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

ORDER MO-1860

Appeal MA-030426-1

Toronto Police Services Board

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NATURE OF THE APPEAL:

The Toronto Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to a specific traffic radar device.

In an initial decision the Police granted access to some of the records and indicated that some requested information could be obtained by contacting the manufacturer of the traffic radar device directly. Access to the repair history of the unit was denied on the basis of the exemption found at section 8(1)(a) of the *Act* (interference with a law enforcement matter).

The requester (now the appellant) appealed the decision of the Police denying access to the repair history of the unit.

During mediation (and within the 35 day period specified in the Confirmation of Appeal for claiming additional discretionary exemptions) the Police issued a supplementary decision letter indicating that they also rely on the exemption found at section 8(1)(l) (facilitate the commission of an unlawful act or hamper the control of crime) to deny access to this information.

Mediation did not resolve the appeal and it was moved to the adjudication stage. A Notice of Inquiry was sent to the Police, initially, and the Police provided representations in response. The Notice of Inquiry along with a copy of the Police's representations were then sent to the appellant for a response. The appellant indicated that he did not wish to submit any representations.

RECORD:

The record that remains at issue is the repair log of the specific traffic radar device.

DISCUSSION:

LAW ENFORCEMENT

The Police take the position that the record is exempt from disclosure under the discretionary exemptions in sections 8(1)(a) and (l), which read:

> 8. (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> (a) interfere with a law enforcement matter; or
>
> …
>
> (l) facilitate the commission of an unlawful act or hamper the control of crime.

General principles

Law Enforcement

The term "law enforcement" is used in several parts of section 8, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [*Ontario (Attorney General) v. Fineberg* (1994), 19 O.R. (3d) 197 (Div. Ct.)].

Under sections 8(1)(a) and (l), the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

It is not sufficient for the Police to take the position that the harms under section 8 are self-evident from the record or that a continuing law enforcement matter constitutes a *per se* fulfillment of the requirements of the exemption [Order PO-2040; *Ontario (Attorney General) v. Fineberg*].

Representations of the Police

Section 8(1)(a) of the Act

With respect to section 8(1)(a) of the *Act*, in their representations the Police submit that the appellant's next court date was upcoming, and until the resolution of any charge, dissemination of the information might interfere with any further investigation necessitated by the Court's eventual ruling. The Police submit that their refusal to disclose on this basis is supported by the rulings in Orders P-225 and M-450, and that same rationale in those Orders should apply to *Highway Traffic Act* infractions and proceedings.

The Police submit that:

> In the event of conviction [under the *Highway Traffic Act*] the person's driver's license history maintained by the Ministry of Transportation reflects the court's decision and, in certain instances, an individual's driver's license may be suspended because of accumulated demerit points.
>
> It is obvious that dissemination of the requested information prior to the pending trial could jeopardize the Crown's mandate and, therefore, section 8(1)(a) would apply to the record at issue. Since premature disclosure of information concerning an impending court case could, either intentionally or inadvertently, cause an obstruction of justice in the matter, the institution does not feel that release of the information is permissible at this time.
>
> In balancing the access rights of the requester against the possible obstruction of justice, we must deny access to the records at this time. [emphasis in original]

The Police conclude their submissions on the application of section 8(1)(a) by stating that any disclosure would not only have ramifications on this current law enforcement matter but on "any/all subsequent trials concerning speed enforcement".

Section 8(1)(l) of the Act

With respect to section 8(1)(l) of the *Act*, the Police submit that:

> As there is only a limited stock of laser/radar devices available in each division, most Police Officers must use the same devi[c]es on a day-to-day basis in each division and it is, therefore, common for the same device to be issued frequently to the same police vehicle.
>
> As well as those persons receiving speeding tickets in the same area who would take advantage of the repair history of a device, there are many private companies in Toronto which specialize in legally assisting those accused of driving infractions. Such companies would have a vested interest in accumulating the history of each and every speed recording device in order to use such information for their business purposes.
>
> Inquiry Officer Anita Fineberg writes in Order No. M-757 (in regards to police "ten" codes):
>
> > *"[The Police] have provided as part of their representations, an example of a case in which those involved in criminal activities acquired a list of the police codes and how it undermined the effectiveness of the police in their attempt to control these activities…*

> *The purpose of the exemption in section 8(1)(l) is to provide the Police with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to result in the harm set out in this section."* [emphasis in original]

It is reasonable to anticipate that if radar unit repair information is released, the data would be kept on file by such paralegal businesses and introduced at any/all future proceedings where the same laser/radar devi[c]e was used. Likewise, such companies may share the information with other such agencies or even post the data on the internet. This would certainly impede the control of speeding drivers who may subsequently escape judicial censure with all the attendant dangers inherent in such negligent activity (i.e. accidents, injuries, fatalities).

The Police also state:

> In exercising its discretion under section 8, the Police considered the following factors:
>
> a) … this institution submits that discretion was used in determining the suitability of applying sections 8(1)(a) and (1)(l) to the subject records. As previously indicated, premature disclosure of information concerning a pending court case, could reasonably be envisaged to cause an obstruction of justice. Furthermore, the institution would be interfering with the court's decision on what can or can not be allowed as evidence.
>
> b) In balancing the access rights of the requester, measuring these against the possible obstruction of justice and the very real possibility of private companies collecting such information for future use in speeding trials, we must deny access to the record at this time. [emphasis in original]

The submissions of the Police conclude with the following:

> In summary, each year, the statistics concerning the results of speeding become more alarming and the results in many cases are tragic (a reference is then made to an attachment containing statistical reports for the years 2001 and 2002 of traffic and other offences by division). Any piece of information which might provide persons deliberately violating speed limits to believe they could escape penalty for violating the Highway Traffic Act must be treated with the utmost circumspection.

Analysis and Findings

In order to establish the application of sections 8(1)(a) and 8(1)(l) of the *Act*, the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation" that the disclosure of the record would interfere with a law enforcement matter (section 8(1)(a)) or that the disclosure of the record would facilitate the commission of an unlawful act or hamper the control of crime (section 8(1)(l)). It is incumbent upon the Police to establish that the disclosure of the record could reasonably be expected to result in the harms contemplated by the sections. In my view, the Police have failed to do so in this case.

As regards section 8(1)(a), while I can appreciate the concerns that the Police have about speeding in general, other than speculation about the potential use there is no indication of how the release of the record would actually interfere with an ongoing matter. In my opinion, the Police have failed to establish that knowledge of any information contained in the repair log leads to some ability of the requester to jeopardize the Crown's mandate or cause an obstruction of justice. Simply stating the assertion does not make it so. Nor can I see how a concern that the release of the repair log may result in a defence, if that is actually what the Police are concerned about, will result in an obstruction of justice. Unlike in Orders P-225 and M-450, on the representations in this appeal, there is no indication or conclusion to be drawn that the repair record forms a part of the investigation or will be used at any trial by any party. I therefore find that the exemption in section 8(1)(a) does not apply.

I also find that the evidence tendered by the Police with respect to the application of section 8(1)(l) is highly speculative and neither detailed nor convincing. The fact that some commercial benefit may result from disclosure of the record is not the foundation for the application of this exemption. There is no equivalent factual foundation here similar to that in Order M-757, which led to the result in that case. I am not prepared to accept the leap of logic that disclosure of the repair records of this device would result in it being, as the Police submit, a piece of information which might lead persons deliberately violating speed limits to believe they could escape penalty for violating the *Highway Traffic Act*, which even at its highest is an extremely speculative assertion. Nor do I see how ordering the release of this information would somehow interfere with or supplant a Courts' decision on its admissibility, which would still be governed by the applicable rules of evidence. Accordingly, the exemption in section 8(1)(l) also does not apply.

In all the circumstances, the Police have failed to satisfy me that the exemptions in sections 8(1)(a) and (l) apply, and the record shall be ordered disclosed.

ORDER:

1. I order the Police to disclose the record to the appellant by sending him a copy by **November 30, 2004**, but not earlier than **November 23, 2004**.

2. In order to verify compliance with this order, I reserve the right to require the Police to provide me with a copy of the record disclosed to the appellant in accordance with paragraph 1 above.

October 25, 2004

Steven Faughnan
Adjudicator