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

ORDER MO-1790

Appeal MA-030356-1

Owen Sound Police Services Board

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NATURE OF THE APPEAL:

The Owen Sound Police Services Board (the Police) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

i. Operator's Manual – [a specific] Directional Radar Unit
ii. Service Record – [a specific] Directional Radar Device
iii. Service Record – [a specific] Tuning Fork

The Police initially denied access to the responsive records on the basis that they were exempt from disclosure under the discretionary exemptions in sections 8(1)(a), (b), (c), (f) and 8(2)(a) of the *Act* (law enforcement). The requester, now the appellant, appealed the decision of the Police.

During the mediation stage of the appeal, the Police notified the manufacturer of the radar unit (the affected party), seeking its views on the disclosure of the operator's manual. The affected party objected to the disclosure of this record. As a result, the Police issued a new decision letter denying access to the operator's manual on the basis that it was exempt under section 8(1)(c) and the mandatory exemption in section 10(1) (third party information).

Also during mediation, the appellant agreed not to pursue access to records responsive to the second and third parts of his request. The Police indicated to the appellant that he could obtain access to the requested manual by attending at its offices, as is its normal practice. The appellant declined the opportunity to do so.

As further mediation was not possible, the appeal was moved to the adjudication stage of the appeal process. I decided to seek the representations of the Police and the affected party initially. Both parties provided representations, the relevant portions of which were shared with the appellant along with a Notice of Inquiry. The appellant provided representations that were also shared with the Police and the affected party. I then received additional representations by way of reply from the affected party.

RECORDS:

The sole record at issue in this appeal is the User's Manual for the specified directional radar unit referred to in the request.

DISCUSSION:

LAW ENFORCEMENT

The Police take the position that the record is exempt from disclosure under the discretionary exemption in section 8(1)(c), which reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> > reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;

General principles

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 section 8(1)(c), 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.)].

In order to meet the "investigative technique or procedure" test under section 8(1)(c), the Police must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487].

The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders PO-2034, P-1340].

Representations of the parties

The Police submit that the disclosure of the record could reasonably be expected to reveal a "technique or procedure" involving the operation of a "directional radar unit" by police officers "conducting an investigation into a possible violation of the *Highway Traffic Act*." They argue that the procedure described in the record is investigative in nature as it describes how the equipment is to be operated by the officer. The Police also indicate that it uses the radar devise described in the record on a daily basis and that this use has a law enforcement purpose. Finally, the Police submit that:

> . . . if the information contained within the User's Manual of the [specified] Directional Radar Unit were to be made public it could reasonably be expected to hinder or compromise the effective utilization of the unit.
>
> Although the general public is aware that the police use the Radar Unit to enforce traffic violations, the specific operation of the Radar Unit is not known and could hinder the effective utilization of the unit and how the violations are prosecuted, thereby impeding future law enforcement.

The representations of the affected party address only the application of section 10(1) to the record.

The appellant makes the following submissions as part of his representations on the application of section 8(1)(c) to the record, arguing that the conclusions reached by the Police in their representations are unsupported by the facts that they rely on. Refuting the arguments put forward by the Police, the appellant submits that:

> The bottom falls out of the [Police] representations when they admit that they and the affected party both agree that the appellant could attend to the offices of the [Police] and review the manual.

The appellant also argues that the disclosure of the information contained in the record would not reveal *investigative* techniques or procedures but would rather result in the disclosure of information relating strictly to *enforcement*.

Findings

In order to establish the application of section 8(1)(c), the Police must provide "detailed and convincing" evidence to establish a "reasonable expectation" that the disclosure of the record would reveal investigative techniques and procedures currently in use or likely to be used in law enforcement. It is incumbent upon the Police to establish that the disclosure of the record could reasonably be expected to result in the harm contemplated by the section. In my view, the Police have failed to do so in this case.

I find that the evidence tendered by the Police is neither detailed nor convincing. Further, my review of the record itself does not lead me to conclude that it contains specific information relating to "investigative techniques and procedures" for the purposes of section 8(1)(c). Rather, the record simply describes how the radar device operates. I am not satisfied, based on the submissions of the Police, that the disclosure of the record would reveal the type of investigative techniques and procedures contemplated by the exemption.

I am also persuaded of the correctness of this finding by the fact that both the Police and the affected party are agreeable to allowing the appellant to have the right to view the record though they object to it being copied. In my view, it is simply incongruous to take the position that the

disclosure of the record would give rise to the harms contemplated by section 8(1)(c) and yet be amenable to the appellant having the right to view the record in person.

THIRD PARTY INFORMATION

General principles

The affected party and the Police take the position that the record is exempt under the mandatory exemptions in section 10(1)(a), (b) and (c) of the *Act*, which state:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 10(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 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the Police 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 10(1) will occur.

Representations of the parties

The affected party argues that the record 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. 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.

The Police argue that the record contains "technical information" for the purposes of section 10(1) and that this information was supplied to them by the affected party with an expectation that it was to be treated confidentially by the Police. The Police also rely on my decision in Order P-1024 which addressed the application of the equivalent provision in the provincial *Act* to section 10(1) to certain information contained in the operator's manuals for photo-radar units.

With respect to the third part of the test under section 10(1), the Police submit that the disclosure of the record to the appellant could reasonably be expected to significantly impact on the affected party's competitive position. The Police also argue that the harms contemplated by section 10(1)(b) are reasonably likely to flow from the disclosure of the record to the appellant. The Police argue that:

> The possibility remains that if this information is released and the Owen Sound Police Service is perceived to have breached their confidence the affected party may no longer supply us with their products or manuals. If we are unable to protect the affected party's interest we may no longer be supplied the necessary tools to conduct law enforcement investigations into possible violations of the *Highway Traffic Act* and protect the safety of the public.
>
> It is in the best interest of the public that this information continues to be supplied to the Owen Sound Police Service as the product is currently used in the enforcement of *Highway Traffic Act* violations/investigations into high volume, problem roadways. If the product and manuals were no longer supplied the Owen Sound Police Service would be unable to determine traffic difficulties and institute a safety plan for the public and roadways.

The appellant concedes that the record contains "technical information" within the meaning of section 10(1) and that this information was "supplied" by the affected party to the Police. However, he takes issue with the positions put forward by the affected party and the Police that there exists a reasonable expectation that the information would be treated confidentially by the Police. The appellant again notes that both the affected party and the Police have indicated a willingness to allow him to view the record in person at the offices of the Police, though they objected to him making copies of its contents. He also points out that in the case of the affected party in Order P-1024, explicit statements of confidentiality were provided on two occasions by the affected party to the Ministry, unlike the situation in the present case.

The appellant argues that the evidence relied upon by the Police and the affected party respecting possible harm to the competitive position of the affected party is not sufficiently "detailed and convincing" to satisfy the onus on them under section 10(1). The appellant also points out that the record is a "user's manual" as opposed to a "service manual" which would describe in detail the inner workings of the device and the methods to be employed when repairing it in the event of a failure.

In response to the Police representations under section 10(1)(b), the appellant argues that these submissions are speculative at best as the affected party has not indicated that it would no longer supply the Police with either the radar equipment or the manuals if the record is disclosed to the appellant.

Findings

I find that the record contains information that qualifies as "technical information" for the purposes of section 10(1) and that this information was "supplied" to the Police by the affected party.

In Order PO-2274, Adjudicator Shirley 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 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, 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 Police and the affected party have not provided me with sufficient evidence to substantiate a finding that the record was supplied to the Police with a reasonably held expectation that it would be treated confidentially. Specifically, I find that the fact that the Police and the affected party have extended the appellant an opportunity to view the record belies their argument that the record has been treated in a confidential fashion. I find that the second part of the test under section 10(1) has not been satisfied, accordingly.

In addition, I concur with the findings of Adjudicator Senoff in Order PO-2274 with respect to the harms aspect of section 10(1)(a) and (c). I find that the affected party and the Police have not provided me with the kind of detailed and convincing evidence required to meet the third part of the test under these exemptions. Finally, I agree with the appellant that the evidence tendered by the Police in support of its arguments under section 10(1)(b) are speculative and not supported by the evidence of the affected party.

As the second and third parts of the test under section 10(1) have not been met, I find that the manual at issue in the current appeal is not exempt under the section 10(1) exemption.

ORDER:

1. I order the Police to disclose the record to the appellant by **June 24, 2004** but not before **June 18, 2004**.

2. In order to verify compliance with the terms of Provision 1, I reserve the right to require the Police to provide me with a copy of the record that is disclosed to the appellant.

Original signed by: May 20, 2004
Donald Hale
Adjudicator