



Information and Privacy
Commissioner/Ontario

Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-797

Appeal P-9400271

Liquor Control Board of Ontario



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The requester asked the Liquor Control Board of Ontario (the Board) to provide him with copies of records relating to the purchases of wine and liquor by a named consulate for the 1992, 1993 and 1994 calendar years.

The Board identified a number of diplomatic sales invoices with order forms attached as the records that were responsive to the request. The Board decided, however, to deny access to these documents in their entirety based on the following exemptions contained in the Act:

- third party information - section 17(1)
- valuable government information - section 18(1)(a)
- economic and other interests of the Board - sections 18(1)(c) and (d)

A Notice of Inquiry was provided to the parties to the appeal. Representations were received from the appellant through his solicitor, the Board and the consulate through the Federal Department of Foreign Affairs and International Trade (the federal government).

In its submissions, the federal government argued on behalf of the consulate that section 15 of the Act (relations with other governments) applied to exempt the records from disclosure. The appellant, for his part, argued that there exists a compelling public interest in the disclosure of the records under section 23 of the Act.

DISCUSSION:

THE RAISING OF A DISCRETIONARY EXEMPTION BY A THIRD PARTY

As indicated, the federal government has taken the position that the records at issue are exempt from disclosure under the discretionary exemption found in section 15 of the Act. This provision was not originally raised by the Board.

As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where the release of a record would seriously jeopardize the rights of a third party.

In my view, however, this appeal does not represent the kind of situation where a discretionary exemption not originally raised by an institution should be considered. Accordingly, I am not prepared to apply section 15 to the records at issue in this appeal.

VALUABLE GOVERNMENT INFORMATION

The Board submits that the invoices and order forms are exempt from disclosure under section 18(1)(a) of the Act. In order for this provision to apply to the records in question, the Ministry must establish that the information contained in these documents:

1. is a trade secret, or financial, commercial, scientific or technical information; **and**
2. belongs to the Government of Ontario or an institution; **and**
3. has monetary value or potential monetary value.

The records at issue in this appeal are similar in nature. Each document set consists of a diplomatic sales invoice prepared by the Board and an attached order form completed by the consulate. The invoice lists the products which the consulate has ordered from the Board, the price per case and the total costs of the shipment. The order form essentially provides the same information.

I will now consider each component of the section 18(1)(a) test in relation to these records.

Part 1 of the Test

The Board submits that the information contained in the records constitutes financial and/or commercial information since it discloses the quantity and category of products which the consulate has purchased. Previous orders issued by the Commissioner's office have held that financial information means information pertaining to finance or money matters, whereas commercial information is information which relates to the buying, selling or exchange of merchandise or services. Based on these definitions, I agree that the contents of the records may properly be characterized as commercial or financial information.

Part 2 of the Test

In order for this part of the test to be satisfied, it must be shown that the information contained in the sales invoice and order form belongs to the Board. As indicated previously, these records list the types of alcoholic beverages which the consulate ordered from the Board and which the Board subsequently delivered to the consulate. Given the reciprocal nature of this transaction, I find that the information in the records belongs to both the Board and the consulate.

Several orders issued by the Commissioner's office have considered scenarios where a government organization and a third party have a joint proprietary interest in information (Orders P-219 and P-561).

These orders state that a finding of this nature is not inconsistent with the conclusion that the information belongs to the government organization for the purposes of the Act.

Based on this line of reasoning, I find that the information contained in the sales invoices and order forms belong to the Board for the purposes of section 18(1)(a). The result is that the second part of the test has been satisfied.

Part 3 of the Test

For the third component of the section 18(1)(a) test to be satisfied, the Board must establish that the information contained in the records has monetary value or potential monetary value.

In its representations, the Board indicates that it currently sells information to the public under its Sale of Data program. This information includes generic data on the quantity and type of liquor and wine that is sold to embassies and consulates. The Board points out that the companies which market these products are willing to purchase this information to assess the demand for various types of alcoholic beverages. While the Board indicates that this information is not routinely broken down by specific consulate or embassy, it states that this type of data will be offered for sale shortly.

The appellant, on the other hand, submits that records which document the sale of wine and liquor to individual consulates do not contain information which has any intrinsic monetary value. He argues that, even if this were the case, the disclosure of the information would not, in itself, deprive the Board of commercial revenues.

I have carefully reflected on these submissions. Based on the evidence before me, I find that the Board intends to distribute the information contained in these and similar records in a way that will produce monetary gain for itself. I also find that there exists a commercial demand for information of this nature and that third parties would be willing to pay the prescribed rates for access to this data.

For these reasons, I conclude that the information at issue in this appeal has monetary value for the purposes of section 18(1)(a) of the Act. I further find that the disclosure of this information to the appellant would deprive the Board of the revenues which would otherwise be available under its Sale of Data program. On this basis, the third and final component of the test has been satisfied.

PUBLIC INTEREST IN DISCLOSURE

As indicated previously, the appellant has submitted that there exists a public interest in the disclosure of this information under section 23 of the Act. In order for this provision to apply to the records at issue, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption relating to valuable government information.

In his representations, the appellant indicates that the information which he seeks pertains to tax-exempt and discontinued sales of alcoholic beverages to the diplomatic mission of a foreign state. He states that such sales are made at significant price discounts which represent a tax loss to both the federal and provincial governments. The appellant goes on to say that important issues of both fiscal policy and public administration are involved.

I have carefully reviewed the appellant's representations in conjunction with the circumstances of this case. I find that there does not exist a **compelling** public interest in the release of the sales invoices or order forms. I have based this conclusion, in part, on the fact that the information at issue in this appeal is value added in nature and relates neither to the mandate nor day-to-day operational activities of the Board.

I would point out, however, that situations could arise where the release of information that is subject to a sale of data program may be necessary to scrutinize the activities of a government organization. In these scenarios, a case could be made that there exists a compelling public interest in the disclosure of the information which clearly outweighs the need for the institution to obtain commercial revenues from the sale of a record. As I have stated previously, however, the present appeal does not represent one of these situations.

The result is that the records at issue are exempt from disclosure under section 18(1)(a) of the Act.

Based on the determination which I have made, it is not necessary for me to consider the other exemptions which the Board has claimed.

ORDER:

I uphold the decision of the Board.

Original signed by: _____
Irwin Glasberg
Assistant Commissioner

_____ November 16, 1994