



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

ORDER PO-2337

Appeal PA-040030-1

Ministry of Community Safety and Correctional Services



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NATURE OF THE APPEAL:

The Ministry of Community Safety and Correctional Services (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to copies of all documentation pertaining to the radar units currently in use by the Ontario Provincial Police Detachment for Picton (County of Prince Edward), including but not limited to the following:

1. Technical and performance specifications
2. Operating instructions and guidelines
3. Evaluations and assessments

The Ministry identified three responsive records and provided access to two of them. Access to the third record was denied on the basis of the exemption set out at section 17(1) of the *Act* (third party information).

The requester (now the appellant) appealed the decision of the Ministry.

During the mediation stage of the appeal, the Ministry notified the manufacturer of the radar unit (the affected party), seeking its views on the disclosure of the requested information. The affected party objected to the disclosure of this record.

Mediation was not successful and the appeal was moved to the adjudication stage.

A Notice of Inquiry was sent to the Ministry and the affected party initially. The Notice of Inquiry contained the following paragraph:

In two recent decisions of this office, MO-1790 and PO-2274, the application of the third party information exemption in section 17(1) (and its equivalent provision in the municipal *Act*) to user manuals for the operation of the manufacturer's radar units was not upheld. These decisions are attached to this Notice. Please refer to these decisions in making your representations and indicate how and why the facts of the current appeal differ from those present in the earlier cases. [emphasis in original]

Both the Ministry and the affected party provided representations. I determined that it was not necessary to seek representations from the appellant.

RECORDS:

The record at issue consists of a Genesis II User and Installation Manual (47 pages).

THIRD PARTY INFORMATION

General principles

The affected party and the Ministry take the position that the record is exempt under section 17(1) of the *Act*, which states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders MO-1706, PO-1805, PO-2018, PO-2184].

For section 17(1) to apply, the Ministry and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b) and/or (c) of section 17(1) will occur.

To discharge their burden of proof under Part 3, the Ministry and/or the affected party must demonstrate that disclosing the manual “could reasonably be expected to” lead to one or more of the harms in sections 17(1)(a), (b) or (c). They must provide “detailed and convincing” evidence

to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not enough to satisfy this part of the test (*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

A party’s failure to provide detailed and convincing evidence of a section 17(1)(a), (b) or (c) harm will not necessarily defeat its exemption claim where this office can infer such harm from other circumstances. Only in exceptional cases, however, would this office make such an inference based on materials other than the records at issue and the evidence provided by a party in discharging its onus (Order PO-2020).

In their representations the affected party does not specify whether they are relying on sections 17(1)(a), (b) or (c) in opposing disclosure of the manual. It appears, however, that they are relying on sections 17(1)(a) and/or (c). The Ministry also does not particularize its submissions on which of sections 17(1)(a), (b) or (c) apply. It appears, however, that they are also relying on sections 17(1)(a) and/or (c) to deny access to the manual.

Representations of the Ministry and Affected Party

The affected party argues that the manual contains “proprietary information” and that the disclosure of this information to competitors could be “detrimental” to it because of the investment of time and money to research and develop the product described therein. They assert that the information contained in the manual has technical information that could be used by their competitors to improve their units and list the following: “operating range, frequency used, operating parameters – heat, cold, snow, rain, etc., warranty information – what is covered – how many years, etc., strengths and weaknesses – all above.”

The affected party states that the release of the manual could damage the affected party’s market position in the future, which could cost the company thousands of dollars. They say that if released, the manual could be sent to their competitors in the United States or be published on the Internet. The affected party also suggests that the record ought not to be disclosed because it holds the copyright on the information contained in the manuals. It states, however, that the information contained in the manual is available to the public to view at police detachments to read and take notes. This allows the manual to be reviewed in a controlled environment.

The Ministry argues that the manual contains “technical information” for the purposes of section 17(1), and notes that in Order PO-2274, it was accepted that radar manuals contain technical information as envisaged by section 17(1). The Ministry submits the manual was provided to it in confidence upon the purchase of the radar unit. The Ministry submits that the manual is protected by copyright and that it does not make the manual available to the public. With respect to the third part of the test under section 17(1), the Ministry submits that it is aware that the position of the affected party is that disclosure of the record to the appellant will significantly prejudice the affected party’s business interests and competitive position and that the affected party has provided its comments on the specific harms that may be associated with disclosure of the manual.

Findings

As in Orders PO-1790 and PO-2274, I find that the manual contains information that qualifies as “technical information” for the purposes of section 17(1) and that this information was “supplied” to the Ministry by the affected party. I note that in their representations neither the Ministry nor the affected party specifically indicated how and why the facts of the current appeal differ from those present in those cases.

In Order PO-2274, Adjudicator Senoff was faced with a similar fact situation involving a request for the user and installation manuals relating to a specified radar device. In determining whether the record had been supplied in confidence, she made the following findings:

I find that the parties resisting disclosure in this case have not provided sufficient evidence to establish that the information at issue was supplied to the Ministry “in confidence” for the purpose of section 17. The parties have not provided enough evidence of any understanding, explicit or implicit, that the information would be kept confidential. For example, none of the parties have suggested that the information was provided to the Ministry subject to a confidentiality agreement or any other condition. Nor have they established that the information is “treated consistently in a manner that indicates a concern for its protection from disclosure.” Simply asserting that the information is confidential is not enough. Moreover, the parties’ representations suggest that the manuals are available to every paying consumer of the radar device. In addition, while copyright may suggest some measure of ownership, it does not alone render the information confidential. Finally, the case before me is distinguishable from Order P-1024: in the latter case, the evidence showed that the affected party had explicitly advised the institution in writing that the information at issue was to be treated confidentially.

Thus, to the extent that some or all of the information at issue may have been “supplied” for the purpose of section 17 – and without making any finding on this point – I find that it was not supplied “in confidence.” The information therefore does not meet Part 2 of the test. On this basis alone, the Ministry’s section 17 claim must fail.

Adjudicator Senoff went on in that case to evaluate whether the affected party and the Ministry had provided “detailed and convincing” evidence of harm, as required by part 3 of the test under sections 17(1)(a) and (c) of the provincial *Act*, and concluded that they had not. As a result, the manuals in that appeal were ordered disclosed.

For the purposes of the present appeal, as Adjudicator Hale did in Order MO-1790, I adopt the approach taken in Order PO-2274 in determining whether a reasonable expectation of confidentiality has been established. In the current appeal, I am of the view that the Ministry and the affected party have not provided sufficient evidence to substantiate a finding that the manual was supplied to the Ministry with a reasonably held expectation that it would be treated

confidentially. Specifically, I find that the fact that the affected party indicated that the public have an opportunity to view the record at a police detachment contradicts their argument that the record has been treated in a confidential fashion. With respect to the submission that the manual is subject to copyright, this is directly addressed by sections 32.1(1)(a) and (b) and 32.1(2) of the *Copyright Act*, which provide:

32.1 (1) It is not an infringement of copyright for any person

(a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material;

(b) to disclose, pursuant to the Privacy Act, personal information within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like information; ...

Limitation

(2) Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

Simply put, the fact that the manual may be subject to copyright, while it may suggest some measure of ownership, in and of itself, it does not render the information confidential and as clarified by section 32.1(1)(a) of the *Copyright Act*, it does not provide a basis to deny access to the information under the provisions of the *Act*.

I find that the second part of the test under section 17(1) has not been satisfied, accordingly.

Furthermore, as Adjudicator Senoff and Adjudicator Hale did in Orders PO-2274 and MO-1790, respectively, I find that in this case the affected party and the Ministry have also not provided the kind of detailed and convincing evidence required to meet the “harms” requirement in the third part of the test under 17(1)(a) and (c). For example, they have not adequately explained the nature of the competition in the field of the affected party or the uniqueness (if any) of the information at issue. I therefore find that the affected party and the Ministry have also failed to satisfy the third part of the test.

As the second and third parts of the test under section 17(1) have not been met, I find that the manual at issue in the current appeal is not exempt under the section 17(1) exemption.

ORDER:

1. I order the Ministry to disclose the record to the appellant by December 1, 2004 but not before November 26, 2004.
2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Ministry to provide me with a copy of the record that is disclosed to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

_____ October 26, 2004