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

ORDER PO-2274

Appeal PA-020145-1

Ministry of Public Safety and Security

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NATURE OF THE APPEAL:

The requester made a request to the Ministry of Public Safety and Security (now the Ministry of Community Safety and Correctional Services) (the Ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to certain Ontario Provincial Police (OPP) records relating to a traffic radar device. The requester sought the information as part of his challenge to a speeding ticket issued to him near Sault Ste. Marie.

The Ministry issued a decision to the requester denying access to the responsive records in their entirety on the basis that they qualified for exemption under the following provisions of the *Act*:

- sections 14(1)(a), 14(1)(b) and 14(1)(f) (law enforcement);
- section 17 (third party information); and
- section 21(1) (invasion of privacy) with specific reference to section 21(3)(d) (employment or educational history).

In its decision, the Ministry also advised the requester that some records have been destroyed and other records do not exist.

The requester (now the appellant) appealed the Ministry's decision.

During mediation, the parties removed a number of records and issues, including the Ministry's section 21(1) claim, from the scope of this appeal.

Mediation did not resolve this appeal, and the file was transferred to adjudication.

This office sent a Notice of Inquiry to the Ministry and the Canadian distributor of the radar device (the distributor), initially, outlining the facts and issues and inviting these two parties to make written representations. The Ministry and the distributor submitted representations in response to the Notice. The Ministry also contacted the manufacturer of the radar device (the manufacturer) and it provided this office with representations the manufacturer made to it. This office then sent a Notice of Inquiry to the manufacturer and invited it to make additional representations. The manufacturer did not submit representations directly to this office. Finally, this office sent a Notice of Inquiry to the appellant, together with a copy of portions of the Ministry's representations. This office invited the appellant to make representations only on the issue of whether the Ministry conducted a reasonable search for records. The appellant, in turn, provided representations.

In this appeal I must decide whether the Ministry has conducted a reasonable search for records, and whether the exemptions claimed by the Ministry apply to the records.

RECORDS:

Approximately 58 pages of records remain at issue. They all relate to the radar device and include certificates for accurateness and correctness of operation (pages 2-3), user and installation manuals (pages 4-34 and 40-58), tuning fork certificates of accuracy (pages 59-60

and 62) and repair records (pages 63-65). All page references in this order correspond to the numbering system used by the Ministry.

BRIEF CONCLUSION:

The Ministry's search for additional records was reasonable. The records at issue are not exempt from disclosure, and the Ministry must disclose them.

DISCUSSION:

DID THE MINISTRY CONDUCT A REASONABLE SEARCH FOR RECORDS?

The appellant believes that additional records relating to the calibration of the speedometers used in police patrol cars 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 24 (Orders P-85, P-221, PO-1954-I).

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).

Although a requester 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.

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

Among other things, the Ministry submits that it contacted the OPP Detachment Commander at Sault Ste. Marie. The latter advised the Ministry that no records relating to the calibration of speedometers exist, and that the detachment had not conducted speedometer verification for approximately six years.

The appellant does not specifically make representations on this issue.

Based on the evidence before me, I find that the Ministry has conducted a reasonable search for records relating to the calibration of the speedometers. Contacting the OPP Detachment Commander at Sault Ste. Marie was an appropriate and reasonable means of determining whether responsive records exist. The appellant has not provided sufficient evidence to persuade me otherwise. I will therefore dismiss this part of the appellant's appeal.

DOES THE LAW ENFORCEMENT EXEMPTION AT SECTION 14(1)(F) APPLY TO THE RECORDS AT ISSUE?

The Ministry initially claimed the discretionary exemptions at sections 14(1)(a), (b) and (f) for pages 2-3, 59-60 and 62-65. In its representations, the Ministry relies on section 14(1)(f) only. This section reads:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> deprive a person of the right to a fair trial or impartial adjudication;

Because section 14(1)(f) is a discretionary exemption, even if the information falls within the scope of this section, the institution must nevertheless consider whether to disclose the information to the requester.

In order for a record to qualify for exemption under section 14(1)(f), the institution must show that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication. The exemption is not available as a protection against remote and speculative dangers (Order P-948; *Dagenais v. Canadian Broadcasting Corp.* (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)*, [2003] O.J. No. 2182 (Div. Ct.)).

Among other things, the Ministry submits:

> Since the information contained in the records at issue relates to a charge pursuant to the *Highway Traffic Act*, a Provincial Statute, and in which the trial is pending, it is submitted that the exemption in section 14(1)(f) must be considered in light of the Charter right in section 11(d) and great care must be taken to ensure that disclosure of the information does not in any way impair the fair trial rights of the accused. If, as is asserted in these representations, the records contain information that could reasonably be expected to relate to the upcoming trials, then the disclosure of that information in advance of the trials "could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication," as contemplated by section 14(1)(f).
>
> In trial matters, pre-trial publicity or release, has long been considered to have an adverse impact on the ability of an accused to have a fair trial. It is submitted that disclosure of the records to the appellant, and thus to the public, "could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication" as contemplated by the section 14(1)(f) exemption.

The appellant submits that having the information he seeks would assist his defence to the charge. At the time the parties made their representations, the appellant's trial had not yet concluded.

I do not accept the Ministry's submission that section 14(1)(f) applies to the information at issue. One of the purposes of section 14(1)(f) is to protect the fair-trial rights of an accused individual. In this case, the accused individual charged with a traffic violation is the appellant himself. Denying him access to the information he seeks would not serve the purpose of section 14(1)(f) (see Order MO-1252). In addition, the Ministry's representations are generalized and they fail to explain exactly how disclosing these records could reasonably be expected to deprive the appellant of the right to a fair trial.

I therefore find that the records do not qualify for exemption under section 14(1)(f).

DOES THE EXEMPTION FOR THIRD PARTY INFORMATION AT SECTION 17 APPLY TO THE RECORDS?

The Ministry initially claimed the exemption at section 17 for pages 4-34 and 40-58. In its representations, the Ministry takes the position that all the records qualify for exemption under section 17. Because section 17 is a mandatory exemption, I will review whether it applies to any of the records before me.

General principles

Sections 17(1)(a), (b) and (c) read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; …

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central

purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit the 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 a record to qualify for exemption under sections 17(1)(a), (b) or (c), the parties resisting disclosure (in this case, the Ministry, the distributor and/or the manufacturer) 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 (the Ministry) 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) or (c) of section 17(1) will occur.

Part 1: Type of information

"Technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing (Order PO-2010).

I am satisfied that all the records at issue contain technical information. The first part of the section 17 test has therefore been satisfied. I will now turn to the second and third parts.

Part 2: Supplied in confidence

Part 2 of the section 17 test has two components: first, the information at issue must have been "supplied" to an institution; and secondly, it must have been supplied "in confidence."

I have decided to begin by examining whether the information meets the "in confidence" requirement. On this question, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality at the time the information was provided. This expectation may be implicit or explicit, and it must have an objective basis (Order PO-2020).

To determine whether the supplier's 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 institution 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 person prior to being communicated to the government organization;

- not otherwise disclosed or available from sources to which the public has access; and

- prepared for a purpose that would not entail disclosure (Order PO-2043).

The Ministry submits that all the information at issue is confidential. The distributor and the manufacturer restrict their representations to the user and installation manuals, and submit that this information is confidential. The manufacturer, in particular, submits that the manuals are protected by copyright. It also submits that it provides the manuals to the law enforcement officials solely for their use in operating the radar equipment, and that it expects them to treat the information in confidence. The Ministry and the manufacturer both acknowledge that the manuals themselves are not marked "confidential." The Ministry also relies on Order P-1024, in which this office found that an operator's manual for photo-radar units was exempt from disclosure under section 17.

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. Nevertheless, I have decided also to address the parties' submissions under Part 3.

Part 3: Harms

To discharge their burden of proof under Part 3, the Ministry, the distributor and/or the manufacturer must demonstrate that disclosing the records "could reasonably be expected to" lead to one or more of the harms in sections 17(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 17(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 Ministry, the distributor and the manufacturer do not specify whether they are relying on sections 17(1)(a), (b) or (c) in opposing disclosure of the records. It appears, however, that they are relying on sections 17(1)(a) and/or (c).

The Ministry, the distributor and the manufacturer submit that disclosing the information at issue could cause harm under section 17. The distributor submits that disclosing the information in the user and installation manuals may provide secret and private information to competitors in a very competitive market. The manufacturer submits that disclosing the manuals could allow competitors to determine technical specifications about its product and hurt its ability to compete.

Based on the materials before me, I am not persuaded that disclosing the records could reasonably be expected to result in any of the harms in sections 17(1)(a) or (c). Many pages of records are at issue and the Ministry, the distributor and the manufacturer bear the burden of establishing a reasonable expectation of harm under those sections. In my view, these parties have not provided the "detailed and convincing" evidence required to demonstrate that the harms they allege are not merely speculative. For example, they have not adequately explained the nature of the competition in their field or the uniqueness (if any) of the information at issue. I therefore find that the Ministry, the distributor and the manufacturer have not met Part 3 of the test.

Accordingly, the records do not qualify for exemption under section 17, and I will order the Ministry to disclose them.

ORDER:

1. I dismiss the part of the appellant's appeal regarding the Ministry's search for records.

2. I order the Ministry to disclose pages 2-3, 4-34, 40-60, 62-65 in their entirety to the appellant by **June 7, 2004** but not before **June 1, 2004**.

3. In order to verify compliance with the terms of Provision 2, I reserve the right to require the Ministry to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: April 30, 2004
Shirley Senoff
Adjudicator