

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendations 02-25
File: 01-160-4

BACKGROUND

On April 19, 2001, I received a request from the Applicant to review what he considered to be a refusal to disclose information held by the Department of Justice, specifically copies of tape recordings of certain trial proceedings involving the Applicant. The Applicant was provided with a transcript of a "limited in content" tape recording made by the Court Reporter during the trial, as well as an explanation that the tape recording was not continuous and was made for back-up purposes only. He was also advised that the Clerk of the Court had made a tape recording. The Department of Justice took the position that this particular tape recording was information in a court record and, therefore, outside the scope of the *Access to Information and Protection of Privacy Act* pursuant to section 3 of the Act. The Applicant was, however, advised that the tape recording would be made available for him to listen to. In order to listen to it, however, it was the Court's policy that either the Applicant or his agent would have to attend at the Court House in Yellowknife to listen to the tape in the presence of the Clerk of the Court. This clearly proved impossible for the Applicant to do in light of the fact that he was incarcerated in a southern security institution.

THE ISSUE

The issue in this case is firstly, whether or not the tape recordings in the possession of the Clerk of the Supreme Court are subject to the provisions of the *Access to Information and Protection of Privacy Act* and, secondly, if so, whether the Court's offer to allow access to the tapes at the Court House in Yellowknife only was sufficient to meet the requirements of disclosure under the Act.

DISCUSSION

Section 3 of the Access to Information and Protection of Privacy Act outlines the scope of the Act as follows:

This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- a) a record made from information in a court file, a record of a judge of the Court of Appeal, the Supreme Court or the Territorial Court or a record of a justice of the peace;
- b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;
- c) a record relating to a prosecution where all proceedings in respect of the prosecution have not been completed;.....

The first matter to be determined is whether the record in question is a “court administration record”.

In my view, an “administration record” is one that deals with the day to day operations of the courts, such as paper supplies, travel schedules, court assignments, trial schedules, and the like. The tape recording in question does not fall into this category because it relates to a specific case. We therefore have to look further to determine whether the exceptions provided for in section 3 apply.

The tape recording in question is not a personal note, communication or draft of a decision of a person acting in a judicial capacity. Nor, as I understand it, is this a record relating to a prosecution which has not yet been completed. Section 3(b) and (c), therefore, do not apply to exempt the tape recording from the scope of the Act.

The only remaining provision which would prevent the tape recording from coming within the scope of the Act is section 3(a). The wording of this subsection, however is not entirely clear. It does not say, as it might, that the Act does not apply to “any information in a court file”. Instead, it says that the Act does not apply to a record “**made from** information in a court file”. One must assume that the legislators had a good reason for drafting this section in this way. The wording suggests that in order to fall under the exclusion provided in section 3(a), the record would have to be in some way extrapolated from the original information in the court file. Is the tape recording a record **made** from information in a court file? In my opinion, it is not. It is, rather, simply information in the court file. In the circumstances, therefore, it is my opinion that the tape recording does not fall within the exclusion provided for in paragraph 3(a) of the Act. It is, therefore, subject to an application under the Access to Information and Protection of Privacy Act.

That being the case, the next question becomes whether the offer to allow the Applicant to listen to the tape at the Court House in Yellowknife is sufficient to meet the requirements of access under the Act. In my opinion, it is not.

Section 6(3) of the Act clearly states:

- (3) The applicant may ask for a copy of the record or ask to examine the record.

Furthermore, Section 10 (2) states that:

- (2) Where an applicant has asked for a copy of a record, the copy must be provided with the response or the applicant must be given reasons for the delay in providing the copy if
 - (a) the record, or the part of it to which access will be given, can be reasonably reproduced by the public body using its normal equipment and expertise; and

- (b) creating the copy would not unreasonably interfere with the operations of the public body.

The record in question is a tape recording. It is a simple matter to make a copy of it and the courts clearly have the equipment necessary to do so. Nor would the making of a copy of the tape unreasonably interfere with the operations of the Courts. Under the clear wording of the Act, where a copy of a record is requested, it must be provided, save where it would be extremely difficult to make the copy. That is clearly not the case here.

RECOMMENDATION

In light of the above discussion, I make the following comments and recommendations:

- a) the tape recording requested by the Applicant and in the possession of the Territorial Court is within the scope of the Access to Information and Protection of Privacy Act;
- b) a copy of the tape recording should be made and provided to the Applicant at the earliest opportunity.

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Information and Privacy Commissioner