inquiry to review the head's decision under appeal. The Act contained no provisions regarding the timing of such inquiries and was silent on the specific issue before me, namely whether I have the authority to decline to proceed with this issue **at the present time**.

Previous orders issued by the Commissioner's office have determined that the Commissioner has the power to control the process by which the inquiry process is undertaken (Orders 164, 207, P-345, P-373, P-537 and P-658).

These orders have considered such matters as the exchange of representations between the parties (Orders 164, 207 and P-345), disclosure of correspondence between a Ministry and the Commissioner's office (Order P-537), the reasonableness of the time period allowed by the Commissioner's office for submitting representations (Order P-373), and the late raising of additional discretionary exemptions by an institution (Order P-658). The conclusion reached in

all of these orders is that, based on the general scheme of the Act, case law and academic sources dealing with questions of procedure before administrative tribunals, these matters fall within the authority of the Commissioner's office to control its own process.

On the basis of the above, it is my view that the Commissioner's office has the authority to decide whether to proceed with the custody or control issue at this time. I am also of the view that I should place this issue "on hold". There are several reasons why I believe that this is the appropriate course to adopt in the circumstances of this appeal. These include both legal and practical considerations.

The Board has not provided any submissions in this case on the custody or control issue apart from stating that Order P-912 is under judicial review. For the purposes of the judicial review of Order P-704, the Divisional Court was prepared to concede that the issue of custody and control of records is one which goes to the jurisdiction of this office (Attorney General for Ontario v. Irwin Glasberg, Assistant Information and Privacy Commissioner et al. (27 March 1996), Toronto Doc. 414/94 (Ont. Div. Ct.)). In the circumstances of this case, it would be necessary for me to obtain submissions from the Board on this issue, and to invite all other parties with an interest in this matter to make submissions in this regard. Following this course would involve the expenditure of scarce resources of both the Board and this office.

Based on the fact that the Board has filed a Judicial Review application of Order P-912, it is apparent that the Board views the issue of custody or control of tapes of its hearings as extremely important. It thus appears that, should I undertake such an inquiry and reach the same decision as in Order P-912, the Board will seek to have this order judicially reviewed. Should this occur, the order would be stayed and the appellant would not receive immediate access to the information which he is seeking. As well, both the Board and this office will necessarily be involved in another court proceeding which will result in the utilization of further resources of both offices. In my view, such a chain of events would not serve the interests of any party, including the appellant.

I am cognizant of the fact that by placing this issue "on hold" the appellant will not immediately receive a decision from this office on a matter of importance to him. However, based on all of the above, and in the absence of any cogent reasons from the appellant to the contrary, it is my view that no useful purpose would be served by adjudicating this matter at this time. In arriving at this conclusion, I have carefully weighed the concerns of administrative efficiency against the seriousness of the consequences to the appellant.

At the relevant time, section 54(3) of the Act read as follows:

The Commissioner's order may contain any terms and conditions the Commissioner considers appropriate.

In the circumstances of this appeal, it would be appropriate to defer consideration of this issue in this case. Therefore, this aspect of the appeal will be placed "on hold", to be re-activated when the Judicial Review application of Order P-912 is finally resolved. The Commissioner's office remains seized of this matter and will contact the appellant at that time.

The following is my order with respect to the other issues in this appeal:

ORDER:

1. I order the Board to conduct a search for any records relating to any investigations into allegations made by or about the appellant at his hearing, and as described in paragraphs two and three of his request dated July 24, 1995, and to advise the appellant in writing of the results of this search, by sending him the results by **July 4, 1996**.
2. In the event that the Board locates additional responsive records as a result of the searches referred to in Provision 1, I order the Board to render a final decision on access to the records in accordance with the provisions of section 26 and 29 of the Act, treating the date of this interim order as the date of the request, without recourse to a time extension under section 27.
3. I order the Board to provide me with a copy of the correspondence referred to in Provisions 1 and 2 (if applicable), by **July 9, 1996**. This should be forwarded to my attention, c/o Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1.

Original signed by: _____
Anita Fineberg
Inquiry Officer

_____ June 4, 1996