



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

ORDER MO-2016

Appeal MA-050109-2

Toronto Police Services Board



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NATURE OF THE APPEAL:

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) the Toronto Police Services Board (the *Police*) received a request for access to the following information relating to a specific alleged driving offence:

1. Copies of all memoranda, including the charging officer's duty book entries, for [a specific date], and in particular relating to the charge of speeding in this particular case;
2. Copies of all memoranda, including duty book entries, relating to the operation of the laser or radar apparatus used to record the speed in question in this particular case;
3. Copies of all memoranda relating to the purchase and service history of the apparatus in question;
4. Copies of the operating manual or similar document relating to the apparatus in question;
5. Copies of all Toronto Police internal memoranda, including standing orders, policies and training relating to the laying of charges of speeding and the operation of said apparatus;
6. Copies of any documentation relating to the training of police officers with respect to the apparatus in question, including without limitation, documentation from, emanating or used at the Ontario Police College and Toronto Police C.O. Bick College.
7. Copies of any documentation in the possession, control or power of the Toronto Police describing the operation of the apparatus in question, including any commentary regarding the proper use of the apparatus, its accuracy and reliability, and factors affecting the accuracy and reliability of the apparatus;
8. Information relating to the applicability or inapplicability of the following to the apparatus in question:
 - Shadowing Error,
 - Cosine Error,
 - Sweep Error,
 - Batching Error,
 - Panning Error,
 - Speed Doubling Error
9. Copy of the charging officer's Certificate of Training or similar documentation.

As set out in section 19 of the *Act*, in the normal course, an institution has 30 days to respond to a request for access to a record. Under section 22(4) of the *Act*, failing to respond to a request for access to a record within the statutory time frame results in a “deemed refusal” to provide access, which gives rise to a right of appeal.

As a result of the failure of the Police to respond to the request within the requisite time frame the appellant filed a deemed refusal appeal and this office opened appeal file MA-050109-1. When the Police issued their first decision letter that file was closed.

In their first decision letter the Police granted access to three pages of the User’s Guide for the Laser Atlanta Speed Laser, serial no. 22643 (the Radar Unit) and to a copy of the Toronto Police Procedure No. 07-10, entitled “Speed Enforcement”. Relying on the exemption in section 8(1)(a) of the *Act* (law enforcement) the Police denied access to the repair history and any record of calibration pertaining to the Radar Unit. In addition, the Police relied on the exemption in sections 52(3)1 and 3 (which, if applicable, excludes records from the scope of the *Act*) to deny access to the charging officer’s training record.

In a subsequent decision letter dated April 15, 2005, the Police changed their original decision by granting access to the repair history of the Radar Unit.

The requester (now the appellant) appealed the Police’s decision to deny access to the withheld information. In the Notice of Appeal, the appellant points out that although the entire User’s Guide for the Radar Unit was sought in her access request, the Police only provided a portion of it.

At the mediation stage of the appeal, the appellant decided to withdraw the request for information at items 5, 6 and 9 relating to officers training records and this information is no longer at issue. As sections 52(3) 1 and 3 are claimed only for the officer’s training records, these sections are also no longer at issue.

Also during mediation, the Police advised that the police officer involved did not take any notes in relation to the alleged driving offence and that no other records exist. Notwithstanding this denial, the appellant asserted that responsive records relating to items 1 and 2 of the request should exist. The appellant also took the position that further responsive records should exist in addition to those disclosed by the Police in response to items 3, 7 and 8 of the request. These claims by the appellant raised the reasonableness of the Police’s search for records as an issue in this appeal.

At mediation, the appellant reiterated her request for a complete copy of the User’s Guide for the Radar Unit. When the Police notified the manufacturer of the Radar Unit (the affected party) to seek its view on the release of the User’s Guide, the affected party objected to its disclosure. The Police then notified the appellant that it was denying access to it. As a result, the application of the mandatory exemption in section 10(1) of the *Act* (third party information) also became an issue in this appeal.

No other issues could be resolved at mediation and the matter moved to the adjudication stage.

In my review of the appeal file, I noted that the Police had never sent a full copy of the User's Guide for the Radar Unit to this office, and the appeal file only contained the cover page and two other pages of the User's Guide. These were the portions that had already been disclosed to the appellant. After several unsuccessful attempts by the Adjudication Review Officer to obtain a complete copy of the User's Guide for the Radar Unit, I made an Order for Production, requiring the Police to provide this office with a complete copy of the User's Guide for the Radar Unit.

That Order for Production was sent to the Police along with a Notice of Inquiry setting out the facts and issues in the appeal and seeking representations. As Orders MO-1790, MO-1873 and PO-2274 dealt with similar issues to those before me on this appeal, I enclosed copies of those orders, and in the Notice of Inquiry I asked that they be addressed in any response. I sent the same materials to the affected party. Both the Police and the affected party provided representations in response.

In their representations, the Police explained that they were relying on the exemption in section 8(1)(a) of the *Act* only with respect to the repair history of the Radar Unit. The Police advised that since the repair history was disclosed, they are no longer relying on that exemption. As a result, the exemption in section 8(1)(a) of the *Act* is no longer at issue in this appeal.

An issue then arose with respect to the sharing of the representations with the appellant. In their representations, the Police asked that a portion of the representations not be shared with the appellant for confidentiality reasons. The affected party also asked that their one page submission remain confidential.

After this office contacted the Police and the affected party, the issue of the sharing of representations was resolved. The Police agreed that a portion of their representations they had sought to withhold could be shared. The affected party agreed to share its entire submission with certain identifiers removed.

The materials sent to the Police and the affected party, being the Notice of Inquiry and the orders cited above, and a copy of the non-confidential representations of the Police and the affected party were then sent to the appellant's representative for a response. The appellant provided representations in response.

Although I have not received a complete copy of the User's Guide for the Radar Unit, I have concluded that I am able to fully adjudicate this appeal without receiving it.

RECORD/ISSUES

The record remaining at issue consists of the undisclosed parts of the User's Guide for the Radar Unit, which were withheld under section 10(1). The cover page and pages 20 and 22 of this record were released by the Police to the appellant. The reasonableness of the Police's search for responsive records also remains an issue in this appeal.

DISCUSSION:

SEARCH FOR RESPONSIVE RECORDS

Where an appellant 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 within its custody or control. [Orders P-85, P-221, PO-1954-I].

Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still 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. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

As set out above, at mediation the appellant asserted that responsive records relating to items 1 and 2 of the request should exist, notwithstanding the statement of the Police that this was not the case. The appellant also took the position that further responsive records should exist in addition to those disclosed by the Police in response to items 3, 7 and 8 of the request.

With respect to items 1 and 2 of the request, the Police state in their representations that after contacting the appellant to clarify her request, they communicated with 54 Division to obtain the officer's notes for the specified date. Upon receipt of the officer's notes, the Police determined that no entries were made for the event in question. The Police further explain that officers assigned to speed-monitoring details do not make specific notes of each infraction event. They say that the resulting Provincial Offence Notice, if issued, becomes the record of that incident.

With respect to item 3 of the request, the Police state that the Radar Coordinator provided all the available details for the Radar Unit, being the serial number, make and model and the Radar Unit's repair history. The Police quote an excerpt from Order MO-1873 in support of their contention that the Traffic Services Unit does not keep any formal calibration log or details on any calibration of the Radar Unit.

With respect to items 7 and 8 of the request, the Police submit that the only record available that is responsive to the request is the User's Guide for the Radar Unit.

In her representations, the appellant states that notwithstanding the insistence of the Police that no records of a notation by the charging officer existed, at the first court appearance with respect to the alleged driving offence, the prosecutor produced a copy of the officer's notes relating to

the matter. The appellant enclosed a copy of the notes with her representations. The appellant alleges that this raises questions about the adequacy of the steps taken by the Police to locate responsive records.

The appellant also states that there is no mention of any search of C.O. Bick College's records. The appellant submits that the reference to 80 hours of mandatory training and the requirement of a written examination on page 2 of the Toronto Police Procedure No. 07-10, entitled "Speed Enforcement" makes it likely that this would generate records.

The appellant further submits that although it was suggested in the Notice of Inquiry that the Police file an affidavit outlining the steps it took to conduct its search, no such affidavit was provided.

Analysis and Findings

While filing an affidavit detailing the steps taken to locate responsive records is helpful, it is not mandatory, unless this office makes it a condition of an order or there are other valid grounds for it to be provided. In this appeal there was no mandatory requirement that an affidavit be provided.

At mediation, the appellant withdrew her request for information at item 6, which included records at C.O. Bicks College. This would explain why no search of C.O. Bicks College's records occurred.

In Order MO-1873 dated November 24, 2004, in addition to a request for a User's manual, I adjudicated whether the Police in that appeal had conducted a reasonable search for records relating to the calibration of the specified traffic radar device. In the order, I repeated the extensive representations that the Police gave in support of their contention that they conducted a reasonable search for records. Amongst other things, the representations filed in that appeal indicated that the traffic radar device had at the time only recently come into use and on a sticker affixed to the device there was a line through the sentence "next calibration date". In that order, after reproducing the extensive representations of the Police on the issue, I wrote:

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.

The representations of the Police on this appeal are not nearly as extensive. There is also no indication that the Radar Unit at issue in this appeal is a comparatively recent purchase. If the Radar Unit is the same one that was under consideration in Order MO-1873, some time has passed since that order was made.

Based upon the representations of the Police with respect to their search for records responsive to the calibration of the Radar Unit and the events that transpired at the appellant's first court appearance, I am not satisfied with the adequacy of the Police's search for responsive records relating to items 1 and 2 of the request and for records relating to the calibration of the Radar Unit, relating to item 7. In the circumstances of this appeal, I am, however, satisfied that the Police conducted a reasonable search for records relating to items 3 and 8.

I will therefore require the Police to conduct a further search for records relating to items 1 and 2 of the request and, as regards item 7, for records relating to the calibration of the Radar Unit. In advising the appellant of the results of the search the Police should explain in detail who conducted the search, what places were searched, who was contacted in the course of the search and finally, the result.

THIRD PARTY INFORMATION

General Principles

The affected party and the Police take the position that the undisclosed parts of the User's Guide for the Radar Unit are exempt under section 10(1) of the *Act* which states, in part:

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, if 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 [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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.

To discharge their burden of proof under Part 3, the Police and/or the affected party must demonstrate that disclosure “could reasonably be expected to” lead to one or more of the harms in sections 10(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 10(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).

The Police and the affected party submit that the User’s Guide for the Radar Unit is protected by copyright. The Police explain that although they have been a customer of the affected party since 2003, they were only recently advised that due to many factors, including competitive pressures, guarantees of confidentiality given by other clients of the affected party, as well as concerns about personal and/or national safety, the User’s Guide for the Radar Unit should not be disclosed under the *Act*. The Police state that although the User’s Guide can be sold, the president of the affected party personally vets all requests for purchase and strictly controls any sale.

The Police do acknowledge that a User’s Guide for the Radar Unit was provided to them when the unit was purchased. They submit that there was no suggestion at that time that the Police would release the User’s Guide to the general public. However, the Police also state that the affected party has provided a copy of the User’s Guide for public viewing at certain courts in Ontario. They refer, however, to a stipulation that no portion of the User’s Guide is to be photocopied under any circumstances.

The Police submit that if the User’s Guide is released, the affected party’s clients would be concerned that their security would be compromised and would seek other suppliers, whose manuals cannot be readily obtained. In such a circumstance, the Police state that their

commercial relationship with the affected party would be jeopardized. They further submit that the affected party could require the removal of the User's Guide from public viewing and that the competitive and financial position of the affected party would be harmed.

The Police also submit that ordering disclosure of the User's Guide for the Radar Unit may result in other companies not being willing to deal with the Police for fear that their manuals may also be ordered disclosed. The Police state that this could leave them without proper equipment to enforce the law. They say that cities could then fall into "chaos and destruction". The Police submit that if someone is not content to publicly review the User's Guide at certain court location, they are free to contact the president of the affected party regarding a purchase of one.

In its representations, the affected party explains that the User's Guide is distributed to its customers only with the purchase of a Radar Unit, with any copying or further distribution of the User's Guide being strictly limited. On a few rare occasions, they sell a copy of the manual for a fee. Aside from its concerns about protecting its intellectual property and its claim to copyright, the affected party mentions no other harms that could arise from disclosure.

The appellant submits that the claims made by the Police are speculative and no evidence was provided to support the statements made. The appellant notes that the manual is publicly available, can be purchased for a fee, and that none of the "calamities" cited by the Police have occurred even though radar manuals have been previously disclosed pursuant to orders of this office.

Analysis and Findings

As in Orders PO-1790, PO-2274 and PO-2337, I find that the User's Guide 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. As a result, the first part of the section 10(1) test and the "supplied" component of part 2 have been satisfied. However, part 2 also requires that the information was supplied "in confidence".

As I explained in Order PO-2337, 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 that appeal, the institution claimed an exemption under section 17 of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent of the exemption at issue in this appeal. 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.

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 Police and the affected party have not provided sufficient evidence to substantiate a finding that the User’s Guide was supplied to the Police with a reasonably held expectation that it would be treated confidentially. In fact, the evidence before me suggests otherwise. Specifically, I find that providing the public with an opportunity to view the User’s Guide at certain Ontario court offices contradicts an argument that the record has been treated in a confidential fashion. The confidentiality argument is also undercut by the fact that affected party sometimes sells the User’s Guide for a fee.

With respect to the submission that the User’s Guide 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 User's Guide may be subject to copyright, while it may suggest some measure of ownership, in and of itself, it does not provide a basis to deny access to the information under the provisions of the *Act*.

In conclusion, I am not satisfied that the User's Guide was supplied "in confidence" within the meaning of section 10(1). I find, therefore, that Police and the affected party have not satisfied the requirements of the second part of the test under section 10(1).

As all three parts of the test under section 10(1) must be met in order for the exemption to apply, I find that section 10(1) has no application to the undisclosed parts of the User's Guide for the Radar Unit. As no other exemptions have been claimed for it, I order that the entire User's Guide be disclosed.

ORDER:

1. I order the Police to disclose the entire User's Guide for the Radar Unit to the appellant by sending her a copy by **March 7, 2006**, but not earlier than **March 2, 2006**.
2. I order the Police to issue a final access decision for the following records:
 - a. All memoranda, including the charging officer's duty book entries, for the specific date indicated in the request and in particular relating to the identified charge of speeding;
 - b. All memoranda, including duty book entries, relating to the operation of the laser or radar apparatus used to record the speed in question with respect to the alleged speeding offence; and
 - c. All records relating to the calibration of the Radar Unit,

without recourse to a time extension, in accordance with the requirements of sections 19, 21 and 22 of the *Act*, as applicable, treating the date of this order as the date of the request, and to send me a copy of the decision letter when it is sent to the appellant.

Original Signed by: _____
Steven Faughnan
Adjudicator

January 31, 2006