

# Manitoba Ombudsman

## REPORT UNDER

## THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

CASE 2016-0214

### CITY OF WINNIPEG – WINNIPEG POLICE SERVICE

#### ACCESS COMPLAINT: REFUSED ACCESS

PROVISION CONSIDERED: 7(1) and 25(1)(e)

REPORT ISSUED ON DECEMBER 1, 2017

**SUMMARY:** The complainant requested information regarding mobile photo traffic enforcement. The public body refused access on the basis that it did not have custody or control of the requested records. Based on our review, we determined that the public body did have both custody and control of the responsive information. Subsequently, the public body provided access to information which satisfied the complainant's access request. As such, we determined the complaint to be supported.

### THE COMPLAINT

The complainant requested the City of Winnipeg – Winnipeg Police Service (the WPS or the public body) provide the following records under the Freedom of Information and Protection of Privacy Act (FIPPA or the act) on June 1, 2016:

*The Winnipeg Police's mobile Image Capturing Enforcement System offense notices (i.e. photo radar tickets), contains many data fields, including vehicle speed, fine amount, location of offense, etc. These data are gathered, stored electronically and used to ultimately print the offense notices mailed to motorists.*

*As per the contract between the WPS and the vendor, "...information provided to or acquired by the contractor are the property of the City", "All photographs, images, and records of photo safety technology that exist electronically or in hard copy are the property of the Winnipeg Police Service", and "The city shall have free access at all proper times to such records and the right to examine and audit [...] and inspect all data, documents, proceedings and activities".*

*As such – for the period between January 1, 2016 to May 1, 2016 – please provide an electronic, coma-delimited [sic.], machine-readable file that contains the following*

*records for each offense notice issued: time and date of infraction, vehicle speed, posted speed limit, fine amount, location of offense (road, lane direction and nearest crossroad. If infraction is identified as a code or ID, please provide reference guide for location codes or IDs). If it is simpler to provide all records – excluding those that present privacy issues – that would satisfy my request as well.*

The public body responded on June 27, 2016. In its access decision it advised that it did not have custody or control of the requested records, and referred to subsection 7(1) of FIPPA to support its decision.

A complaint disputing the decision regarding custody and control of the responsive records was received by our office on July 12, 2016.

### **INVESTIGATION OF THE DECISION THAT THE RECORDS ARE NOT IN CUSTODY OR CONTROL OF THE WPS**

In its access decision, the WPS had advised that it did not have custody or control over the electronic records requested by the complainant and it referenced subsection 7(1) of FIPPA. This provision reads as follows:

***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.*

Our office contacted the WPS on July 19, 2016, to notify the public body of the complaint and request clarification with regard to its access decision. We referred to the Request For Proposal, the document that specifies the conditions of the agreement between the WPS and the vendor that provides photo enforcement services, which states in part that “all deliverables produced or developed, and information provided to or acquired by the Contractor are the property of the City” and that “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.”

We asked the WPS to consider the conditions of the vendor service agreement and to clarify how it determined that it did not have custody or control of records responsive to the complainant’s access request, in light of the terms of the agreement.

The public body responded to our office on August 11, 2016. In its representations, the WPS advised that a Tri-Party Agreement<sup>1</sup> (the agreement) is in place between the Province of Manitoba, the City of Winnipeg, and the third party contractor. The WPS stated that upon consultation with the Central Traffic Unit and upon review of the agreement, it determined that the WPS does not have custody of the records in the format being requested by the complainant

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<sup>1</sup> The details of this Agreement are contained in the City of Winnipeg Bid Opportunity No. 576-2012. This document is publicly available and can be found online at the City of Winnipeg’s website at: <http://www.winnipeg.ca/finance/findata/matmgmt/bidres/Past/2012.asp>

and that the contractor is not obligated by the agreement to provide records in the requested format to the WPS.

The WPS further advised that while it has access to the contractor's database that contains the information being requested, in order to provide responsive records, the WPS would be required to: print each ticket; review each ticket for the date and time of the infraction, vehicle speed, posted speed limit, fine amount, and location of the offence; and enter the data onto a spreadsheet.

The WPS also indicated that the requested information was "personal information" and that to use and access this information for the purpose of responding to this access request would be in violation of the agreement. In support of this position, the WPS referred to sections 4.1 and 15.2 of the agreement, which read as follows:

*4.1 The Personal Information may only be used to issue offence notices to the registered owner of those vehicles captured by the ICE System and determined to have violated those provisions of the HTA for which use of an image capturing enforcement system has been authorized.*

*15.2 Winnipeg agrees that all Personal Information disclosed by Manitoba to the Contractor and subsequently disclosed by the Contractor to Winnipeg shall be:*

*(a) used only for the purposes outlined in subsection 4.1; and*

*(b) handled by Winnipeg in a manner consistent with the provisions of FIPPA and consistent with the obligations imposed by Manitoba on the Contractor under this Agreement.*

In determining whether a public body has custody or control of a record, it is necessary to consider all aspects of the creation, maintenance, or use of the record. The Information and Privacy Commissioner of Ontario considered this question in its Order P-120, which is frequently cited in this regard. The order sets out ten criteria as relevant considerations for determining whether the requirements of custody or control are met:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have possession of the record, either because it has been voluntarily provided by the creator pursuant to a mandatory, statutory, or employment requirement?
4. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of their duties as an officer or employee?
5. Does the institution have a right to possession of the record?
6. Does the content of the record relate to the institution's mandate and functions?
7. Does the institution have the authority to regulate the record's use?
8. To what extent has the record been relied upon by the institution?
9. How closely is the record integrated with other records held by the institution?
10. Does the institution have the authority to dispose of the record?

In this case, we note that the information at issue was stored in electronic form, in a database, maintained by a third party contractor, whom the WPS had contracted to perform the mobile photo enforcement ticketing services. Based on the contract in place between the WPS and its contractor, it was clear that the information was the property of the WPS. As previously noted in this report, the agreement in place between the WPS and the contractor which carries out the mobile photo enforcement explicitly states that “*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.*”

Our office contacted the WPS by letter on September 7, 2016, and we asked the public body to reconsider its position. We referred to an earlier report we issued (2013-0229), a copy of which was provided to the WPS at that time, in which we reviewed a similar issue pertaining to custody and control of responsive records. We referred to one section in that report which reads as follows:

*...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 again referred to the agreement in place between the public body and the contractor regarding the supply, installation, and operation of the current photo enforcement system, and referred to the following provision:

*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.*

We also asked the WPS to provide further clarification regarding its reference to personal information, as it did not appear to our office that the records responsive to this access request would contain information would lead to the identification of any individual.

In addition, we referred to clauses 10(1)(a) and (b) of FIPPA and asked the WPS to clarify whether the contractor maintained information in electronic form that would be responsive to the complainant’s access request. These provisions of FIPPA read as follows:

***Access to records in electronic form***

***10(1)*** *If information requested is in an electronic form in the custody or under the control of a public body, the head of the public body shall produce a record for the applicant if*

*(a) it can be produced using the normal computer hardware and software and technical expertise of the public body; and*

*(b) producing it would not interfere unreasonably with the operations of the public body.*

The public body responded to our office on October 3, 2016. The WPS reiterated its position that it does not have custody of the records in the format being requested by the complainant. It stated that as per the agreement, the information in the records is provided to the WPS for limited purposes. The WPS stated that the agreement does not give it the authority to access the information in the records for the purpose of going through them and vetting out third party personal information for the purpose of responding to mass data requests.

Based on our review, we determined that the WPS has control over the responsive records. The fact that the WPS was able to request and receive the information is consistent with this finding and demonstrates that it was able to exercise effective control over the information.

In responding to specific questions posed by our office, the WPS advised that it consulted with the contractor to determine if it was able to produce the responsive information in the requested format. The public body stated that, although it was under no obligation to make this request, the contractor indicated that it was capable of producing a report containing the responsive information in the requested format.

The WPS indicated that the cost of this work was estimated to be \$375, and as such it would prepare an Estimate of Costs for the complainant in the amount of \$375.

On October 13, 2016, our office spoke with the complainant to advise him of the public body's revised position and to inform him that the public body was willing to issue an Estimate of Costs for the responsive records. The complainant confirmed that he was prepared to pay the fees, but wanted to verify that the information would be provided in a format that would allow analysis of the data.

The complainant attended our office on October 18, 2016. The complainant specified that he was interested in proceeding with the Estimate of Costs, provided he would receive the responsive information in a common electronic spreadsheet format. In addition, the complainant provided our office with a sample version of a spreadsheet indicating the specific information that he was interested in receiving.

Subsequent to this meeting, our office contacted the public body on October 18, 2016 and outlined the information the complainant was seeking. The WPS confirmed that it would release this information in an electronic spreadsheet format requested by the complainant. Where our office referred to the complainant's request for data listing the locations of traffic offences and asked how this information would be displayed, the WPS indicated that this information would be listed "by intersection." The WPS stated that any information would be subject to necessary review and severing prior to release, and specified that it would not release the threshold upon which traffic tickets are issued as disclosing this information would be a public safety concern.

The WPS identified this variable which was not listed in the sample spreadsheet provided by the complainant.

We provided the public body with a copy of the sample spreadsheet which the complainant had given to our office. We note that this spreadsheet contained the following headings: Unique ticket ID; Date; Time; City; Province; Recorded Speed; Posted Speed; Location of offense; and, Ticket amount. After reviewing the sample spreadsheet, the public body responded on October 19, 2016. The WPS reiterated that it would be severing the “speed thresholds” upon which tickets are issued for safety reasons. The WPS also stated that where the sample spreadsheet refers to “unique ticket ID”, that it would be removing the Provincial Offence Notice numbers of each ticket for privacy reasons.

Our office contacted the complainant to confirm whether he was prepared to proceed with the fee estimate. The complainant questioned whether the severing of “speed threshold” meant that the WPS would be withholding the posted speed, the vehicle speed, or both of these pieces of information. We advised that, based on our understanding of the conversations we had with the public body, the WPS had identified this as a separate variable from the information contained in the sample spreadsheet. The complainant agreed to proceed with the fee estimate.

On October 21, 2016, the WPS issued the Estimate of Costs to the complainant in the amount of \$375. The complainant paid the fee estimate in full on November 1, 2016.

On December 16, 2016, the public body issued its revised access decision. The WPS stated that it was granting access to the responsive information in part. The public body stated that it was withholding some information in accordance with clause 25(1)(e) of the act.

## **INVESTIGATION OF THE DECISION TO REFUSE ACCESS TO PART OF THE RECORDS**

In refusing access under clause 25(1)(e) of FIPPA, the WPS stated in its revised access decision that it had removed the speeds of all tickets issued for less than 20 kilometers over the posted speed limit as well as the corresponding fine amount. The public body advised that this information would reveal enforcement tolerance limits and had been severed to protect public safety.

In addition, the WPS advised that it had withheld the location description to protect the safety of mobile enforcement operators. The public body stated that revealing these locations would show areas of higher enforcement and would provide the means to accurately predict where the mobile enforcement operators would set up. The WPS cited clause 25(1)(e) of FIPPA to support this decision.

In an email sent to both the WPS and our office on December 22, 2016, the complainant objected to the public body’s access decision, indicating that it did not provide the information that he had requested. Our office subsequently contacted the WPS on December 22, 2016, to request copies of the severed and unsevered records. The WPS provided the responsive records to our office which were received on January 12, 2017.

We note that subsection 25(1) of FIPPA gives the head of a public body the discretion to refuse to disclose information where disclosure would be harmful to law enforcement or legal proceedings. The WPS relied on the exception in clause 25(1)(e) which provides as follows:

***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;*

The exception to disclosure contains a reasonable expectation of harm test. The head of the public body must determine whether disclosure of the information could reasonably be expected to cause the harm described in each specific exception being applied. The WPS applied clause 25(1)(e) to withhold the locations at which mobile photo radar units were deployed during recorded traffic violations. In order for this exception to apply, there must be a reasonable expectation of harm associated with the disclosure of the withheld information.

On January 25, 2017, our office contacted the WPS to request further clarification with regard to its access decision. Specifically, we asked the WPS to clarify how it determined that releasing information about vehicle speeds less than 20 kilometers over the speed limit, as well as the corresponding fine amount, would reveal the enforcement tolerance limit threshold of mobile photo enforcement.

In addition, our office requested clarification regarding the decision to withhold the location descriptions in full. We asked the WPS to clarify how revealing the intersection location of a traffic offence could potentially pose harm to a law enforcement officer, as well as how the location of a traffic offence could reasonably be expected to reveal the likelihood of a future date and time at which a mobile enforcement operator will be at that same location.

The WPS responded to our office on February 21, 2017. In responding to specific questions posed by our office, the WPS advised that releasing the speeds for all tickets issued would reveal the speed threshold at which ticketing began, because speed fine amounts are set at a certain dollar amount per kilometer and this formula is publicly available online. They advised that this information would pose a threat to public safety.

The WPS confirmed that it would consider re-severing and releasing the vehicle speed in tickets in the ranges of up to 14 and 15-19 kilometers per hour over the posted limit.

The WPS stated that it would not be releasing the locations of photo enforcement. The public body advised that revealing the locations of violations along with the date and time at which the occurred would reveal the frequency with which photo enforcement operators are present at a given location. The WPS stated that identifying high frequency mobile enforcement locations would identify the locations frequented by photo enforcement operators, in turn endangering their safety.

During the course of our investigation, our office issued a report with recommendation on April 18, 2017, regarding another case involving locations of photo enforcement deployment.<sup>2</sup> In that case, the WPS similarly made an initial access decision which refused access on the basis that the public body did not have custody or control over the records. On receiving a complaint of refused access the ombudsman advised the WPS that it was the view of our office that records associated with photo radar enforcement were under the control of the WPS. Subsequently, the WPS 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. Based on the results of our previous investigation, the ombudsman found that the WPS had failed to establish the application of the cited exception to most of the location information severed from the responsive record. In that case, 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 information remaining at issue. 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.

In view of the fact that the information was released in the previous case, our office asked the WPS, in a letter dated June 21, 2017, to reconsider its position. The WPS responded to our office on July 14, 2017, and stated that it was willing to issue a revised access decision.

Subsequently, on October 27, 2017, the WPS issued a revised access decision in which it granted access to more information than it had in the December 16, 2016, access decision. Specifically, the public body provided information for each traffic violation which detailed the location of each recorded violation, the date and time at which they occurred, the speed at which the vehicle was moving (if it was in excess of 15 kilometers over the posted speed limit) and the corresponding fine amount. The public body withheld the speed at which a vehicle was moving and the corresponding fine amount for each violation that was less than 15 kilometers over the posted speed limit. The WPS also withheld the location for those instances where the mobile photo enforcement unit was deployed on private property (consistent with our findings in the previously mentioned case).

With regard to the location information that would reveal where mobile photo enforcement units were deployed on private property, we determined that the WPS was authorized to withhold this information.

Our office is of the view that the frequency of violations issued at a given location is affected by a number of factors, and the frequency with which enforcement operators are present at the location is but one of these factors. Based on our review of the responsive information we were unable to determine how the disclosure of this information would reveal any specific pattern which would facilitate the accurate prediction of the presence of a photo enforcement operator at future dates and times. Further, we were not presented with any evidence that would suggest that mobile enforcement operators are in any way targeted in a premeditated manner. Without

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<sup>2</sup> The report issued for our file number 2015-0338 is publicly available and can be found on our website at: <https://www.ombudsman.mb.ca/uploads/document/files/case-2015-0338-en.pdf>

sufficient evidence, our office was unable to conclude that the release of location data would result in a reasonable expectation of harm to enforcement operators, which was required to support the public body's reliance on clause 25(1)(e) of the act.

Further to receiving the WPS's revised access decision and additional information, the complainant contacted our office on November 9, 2017, to advise that he was satisfied with the information that he had received.

The WPS chose to release significant amounts of the information that had initially been withheld under clause 25(1)(e) prior to our office making findings, and as the complainant advised our office that he was satisfied with the information that he had received in the most recent revised access decision, our office did not give further consideration to this provision.

## **CONCLUSION**

Our investigation determined that the WPS has control over the responsive records and based on our finding, the complaint regarding custody and control is supported.

The WPS revised its access decision and released part of the responsive records. After further investigation, the WPS released additional information. As the complainant is satisfied with the additional information that was released, we concluded our investigation of this matter.

December 1, 2017  
Manitoba Ombudsman