



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-1873

Appeal MA-040152-1

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 but denied access to the entire user's guide, any repair history of the specific traffic radar device and any record of calibration equipment used to calibrate the specific device, under the exemptions found at sections 8(1)(a) (interference with a law enforcement matter) and 8(1)(l) (facilitate the commission of an unlawful act or hamper the control of crime) of the *Act*.

The requester (now the appellant) focussed his inquiry and appealed the decision of the Police denying access to the complete user's guide for the specific traffic radar device and records of calibration of the specific device within the 12-month period prior to September 12, 2003.

During mediation, the Police granted access to the cover page and two other pages of the user's guide and clarified that access was denied to records relating to the specific device's calibration because these records did not exist. The appellant then raised the reasonableness of the search for responsive records as an issue.

Mediation did not resolve the appeal and it was moved to the adjudication stage. A Notice of Inquiry, which enclosed a copy of Order MO-1790 (an appeal in which a Police Services Board unsuccessfully argued access to a user's manual for a specific traffic radar device should be denied under sections 8(1)(c) and 10 of the *Act*), was sent to the Police, initially, and the Police provided representations in response. In their representations, the Police asked that a portion of their representations be severed for confidentiality reasons. The Notice of Inquiry along with a copy of the non-confidential representations of the Police was then sent to the appellant for a response. The appellant indicated that he did not wish to submit any representations.

RECORD:

The record at issue consists of a 40 page user's guide, from which the inside cover page and pages 21 and 22 were released to the appellant. The appellant also believes that records responsive to the calibration of the specified traffic radar device should exist.

DISCUSSION:

DID THE POLICE CONDUCT A REASONABLE SEARCH FOR THE RECORDS

The appellant believes that additional records relating to the specific device's calibration exist.

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 of the *Act* [Orders P-85, P-221, PO-1954-I].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester must provide a reasonable basis for concluding that such records exist.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. The institution must, however, provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

In this case, if I am satisfied that the search by the Police was reasonable in the circumstances, I will uphold their decision. If I am not satisfied, I may order the Police to conduct further searches.

With respect to the conduct of a reasonable search, and in support of their assertion that records relating to the specific device's calibration do not exist, the Police state:

The Toronto Police Traffic Services Section has excerpted specific portions of the laser/radar manuals for the other speed measuring devices used in Toronto and incorporated them into the "Toronto Police Service Operators Instructions" (reference deleted). However, as the Laser Atlanta Speed Laser has only recently come into use by the Toronto Police Service, the information has not yet been included in the TPS Operators Instructions. In the interests of 'fair play' for the requester, and for purposes of consistency insofar as the information available to requesters wishing access to speed measuring device information, the Traffic Services Radar Co-ordinator advised that pages 21 and 22 of the Laser Atlanta User's Guide approximated the information generally included in the TPS Operators Instructions, and a copy of pages 21 and 22 could be forwarded to the requester (along with a copy of the inside cover page of the Laser Atlanta User's Guide in order to include contact information for the davTECH company).

For example, the section of the TPS Operators Instructions regarding the Laser Technologies Inc. Marksman 20-20 Laser Speed Measuring Device contains various instructions for pre-operation tests to ensure the accurate working of the instrument (referring to an Appendix "A", enclosed with the representations of the Police). The categories of alignment and equipment function tests are roughly analogous to the instructions contained in pages 21 and 22 of the Laser Atlanta (Referring to an Appendix "B", enclosed with the representations of the Police).

[The mediator] advised that the appellant told her he had contacted the manufacturer and the manufacturer had told him that they would not provide him with a copy of their Manual, but that a copy of it was available for perusal at the court. I have since verified with [the City Prosecutor], that viewing (the Police point out that photocopying of the manual(s) is not permitted) the speeding measuring device manual relevant to an individual's case comprises part of the normal court disclosure process. Arrangements for viewing can be made with the prosecutor of the relevant court or with the Supervisor of Prosecutions for the City of Toronto.

In a telephone conversation July 7, 2004, [the mediator] relayed the appellant's opinion that there should be a calibration sticker stating the length of time for which the calibration is valid.

The Radar Coordinator advised that there is no policy or stipulation from the manufacturer for a time period for calibration. Since all speed measuring devices are tested (using the information in the Operator's Instructions) prior to each use, should the radar/laser device's calibration be found defective, the unit is submitted for repairs/recalibration to the manufacturer. Following such repairs the device is, of course, recalibrated by the manufacturer.

So that, although there is a notation on the sticker saying "Next Calibration Date", there is no date given and the sentence itself has a line through it (i.e. ~~Next Calibration Date~~), reinforcing the assertion that no pre-determined date for calibration exists. [Underlining in original]

As noted, the appellant did not make representations in this appeal.

Based on the evidence before me, I find that the Police have conducted a reasonable search for records relating to the calibration of the specified traffic radar device, based on its recent vintage. The appellant has not provided sufficient evidence to persuade me otherwise. I will therefore dismiss this part of the appellant's appeal.

As no such records exist, the balance of this order will address the denial of access to the user's guide.

LAW ENFORCEMENT

The Police take the position that the user's guide is exempt from disclosure under the discretionary exemptions in sections 8(1)(a) and (l) of the *Act*, 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 premature disclosure of information concerning a pending court case would essentially compromise the integrity of the court process concerning disclosure, and, either intentionally or inadvertently, cause an obstruction of justice for any and all concerned in the matter. 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, until resolution of the underlying charge, “dissemination of the documents might interfere with any further investigation necessitated by the court’s eventual ruling”.

Section 8(1)(l) of the Act

In their representations with respect to how the user’s guide falls within the exemption under section 8(1)(l) of the *Act*, the Police submit that:

As with all such equipment – whether radar or laser – such instruments are comprised of complex components. A thorough knowledge of the components could afford an individual gifted with the technical/mechanical expertise (or the time and inclination to gain such expertise) the opportunity to develop a new ‘radar/laser detector’ or a method by which one can electronically sabotage or ‘jam’ the device(s).

The particular unit used – the Laser Atlanta Speed Laser – is new to Toronto and a means by which one could alter its function, ‘jam it’, or be alerted to the proximity of the device would not only be quite useful to its inventor but, like the previously utilized radar detector, have financial value to its inventor.

In MO-1790, the institution exempted the information under section 8(1)(c), putting forth the contention that the information sought would reveal an investigative technique. The appellant successfully argued that since the institution would allow viewing of the Manual, their contention was not defensible.

The Toronto Police Service has not made the same assertion. The appellant advised the IPC that the dayTECH company had already told him he could view the manual at the court; however, the manufacturer was quite clear in that they would not allow him to have a copy of it.

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 8(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.

The submissions of the Police conclude with the following:

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 disclosure of information concerning a pending 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. In this instance, such release of information could not only jeopardize the cause of justice in the specific instance, but the compilation of such information could infringe upon all Highway Traffic Act speeding charges.

Just as computer and auto manufacturers only supply owner's manuals to individuals who purchased their product, speed measuring device manufacturers also only provide their manuals to their customers. Certainly part of the concern of such manufacturers must be that with all the technical specifications of their product, certain individuals could either improve upon, or – in the instance of certain devices such as radar/laser – find the means by which to interfere or sabotage them.

With the rare exception of persons with photographic memories, simply viewing a manual does not afford the same opportunity for study, experimentation and contemplation that an actual copy of the record would afford.

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 user's guide would interfere with a law enforcement matter (section 8(1)(a)) or that the disclosure of the user's guide 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 user's guide could reasonably be expected to result in the harms contemplated by those sections. In my view, the Police have failed to do so in this case.

As regards section 8(1)(a), other than speculation about the potential use, there is no indication of how the release of the user's guide would actually interfere with an ongoing matter. The Police themselves mention that the user's guide is available for inspection and even for purchase (along with a specified radar device). In my opinion, the Police have failed to establish that knowledge of any information contained in the user's guide 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. I cannot see how a concern that the release of the user's guide for the specified traffic radar device 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 user's guide forms a part of an investigation or that its disclosure could reasonably be expected to harm an ongoing law enforcement matter. I therefore find that the exemption in section 8(1)(a) does not apply.

I also find that the evidence tendered by the Police in this appeal 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 user's guide is not the foundation for the application of this exemption. In the same vein, the concern that, "a thorough knowledge of the components could afford an individual gifted with the technical/mechanical expertise (or the time and inclination to gain such expertise) the opportunity to develop a new 'radar/laser detector' or a method by which one can electronically sabotage or "jam" the device(s)" is at its highest a very speculative assertion. I also do not accept the leap of logic that disclosure of the user's guide would somehow impede the control of speeding drivers. Finally, I do not see how ordering the release of this information could interfere with or supplant a Court's decision on its admissibility, which would still be governed by the applicable rules of evidence.

Accordingly, the exemption under 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 user's guide shall be ordered disclosed.

ORDER:

1. I order the Police to disclose the user's guide for the specified traffic radar device to the appellant by sending him a copy by **December 30, 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.

Original signed by: _____
Steven Faughnan
Adjudicator

November 24, 2004