



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2263

Appeal MA06-288

Peel Regional Police Services Board



Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téloc: 416-325-9188
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The Peel Regional Police (the Police) received a multi-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) for access to:

The Operations Manual & Users Manual for [a specified] Speed Laser Detection System used by [an identified Police officer] on December 7, 2005

The maintenance records for the [specified laser device] for a period of 60 days prior to December 7, 2005 and 60 days after December 7, 2005.

The training records of [the identified Police officer] for any Speed Detection Device.

The Calibration Certificate for the [specified] Laser Speed Detection System that shows the device complies with the Calibration Requirements for Traffic Enforcement Equipment.

A copy of the Guide to Calibration Requirements for Traffic Enforcement Equipment.

In their decision letter, the Police advised that they were granting access to the Calibration Certificate for the specified traffic radar device, but that no responsive record exists pertaining to the request for the maintenance records for the specified traffic radar device for the identified time period. The Police further advised that they were relying on section 15(a) of the Act (information published or publicly available) to deny access to the User's Guide for the specified traffic radar device, and the exclusionary provision in section 52(3)3 of the Act (Act does not apply) to deny access to the training records of the specified police officer. Finally, the Police advised that the Guide to Calibration Requirements for Traffic Enforcement Equipment is in the custody and control of the Ministry of Community Safety and Correctional Services, which has a greater interest in the record.

The requester (now the appellant) appealed the decision denying access.

At mediation, the appellant indicated that access was no longer being sought to a maintenance record for the specified speed detection device or to the Guide to Calibration Requirements for Traffic Enforcement. As a result, access to those records is no longer at issue in this appeal. In addition, during mediation the appellant questioned whether the record the Police identified as responsive to the request was the User's Guide used by the identified Police officer on December 7, 2005. In response, as set out in the mediator's report, the Police confirmed with the mediator that, "this manual was used by the identified Police Constable as it is the only manual that applies to the specified [laser device]."

Mediation did not resolve the appeal and the matter moved to the adjudication stage.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Police and a party whose interests may be affected by disclosure of the record, initially. The Police and the affected party filed representations in response to the Notice. In their representations the Police raised the

possible application of the mandatory exemption in section 10(1) of the *Act* (third party information). I then sent a Notice of Inquiry, along with the representations of the Police and the affected party, to the appellant. The appellant provided representations in response. I determined that the appellant's representations raised issues to which the Police should be given an opportunity to reply. Accordingly, I sent a copy of the appellant's representations (with identities removed from some documentation that was included in the appellant's representations) to the Police, along with a letter inviting their representations in reply. The Police filed representations in reply.

RECORDS:

The records at issue in the appeal are a User's Guide and a Training Certificate.

DISCUSSION:

INFORMATION CURRENTLY AVAILABLE TO THE PUBLIC - SECTION 15(a)

The Police and the affected party assert that the User's Guide at issue in this appeal is available for purchase and thereby qualifies for exemption under section 15(a) of the *Act*.

If information is publicly available, it may be exempt under section 15(a), which reads:

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public.

For this exemption to apply, the Police must establish that the record or the information contained in the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387 and MO-1881].

To show that a "regularized system of access" exists, the Police must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order MO-1881]

Examples of the types of records and circumstances that have been found to qualify as a "regularized system of access" include

- unreported court decisions [Order P-159]

- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411 and MO-1573].

In their initial representations the Police submit that their decision letter clearly states that the User's Guide is available to the public for purchase. They state their letter provided the cost and how it can be obtained.

Police also submit that:

It should be noted that the Prosecutor's Office of the Ministry of the Attorney General, is responsible for providing full Disclosure to individuals charged under the Provincial Offences Act. It is the responsibility of the Disclosure Clerks, employed by the Provincial Offences Prosecutors, to provide current copies of manuals and testing procedures required for Disclosure. The information provided to the appellant's client under Disclosure was intended **for use in the individual case only**. This would indicate that there is no intention to allow the record to be used by the accused, or his representative, in future similar matters. [Emphasis in original]

The appellant's representative submits that when he contacted the affected party he was informed that only the latest version of the User's Guide was available and that no guarantee could be provided that it was the same version of the manual for the speed detection device used by the identified Police officer on December 7, 2005.

In their reply submissions, the Police enclose a copy of an email from the affected party stating that if the serial number of the speed detection device is identified, it can be matched to the version of the User's Guide that was provided with the speed detection device and that "in fact, our current manual covers the different versions of the [speed detection device]."

Analysis and Findings

This office has previously considered whether a record can be available to the public when the system of access is through a private sector entity [see, for example the discussion of former Commissioner Tom Wright in Order P-496]. In my view, however, it is not necessary to address this broader issue in the appeal before me. In my opinion, to be able to rely on the section 15(a) exemption the Police have a duty to identify for the requester the record at issue and inform the requester of its specific location [see, for example Orders P-123, P-124, P-191, P-204 and P-327]. Simply put, to rely on the section 15(a) exemption, the Police must take adequate steps to

ensure that the record that they allege is publicly available is the record that is responsive to the request. In my view the Police have failed to do that here. The Police address the appellant's concern about there being no guarantee the responsive User's Guide was available for sale, by simply relying on the affected party's statement that if the serial number of the speed detection device is identified, it can be matched to the version of the User's Guide that was provided along with it. The Police, however, fail to provide the serial number of the speed detection device or to otherwise take the appropriate action to match the User's Guide they claim is currently available to the public to the record they identify as responsive to the request. Although the affected party suggests at one point that "our current manual covers the different versions of the [speed detection device]," this is inconsistent with its earlier statement that "if the serial number of the speed detection device is identified, it can be matched to the version of the User's Guide that was provided with the speed detection device." In all the circumstances, I find that the Police have failed to establish that the specific User's Guide requested is available under a "regularized system of access". As a result, the Police have failed to establish the application of the section 15(a) discretionary exemption.

THIRD PARTY INFORMATION

General Principles

In this appeal the Police also take the position that the User's Guide is subject to exemption under section 10(1) of the *Act*.

Section 10(1) of the *Act* 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, each part of the following three-part test must be satisfied:

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.

In order to satisfy Part 2 of the test, it must be established that the information was "supplied" to the institution "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be supplied to an institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In Confidence

In order to satisfy the "in confidence" component of part 2, it must be established that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2043].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the Police on the basis that it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the Police;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

The Police acknowledge that a User's Guide is provided to them when a speed detection device is purchased but submit that there was an implicit expectation that the information in the User's Guide would be treated confidentially. Although the Police confirm that a portion of a User's Guide is provided pursuant to their disclosure obligation in the context of a prosecution under the *Provincial Offences Act*, they assert that disclosure of the User's Guide at issue in this appeal would prejudice the competitive position of the affected party. Both the Police and the affected party submit that the User's Guide is protected by copyright. The Police rely on Order P-1024 in support of their position that the User's Guide should not be disclosed.

The affected party states that the User's Guide is available for sale to everyone and there is an "easy" system in place for its purchase. The affected party also asserts that the *Copyright Act* excludes copyrighted information from the application of the *Act*. This will be dealt with in more detail below.

The appellant relies on my decision in Order PO-2337 in support of its position that the User's Guide should be disclosed. The Police argue in reply that each decision turns on its facts and that my decision in Order PO-2337 should not be followed.

Analysis and Findings

I find that the User's Guide contains information that qualifies as "technical information" for the purposes of part 1 of the section 10(1) test. For the purpose of the analysis that follows, I am also prepared to assume, without deciding, that this information was "supplied" to the Police by the affected party. However, part 2 of the section 10(1) test also requires that the information was supplied "in confidence". For the reasons set out below, I am not satisfied that this portion of part 2 of the test has been met. As a result, it is not necessary to consider part 3 of the section 10(1) test.

In Order PO-2274, Adjudicator Shirley Senoff was faced with a similar request for the user and installation manuals relating to a specified speed detection device. In that appeal, the institution claimed the application of the exemption at section 17 of the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent of section 10 of the *Act*. In determining whether the record had been supplied in confidence, Adjudicator Senoff 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.

...

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.

[See also Orders PO-2337 and MO-1790]

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, there is no evidence of an explicit expectation of confidentiality. The assertion of an implicit expectation of confidentiality is contradicted by evidence that a portion of the User's Guide is provided in the course of disclosure and the statement that a copy of the User's Guide is available for a fee. I am therefore not satisfied that there was a reasonable expectation of confidence when the User's Guide was provided to the Police.

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 the requirements of the second part of the test under section 10(1) have not been satisfied.

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 User's Guide for the speed detection device. I now turn to the submissions regarding the *Copyright Act*.

The Impact of the *Copyright Act*

The affected party submits that copyrighted information is excluded from the *Act*. In response, the appellant asserts that the purpose of the request is to "review the manual in private study." The appellant submits that this qualifies as fair dealing for the purpose of research or private study under section 29 of the *Copyright Act* and does not infringe copyright. In their reply submissions, the Police dispute the appellant's characterization of the purpose for the request. The Police assert that the appellant seeks access to the User's Guide for use in representing people charged with traffic offences, not for the purpose of "private study".

Analysis and Findings

It is not necessary for me to delve into this issue in great length. I accept that the User's Guide is subject to the *Copyright Act*; however, this does not oust the application of the *Act*. Sections 32.1(1)(a) and (b) of the *Copyright Act*, 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; ...

Disclosure, however, is subject to the limitation set out in section 32.1(2) of the *Copyright Act*, which states that:

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, it does not, in and of itself, provide a basis to deny access to the information under the provisions of the *Act*, or oust its application.

Final Conclusion on the Application of the Section 10(1) and 15(a) Exemptions

As I have found that the section 10(1) and 15(a) exemptions do not apply, and no other exemptions have been claimed for the User's Guide, I shall order that it be disclosed to the appellant.

APPLICATION OF THE ACT - SECTION 52(3)3

General Principles

As stated above, the Police have taken the position that section 52(3)3 applies to the Training Certificate. The appellant submits that different policies exist with respect to the voluntary disclosure of training records and included with its representations examples of certificates that were provided through disclosure under the *Provincial Offences Act*. The appellant submits that a Police officer's participation in training programs should be made public and that as regards this appeal, their ability to operate the device amounts to a "triable issue" which should result in disclosure.

Whether or not similar information is disclosed in similar circumstances, or whether the Training Certificate is admissible as evidence in a *Provincial Offences Act* proceeding, is not relevant to my determination on this issue, which is jurisdictional in nature.

If section 52(3)3 applies, and none of the exceptions found in section 52(4) applies, section 52(3)3 has the effect of excluding the Training Certificate from the scope of the *Act*. If that is the case, I do not have jurisdiction to consider the issue of the denial of access by the Police and whether the record qualifies or does not qualify for exemption under the *Act*.

Section 52(3)3 of the *Act* provides:

Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

Section 52(4), which lists the exceptions to section 52(3), provides:

This *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal, or other entity relating to labour relations or employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursements for expenses incurred by the employee in his or her employment.

In the circumstances of this appeal, the exceptions listed in sections 52(4) have no application.

Some of the terms used in section 52(3)3 have previously been defined:

- The term “in relation to” in section 52(3) means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

- The term “labour relations” refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Ministry of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].
- The term “employment related matters” refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

Section 52(3)3: matters in which the institution has an interest

For section 52(3)3 to apply, the Police must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultation, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Part 1: collected, prepared, maintained or used

The Police submit that the preparation, maintenance and use of the Training Certificate was for the specific purpose of complying with employment-related directive 1-B-603(F)-Sec.F-Training-No. 2, which provides that:

Only officers who have successfully completed an approved Laser Operator’s Course shall conduct laser enforcement. Further, the training must have covered the make and model of the laser speed measuring device being utilized.

On my review of the records, the representations of the Police, and of the appellant, and bearing in mind the surrounding circumstances of this appeal, I agree that the record at issue was “collected”, “maintained” and “used” by the Police. The Police did so to ensure that Police officers conducting laser enforcement had the requisite qualification mandated by the directive set out above. Although I do not agree that the information contained in the Training Certificate was “prepared” by the Police, the first part of the section 52(3)3 test has been established as the information was clearly “collected” and/or “used” by the Police. Accordingly, I am satisfied that part one of the test has been met.

Part 2: meetings, consultations, discussions or communications

Given the nature of the information and the fact that the information appears on a certificate that is not of the Police, the very existence of the record reveals that communications have passed between a certifying entity and the Police. I am therefore satisfied that the Police collected, maintained and used the record “in relation to [...] communications.”

As a result, I find that part two of the test under section 52(3)3 has been satisfied.

Part 3: labour relations or employment related matters in which the Police have an interest

I must now determine, first, whether the communications in the record are about “labour relations or employment-related matters”, and, if so, whether these are matters in which the Police “have an interest”.

The Police maintain that officers conducting laser speed enforcement are required to be trained. The Police state that “this is a requirement of the employment in this capacity.” From my review of the record, as well as the submissions, I accept that the information at issue relates to the qualification of Police officers to conduct laser speed enforcement in the context of their employment in accordance with the directive set out above. Accordingly, I am satisfied that the communications between a certifying entity and the Police with respect to information contained in the record at issue was “about employment-related matters”, namely to determine or to establish whether certain Police officers were qualified to use a speed laser device in the context of their employment.

The second component of part three of the section 52(3)3 test which must be established is whether these employment-related matters can be characterized as matters “in which the institution has an interest”.

It has been established that the phrase “in which the institution has an interest” means more than a “mere curiosity or concern” [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355(C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

In this case, the officer about whom information is being sought is employed by the Police. In their capacity as employer, the Police must ensure that this individual, if they are using speed Laser devices, have the requisite qualifications. In my view, in light of this employment relationship and the requirement of qualification to operate speed laser devices, the Police have an interest that is far more than a mere curiosity or concern within the meaning of section 52(3)3. I therefore conclude that the Police “have an interest” in the “employment-related matter” of the qualification of the subject police officer to conduct laser enforcement in the context of their employment in accordance with the directive set out above.

Accordingly, I find that part three of the section 52(3)3 test has been met.

In summary, I find that Police have established all of the requirements of section 52(3)3; the record was collected, maintained and used by the Police in relation to communications about employment-related matters in which the Police have an interest. Also, it is clear that none of the exceptions in section 52(4) applies. Accordingly, I find that the record falls within the parameters of section 52(3)3 and is, therefore, excluded from the scope of the *Act*.

ORDER:

1. I find that the *Act* does not apply to the Training Certificate.
2. I order the Police to disclose the User's Guide to the appellant by **February 15, 2008** but not before **February 11, 2008**.
3. In order to verify compliance with the terms of provision 2, 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: _____
Steven Faughnan
Adjudicator

_____ January 11, 2008