

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-3306

Appeal MA15-63

Guelph Police Services Board

April 22, 2016

Summary: The Guelph Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)* for access to two specific radar manuals and one laser manual. The police denied access, citing the discretionary exemption in section 15(a) (information currently available to the public). This order upholds the police's decision that the records are exempt under section 15(a) as they are currently available to the public.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 15(a); *Copyright Act*, R.S.C. 1985, c. C-42, s. 32.1.

Orders Considered: Orders MO-3179, PO-2908 and PO-2737.

OVERVIEW:

[1] The Guelph Police Services Board (the police) received an access request under the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA or the Act)* for the following records:

1. Copy of complete manual for [named] radar;
2. Copy of complete manual for [2nd named] radar;
3. Copy of complete manual for [named laser]; and

4. A list of all speed measuring devices used by [the police]

[2] The police issued a decision to deny access to the records in response to parts 1 to 3 of the request pursuant to section 15(a) (information currently available to the public) of the *Act*. The police advised that the manuals requested are available for access from the Provincial Offences Court. The police further advised that the manuals requested are subject to copyright protection and cannot be reproduced. The police responded to part 4 of the request providing a list of all speed measuring devices used by the police.

[3] The requester, now the appellant, appealed the police's decision on parts 1 to 3 of the request.

[4] During mediation, the appellant confirmed with the mediator that while he can access the manuals at the Provincial Offences Court, he is unable to make a photocopy of the manuals, which he requires in order to prepare his defence in court. The police confirmed their position that the manuals are publicly available 'through a regularized system of access through the Provincial Offences Court office' and that, therefore, section 15(a) of the *Act* should apply to the records requested.

[5] No further mediation was possible. Accordingly, this file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. I sought the representations of the police, a copy of which was provided to the appellant. The appellant did not provide representations in response to the police's representations.

[6] In this order, I uphold the police's decision that the records are exempt under section 15(a) as they are currently available to the public.

RECORDS:

[7] At issue are two radar manuals and one laser manual.

ISSUES:

- A. Does the discretionary exemption at section 15(a) (information currently available to the public) apply to the records?
- B. Did the institution exercise its discretion under section 15? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Does the discretionary exemption at section 15(a) (information currently available to the public) apply to the records?

[8] Section 15(a) states:

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;

[9] The police state that the three manuals have been historically and are currently available to the public through a regularized system of access and review at the Provincial Offences Court in Guelph for viewing in their entirety upon request by any member of the public. The police state that they provide updates or replacement manuals to the Ontario Court of Justice, Prosecutor's Office as they are received, thereby ensuring the most current information is available to the public at all times.

[10] The police provided a copy of a letter from an assistant prosecutor that confirms to the appellant the availability of access and review opportunities for the requested records. They provided further details of offers made to the appellant to view the records.

[11] It is the position of the police that no element of the process for accessing the requested records could be construed as being in any way prohibitive so as to invoke non-applicability of section 15(a) in this instance.

[12] The police further state that they contacted the radar manufacturers (as any member of the public is able to do by searching on the internet) who are the copyright owners of all three manuals. They state that these manuals contain express copyright notices and prohibitions with respect to the reproduction of the same. They submit that access to information does not import the provision of photocopies of the requested information, particularly where to do so would place them in a position of breaching the provisions of the federal *Copyright Act*¹ by so doing.

[13] The police provided letters from the radar manufacturers setting out their reservation of their respective intellectual proprietary rights and that these manufacturers make their manuals available for purchase directly from them at a cost of \$75(US) and \$105(US)² plus applicable taxes, freight and duty respectively. The police submit that this fee is not prohibitive.

¹ *Copyright Act*, R.S.C., 1985, c. C-42.

² One manufacturer produces the two radar manuals. A second manufacturer produces the laser manual.

Analysis/Findings

[14] As a preliminary matter, I do not accept the police's arguments that providing copies of the manuals would breach the *Copyright Act*. By section 23(1) of *MFIPPA* a person who requests access to a record is entitled to be provided with a copy of the record unless it would not be reasonably practicable to reproduce it by reason of its length or nature, in which case the person shall be given an opportunity to examine the record or part.

[15] Furthermore, an institution providing copies of copyrighted records to requesters is not a breach of copyright. Sections 32.1(1)(a) of the *Copyright Act* provides that:

It is not an infringement of copyright for any person

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;... [emphasis added by me]

[16] There is protection for the copyright owner provided in the *Copyright Act* regarding copies being made by requesters after disclosure. Section 32.1(2) of the *Copyright Act* provides 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.

[17] In support, I note that Adjudicator John Higgins in Order MO-3179, when considering an argument about whether a training manual was exempt under the mandatory third party information exemption in section 10(1), stated that:

...assuming (without making a finding) that the manual is subject to copyright, I note that although disclosure of copyrighted material under the Act is not a breach of the *Copyright Act*,³ section 32.1(2) of that statute indicates that copyright continues to attach to records that are subject to such disclosure.⁴ [emphasis added by me]

³ R.C.C. 1985, c. C-42. See also Order MO-2016.

⁴ Section 32.1 of the *Copyright Act* states in part:

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; . . .

[18] For section 15(a) to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.⁵

[19] To show that a “regularized system of access” exists, the institution 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 information⁶

[20] Section 15(a) 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*.⁷

[21] In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request.⁸

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

- unreported court decisions⁹
- statutes and regulations¹⁰
- property assessment rolls¹¹
- septic records¹²

(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.

⁵ Orders P-327, P-1387 and MO-1881.

⁶ Order MO-1881.

⁷ Orders P-327, P-1114 and MO-2280.

⁸ Order MO-2263.

⁹ Order P-159.

¹⁰ Orders P-170 and P-1387.

¹¹ Order P-1316.

¹² Order MO-1411.

- property sale data¹³
- police accident reconstruction records¹⁴
- orders to comply with property standards¹⁵

[22] 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*.¹⁶ However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply.¹⁷

[23] As stated above, section 15(a) provides that a head may refuse to disclose a record if it has been published or is currently available to the public.

[24] I find that the manuals in this appeal are currently available to the public within the meaning of section 15(a).

[25] Concerning the issue of charging for the manuals, the police rely on Order PO-2908. In that order, Adjudicator Frank DeVries¹⁸ held that the discretionary exemption in section 22(a) of *FIPPA*¹⁹ applied where the Ministry of Natural Resources (MNR) responded to a request for significant geographical information from MNR's many databases on the basis that the information was currently available to the public, albeit under the provisions of a "limited end-user license", at a rate of \$16.00 per megabyte. Adjudicator DeVries held that the fact that parties wishing to access the information in the Land Information Ontario data base must enter into an agreement which put some restrictions on the uses of the information did not affect the fact that the information was publically available through a regularized system of access.

[26] The police also refer to and distinguish Order PO-2737, where the requester sought access from the Ministry of Community Safety and Correctional Services (MCSCS) to a specified radar manual that was used by a specified police officer on a specified date. MCSCS denied access relying on section 22(a) of *FIPPA*.

[27] In Order PO-2737, there was no evidence from the institution or the manufacturer that the actual Operator's Manual requested in that appeal for the specified Radar Speed Detection System was actually available through the U.S. website. As well, the institution and the affected party failed to provide sufficiently cogent evidence to establish that the requested Operator's Manual for the specified

¹³ Order PO-1655.

¹⁴ Order MO-1573.

¹⁵ Order MO-2280.

¹⁶ Orders P-159, PO-1655, MO-1411 and MO-1573.

¹⁷ Order MO-1573.

¹⁸ Now Senior Adjudicator Frank DeVries.

¹⁹ The provincial equivalent to section 15(a) of *MFIPPA*.

Radar Speed Detection System was "available to everyone". Finally, there was a lack of a consistent approach to pricing of the manuals. Accordingly, Adjudicator Steven Faughnan found that the section 22(a) discretionary exemption in *FIPPA* did not apply in the circumstances of that appeal.

[28] Unlike the situation in Order PO-2737, in this appeal I do not have evidence that the actual requested manuals are not available to everyone and that there is not a consistent approach to pricing of these manuals.

[29] In this appeal, the appellant has been afforded access to the information through a regularized system of access allowing him to view the records at no cost and to purchase the records at a consistent pricing structure directly from the manufacturers. The records in this appeal are available to everyone and there is a consistent pricing structure that is applied to all who wish to obtain them.

[30] I agree with the police's representations and their supporting case law and find that section 15(a) applies. I agree with the police that the appellant was not denied access to his request for "copies" of the manuals in question, as he was directed to the regularized system of access to those manuals.

[31] Relying on the police's representations and in the absence of representations from the appellant, I find that the records in this appeal are currently available to the public through a regularized system of access. Therefore, I find that section 15(a) of *MFIPPA* applies. Subject to my review of the police's exercise of discretion, the records are exempt under section 15(a).

B. Did the institution exercise its discretion under section 15? If so, should this office uphold the exercise of discretion?

[32] The section 15 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[33] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[34] In either case this office may send the matter back to the institution for an

exercise of discretion based on proper considerations.²⁰ This office may not, however, substitute its own discretion for that of the institution.²¹

[35] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²²

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[36] The police state the overarching purpose of the *Act* is to ensure that information be made available to the public. They state that access was specifically provided to the appellant as far back as December 2014 and is provided in a like manner on a daily basis (Monday to Friday 8:30 - 4:30) to any member of the public. They also refer to ability of anyone to order copies directly from the manufacturers at a consistent pricing

²⁰ Order MO-1573.

²¹ Section 43(2).

²² Orders P-344 and MO-1573.

structure.

[37] Based on my review of the police's representations, I find that they have exercised their discretion in a proper manner, taking into account relevant considerations and not taking into account irrelevant considerations. Accordingly, I am upholding the police's exercise of discretion and find that the records are exempt under section 15(a) of *MFIPPA*.

ORDER:

I uphold the police's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ April 22, 2016