



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-338

Appeal P-910168

Ministry of Consumer and Commercial Relations



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ORDER

BACKGROUND:

The requester co-owns three restaurants in Ottawa, Ontario. He is a licensee pursuant to the Ontario Liquor Licence Act (the LLA) which entitles him to sell liquor at each of his restaurants.

In January 1991, the requester and his partner were approached by investigators from the Liquor Licence Board of Ontario. It was alleged that the requester and his partner had contravened certain provisions of the LLA.

In February 1991, the requester submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) to the Ministry of Consumer and Commercial Relations (the institution) for access to:

... the name of the person or persons who provided information to the Liquor Licence Board of Ontario which led to the investigation ... and ... copies of all written reports or briefs submitted to the LLBO on the subject.

The institution refused to confirm or deny the existence of any records, pursuant to section 14(3) of the Act. The institution advised the requester that if any responsive records existed, access to them would be denied pursuant to sections 14(1)(a), (b), (c), (d), (g), and 14(2)(c) of the Act. The requester appealed the institution's decision.

Mediation was unsuccessful and the matter proceeded to an inquiry. Notice that an inquiry was being conducted to review the decision of the head was sent to the appellant and the institution. Enclosed with the notice was a report prepared by the Appeals Officer, intended to assist the parties in making representations to this office concerning the subject matter of the appeal. Both parties provided written representations, which I have reviewed.

In its representations, the institution abandoned reliance upon sections 14(1)(g) and 14(2)(c) of the Act. Accordingly, the exemptions to disclosure at issue in this appeal are contained in sections 14(1)(a), (b), (c), (d) and 14(3) of the Act.

ISSUES:

- A. Whether the head properly exercised her discretion under section 14(3) of the Act to refuse to confirm or deny the existence of a record of the nature requested.
- B. Whether records of the nature requested, if they exist, would qualify for exemption under sections 14(1)(a), (b), (c) or (d) of the Act.

SUBMISSIONS/CONCLUSIONS:

ISSUE A: Whether the head properly exercised her discretion under section 14(3) of the Act to refuse to confirm or deny the existence of a record of the nature requested.

A requester in a section 14(3) situation is in a very different position than other requesters who have been denied access under the Act. By invoking section 14(3), the institution is denying the requester the right to know whether a record exists, even when one does not. This section provides institutions with a significant discretionary power which I feel should be exercised only in rare cases.

In my view, an institution relying on section 14(3) must do more than merely indicate that records of the nature requested, if they exist, would qualify for exemption under sections 14(1) or (2). An institution must provide detailed and convincing evidence that disclosure of the mere existence of the requested records would convey information to the requester which could compromise the effectiveness of a law enforcement activity.

In its representations, the institution submits that to indicate to the appellant which records exist, would reveal the source of those records, the source of its case before the licence suspension board, the nature of the information obtained to date, and the nature of the investigation. The institution contends that disclosure of this information to the appellant would jeopardize the confidentiality of the informant, the confidentiality of the investigation, the investigation itself, and may impact on the hearing and affect its outcome.

In my view, by simply confirming that records associated with an investigation exist, the institution is not required to confirm the content of the records to the extent described by the institution. Rather, the institution is required to provide a general description of each record, providing enough detail so that the requester has an understanding of the types of records held by the institution. In my view, providing the appellant with a general description of the requested records would not convey information which could compromise the effectiveness of a law enforcement activity in the circumstances of this appeal.

I find that the head has not provided sufficient evidence to show that disclosure of the fact that responsive records exist would convey information to the requester which would compromise the effectiveness of a law enforcement activity and, therefore, section 14(3) does not apply.

ISSUE B: Whether a records of the nature requested, if they exist, would qualify for exemption under sections 14(1)(a), (b), (c) or (d) of the Act.

In disposing of Issue A, it was necessary for me to confirm that records related to an investigation do in fact exist. I will now determine whether these records qualify for exemption under sections 14(1)(a), (b), (c) and/or (d) of the Act.

The records which have been identified by the institution as responsive to the request are:

1. Memorandum dated November 27, 1990 to Manager, Investigations and Enforcement Unit from Director of Inspections requesting an investigation of allegations.
2. Letter containing allegations of LLA non-compliance and supporting information.
3. Memorandum dated November 27, 1990 to Manager, Investigations and Enforcement Unit from Director of Inspections regarding investigation.
4. Memorandum dated January 17, 1991 to Manager, Investigations and Enforcement Unit regarding investigation.
5. Three one-page forms entitled "Investigation of Licenced Premises".
6. Memorandum dated February 17, 1991 to Manager, Investigation and Enforcement from Investigator regarding the appellant's restaurants.
7. Facsimile transmission to the Liquor Licence Board dated February 7, 1991 consisting of the statement of the appellant's partner.

Sections 14(1)(a), (b), (c) and (d) state:

A head may refuse to disclose a record where the disclosure could reasonably be expected to,

- (a) interfere with a law enforcement matter;
- (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
- (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement;
- (d) disclose the identity of a confidential source of information in respect of a law enforcement matter, or disclose information furnished only by the confidential source

The words "law enforcement" are defined in section 2(1) of the Act as follows:

"law enforcement" means,

- (a) policing,
- (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
- (c) the conduct of proceedings referred to in clause (b)

The institution maintains that an investigation under the LLA into a complaint qualifies as a "law enforcement" matter as defined in subparagraph (b) above. To support that position, the institution states that compliance investigations, which are governed by section 44 of the LLA, are commenced upon an allegation that a licensee contravened section 6 of the LLA. If such a contravention is found to exist, the Liquor Licence Board has the authority under section 15 of the LLA, to issue a proposal to revoke, suspend or refuse to renew a licence to sell liquor. Notice of a proposal, which is governed by section 21 of the LLA, is given to the applicant, licensee, permit holder or owner. The notice informs the recipient of his or her right to request a hearing by the Liquor Licence Board. Section 23 of the LLA governs the hearing.

In my view, the process described by the institution is a "law enforcement" matter. It is clear that each element of subparagraph (b) of the definition has been satisfied. A LLA investigation is an investigation into "unlawful" conduct proscribed by the LLA. An investigation could lead to a Liquor Licence Board hearing. Upon a finding at such a hearing that a violation of the statute occurred, a penalty or sanction can be imposed. In my view, the Board hearing process meets the functional definition of a "court or tribunal" [Order 170].

Having determined that the investigation process is a law enforcement matter, I must now decide whether any of the exemptions to disclosure claimed by the institution apply to the records.

Section 14(1)(d)

The institution submits that section 14(1)(d) applies to Records 1, 2, 4, 5 and 7. In order to satisfy the requirements of section 14(1)(d), the institution must establish confidentiality by providing evidence of the circumstances in which the information was given [Order 139].

In its representations, the institution submits that the source of the information identified in Records 1 and 2 specifically requested confidentiality, and this is confirmed by a statement in

one of the records. Assurances of confidentiality given to the source by the Liquor Licence Board are also stated in one of the records.

As far as Records 4 and 5 are concerned, the institution has not provided any evidence to establish confidentiality, and there is nothing in the records themselves which indicates that the information contained in the records was provided by a confidential source.

Record 7 indicates that the author (the appellant's partner) provided the appellant with a copy of the record. Accordingly, I find that its disclosure would not disclose the identity of or information provided only by a confidential source.

In summary, I find that only Records 1 and 2 are properly exempt under section 14(1)(d).

Because Record 7 is not subject to any other exemption claims under section 14(1), I order this record to be released to the appellant in its entirety.

Section 14(1)(b)

The institution submits that Records 3, 4, 5 and 6 are exempt under section 14(1)(b), claiming that disclosure of the records would interfere with an investigation from which a law enforcement proceeding is likely to result. As a result of the complaint and subsequent investigation, the Liquor Licence Board issued a Notice of Proposal to suspend the licences of the three establishments in question. The appellant and his partners have requested a hearing before the Liquor Licence Board, and the hearing process is currently underway.

In its representations, the institution states that the untimely disclosure of the records, "would identify complaints and reveal opinions and advice of staff" and "would reveal the nature of the investigation, the information already gathered and the type of information needed", which could enable the parties under investigation to obstruct the course of the investigation. The institution submits that the investigation will not be complete until the Liquor Licence Board hearing is finalized.

In my view, the institution has provided sufficient evidence to establish that a premature release of Records 3, 4, 5 and 6 would interfere with the investigation and prosecution process under the LLA, and I find that these records are properly exempt under section 14(1)(b).

Because I have found that Records 1 and 2 are exempt under section 14(1)(d) and Records 3, 4, 5 and 6 are exempt under section 14(1)(b), it is not necessary for me to consider the application of sections 14(1)(a) or (c) to these records.

ORDER:

1. In this order, I have disclosed the existence of records responsive to the appellant's request. Because the institution may apply for judicial review, I have decided to release this order to the institution in advance of the appellant. The purpose for doing this is to provide the institution with an opportunity to review this order and determine whether to apply for judicial review.
2. If I have not been served with a Notice of Application for Judicial Review within fifteen (15) days of the date of this order, I order the institution to disclose Record 7 to the appellant within twenty (20) days of the date of this order, and advise me in writing within five (5) days of the date on which disclosure was made. This notice should be forwarded to my attention, c/o the Information and Privacy Commissioner/Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario, M5S 2V1. A copy of this order will be sent to the appellant upon the expiration of the fifteen (15) day period referred to above, unless a Notice of an Application for Judicial Review has been served on me.
3. I uphold the head's decision not to disclose Records 1, 2, 3, 4, 5 and 6.
4. In order to verify compliance with the provisions of this order, I order the head to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1, only upon my request.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ August 10, 1992