Court File No. 283/95

ONTARIO COURT OF JUSTICE
(GENERAL DIVISION)
DIVISIONAL COURT

DANDIE, GREER, SHARPE JJ.

B E T W E E N:	)	
	)	
ONTARIO CRIMINAL CODE REVIEW BOARD	)	Robert H. Ratcliffe, Counsel for AG for Crim. Code Review Bd.
	)	
Applicant	)	
- and -	)	
	)	
	)	William Challis and Mary O'Donoghue,
DONALD HALE, Inquiry Officer; JOHN DOE I; JOHN DOE II; JOHN III; and SIMCOE COURT REPORTING (BARRIE) INC.	)	Counsel for Donald Hale
	)	Peter Harte, Counsel for Simcoe Court Reporting
Respondents	)	
	)	
	)	**HEARD: February 5, 1997**

SHARPE J.

The applicant Ontario Criminal Code Review Board ("the Board") is the statutory body empowered to review dispositions of those detained pursuant to Part XX.1 of the *Criminal Code* as unfit to stand trial or not criminally responsible on account of mental disorder. In the exercise of that authority, the Board holds hearings that are recorded by a court reporter. Pursuant to the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*"), the respondents "John Doe I; John Doe II and John III", requested production of audio tape recordings made by the court reporter of their hearings before the Board. The Board refused that request on the ground that the tapes were not in its custody or control. The respondents appealed to the Inquiry Officer who ruled that the Board was required by *FIPPA* to obtain copies of the tapes and make a decision regarding access. The Board seeks judicial review of that order.

ISSUE

The following issue arises for determination by this Court:

Did the Inquiry Officer make an error going to jurisdiction in ruling that the tape recordings of the respondents' hearings before the Board are "in the control" of the Board and therefore subject to the provisions of *FIPPA*?

FACTS

The Board is required to keep "a record" of its proceedings by the *Criminal Code*, s. 672.52. The Board retains independent fee-for-service or freelance court reporters for this purpose. The free-lance court reporter used a stenograph machine to make stenograph notes of the three hearings at issue here. The court reporter also made backup audio tape recordings. She described the manner in which she records the proceedings as follows:

> I am a Chartered Shorthand Reporter hired by the Ontario Criminal Code Review Board to make an official record of various proceedings. I do that by means of a Stenographic machine. That is the official record. The tape recordings in question are aids to me in preparing an accurate record, just as I would correct spellings in my notebook.

In response to the respondents' request, the Board was prepared to produce copies of the reporter's stenographic notes, consisting of a series of symbols marked on a long piece of paper resembling a cash register tape. However, both the Board and the court reporter take the position that the audio tapes are not part of the "official record."

In ruling that the tapes should be produced, the Inquiry Officer stated that the sole issue was whether the Board exercises the requisite degree of custody or control over the tapes within the meaning of *FIPPA*, s. 10 (1) which provides as follows:

> 10(1) Every person has a right of access to a record or a part of a record in the custody or under the control or an institution unless the record or the part of the record falls within one of the exemptions under sections 12 to 22.

He then referred to an earlier decision he had made dealing with shorthand notes and stenomask tapes taken at a Board hearing:

> 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 Inquiry Officer noted the contention of the Board, the court reporter and the submissions received from the Society of Ontario Adjudicators and Regulators to the effect that the tapes should not be considered part of the record as they were for backup purposes only and could often be incomplete:

> 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 [for the earlier order referred to above], the reporter simply acts as the trustee or repository of the tape recordings at issue and that the right of control over such record remain 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.

ANALYSIS

It is accepted by all parties that the issue to be decided by this court is whether the requested tape recordings are "in the custody or under the control" of the Board within the meaning of s. 10 of *FIPPA*. It is conceded by the Board that audio tapes may be a "record" within the definition of that

word in the *FIPPA* and that the Board is an "institution" bound to abide by the regulatory obligations *FIPPA* imposes.

It is also accepted by all parties for the purposes of determining the appropriate standard of review for this application that s. 10 of *FIPPA* is a jurisdiction limiting provision. On this point, reference was made to the decision of this Court in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)* (1996), 90 O.A.C. 181, leave to appeal granted, [1996] O.J. Nos. 2478, 2479 (C.A.). Counsel for the Inquiry Officer submits, however, that the court should "be reasonably flexible and deferential in its approach to the jurisdiction of administrative tribunals in those cases where a tribunal has ruled on its own jurisdiction" citing *Canada (A. G.) v. P.S.A.C. No. 1* (1991), 80 D.L.R. (4th) 520 at 528, 544, 550.

In my view, the words "in the custody or under the control of" in s. 10 should be interpreted in light of the overall purpose and effect of *FIPPA*. The Act contains a purpose clause which indicates that the Act has the dual purpose of (1) ensuring that individuals have appropriate access to information under the control of public institutions, and (2) ensuring that individual rights of privacy with respect to such information be respected:

> 1. 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; and
>
> (b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

This application arises in relation to Part II of *FIPPA*, "Freedom of Information: Access to Records". The right of access to records subject to *FIPPA* is not absolute. There is a long list of "exemptions" to protect governmental interests and rights of confidentiality deemed by the legislature to be more important than the right of access by individuals. None of the general statutory exemptions apply to the tapes at issue here. However, it is suggested that access to the tapes at issue is limited by s. 21(1)(f) which limits access to "personal information", defined as:

> information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved.

"Personal information" is not to be provided to any person other than the person to whom the information relates except in certain specified situations or where "disclosure does not constitute an unjustified invasion of personal privacy." The statute creates a presumption that disclosure of personal information constitutes an unjustified invasion of personal privacy where the personal information "relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation" (s. 21(3)(a)). Accordingly, in the circumstances of this case, although the tapes fall within the right of access provisions of *FIPPA*, only the individual who was the subject of the hearing has a right of access to the tapes.

It might also be noted that there is nothing in the record before us to indicate why the respondents have made the access request. However, *FIPPA* imposes no requirement that party requesting disclosure justify or give reasons for the request. If the matter requested falls within the statute, there is a right to access.

The words "custody" and "control" defining what records are subject to *FIPPA*'s access provisions are also crucial to Part III dealing with "Protection of Individual Privacy". The statute imposes obligations on institutions to ensure that records within the institution's "control" are kept so as to respect the provisions designed to protect privacy. If the tapes at issue here are not under the "control" of the Board for purposes of Part II and the access provisions of *FIPPA*, neither are they under its "control" for purposes of Part III and the protection of privacy provisions. In my view, the

Court should endeavour to look to the entire statute and to its overall purpose and effect when interpreting the word "control".

As already noted, previous orders of the Inquiry Officer have found that a reporter's shorthand notes are within the Board's control and subject to the provisions of *FIPPA*. The Board does not contest the correctness of those decisions and the Board concedes that the stenographic notes of the hearings at issue here are its "record", that those notes are within its "control", and that it must therefore disclose those notes under *FIPPA*. It argues, however, before this Court, as it did before the Inquiry Officer, that the tapes are not part of the "official record" but are just something kept by the free-lance reporter for her own purposes and that they do not fall under the Board's control. In oral argument, counsel for the respondent court reporter went farther and submitted nothing is under the Board's control except the contractual right to require her to prepare a transcript, thereby implicitly challenging the correctness of the Inquiry Officer's previous order.

It goes without saying that Board must comply with the statutory duties imposed upon it, namely, (1) maintain a record pursuant to the Criminal Code, and (2) provide access to records as well as protect rights of privacy attaching to such records pursuant to *FIPPA*. In my view, in light of these statutory obligations, it cannot be said that the Inquiry Officer exceeded his jurisdiction in finding that the tapes at issue here fall within the "control" of the Board.

From the perspective of maintaining its "record" under the *Criminal Code*, counsel for the Board conceded that it does not specify any particular method of recording the proceedings. That is left up to the freelance reporter. As is evident from the record before us, various reporters use various methods to record the hearings. As the Board has not specified anything as its "official report" (except in response to these access to information requests) it is difficult to see any basis for distinguishing between various records made by the court reporter. The reporter has no reason to make a tape other than to assist in the preparation of the transcript of the hearing if one is required. I fail to see how, when two methods are used to record proceedings, one being the primary method and the other being a backup or check, one constitutes the "record" while the other does not. Both

are created for the same purpose and neither have any purpose other than to assist the reporter in preparing a transcript if and when its required.

In light of the purposes of the *FIPPA*, in particular, its protection of privacy provisions, it is apparent that the tapes are bound to contain highly sensitive personal information regarding the mental health of those detained. If we accept the arguments of the Board and the court reporter that these tapes are not under the control of Board, the tapes would, therefore, not be subject to the privacy protection provisions of *FIPPA*. This would mean that highly sensitive personal information collected for the purposes of a public institution could be retained by a third party not subject to statutory privacy protection provisions. The court reporter would be a liberty to dispose of or distribute the tapes without regard to the statutory protection. In my view, this is would be an unacceptable and unwarranted conclusion.

There was no evidence before the Inquiry Officer of any precise contractual terms between the Board and the reporter specifying what it is the reporter must keep or defining their respective rights of property, access, custody or control to the notes and recordings of hearings made by the reporter. It is submitted by counsel for Board that in view of this lack of evidence, there was no basis for the Inquiry Officer to conclude that the reporter was the Board's "trustee" or "repository" with respect to the tapes. I am unable to accept that submission. In my view, in light of the evidence before him and in view of the statutory framework within which the Board and the reporter operate, the Inquiry Officer did have an adequate and factual and legal basis to conclude that the reporter is the "trustee" or "repository" for the tapes.

I do not understand the Inquiry Officer to use the word "trustee" in its technical property law sense. He used "trustee" in conjunction with "repository", a word perhaps more apt to define the Board's public law duties with respect to its records. The issue of the meaning of "control" is surely to be resolved on the basis of the statutory framework rather than the private arrangements between the Board and the court reporter. The Inquiry Officer did have evidence that the reporter made the tapes in the course of a Board hearing. The Board was required to keep a record and there was

evidence from which the Inquiry Officer could conclude that the Board's obligation was facilitated by the reporter making the tapes.

In any event, it is my view that in the absence of evidence to the contrary, the Inquiry Officer and this court are entitled to assume that the Board's contractual arrangements with reporter are appropriate to ensure compliance with its statutory obligations. To the extent there is a want of evidence on the terms of the contract between the Board and the reporter, it does not assist the Board in its attack on the order of the Inquiry Officer.

If in fact its contract with the reporter is inadequate to ensure that the Board is in compliance with its statutory duties under *FIPPA*, it is not obvious to me that that would provide a basis to refuse an otherwise valid access to information request. If the Board finds that it is unable to comply with a valid request, that would be a matter for whatever sanctions are available under *FIPPA*, and not a reason to refuse the request. The Board is not entitled to "contract out" of its statutory obligations.

I note as well that in *Ontario (Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, *supra*, it was held that where a third party has in its possession documents acquired solely as a result of providing advice to the Attorney General to enable her to carry out her statutory duties, the Attorney General retains control of the documents for the purposes of *FIPPA*.

In his oral argument, counsel for the court reporter argued that as the hearings at issue are public, subject to a specific exclusion order pursuant to the *Criminal Code*, s. 672.5(6), the tape recording of the hearings is not subject to *FIPPA*. This appears to be the first time this point was raised. It was not mentioned in the court reporter's factum, and appears not to have been raised before the Inquiry Officer. Neither the Board nor the Society of Ontario Adjudicators and Regulators rely on this point. I would reject the argument as I can find nothing in *FIPPA* that would justify limiting its application on the ground that the record at issue originated in a public proceeding. I would note as well that there are a number of provisions in the Criminal Code permitting the Board to close its proceedings or access to its records to the public. Moreover, in recognition of the sensitive nature of the information contained in the record of its proceedings, the Board's policy is

to require Board approval before any transcript is prepared. I should perhaps add that the application of both the access and protection of privacy provisions of *FIPPA* to the records of other boards or tribunals will depend upon the governing legislative framework and the nature of the information they collect, as well as being subject to any applicable constitutional guarantees.

I would also point out that this decision does not mean that records of court proceedings are caught by *FIPPA*. Counsel for the Inquiry Officer cited before us Inquiry Officer decisions which recognize that *FIPPA* does not apply to the courts and court proceedings.

One obvious implication of the Inquiry Officer's decision is that individuals will have access to the records of Board proceedings without having to pay the court reporter for a certified transcript. The reporter is, however, still entitled to charge for the preparation of a transcript when one is required, the usual situation is if the individual requires a record of the hearing for any court proceedings. Moreover, control over the transcript enables the court reporter to satisfy her duty of ensuring that there is a certified accurate record of the hearing. In my view, control over the preparation of the transcript protects the integrity of the record and the capacity of the reporter to generate income from her work. In any event, in view of the scheme enacted by the legislature, the reporter's claims must, in my view, yield to the individual's statutory right to disclosure.

CONCLUSION

For these reasons, I would dismiss the application for judicial review. As no party sought costs, I would dismiss the application without costs.

SHARPE J.
I agree. – GREER J.
DANDIE J. has indicated by fax to me his concurrence in these reasons. – SHARPE J.

RELEASED: **March 7, 1997**

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JUDGMENT

SHARPE J.

RELEASED: **March 7, 1997**