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Subject: Fw: Sunshine Cases

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Date: 06/28/2011 04:06 PM  
Subject: Re: Sunshine Cases

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### 14 Fla. L. Weekly Supp. 172a

**Criminal law -- Traffic infractions -- Speeding -- Discovery -- Radar records -- Operator's manual -- Despite police department's objection that copying of operator's manual for radar device is prohibited by copyright law, defendant charged with speeding is entitled to reasonable opportunity to inspect and copy document under fair use doctrine and pursuant to right to inspect and copy public records provided in Florida Constitution, Article I, section 24, and/or fundamental right to due process of law**

STATE OF FLORIDA, Plaintiff, vs. MATTHEW ALLEN, Defendant. County Court, 7th Judicial Circuit in and for Volusia County. Case No. 5853 EPB. November 2, 2006. H. Pope Hamrick, Judge. Counsel: Office of the City Attorney, Ormond Beach. Eric A. Latinsky.

#### *ORDER REQUIRING ACCESS TO RADAR RECORDS*

THIS CAUSE having come before this court on the Defendant's Motion to Dismiss on October 30, 2006, and based upon the record, evidence and arguments presented, Court finds:

#### I. FACTUAL and PROCEDURAL FINDINGS:

On May 17, 2006, Defendant was issued a citation for Unlawful Speed. On June 2, 2006, counsel for Defendant mailed a public records request directed to the officer who issued the citation and/or the custodian of records which stated in the relevant portion:

Pursuant to Chapter 119, Florida Statutes, pertaining to public records, I am writing to request the above copies of your radar log for the relevant date, your certification to operate and all available proof that the unit complied with Chapter 15B-2, including the three most recent testing certificates for the radar unit and speedometer. My purpose in requesting the documents is so I can review them as soon as possible and determine whether to file any motions and/or whether to advise my client to proceed with a hearing. In this manner I can minimize the amount of time needed in Court with the magistrate or judge and still properly advise my client. I specifically request a copy of the manufacturer's maintenance and operating manual for the unit utilized pursuant to *Yolman v. State*, 388 So.2d 1038 (Fla. 1980).

Counsel for Defendant was promptly furnished copies of the requested documents other than the operator's manual. Counsel was allowed to review the operator's manual at Ormond Beach Police Department but Ormond Beach would not allow counsel for Defendant to copy any portions of the manual in furtherance of Applied Concepts' position that the Stalker DSR Operator's Manual is protected by copyright law. On August 25, 2006, counsel for Defendant appeared at an infraction hearing. The officer testified he utilized the radar in the moving mode. Defense counsel argued that the log produced failed to affirmatively disclose that the Stalker DSR had been tested in the "opposite lane moving mode" and/or "same lane moving mode" on May 17, 2006, as required by the manual and applicable Florida law. The hearing officer directed defense counsel to obtain copies of the relevant portions of the manual from Ormond Beach Police Department and file copies with the Court but the Department again refused to cooperate based upon copyright law. The Defendant then moved for dismissal citing *Yolmans v. State*, 388 So.2d 1038 (Fla. 1980) which states:

. . . We reject the contention that in adopting rules the Department must expressly adopt or ratify the manufacturer's operating manual. *Once a testing device has been approved for use, it necessarily follows that it should be maintained and operated in accordance with the manufacturer's maintenance and operating manuals* . There is no showing in this record that the operating manual for the testing device used in this case was unavailable to the appellant. In fact, the operating manual is part of the record in this cause. We find the appellant was not prejudiced in any manner by the failure of the Department to incorporate the operating manuals as part of the administrative rules. (Emphasis supplied)

and *State v. Muldowny* , 871 So.2d 911 (Fla. 5th DCA 2004) which finds that a defendant in a DUI case had a right to obtain the operating and maintenance manuals pertaining to the breath testing machine and the Florida Constitution which states:

## FLORIDA CONSTITUTION

### ARTICLE I -- DECLARATION OF RIGHTS

#### § 24 Access to public records and meetings

Every person has the right to inspect or copy any public *record made or received in connection with the official business of any public body* , officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. (Emphasis supplied)

A hearing was held on October 30, 2006, and the City Attorney for Ormond Beach was notified and was present.

## II. LEGAL DISCUSSION:

The Defendant maintains that pursuant to Article I, section 24, Florida Constitution, *Yolmans, supra*, and *Muldowny, supra*, counsel was entitled to review and obtain copies of the relevant portions of the operator's manual in a reasonable manner. Ormond Beach cites Attorney General Opinion #2003-26 which states:

A more recent opinion by this office, Attorney General's Opinion 97-84, struck a balance between the copyright law and Florida's Public Records Law that recognized the doctrine of "fair use," that is, even if a record is copyrighted, federal law permits copying under certain conditions. For example, notwithstanding the exclusive rights of the copyright owner, "the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright."

In an effort to avoid making records custodians the guarantors of compliance with "fair use," the 1997 opinion suggests that records be made available and that individuals seeking to make copies of their own use be informed of the requirements of the federal copyright law. The opinion counsels records custodians that they "should advise individuals seeking to copy such records of the limitations of the federal copyright law and the consequences of violating its provisions." The opinion does not advise a records custodian to reproduce copyrighted material for distribution but suggests measures to be taken to protect the custodian from liability in the event that materials which are subject to the copyright law and the public records law are copied for unauthorized purposes.

The defense argues that they are not utilizing the copies for commercial purpose and are entitled to obtain relevant copies of the manual under the fair use doctrine and also need the copies to properly prepare and present a defense.

### III. CONCLUSIONS and RULING:

The Court agrees that Defendant is entitled to a reasonable opportunity to inspect and copy the requested documents pursuant to Florida Constitution, Article I, section 24 and/or Defendant's fundamental right to due process of law. Should the police department decline to make copies of the requested documents or portions thereof then the Defendant or his representative should be allowed reasonable access to the documents and a copy machine subject to the normal fees allowed by Chapter 119. The Court further notes that based upon the arresting officer's stipulation the citation was dismissed.

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13 Fla. L. Weekly Supp. 627a

**Criminal law -- Driving under influence -- Discovery -- Intoxilyzer software source code -- Where, by demonstrating only mere possibility that requested Intoxilyzer software source**