



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER PO-2737**

## **Appeal PA06-258**

### **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 multi-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

The Operations Manual & Users Manual for [a specified] Radar Speed Detection System used by [an identified Police officer] on March 3, 2006.

The maintenance records for the [specified] Radar Speed Detection System for a period of 60 days prior to March 3, 2006 and 60 days after March 3, 2006.

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 its decision letter, the Ministry informed the appellant that the Calibration Certificate for the specified Radar Speed Detection System was no longer available and that no maintenance records could be located for the specified Radar Speed Detection System for the identified time period. The Ministry also advised that the calibration requirements for the device were contained in the Operator's Manual. The Ministry further advised that it was relying on section 22(a) of the *Act* (information published or publicly available) to deny access to the Operator's Manual for the specified Radar Speed Detection System, and the exclusionary provision in section 65(6) of the *Act* (labour relations and employment records) to deny access to the training records of the specified police officer.

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

At mediation, in response to some additional information provided by the appellant, the Ministry identified the Operator's Manual at issue in this appeal as the only record that was responsive to the appellant's request. The Ministry advised that a manual it previously forwarded to this Office was not a responsive record. The appellant confirmed that access was not being sought to the non-responsive manual. The appellant also indicated that he was no longer seeking access to any maintenance record for the specified Radar Speed Detection System, any calibration certificate or to the guide to calibration requirements. As a result of mediation, a request for access to all of those records and to a separate guide to calibration requirements is no longer an issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the Ministry and a party whose interests may be affected by disclosure of the record, initially. Only the Ministry filed representations in response to the Notice, which included an email that it had received from the affected party. The Ministry advised that its representations could be shared in full, but requested that the consent of the affected party be obtained before sharing the email. The affected party consented to sharing the email and I then sent a Notice of Inquiry to the appellant, along with the complete representations of the Ministry and the affected party's email (with certain identifiers removed). The appellant provided representations in response to the Notice. After reviewing the appellant's representations, I determined that they raised issues to which the Ministry should be given an opportunity to reply. Accordingly, I sent a letter to the Ministry enclosing the representations of the appellant (with certain identifiers removed) seeking its reply. The Ministry provided representations in response.

I then issued Order MO-2263, which resulted from another appeal, but addressed similar issues to those raised in this appeal. In an effort to determine whether my findings in that order narrowed the issues in this appeal, I arranged for the mediator to contact both the Ministry and the appellant for their respective positions. In response, the Ministry provided a letter further explaining the basis for its application of section 22(a), along with a copy of a letter it had sent to the appellant in that regard. For his part, the appellant advised the mediator that, as a result of my order, access was no longer being sought to the training records of the specified police officer. Accordingly, the Training Certificate that the Ministry identified as responsive to the request and the application of the exclusionary provision in section 65(6) of the *Act* (which was only claimed for that record) is no longer at issue in the appeal. The appellant continued to seek access to the Operator's Manual for a specified Radar Speed Detection System.

This second attempt at mediation did not resolve the appeal, but before I shared the Ministry's reply submissions with the appellant, I decided to provide the Ministry with a formal opportunity to make submissions on the impact of Order MO-2263 and, in particular, whether a record can be available to the public when the system of access is through a private sector entity. I referred in that regard to Orders MO-1573, P-327 and P-496 of this office. The Ministry provided submissions in response.

I then provided the appellant with an opportunity to make submissions on the Ministry's non-confidential reply and supplementary representations, the correspondence it sent to the mediator, and on Order MO-2263. The appellant provided extensive representations in response.

As a result of mediation, all that remains at issue in this appeal is whether section 22(a) applies to the Operator's Manual for a specified Radar Speed Detection System.

## **RECORDS:**

The record at issue in the appeal is an Operator's Manual for a specified Radar Speed Detection System.

## **DISCUSSION:**

### **SCOPE OF THE REQUEST**

The appellant submits that the request was for a specific document, not a generic one and while the distributor can supply a similar document, it cannot provide a copy of the specific manual requested. The appellant argues that the *Act* makes no provision for the substitution of similar records when a request is for a specific one, and section 22(a) only applies when the specific record or specific information is available to the public.

In reply, the Ministry submits that, as worded, the appellant's request is for access to the manual for the specified Radar Speed Detection System used by the Police officer on March 3, 2006. The Ministry submits that the named police officer was contacted and advised that he believes that a copy of the corresponding manual was included in the manufacturer's package that contained the Radar Speed Detection System.

Based on the wording of the request, I conclude that, properly interpreted, the appellant's request is for the manual that corresponds to the specified Speed Laser Detection System used by the specified Police officer on March 3, 2006 and *not* for a particular copy of a manual that may, or may not, be in the care, custody or control of the named Police officer.

### **INFORMATION CURRENTLY AVAILABLE TO THE PUBLIC**

The Ministry and the affected party assert that the Operator's Manual for the specified Radar Speed Detection System is available for purchase and thereby qualifies for exemption under section 22(a) of the *Act*.

If information is publicly available, it may be exempt under section 22(a), which reads:

A head may refuse to disclose a record where,

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

For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access. [Order P-327]

To show that a "regularized system of access" exists, it must be demonstrated 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]

Previous orders of this office have addressed whether a record is publicly available. 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].

### **Representations**

In this appeal the Ministry identified the serial number of the specified Radar Speed Detection System that corresponds to the responsive Operator’s Manual. Both the Ministry and the third party assert that the applicable Operator’s Manual is available for purchase for a set fee.

In response, the appellant submits that he contacted the Canadian distributor on two separate occasions and was informed that the distributor:

- does not maintain a library of old Operator’s Manuals;
- can only provide the latest version of the manual and does not have copies of the previous versions;
- could not guarantee that it could provide a true copy of the manual the identified Police officer used on March 3, 2006.

The Ministry submits in reply that it contacted the President of the Canadian distributor of the specified Radar Speed Detection System, who confirmed that the responsive Operator’s Manual is available for purchase. The Ministry writes in its reply representations that:

The President indicated that the appellant may possibly have been informed that the requested manual was not in stock at the time of the appellant’s call to a company representative. The President confirmed that a copy of the requested manual could still be obtained and made available for purchase.

The Ministry’s reply representations included an email from the President of the Canadian distributor that, the Ministry says, confirms the availability and cost of the manual. That email ends with the line, “Enquiries should be sent to the attention of our National Sales Manager and we will respond accordingly to each situation”.

In addition, in its response to my request for submissions on Order MO-2263, and in support of its position that the responsive manual is available for purchase, the Ministry refers to a letter from the Canadian distributor advising that speed detection and video operational manuals are available for purchase by the general public at a cost of \$350.00 and delivery typically takes three to four weeks since it does not “maintain stock on hand”.

For his part, the appellant points to the difference in the websites of the U.S. manufacturer and the Canadian distributor in support of his position that the responsive Operator’s Manual is not publicly available. The appellant submits that the Canadian distributor’s website contains no statement that a manual can be ordered, whereas the U.S. manufacturer’s website clearly sets out that:

[The U.S. manufacturer] does sell operator’s manuals (U.S. only) for specific models of radar and laser equipment. To obtain a manual, a signed court subpoena is required. The fee for the manuals varies by model, from \$30 to \$45 plus \$5 shipping and handling. Manuals are shipped via U.S. mail. These manuals are protected under the federal copyright protection act and cannot be copied and are non-returnable.

Operation manuals describe how to setup and test the equipment. They do not discuss field operation or how the equipment responds in a specific situation. These are training issues and not covered in this manual.

The appellant also submits that there is no consistency in pricing the manuals. The appellant submits that the letter from the Canadian distributor states that manuals are available for purchase for \$350.00, while the email included in the Ministry’s reply representations sets out that the manual price is \$395.00, taxes extra and FOB.

Further, the appellant submits that the fees the Ministry quotes for acquiring the manual, compared to the U.S. price, is unfair and excessive. The appellant further submits that this is a “circumstance where the cost of accessing a record outside the *Act* is so prohibitive that it amounts to an effective denial of access”.

Finally, the appellant submits that the “President’s statement is a convenience initiated by a government inquiry”. The appellant relies on Order P-327 in support of his position that to be currently available to the public means 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.

## **Analysis and Findings**

### *The Purpose of Section 22(a)*

The purpose of section 22(a) was reviewed in Order P-1114 where former Assistant Commissioner Tom Mitchinson stated:

In Order 170, Inquiry Officer John McCamus discussed the purpose of the discretion conferred by section 22(a). On Page 108 of that order, Mr. McCamus stated:

In general terms, the Ministry appears to be correct in suggesting that the purpose of the discretion conferred by section 22(a) relates to questions of convenience. Obviously, there is no other public interest to be served by withholding disclosure of information which is readily available elsewhere. Accordingly, the discretion to disclose is conferred for the evident purpose of enabling a head to avoid disclosure where that process merely involves expending the resources of the Ministry on the photocopying of material which is otherwise readily available and, from the Ministry's point of view, more conveniently available to the requester in another form. It would, on the other hand, be an abuse of the discretion conferred by section 22(a) if the head were to refuse disclosure of information otherwise publicly available where the refusal does not rest on a balance of convenience of this kind and/or where the refusal to disclose will have the effect of refusing to disclose the nature of the information contained in the Ministry's records which is thought by the Ministry to be responsive to the request.

I applied this line of reasoning in Order P-327, where I made the following statement regarding section 22(a):

In my view, the section 22(a) exemption is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access; it is not intended to be used in order to avoid an institution's obligations under the *Act*.

In my view, if the requested information is otherwise available from a public library, government publications centre or other similar system, then access rights under the *Act* are not diminished by requiring members of the public to utilize these alternative sources (Order P-327). However, I feel that section 22(a) should only be invoked in situations where the request can be satisfied through the alternative source.

In Order MO-2263, I had the occasion to comment on the duty that rests on an institution when invoking section 15(a) of the *Municipal Freedom of Information and Protection of Privacy Act*, the equivalent of section 22(a) of the *Act*. I wrote:

... 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.

As emphasized in Order P-1114, and the short discussion on section 22(a) during the legislative debates, the section must be viewed through the lens of convenience. In a nutshell, there is no public interest to be served by withholding disclosure of information which is readily available elsewhere, provided that the balance of convenience favours this method of alternative access, with the additional caveat that section 22(a) is not intended to be used in order to avoid an institution's obligations under the *Act*.

#### *Access through a Private Sector Entity*

In this appeal, unlike the appeal under consideration in Order MO-2263, the Ministry identified the relevant serial number and, subject to the discussion below, that the Manual is available from the Canadian distributor. In my opinion, subject to the discussion below, the Ministry has thereby met its duty to identify for the requester the record at issue and inform the requester of its specific location, namely a private sector entity.

There is some debate in previous orders of this office surrounding whether a record can be available to the public when the system of access is through a private sector entity. I have considered various orders on this point, including Order P-496, and in my view, it is no impediment to the application of section 22(a) that the source of access is a private as opposed to a public entity. To find otherwise would be to ignore the clear wording of the section, today's commercial reality and the existence of internet sources for written materials. To the extent that this finding may conflict with past decisions of this office, then I respectfully decline to follow them.

I now turn to the specific determinations in this appeal.



*A System of Access does not Exist*

The U.S. manufacturer's website contains an unequivocal statement that (subject to certain limitations discussed below) it sells operator's manuals (although U.S. only) for specific models of radar and laser equipment. That said, there is no evidence from the Ministry or the third party that the requested Operator's Manual for the specified Radar Speed Detection System is actually available through the U.S. manufacturers website, nor do they point to a statement of availability on the Canadian distributor's website. Instead, the Ministry points to a conversation with the President of the Canadian distributor as well as a letter and emails, as discussed below, which vary as to their terms. In my view, this does not demonstrate a "system of access" but rather an ad hoc response to the specific request in this appeal. In my opinion, the Ministry and the affected party have failed to provide me with sufficiently cogent evidence to establish on a balance of probabilities that there is a true "system of access" for the responsive Operator's Manual.

*The Manual is not Available to Everyone*

The excerpt from the U.S. website also requires a signed court subpoena to access a requested manual. This indicates to me that while there is a system for access in the U.S., a specific manual is available only to those with a court subpoena. While there appears to be no similar limitation in Canada, I wonder how a Canadian distributor may circumvent a requirement set by its provider. I need not decide the matter on this basis, however, because some cryptic language in the email from the Canadian distributor presents a greater concern. I refer in that regard to the email from the President of the Canadian distributor included in the Ministry's reply representations, which provides that, "Enquiries should be sent to the attention of our National Sales Manager and we will respond accordingly to each situation." While no similar statement is contained in the other letter or email from the affected party, to my mind this implies that there is some measure of discretion left in the distributor to determine whether, on a request from any member of the public, a manual would be available to them. In my opinion, this raises a question whether the manual is available to *everyone*. In my opinion, the retention by a private sector entity of a residual discretion to disclose, cannot be equated with information being "currently available to the public". In my view, the Ministry and the affected party have failed to provide me with sufficiently cogent evidence to establish that the requested Operator's Manual for the specified Radar Speed Detection System is "available to everyone".

*There is no Consistent Pricing Structure that is Applied to all who wish to Obtain the Manual*

In the U.S. there is a consistent pricing structure for a copy of a manual (although, as stated above, there is no evidence before me that the responsive manual is available through the U.S. manufacturer, in any event) which ranges between \$30.00 to \$45.00 U.S., depending, I presume, on the specific manual chosen. In contrast, in this jurisdiction there appears to be no consistent price for the specific manual at issue. In that regard, I agree with the appellant that the letter from the Canadian distributor states that manuals are available for purchase for \$350.00, while the email included with the Ministry's reply representations sets out that the manual price is \$395.00, taxes extra and FOB. While at first glance the difference may not seem so great, it demonstrates to me a lack of consistent approach to pricing. In my view such an inconsistent

approach to pricing contradicts an assertion that there is a “pricing structure that is applied to all who wish to obtain the information”.

In the result and in the specific circumstances of this appeal, I find that the evidence before me is not sufficient to establish that any of the three criteria under section 22(a) have been met. I therefore find that that the section 22(a) discretionary exemption does not apply in the circumstances of this appeal.

**ORDER:**

1. I order the Ministry to disclose the Operator’s Manual for the specified Radar Speed Detection System to the appellant by **January 5 2009** but not before **December 31, 2008**.
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

\_\_\_\_\_  
November 27, 2008