



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER M-1121

Appeal M-9800019

Woodstock Police Services Board



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

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

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Woodstock Police Services Board (the Police) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to copies of tape recorded anonymous phone calls to the Police, on December 10, 12, 13, 16 and 19, 1997, in relation to complaints regarding the requester's restaurant.

The Police denied access to the records pursuant to sections 8(2)(a), 8(2)(c) and 14(1) of the Act. The requester (now the appellant) appealed this decision.

During mediation, the Police indicated that no tape existed for the December 10, 1997 date, but agreed to create a transcript of the responsive portions of the four remaining tapes, and disclosed the transcript to the appellant. As a result, the exemptions originally claimed by the Police are no longer at issue in this appeal.

The transcript indicated that certain portions of the tapes were "unheard". The appellant expressed concern about these portions, and also that no tape for December 10, 1997 was located. When the Appeals Officer inquired as to the possibility of reviewing the original tapes, the Police informed her that they had been destroyed.

A Notice of Inquiry was sent to the Police and the appellant. The Notice specifically asked the Police to provide an affidavit outlining all steps undertaken to locate responsive records, explaining the "unheard" portions of the tapes, and outlining why the original tapes had been destroyed during the processing of this appeal.

Representations were received from both parties. The Police did not provide the requested affidavit.

DISCUSSION:

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he or she is seeking and an institution indicates that such records do not exist, it is my responsibility to ensure that the institution has made a reasonable search to identify any records which are responsive to the request. The Act does not require the institution to prove with absolute certainty that the requested records do not exist. However, in my view, in order to properly discharge their obligations under the Act, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request.

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

The appellant's request is quite specific, as are his areas of concern with the response of the Police. He is not satisfied with the steps taken by the Police to locate the responsive tape for December 10, 1997, and

the fact that there are certain “unheard” portions of the other tapes make him question whether further responsive records might exist.

I will deal first with the December 10, 1997 tape.

The Police explain that all calls received at the dispatch consoles are continuously recorded. These include both 911 telephone calls and all radio equipment operated by the Police. If a call is received at the console and transferred to an administrative phone line, recording ends at the point of transfer. Administrative phone lines are not recorded. The officer who dealt with the December 10 call involving the appellant’s restaurant recalls that the conversation took place on an administrative phone line. This officer does not recall whether the call was made directly to the administrative line or transferred there from the dispatch console. After completing the call, the officer logged a “non reportable incident” computer entry at 8:10 pm.

The Freedom of Information Co-ordinator for the Police (the Co-ordinator), who conducted the search for responsive records, states that he reviewed the original December 10, 1997 tape between 7:00 p.m. to 9:00 p.m and was unable to locate any call involving the appellant’s restaurant. A Civilian Radio Operator also reviewed the same tape on behalf of the Police, with the same result.

In my view, the Police have provided a satisfactory explanation for why they were unable to locate a responsive tape for December 10, 1997, and I find that the search conducted by the Police for this record was reasonable.

As far as the other four dates are concerned, the Co-ordinator has provided me with a step by step explanation of how the relevant portions of the original tapes for these dates were identified and copied to a cassette. He submits that the cassette is an accurate reproduction and of the same quality as the original tapes, and that the cassette “can be certified under oath as true copies”. The Police attribute the various “unheard” portions as being caused by “background noise”, mumbling or talking away from the phone. The one “unheard” portion on the December 13, 1997 tape which is of particular concern to the appellant, is explained as “some electrical static which may have been caused by a radio mike in the dispatch centre being keyed for use”.

The Police initially provided this office with a cassette, which turned out to be incomplete; it only included the first recorded call on the December 12 transcript. Our office asked for and received a second cassette.

I have listened carefully to both cassettes. The actual content of the first recorded call on December 12 is the same on both cassettes, but the audio quality is different, and the gaps between the caller and police officer during the December 12 conversation are significantly longer on the second cassette. If the second cassette was created from the same source as the first cassette, I am unable to understand why there would be a difference in either quality or, more importantly, the length of the gap between speakers. The Police have provided no explanation for these discrepancies. In my view, one possible explanation is that the two cassettes were not created from the same master tape. If this were the case, then the Police may be in possession of other responsive records not yet identified.

Consequently, having reviewed the representations and carefully listened to the two cassettes provided to me by the Police, I am not satisfied that the search conducted by the Police for these records was reasonable.

COPY OF REQUESTED RECORDS

Section 23 of the Act outlines obligations on the part of an institution in providing access. This section reads as follows:

- (1) Subject to subsection (2), a person who is given access to a record or a part of a record under this Act shall be given a copy of the record or part unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.
- (2) If a person requests the opportunity to examine a record or part and it is reasonably practicable to give the person that opportunity, the head shall allow the person to examine the record or part.
- (3) A person who examines a record or a part and wishes to have portions of it copied shall be given a copy of those portions unless it would not be reasonably practicable to reproduce them by reason of their length or nature.

In my view, one other issue in this appeal is whether the Police have properly discharged their obligations under section 23.

In the circumstances of this appeal, the Police created a cassette which contained those portions of the 911 tapes responsive to the request. The Police determined that they were unable to provide the appellant with a copy of this cassette, since the voices heard on the tape would reveal the speakers' identity. Thus, providing the cassette to the appellant would constitute disclosure of personal information of other individuals contrary to the mandatory section 14(1) exemption claim. To overcome this restriction, the Police created a transcript of the cassette to disclose to the appellant, for the purpose of providing access to the substance of the original record without invading the privacy of other individuals contrary to the Act. The appellant received a copy of the transcript, and raised concerns regarding certain "unheard" portions.

I am responsible for determining whether the actions of the Police in providing the transcript are sufficient to comply with their obligations under section 23(1). It is clear that it was reasonably practicable to reproduce the record since the Police have done so; therefore the latter portion of section 21(1) is not applicable in the circumstances. The question is whether the cassette is a "copy" of the original. In my view, to qualify as a "copy", the record in question must be a reasonably accurate reproduction of the original, taking into account all of the circumstances.

Unfortunately, because the original 911 tapes have been destroyed, I am unable to listen to and compare the originals with the cassette. Instead, I am only able to listen to the cassette, and consider evidence provided by the Police as to whether it is a reasonably accurate copy of the original in the circumstances.

While, for the most part, I accept the representations of the Police with respect to this issue, I have one concern that has not adequately been addressed in the representations provided by the Police. It relates to the “unheard” portion of the December 13 tape. The transcript of this portion reads:

CALLER: Can you go over there to charge him?
 POLICE: Well - we'll see what's going on first of all - I've got to see how many officers I have on the road, but that's entirely up to Sgt. Greenhill, so I'll tell you what . . .
 (unheard)
 CALLER: (Response unheard)
 POLICE: Oh - I'll be glad to do that.

The only explanation offered by the Police for this unheard portion is electrical static caused by the keying of a radio mike. On listening to the tapes, I was unable to detect any static whatsoever.

The Police indicated in their representations that the relevant tape portions “can be certified under oath as true copies”. In the absence of such certification by the Police, I am not satisfied that the cassette provided to this office is a “copy” of the original tapes, within the meaning of section 23(1) of the Act.

DESTRUCTION OF RESPONSIVE RECORDS

The Police explain that the original tapes are changed every 24 hours and retained in accordance with their retention schedule for a period of 60 days, after which they are erased and put back into service. The tapes at issue in this appeal were created on various dates in December 1997, so they were erased and re-used on the corresponding dates in February, 1998.

The Police submit that they created a cassette copy of the tapes in response to the appellant's request and, having satisfied themselves that the copy was the same as the originals, the originals were placed back into their normal rotation.

The appellant objects strongly to the fact that the original tapes, which were in existence at the time of his request, were subsequently destroyed during the course of his appeal.

In view of the discrepancies in the cassette copies which I have noted above, I too am concerned that the original responsive records were destroyed by the Police after the request was received and during the processing of this appeal. In my view, by doing so, the Police have compromised the integrity of the access process.

Section 30(1) of the Act places responsibility on institutions to ensure that personal information is retained and disposed of in accordance with section 5 of Regulation 823. These provisions read as follows:

- 30(1) Personal information that has been used by an institution shall be retained after use by the institution for the period prescribed by regulation in order to ensure that the individual to whom it relates has a reasonable opportunity to obtain access to the personal information.
- 5 Personal information that has been used by an institution shall be retained by the institution for the shorter of one year after use or the period set out in a by-law or resolution made by the institution or made by another institution affecting the institution, unless the individual to whom the information relates consents to its earlier disposal.

By reviewing the original tapes in the course of responding to the appellant's request, the Police "used" the personal information contained in them within the meaning of section 5 of Regulation 823. I have reviewed the record retention by-law provided to me by the Police, and it does not reduce the minimum time period established by section 5. Therefore, in my view, the Police were obliged to maintain the original tapes for a period of one year following this use.

I would go further than this. While there are no specific provisions in the Act covering the retention of records which do not contain personal information or records which are the subject of an ongoing access request, in my view, institutions have an inherent responsibility to retain original records containing information which is the subject of a request under the Act, regardless of the operation of any records retention schedule which may provide for their destruction. Clearly, in order to give effect to the access provisions in the Act, when an institution receives a request, that triggers an obligation on the institution to ensure that the original responsive records are retained and not destroyed until the request has been satisfied and any subsequent proceedings before the Commissioner or the courts is completed.

Just to be clear, I am not saying that the Police are in breach of the Act by re-cycling audio tapes after 60 days. In order to constitute "use" for the purposes section 30 of the Act and section 5 of Regulation 823, the Police must do more than simply collect and store the tapes until the 60-day retention period has expired. It is only when the tapes are "used", including "use" for the purpose of responding to an access request, that the retention schedules must not be strictly applied.

Our office will be in touch with the Police to ensure that the retention and disposal policies and procedures with respect to these kinds of records are in place to ensure compliance with the Act and Regulations. I strongly urge the Police to co-operate with our office in developing acceptable practices with respect to records maintenance.

ORDER:

1. I order the Police to provide me with an affidavit, sworn by the Co-ordinator, explaining the discrepancies in the quality and the length of gaps between the speakers on the two cassettes provided to this office.
2. I order the Police to provide me with an affidavit, sworn by the individual who made the copies of the tapes, stating that the two cassettes provided to this office are true copies of the original segments of the 911 tapes.
3. The affidavits referred to in Provisions 1 and 2 must be forwarded to this office by **June 26, 1998**.
4. I remain seized of this matter respecting any issues with respect to compliance with this interim order or any other outstanding issues arising from this appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ June 12, 1998