

SIMONSEN AND POLICE

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 95068
Decision Ref: D03195**

Participants:

Mark Jeffrey Simonsen
Complainant

- and -

Police Force of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - service manual for radar equipment - clause 8(2) - confidential communications - whether confidential information obtained in confidence - whether disclosure could reasonably be expected to prejudice the future supply of information of that kind - whether, on balance, in the public interest to disclose.

Freedom of Information Act 1992 (WA) ss. 72(1)(b), 75(1), 102(3); Schedule 1 clauses 4(1), 4(2), 8(1), 8(2), 8(4).

Road Traffic Act 1974.

Re Brown and Police Force of Western Australia (Information Commissioner, WA, 14 July 1995, unreported).

DECISION

The decision of the Police Force of Western Australia to refuse access to the disputed document, on the basis that it is exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*, is confirmed.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

11th September 1995

REASONS FOR DECISION

1. This is a complaint for external review by the Information Commissioner arising out of a decision of the Police Force of Western Australia ('the agency') to refuse Mr Simonsen ('the complainant') access to certain documents requested by him under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The agency owns and operates radar equipment, including a number of Muniquip MDR2 mobile radar units ('the equipment'), as part of its responsibilities for the enforcement of the road traffic laws of Western Australia. The equipment is manufactured by Tribar Industries Inc ('Tribar'), a company situated in Canada, but the equipment is repaired and calibrated by the agency. In order for the agency to be able to operate and repair the equipment, Tribar has provided the agency with an operating manual and a service manual for the equipment. The service manual contains information relating to the technical operation of the equipment, including its specifications.
3. On 2 March 1995, the complainant applied to the agency under the FOI Act for access to "*copies of the specifications of the Muniquip MDR2 Mobile Radar Unit*". In a notice of decision dated 8 May 1995, Chief Inspector Rae, Officer in Charge of the agency's FOI Unit, identified the documents held by the agency which were within the ambit of the application. However, access was refused to all of the material on the basis that it is exempt under clause 4(1), clause 4(2), clause 8(1) and clause 8(2) of Schedule 1 to the FOI Act.
4. The complainant applied for internal review of that decision on 17 May 1995. On 22 May 1995, Acting Commander Hawkes confirmed the agency's initial decision that the requested documents are exempt under clauses 4(1), 4(2) and 8(2) of Schedule 1 to the FOI Act. On 28 May 1995, the complainant applied to the Information Commissioner for external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 2 June 1995, in accordance with my statutory obligation under s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to my authority under ss.75(1) and 72(1)(b) of the FOI Act, I also required the production to me of the documents in dispute together with the file maintained by the agency in respect to this matter. The agency's file was delivered to my office on 7 June 1995, and the documents in dispute were delivered to my office on 9 June 1995.

6. An initial examination of the documents produced by the agency indicated that the notice of decision provided to the complainant in the first instance contained information that was incorrect and suggested that the decision had not been made with respect to the documents relating to the equipment, but to another brand of similar radar equipment also used by the agency. As a result, on 22 June 1995, I required further information from the agency to support its claims for exemption. That information was provided to me on 26 June 1995.
7. On 27 June 1995, I notified Tribar that I had accepted this complaint for review and sought its views on the agency's claims that the requested document is exempt from disclosure under the FOI Act. Tribar responded to my invitation and made a submission for my consideration but did not seek to be joined as a third party to this complaint.
8. On 6 July 1995, the complainant was provided with an edited copy of the additional information I had received from the agency, with exempt matter deleted. He was also given a further opportunity to make submissions on the basis of that new information and did so on 11 July 1995.
9. On 7 August 1995, I informed the parties and Tribar that it was my preliminary view that the requested document may be exempt under clause 8(2) of Schedule 1 to the FOI Act and also that it may be exempt in part under clause 4(1) and in part under clause 4(2). By letter dated 11 August 1995, the complainant advised me that he wished to pursue this matter to a formal determination.

THE DISPUTED DOCUMENT

10. The document in dispute in this matter consists of the service manual for the equipment, including attachments to that manual, being a number of facsimile transmissions from the agency to Tribar requesting further information and the responses from Tribar to those requests. The manual contains, *inter alia*, a technical description of the equipment, including details of its specifications, operational performance data, circuit descriptions and schematic representations as well as information and advice on testing and repairs to overcome any problem areas in its performance. The attachments contain later modifications to the circuitry of the equipment as described in the manual.

THE EXEMPTIONS

(a) Clause 8 - Confidential communications

11. The agency claims, *inter alia*, that the disputed document is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8, so far as is relevant, provides:

- "(2) *Matter is exempt matter if its disclosure -*
- (a) *would reveal information of a confidential nature obtained in confidence; and*
- (b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

(3)...

(4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest."*

12. To establish a claim for exemption under clause 8(2), an agency must not only satisfy me that the matter, if disclosed, would reveal information of a confidential nature obtained in confidence as required by sub-clause (2)(a), but also that disclosure could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency. If those elements are established, consideration must be given to whether clause 8(4) operates to limit the exemption.
13. It is the submission of the agency that Tribar - which is responsible for the production of the manual, David Renshaw and Co (David Renshaw) - which was the Australian agent of Tribar at the time the agency received the manual, and the agency at all times regarded the information within the manual as totally confidential, and that this was acknowledged by the parties involved prior to the receipt of the complainant's access application under the FOI Act. That claim is supported by other documentary material before me. The agency also informed me that access to the manual has consistently been refused to any person within the agency not requiring the manual for the purpose of testing, repairing and calibrating the equipment.
14. From my examination of the disputed document and a consideration of the submissions of the parties, and of Tribar, I am of the view that the disputed document contains confidential information relating to the equipment. I also accept the agency's submission that the manner in which the information has consistently been handled by Tribar, David Renshaw and the agency supports its contention that the information was obtained by, and given to, the agency in confidence. On that basis, I am of the view that the requirements of paragraph (a) of clause 8(2) have been satisfied.
15. If a document is a confidential communication of the type that is described in paragraph (a) of clause 8(2), then the "elements" of paragraph (b) must also be satisfied to establish a *prima facie* claim for exemption. In my view, as stated in my decision in *Re Brown and Police Force of Western Australia* (14 July 1995, unreported), those elements are:

- (i) there must be an expectation of prejudice (harm or injury) to the ability of the agency in the future to obtain information of the general class or character under consideration in this case; and
 - (ii) the expectation that the particular harm or injury could result from disclosure of the document must be **reasonably** based.
16. The agency claims that Tribar provided it with a copy of the disputed document to enable the agency to service and calibrate the equipment internally to obviate the need for the equipment to be returned overseas to Tribar for that purpose, or, alternatively, to be sent to an external organisation to perform that work.
17. Further, the agency submitted that Tribar or any other manufacturer of similar equipment would be unwilling, or may even refuse, to supply to the agency in the future information which is of commercial significance to the manufacturer if the disputed document is made available to members of the public. The agency submitted that any company investing large sums of money in the research and development of new products such as the equipment would not be willing to continue to supply information describing the results of that investment if it were likely that such information may be disclosed to potential competitors, because disclosure of that information may result in losses to the company in financial and commercial terms.
18. The agency's submissions in this regard are supported in part by a letter dated 27 June 1995, from Tribar to me, which states:

"The police radar market is very small and competitive. We regard the release of any information contined [sic] in the document into the public domain as being a potential risk as to the protection of Tribar's trade secrets. Therefore we do not wish to see the document in question released into the public domain."
19. It was the complainant's submission that the future supply of information of this kind to the agency would not be prejudiced by the disclosure of the disputed document. The complainant submitted that it is in the interests of a manufacturer of equipment such as the radar unit to provide the specifications of the equipment to a potential purchaser in order to inform the purchaser about the operation of the equipment. However, in the case of this equipment, that view is not supported by the evidence before me.
20. It is my view, from the information provided to me, that the disputed document is essential to the agency in order for the agency to be able itself to repair and calibrate the equipment so that the equipment continues to function and perform as designed. It does not appear to me to be necessary, in order for Tribar to sell the equipment to law enforcement agencies, that Tribar provide those agencies with copies of the disputed document. However, I accept that the provision of the disputed document to enable the servicing of the equipment to be performed internally, may be an added bonus to agencies with the capability of performing that work.

21. The agency's possession of the disputed document, in my view, is not essential in order to permit the agency to operate the equipment, but is only necessary if the agency is able to have the benefit of repairing and calibrating the equipment. I accept that it would be open to Tribar to decline to provide the disputed document to the agency and to either provide it to a private service agent, in order that the agency may engage that agent to repair and calibrate the equipment, or to decline to provide the disputed document at all and to insist upon the equipment being returned to it for repair and calibration. Given the importance of the information in that document to Tribar in terms of maintaining its competitive advantage, in my view, disclosure of the disputed document could reasonably be expected to prejudice the ability of the agency in the future to obtain that kind of information from Tribar and also from other manufacturers of similar radar units.
22. Therefore, I am satisfied by the material before me that the requirements of clause 8(2) have been met. The question then arises as to whether the limitation stated in clause 8(4) applies, which provides that matter is not exempt under clause 8(2) if its disclosure would, on balance, be in the public interest. The onus of establishing that disclosure would, on balance, be in the public interest lies on the complainant by virtue of s.102(3) of the FOI Act.

The public interest

23. It is my understanding that, at the time of the application for internal review, the complainant submitted that disclosure of the disputed document was in the public interest in the context of defending an alleged offence under the *Road Traffic Act 1974*, because, *inter alia*, in order to displace the *prima facie* evidence of the speed of a vehicle as measured by speed measuring equipment, a defendant must be able to introduce competent and cogent evidence to establish a case against the prosecution. The complainant appears to intend to adduce such evidence by submitting an independent assessment of the accuracy of the equipment.
24. The complainant submitted to me that, in view of the revenue raised by speeding convictions, and the ramifications of those convictions on members of the public, it is in the public interest for information detailing the workings of the equipment to be disclosed to enable the public to have confidence that the equipment is operated, calibrated and maintained in accordance with the manufacturer's specifications.
25. A contrary view as to where the balance of the public interest should lie was put to me by the agency in the following terms. The agency submitted that disclosure of the manual may do considerable harm to Tribar in terms of the loss of protection of its trade secrets, and the consequent probable loss of earnings. For that reason, it was claimed that Tribar and manufacturers of similar equipment would be unlikely to provide the agency with such information in the future if the disputed document is disclosed. Without that information, the agency submitted that it would be necessary for the agency to send the equipment to an external company for repair and calibration.

26. The agency submitted that the result of it not being able to repair its own equipment would be an increase in service costs to the agency, and an increase in the time taken for work to be performed on the equipment. The agency claimed that those additional costs would ultimately be borne by the taxpayers and that the result would be fewer radars being available for use. The agency submitted that it follows from that argument that more people would be able to break speed restriction laws without detection.
27. The agency submitted that the only public interest factor in favour of the disclosure of the disputed document is the general right of access granted by the FOI Act. In terms of enabling a defence to an alleged offence to be mounted, the agency submitted that the complainant is able to obtain through other methods a copy of the standards relating to radar speed measuring equipment, which provide the minimum standards applicable to all radar equipment used by the agency. Further, the agency submitted that information relating to the use of the equipment can be obtained from the operator's manual and by cross-examination in a court hearing of the officers who operate the equipment.
28. I recognise that there is a public interest in a person being able to adequately defend himself or herself in any prosecution and in being able to access documents of the agency for that purpose. In my view, that public interest must be balanced against the public interest in ensuring that the ability of an agency to obtain confidential information from third parties, for purposes associated with the effective operations of that agency, is not prejudiced.
29. In this instance, I am persuaded by the material before me and by my examination of the disputed documents, that some of the information in the disputed documents may well be a trade secret of Tribar, or be information which has a commercial value to Tribar, which value may be diminished by its disclosure. In the circumstances, I consider that there is a public interest in the agency being able to obtain confidential information of a commercial nature relating to third parties, and to be able to continue to obtain that kind of information in circumstances where it is essential for the efficiency and effectiveness of its operations dealing with road safety and the enforcement of the road traffic laws in Western Australia.
30. In my view, that public interest outweighs the public interest in the complainant being able to exercise his rights of access to the disputed document, especially when, on the face of it, I am not satisfied that the document contains exculpatory information which would assist in the defence of a charge arising from an alleged speeding offence. I find the disputed document to be exempt under clause 8(2) of Schedule 1 to the FOI Act. That finding does not require that I consider whether the disputed document is also exempt under clauses 4(1) and 4(2) as claimed by the agency. However, although I make no finding on this point, I consider that the disputed document also contains matter that may be a trade secret of Tribar and exempt under clause 4(1) of Schedule 1 to the FOI Act.

