

Manitoba Ombudsman

**REPORT WITH RECOMMENDATION ISSUED ON APRIL 18, 2017
AND
REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER
THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT**

CASE 2015-0338

CITY OF WINNIPEG – WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 7(1), 25(1)(e)

PUBLICLY RELEASED ON JUNE 19, 2017

SUMMARY OF REPORT WITH RECOMMENDATION AND RESPONSE:

A request was made under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg – Winnipeg Police Service (WPS) for access to the current list of all mobile photo radar enforcement locations with assigned location codes as well as access to records containing locations for enforced construction zones with assigned codes for each year since the beginning of photo enforcement. The WPS provided access to the requested information in part with some information severed as falling under clause 25(1)(e) of FIPPA (endanger the life or safety of a law enforcement officer). Based on the results of our investigation, the ombudsman found that the WPS did not establish the application of the cited exception to most of the information severed from the responsive record. Our office found that the cited exception did apply to that part of the record providing information about mobile photo radar enforcement locations on private property. The ombudsman therefore recommended the release to the applicant of the record remaining at issue (consisting of the current list of all mobile photo radar enforcement locations with assigned location codes) while continuing to sever the information relating to photo enforcement on private property.

On April 20, 2017 the City of Winnipeg – Winnipeg Police Service provided its response to the ombudsman's report accepting the recommendation. The WPS requested additional time to comply with the recommendation and the ombudsman agreed to an extension.

On May 9, 2017 the WPS reported to the ombudsman that it had complied with the recommendation to release to the applicant the document titled 'Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)' without severing with the exception of those portions relating to the deployment of photo radar enforcement on private property.

Manitoba Ombudsman

REPORT WITH RECOMMENDATION UNDER

THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2015-0338

CITY OF WINNIPEG - WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

PROVISIONS CONSIDERED: 7(1), 25(1)(e)

REPORT ISSUED ON APRIL 18, 2017

SUMMARY: The complainant made a request under the Freedom of Information and Protection of Privacy Act (FIPPA) to the City of Winnipeg – Winnipeg Police Service (WPS) for access to a record containing the current list of all mobile photo radar enforcement locations with assigned location codes as well as access to records containing locations for enforced construction zones with assigned codes for each year since the beginning of photo enforcement. The WPS initially responded citing subsection 7(1) of FIPPA (right of access) and stating that it did not have custody or control of the requested records as they were maintained by a third party service provider. On receiving a complaint of refused access the ombudsman advised the WPS that it was the view of our office (as articulated in previous complaint investigations) that records associated with photo radar enforcement, although in the custody of a service provider, are in the control of the WPS for the purposes of giving access under FIPPA as all records of photo safety technology offences remain the property of the WPS under the service provider agreement. The WPS subsequently issued a revised access decision, providing access to the requested information in part with some information severed as falling under clause 25(1)(e) of FIPPA (endanger the life or safety of a law enforcement officer). The complainant wished to continue the complaint of refused access and, based on the results of our investigation, the ombudsman found that the WPS had failed to establish the application of the cited exception to most of

the information severed from the responsive record. Our office found that the cited exception did apply to that part of the record providing information about mobile photo radar enforcement locations on private property. The ombudsman therefore recommended the release to the applicant of the record remaining at issue (consisting of the current list of all mobile photo radar enforcement locations with assigned location codes) while continuing to sever the information relating to photo enforcement on private property.

COMPLAINT AND PRELIMINARY MATTERS

On August 25, 2015, the complainant requested access from the City of Winnipeg - Winnipeg Police Service (WPS or the public body) to the following records under the Freedom of Information and Protection of Privacy Act (FIPPA):

Please provide the following lists:

- 1-Current list of all mobile photo enforcement locations by location code;*
- 2-Lists for each year since beginning of photo enforcement for enforced construction zones with locations and assigned codes (should be 7### number codes).*

On September 21, 2015 the WPS issued a decision refusing access and citing subsection 7(1) of FIPPA:

Right of access

7(1) Subject to this Act, an applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

The WPS explained in its decision letter that it did not have custody or control as the records requested are maintained by a third party service provider. A complaint of refused access relating to this decision by the WPS was received in our office on November 20, 2015.

On receiving the complaint our office contacted the WPS on December 11, 2015. We explained that our office has investigated previous complaints of refused access against the WPS where the WPS initially took the view that records relating to photo radar enforcement were in the custody and/or under the control of a third party. We drew the attention of the WPS to our investigation report in a previous complaint of refused access to similar information. It reads, in part:

...our office reviewed the provisions of FIPPA pertaining to custody or control of records and the role played by contracted third party service providers. Even though a public body (such as the City) may not have physical custody of a record, if it has retained the services of

a contractor to create and house the record on its behalf then that record is typically considered to be in the control of the public body for the purposes of FIPPA. A public body cannot contract out of its responsibilities under FIPPA to provide access to records that it would ordinarily hold under its control such as, in this case, records associated with a law enforcement activity.

We noted that the RFP for the supply, installation and operation of the current photo enforcement system (RFP No. 576-2012, Part D Supplemental Conditions, p.4) stipulates:

D6.6 All photographs, images, and records of Photo Safety Technology offences that exist electronically or in hard copy are the property of The Winnipeg Police Service.

This indicated to our office that the records associated with photo radar enforcement are in the control of the WPS for the purposes of FIPPA.

Further, the complainant pointed out to us the similarity of this request with another which he had made previously to the City of Winnipeg. In response to that request a list of photo radar locations with assigned codes was provided to him. The complainant explained to our office that he had made the request which is the subject of this complaint as he wished to have a list of mobile photo enforcement locations (with codes and including construction zones) current to August 2015. As similar information requested by the complainant (albeit a different date range) had been provided to him in the past, he was confused as to why it could not be provided to him in response to his current request.

In light of the foregoing our office asked the WPS to reconsider its response to the complainant's request and issue a response which identified the records responsive to the complainant's request and rendered a decision concerning access.

On January 29, 2016 the WPS issued a revised decision in response to the complainant's request and provided a copy to our office. Access was provided, in part, to two documents identified by the WPS in its decision letter as follows:

- 1) Construction Photo Radar Locs with '7' codes (1 page)
- 2) Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)

In its decision letter the WPS explained to the complainant that, in order to protect the personal safety of operators and officers, the names of parks and schools and some location identifiers were severed from the 35 page document (Record #2) as allowed under clause 25(1)(e) of FIPPA as the disclosure of this information could reasonably be expected to endanger the life or safety of a law enforcement officer or any other person.

THE RESPONSIVE RECORD AND INFORMATION AT ISSUE

The WPS issued a revised decision letter on January 29, 2016 stating that access had been partly granted to two documents as follows:

1. Construction Photo Radar Locations with '7' Codes (1 page)
2. Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)¹

Copies of responsive items were provided to our office at the same time as severed items were provided to the complainant. On reviewing the responsive record, we noted that document '2' also included pages titled as follows:

3. Photo Radar Locations – Reduced Speed School Zones
4. Dragon Cam² Locations (including 'Construction')
5. Dragon Cam Locations - Reduced Speed School Zones

For the 35 page document provided (items numbered 2-5 above) the columns were titled as follows:

- A. Dist[ri]ct³ (Each table is ordered by district, numbered 1 through 6)
- B. Code #
- C. Direction (i.e. EB for East Bound)
- D. Enforced Street
- E. From (i.e. E/O)
- F. Cross Street
- G. [Posted] Speed
- H. School/Park - for Dragon Cam locations this is indicated as 'Type (i.e. 'S' or 'P')
- I. Deployment Site (i.e. "Deploy from alongside fence parallel to church")

In issuing its decision, the WPS explained that to protect the personal safety of operators and officers some information was severed from the items provided to the complainant as allowed under clause 25(1)(e). The cited exception reads:

¹ Also including one page of Photo Radar Locations and one page of Dragon Cam locations headed 'Construction'. Dragon Cam locations are partial duplicate of Item 1.

² Our office understands the DragonCam system to be an operator-present laser-based digital imaging enforcement system capable of capturing high resolution images and video of vehicles violating preset speed limits. The unit consists of DragonEye's IACP-certified LIDAR detection unit integrated with a high performance camera system and a tablet computer. The LIDAR unit may be hand held.

³ The City of Winnipeg is currently divided into four distinct police districts. Each of these districts has a corresponding operational division working within its boundaries. In 2003, city council approved a plan by the Winnipeg Police Service to proceed with a four district model, from the former six district configuration.

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

(e) endanger the life or safety of a law enforcement officer or any other person;

Our office notes that FIPPA defines law enforcement as actions taken for the purpose of enforcing an enactment (such as the Highway Traffic Act). As explained in the ‘FIPPA for Public Bodies Resource Manual’ (the FIPPA Resource Manual)⁴ law enforcement is not limited to the investigative activities of police forces but includes a wide variety of investigations and actions taken by public bodies, if they are undertaken for the purpose of enforcing an enactment. The phrase "any other person" extends the protection provided by the exception in clause 25(1)(e) to individuals who are not law enforcement officers. Our office accepts that this would include photo radar officers charged with the enforcement of the provisions of the Highway Traffic Act relating to vehicle speed.

On examining the document provided, our office determined the information severed to have been all information relating to location contained in the following columns:

D. Enforced Street

F. Cross Street

Information in Column ‘H’ (School/Park or ‘Type’) and Column ‘I’ (Deployment Site) was partially severed, with some information from these columns provided to the complainant. All information in columns ‘A’ through ‘I’ on two pages labelled ‘Construction’ in the larger document was released to the complainant in full.

The single page titled ‘Construction Photo Radar Locations with ‘7’ Codes’ was undated and contains Code Numbers, Enforced Street, and Type (Speed-Construction) for 39 enforcement locations. No severing is indicated on the copy provided to the complainant.

On receiving the records released to him by the WPS, the complainant contacted our office. He explained that it was his belief that, as construction zones are not permanent, new construction zone codes are assigned for each new construction season. As a result, he believed there should be a different location code list for each year designated construction zone speed limits (with photo enforcement) have been in effect and more records relating to construction zones should exist.

⁴ While our office is not bound by the information contained in the FIPPA Resource Manual, we frequently consider it as it was created by the Manitoba government as a reference to assist public bodies in meeting the requirements of FIPPA.

At our request, the WPS conducted a further search for records and on April 12, 2016 provided our office with a copy of a three-page document (also undated). These pages contain Code Numbers and Enforced Street for a number of construction locations, some of the locations and codes are duplicates of those found on the other ‘Construction’ pages already provided to the complainant. The WPS has provided information to our office which indicates that it had conducted a reasonable search for further records and no further records regarding construction zone codes could be located.

At this point in our investigation turned to an analysis of the application of clause 25(1)(e) to the information severed from the list of all current mobile photo enforcement locations and associated location codes which had been provided to the complainant.

POSITION OF THE COMPLAINANT

As noted earlier, in information accompanying his complaint, the complainant had pointed out to our office the similarity of this access request to another which he had made previously in 2011. In response to that request a list of photo radar locations with associated codes was provided to him. A copy of the previous release was provided to us by the complainant with his complaint (and also, at our request, by the WPS on April 12, 2016).

The columns on this document were titled as follows:

- A. Dist[ri]ct] (Each table is ordered by District, numbered 1 through 6)
- B. Code #
- C. Direction (i.e. EB for East Bound)
- D. Enforced Street
- E. From (i.e. E/O)
- F. Cross Street
- G. [Posted] Speed
- H. School/Park - indicated as ‘Type (i.e. ‘S’ or ‘P’) but not named

Our office noted that the list released to the complainant in response to his 2011 access request did not include the column titled ‘Deployment Site.’ Further, the list previously provided was not named. However, by comparing Location Codes between the document previously provided to the complainant in response to his 2011 request and the document provided to us on January 29, 2016 we determined that the earlier list included major portions of the 2016 list “Photo Radar Locations – Regular Speed” (not including the page relating to Construction Zones). Our office concluded that the complainant had been previously provided with some of the location information (i.e. enforced street and cross street) which was now severed from the document provided to him on January 29, 2016.

POSITION OF THE PUBLIC BODY

The WPS explained in its revised access decision letter to the complainant that the WPS relied on clause 25(1)(e) of FIPPA (endanger the life or safety of a law enforcement officer) to sever “locations, names of parks and schools, and some location identifiers” from the information provided. The WPS explained that, “because the list of current locations is quite large, on the face of it, there does not appear to be safety issues for operators and/or officers who are conducting enforcement.” However, the WPS further explained, an issue could arise if these locations were combined with other data. The concern was expressed that, “higher frequency areas would be identified and potentially targeted.” The WPS explained to our office that, if higher frequency areas were identified through other data that may be released by the WPS, this information could identify those locations more frequently attended thereby endangering the safety of photo enforcement officers in those locations.

The WPS explained to the complainant that the identified safety concerns only apply to static mobile enforcement locations. Access was provided to the pages relating to construction zones without severing “because they are continually changing.” Our office notes that construction zones do change more frequently according to the construction schedule; however, we observe that the same sites may be active for a full season or longer.

On February 26, 2016 our office asked the WPS to provide further representations which supported the public body’s reliance on clause 25(1)(e) of FIPPA, especially in light of the fact that a sizable portion of the now severed information had been provided to the complainant previously. The WPS explained that the 2011 document provided did not contain the column titled ‘Deployment Site.’ Further, it did not name schools or parks, but simply indicated ‘S’ or ‘P.’ We note that information in column ‘D – Enforced Street’ and column ‘F-Cross Street’ in the 2011 document was provided to the complainant without severing.

In response to our request for information which would support the position that disclosure of the withheld information could result in harm to law enforcement officers, the WPS provided our office with evidence that described incidents of harassing or intimidating behaviour towards photo enforcement operators (or their vehicles) while they were set up at enforcement locations during 2014, 2015 and 2016. The WPS also provided our office with a copy of communication it had received from the third party service provider stating that the frequency of occasions of harassment and intimidation against photo enforcement operators and/or their vehicles appeared to be increasing.

The WPS also referenced a previous complaint investigation conducted by our office which concluded that its safety concerns associated with photo radar units located on private property were reasonable. The WPS requested that our office consider the same safety concerns could still be valid for photo radar units located on public property.

ANALYSIS OF ISSUES AND FINDINGS

Is the information severed from the records provided to the complainant on January 29, 2016 subject to the discretionary exception allowed under clause 25(1)(e) of FIPPA?

In order for the clause 25(1)(e) of FIPPA to apply, there must be a reasonable expectation that the harm described in the exception will directly result from the disclosure of the withheld information. The Supreme Court of Canada⁵ has described the standard of proof as requiring a reasonable expectation of probable harm. The standard is between what is probable and what is possible, and it requires a public body to provide evidence “well beyond” or “considerably above” a mere possibility of harm. A public body must establish that there is a clear and direct connection between the disclosure of the information in question and the harm that is alleged. Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.

Our office thoroughly reviewed the evidence provided for our review by the WPS. We acknowledge that there have been incidents of harassing and intimidating behaviour towards photo enforcement operators which are understandably concerning. However, it is our view that the WPS has not established a clear and direct connection between knowledge of all potential photo enforcement locations and the risk of the harms (described in the evidence provided to us) to photo enforcement operators. The WPS has not provided evidence by which we could conclude that the described incidents were premeditated in nature and not opportunistic acts on the part of individuals who noted the presence of a photo enforcement vehicle and took the opportunity to harass the operator or cause damage to the vehicles. We note that the number of enforcement vehicles is small in number⁶ compared to the number of possible locations where mobile enforcement may be stationed. We also note that the complainant has not requested the enforcement schedule whereby photo enforcement operators are deployed on a daily basis and the responsive record (a list of all possible enforcement locations) would not permit him to identify currently enforced locations in real time.

We have noted that some of the information now withheld from the complainant was previously released in response to an earlier access request. Although the earlier document did not give the actual names of schools or parks or actual deployment spots, this information could easily be discerned from the enforced street and cross street information which was provided at the time.

⁵ SCR 674, [2014 SCC 31 \(CanLII\)](#) [*Ontario*] at para. 54, citing *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, [2012 SCC 3 \(CanLII\)](#) [*Merck*] at paras. 197 and 199.

⁶ According to information posted on WPS web pages about the photo radar enforcement program there are currently 10 mobile photo radar vehicles that operate and enforce speed violations in school, playground and construction zones throughout the city. [Accessed at <http://www.winnipeg.ca/police/safestreeets/faqs.stm> on March 15, 2017.] Possible enforcement locations on the record determined to be responsive (list of photo radar locations with location codes) number approximately 618 regular speed and reduced speed locations (not including construction zones and dragon cam locations). There are approximately 170 school zones in Winnipeg. Our office notes that each school (or playground) may be surrounded by up to 4 possible enforcement locations.

We note that photo enforcement vehicles are easily identifiable. Further, information relating to the “Photo Radar Locations – Reduced Speed School Zones” is publicly available (albeit not in the same form as the responsive record) as a schedule attached to City of Winnipeg By-Law No. 76/2014. While there is undoubtedly an inherent risk of harm in mobile photo enforcement work, it was not clear to us that making the more complete list of locations available to the complainant would increase the risk of harm in an appreciable way.

Our office further noted that if information had previously been provided to an access applicant, to refuse access to similar information at a later date would require an appreciable change to the conditions/context under which the information had been provided previously such that harm which was not previously extant is now probable. Although the WPS provided our office with anecdotal evidence, it has not provided objective data which would support the contention that incidents of harassment and vandalism against photo enforcement operators or their vehicles are, in fact, increasing.

In the course of this investigation the WPS had raised to our office the possibility that the responsive record could be combined with other data identifying those locations where more tickets are issued thereby increasing the risk to photo enforcement operators in those locations. It seemed to our office that this conclusion is based on a belief that a higher number of tickets result when photo enforcement operators attend a location more often. Our office also noted that, to our knowledge, data on the number of tickets issued for each location is not currently publicly available and the WPS did not identify a publicly available source for this information. In the view of this office, the application of exceptions to withhold information cannot be predicated on what may or may not be released in response to another access request in the future. For the harm alleged to be probable (and not merely possible) the information must currently be publicly available. In our view a higher frequency of violations could result for other reasons, such as higher traffic volume and time of day or factors unique to the location such as the placement of speed limit signage. The WPS did not provide our office with evidence which supports a direct connection between a high number of violations and the increased presence of photo enforcement officers.

Our office concluded that, in the absence of further compelling representations from the WPS, we were of the view that the WPS had not established a direct connection between the release of the information requested and the harm specified. Therefore, we could not conclude that the exception cited could be applied to withhold the information requested by the complainant and this finding supports our recommendation to release this information.

Our office acknowledges that the probability of harm associated with mobile enforcement on private property has been established. We observe that the risk of harm attaches to the property even if the enforcement vehicle is not present. Photo enforcement locations on private property are few, do not move and are, therefore, predictable. Further, third party owners of private

property are always on site and are at risk of retaliation even when photo enforcement vehicles are not present. Thus, these locations are distinguished from the public locations where mobile enforcement vehicles may or may not be positioned. In our view, information related to mobile enforcement on private property may reasonably continue to be severed from any information provided to the complainant.

Our office advised the WPS of our conclusions on October 17, 2016 and on October 31, 2016 the WPS provided our office with supplemental representations.

SUPPLEMENTAL REPRESENTATIONS OF THE PUBLIC BODY AND THE EXERCISE OF DISCRETION

The WPS disagreed with the conclusion reached by our office that the WPS had not established a direct connection between the release of the information requested and the probability of the harm specified. The WPS stated that it continued to believe that the safety of photo radar operators “can be jeopardized from the disclosure of [all possible] mobile enforcement locations,” especially in combination with other data on the frequency of violations. The WPS expressed concern as to “what might happen” if individuals had the means to accurately foresee where photo radar operators would be. The WPS predicted that, if the current list of [all possible] mobile enforcement locations was released, the frequency of violent encounters would increase leading to the assault of a photo radar enforcement operator.

The WPS stated that (what it viewed as) the basis for our conclusion that a direct connection between the release of the requested information and harm to personnel had not been established – that it is already public knowledge what locations are enforceable – was inaccurate. Our office had previously noted that information relating to the “Photo Radar Locations – Reduced Speed School Zones” is publicly available (albeit not in the same form as the responsive record) as a schedule attached to City of Winnipeg By-Law No. 76/2014. To this our office would add that subsection 257.1(2) of Manitoba’s Highway Traffic Act (HTA) specifies that the use of image capturing enforcement systems (photo radar) is restricted to locations adjacent to schools, parks and construction sites. Subsection 257.1(2) of the HTA reads:

Limitations re speed limit enforcement

257.1(2) *Without limiting the generality of subsection (1), when municipalities and peace officers acting on behalf of municipalities or the government use image capturing enforcement systems for speed limit enforcement, they may only use them to detect speed limit violations that occur*

- (a) in construction zones, playground zones and school zones; and*
- (b) at intersections that are controlled by traffic control lights.*

Our office submits that there is already wide public awareness of the types of locations where photo radar enforcement may take place. The possession of a list of all possible mobile enforcement locations does not reveal which locations are more likely to be enforced on any given day or where photo radar enforcement operators may predictably be found at any point in time. As noted on page eight above, the odds of predicting the location of photo radar enforcement operators are made difficult by the low ratio of photo enforcement vehicles to the high number possible locations. In the view of our office, it is direct observation and experience that tells the public that some locations are more frequently enforced than others.

In order to better understand the basis for the WPS position in this matter, our office asked the WPS if there was evidence or information about an actual threat being made by the complainant or others which would increase the likelihood of future harm if the requested information were provided to the complainant. The WPS pointed to the arrest of an individual in 2013 for obstructing a peace officer (a photo radar enforcement operator). However, the WPS did not provide any information that it has a well-founded reason to believe that the complainant or others have plans to use the requested information to target enforcement officers if the complainant should receive it.

The WPS also raised clause 17(3)(d) of FIPPA (disclosure may unfairly expose the third party to harm) based on reasons given in the Supreme Court of Canada case 2014 SCC 31, para 42. In that case the court found there is no distinction between an identifiable person and their location; however, it is the view of our office that this reference is not applicable in this case. The location in 2014 SCC 31 is the home address of a sex offender as discerned from the complete postal code – and an individual's home address is personal information under FIPPA. In our view, photo enforcement operators are not personally identifiable from the random locations where they may (or may not) be assigned to conduct enforcement unless someone happens to recognize them on site; once again, a serendipitous occurrence.

In continuing to oppose the release of this information, the WPS also stated that the traffic division commanding officer is preserving the public peace and preventing crime as is his duty under 25 (1)(b) of the Criminal Code:

Protection of persons acting under authority

25 (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law

- (a) as a private person,***
- (b) as a peace officer or public officer,***
- (c) in aid of a peace officer or public officer, or***
- (d) by virtue of his office,***

is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

We note, the protection afforded by the section precludes attaching criminal liability to the authorized person's actions when engaged in law enforcement. In citing this subsection of the Criminal Code, the WPS has made reference to the concept of paramountcy, in effect stating that the Criminal Code takes precedence over FIPPA where this is a conflict.

We note the doctrine of 'paramountcy' establishes that, where there is a conflict between valid provincial and federal laws, the federal law will prevail and the provincial law will be inoperative to the extent that it conflicts with the federal law. For example, records that relate to persons dealt with under the federal Youth Criminal Justice Act are not governed by FIPPA. The Supreme Court has held that there must be an "operational incompatibility" between the laws in order for the federal law to prevail. In other words, compliance with one statute must result in a breach of the other. Our office does not agree that is the case here as 25(1)(b) of the Criminal Code does not relate to access to records but rather, the use of necessary force in law enforcement.

By way of clarification the WPS has explained that it was not raising the issue of paramountcy but rather saying that individual police officers, including the traffic division commanding officer, have independence and discretion when it comes to operational matters, in this case, the safety of photo enforcement personnel. The WPS had stated in earlier representations that the ombudsman does not have the authority to 'second guess' the discretion of a police officer who is carrying out his or her lawful operational duties in refusing access to the requested information. We note that it is the role of our office to investigate that exceptions to access have been applied appropriately. Our office considered the WPS representations in light of the fact that clause 25(1)(e) of FIPPA is a discretionary exception to access. Discretionary exceptions, such as clause 25(1)(e), provide the head of a public body with discretion to disclose rather than withhold information in a record even though the information can be shown to fall under the cited exception to access.

However, we note that determining whether to apply a discretionary exception involves two steps, the first of which is establishing whether or not the requested information falls within the exception to access. If it cannot be established that the information falls under the exception, the public body does not move forward to the step of exercising discretion in making the decision whether or not to disclose the requested information.

Our office acknowledges that we may not usurp the exercise of discretion by the public body. If we agree that a public body has established that a discretionary exception applies to requested information, our role would then be limited to confirming whether the public body had

reasonably exercised its discretion, taking into account all relevant factors, when deciding to withhold rather than release the information at issue.

In this case, because we cannot conclude that the exception applies to the withheld information, it is not open to us to consider the public body's arguments relating to the exercise of discretion.

Late in the investigation process, the WPS proposed the release to the complainant of the names of schools and parks (the information contained in column H of the document released to the complainant). Information relating to enforced streets and cross streets (columns D, E and F) would continue to be severed. Our office explained the WPS's offer to the complainant who noted that some schools and parks have a number of possibly enforceable zones but not all are enforced (and thus a location code may not be assigned). As the complainant was interested in the locations that are actually enforced for the purpose of comparing that data to historical enforcement data and noting changes over time, the continued severing of the data in columns D, E and F was not acceptable to him. Our office, therefore, proceeded to conclude our investigation.

COMMENT

Our office is aware of the concerns expressed by many police officers, including those of the WPS, regarding public access to information which makes available the actual locations of police officers and peace officers (such as photo radar enforcement operators) while on duty. We acknowledge that there are real concerns that such knowledge could compromise the safety of officers.

However, from our review of the public discourse on this subject our office notes that officer concerns regarding public knowledge of officer whereabouts primarily relate to social media applications, such as the Facebook groups which publicized the location of Winnipeg's 'Checkstop' enforcement locations or real time traffic monitoring applications which allow users to enter the locality of police vehicles observed to be engaging in speed enforcement.

It is the view of our office that the information which is the subject of this complaint investigation will not allow individuals to more easily identify the actual locations of radar photo enforcement than is already possible through direct observation of photo enforcement units in situ. Further, it is our view that withholding this information from access will not protect photo enforcement operators or their vehicles from opportunistic acts on the part of individuals who note the presence of a photo enforcement unit and take advantage of the opportunity to harass or threaten the operator or cause damage to the photo enforcement vehicles.

RECOMMENDATION

The ombudsman found that the application of the cited exception to the information withheld from the complainant was not authorized with the exception of those portions relating to the deployment of photo radar enforcement on private property.

Based on our finding, the ombudsman is recommending that the City of Winnipeg – Winnipeg Police Service release to the applicant the document titled ‘Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)’ without severing with the exception of those portions relating to the deployment of photo radar enforcement on private property.

HEAD’S RESPONSE TO THE RECOMMENDATION

Under subsection 66(4), the City of Winnipeg – Winnipeg Police Service must respond to the ombudsman’s report in writing within 15 days of receiving this report. As this report is being sent by courier to the head on this date, the head shall respond by May 3, 2017. The head’s response must contain the following information:

Head's response to the report

66(4) *If the report contains recommendations, the head of the public body shall, within 15 days after receiving the report, send the Ombudsman a written response indicating*

- (a) that the head accepts the recommendations and describing any action the head has taken or proposes to take to implement them; or*
- (b) the reasons why the head refuses to take action to implement the recommendations.*

OMBUDSMAN TO NOTIFY THE COMPLAINANT OF THE HEAD’S RESPONSE

When the ombudsman has received the City of Winnipeg – Winnipeg Police Service’s response to her recommendation, she will notify the complainant about the head’s response as required under subsection 66(5).

HEAD’S COMPLIANCE WITH THE RECOMMENDATION

If the head accepts the recommendation, subsection 66(6) requires the head to comply with the recommendation within 15 days of acceptance of the recommendation or within an additional period if the ombudsman considers it to be reasonable. Accordingly, the head should provide written notice to the ombudsman and information to demonstrate that the public body has complied with the recommendation and did so within the specified time period.

Alternatively, if the head believes that an additional period of time is required to comply with the recommendation, the head's response to the ombudsman under subsection 66(4) must include a request that the ombudsman consider an additional period of time for compliance with the recommendation. A request for additional time must include the number of days being requested and the reasons why the additional time is needed.

April 18, 2017
Manitoba Ombudsman

Manitoba mbudsman

REPORT ON COMPLIANCE WITH RECOMMENDATION UNDER THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2015-0338

CITY OF WINNIPEG –
WINNIPEG POLICE SERVICE

ACCESS COMPLAINT: REFUSAL OF ACCESS

SUMMARY: On April 20, 2017 the City of Winnipeg – Winnipeg Police Service (WPS) provided its response to the ombudsman’s report with a recommendation under the Freedom of Information and Protection of Privacy Act accepting the recommendation. The city requested additional time to comply with the recommendation and the ombudsman agreed to an extension. On May 9, 2017 the WPS reported to the ombudsman that it had complied with the recommendation to release to the applicant the document titled ‘Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)’ without severing with the exception of those portions relating to the deployment of photo radar enforcement on private property.

COMPLIANCE WITH THE RECOMMENDATIONS

On April 18, 2017 the ombudsman issued a report with a recommendation in this case following investigation of a complaint of refused access against the City of Winnipeg – Winnipeg Police Service (WPS) under the Freedom of Information and Protection of Privacy Act (FIPPA). On April 20, 2017 the WPS responded to the ombudsman accepting the recommendation, which was as follows:

...the Ombudsman is recommending that the City of Winnipeg – Winnipeg Police Service release to the applicant the document titled ‘Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)’ without severing with the exception of those portions relating to the deployment of photo radar enforcement on private property.

Under subsection 66(6) of FIPPA, when a public body accepts a recommendation it is required to comply with the recommendation within 15 days or within such additional time as the ombudsman considers reasonable. In accepting the recommendation, the WPS requested an additional 7 days to comply, extending the period for compliance to 22 days. The WPS explained that the additional time was required to consult with staff and to review and sever information relating to photo enforcement on private property from the records.

On April 20, 2017 the ombudsman responded that the deadline for compliance with the recommendation in this matter was extended to May 12, 2017. As required under subsection 66(5) of FIPPA, the complainant was notified regarding the city's response to the recommendation in this matter without delay.

On May 9, 2017 the WPS reported to the ombudsman that it had complied with the recommendation to release to the applicant the document titled 'Photo Radar Locations – Regular Speed – effective 2016-01-21 (35 pages)' without severing with the exception of those portions relating to the deployment of photo radar enforcement on private property.

Information related to the deployment of photo radar enforcement on private property was severed as allowed by the exception described under clause 25(1)(e) of FIPPA. The cited exception reads:

Disclosure harmful to law enforcement or legal proceedings

25(1) *The head of a public body may refuse to disclose information to an applicant if disclosure could reasonably be expected to*

(e) endanger the life or safety of a law enforcement officer or any other person;

Our office acknowledged that the probability of harm associated with mobile enforcement on private property has been established by the WPS. We observed that the risk of harm attaches to the property even if the enforcement vehicle is not present. Photo enforcement locations on private property are few, do not move and are, therefore, predictable. Further, third party owners of private property are always on site and are at risk of retaliation even when photo enforcement vehicles are not present. Thus, these locations are distinguished from the public locations where mobile enforcement vehicles may or may not be positioned. In our view, information related to mobile enforcement on private property may reasonably continue to be severed from any information provided to the complainant.

As required by subsection 66(5) of the Freedom of Information and Protection of Privacy Act, the ombudsman is advising the complainant by this report that she will not be requesting the information and privacy adjudicator to review this matter.

In accordance with subsection 67(3) of the Freedom of Information and Protection of Privacy Act, the complainant may appeal the City of Winnipeg – Winnipeg Police Service’s decision to refuse access to the information severed to the Court of Queen’s Bench within 30 days of receiving this report.

SUMMARY

The ombudsman is satisfied that the City of Winnipeg – Winnipeg Police Service has complied with the recommendation contained in our report.

Charlene Paquin
Manitoba Ombudsman
May 26, 2017