



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

ORDER P-1297

Appeal P-9600222

Liquor Control Board of Ontario



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NATURE OF THE APPEAL:

The Liquor Control Board of Ontario (the LCBO) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all records including internal and external memoranda, correspondence, investigation notes and reports, statements, photographs and complaint reports related to a specific investigation into a wine-making operation involving the requester. The LCBO identified the responsive records and granted partial access. Access was denied to the remaining records pursuant to the exemptions contained in sections 19 and 21(1) of the Act.

The records relate to discussions and events which eventually led to charges being laid against the requester, the company that he is associated with and two other individuals. The criminal prosecutions have been completed but civil proceedings are now ongoing.

The requester, who is represented by counsel, appealed the decision to deny access. During mediation, the appellant indicated that he believed that e-mail messages, responsive to the request, should exist. Accordingly, the reasonableness of the LCBO's search for responsive records is an issue in this appeal.

The records withheld by the LCBO and the exemptions claimed for each are as follows:

- (1) Record 1: handwritten notes (section 19)
- (2) Record 2: synopsis of investigation (section 19)
- (3) Record 3: correspondence with attachments (section 19)
- (4) Records 4, 5, 6, 10 and 14: internal memoranda (section 19)
- (5) Record 12: letter from counsel (sections 19 and 21)

This office provided a Notice of Inquiry to the appellant, the LCBO and an individual identified in the records (the affected party). Representations were received from the LCBO only. Because it appeared that the records might contain the personal information of individuals other than the appellant, the LCBO was also asked to comment on the possible application of sections 49(a) (discretion to refuse the requester's own personal information) and 49(b) (invasion of privacy).

DISCUSSION:

PERSONAL INFORMATION

Section 2(1) of the Act defines personal information, in part, as "recorded information about an identifiable individual". I have reviewed the records and find that Record 12 contains the personal information of the appellant and other identifiable individuals. I find that the remaining records also contain personal information of the appellant to the extent that they relate to discussions leading to the charges subsequently laid against him personally and as president of the company.

The LCBO has claimed section 21(1) and section 19 for Record 12 and section 19 for the remaining records. I will first consider the application of section 21(1) and 49(b) to Record 12.

INVASION OF PRIVACY

Section 47(1) of the Act allows individuals access to their own personal information held by a government institution. However, section 49 sets out exceptions to this general right of access.

Where a record contains the personal information of both the appellant and other individuals, section 49(b) of the Act allows the LCBO to withhold information from the record if it determines that disclosing that information would constitute an unjustified invasion of another individual's personal privacy. On appeal, I must be satisfied that disclosure **would** constitute an unjustified invasion of another individual's personal privacy.

Disclosing the types of personal information listed in section 21(3) is presumed to be an unjustified invasion of personal privacy. If one of the presumptions applies, the LCBO can disclose the personal information only if it falls under section 21(4) or if section 23 applies to it. If none of the presumptions in section 21(3) apply, the LCBO must consider the factors listed in section 21(2), as well as all other relevant circumstances.

The LCBO submits that the disclosure of the personal information in Record 12 would be a presumed unjustified invasion of personal privacy under section 21(3)(b). Record 12 is a letter from the solicitor for two individuals who were charged together with the appellant. The letter is addressed to the Regional Director of Crown Attorneys and contains the solicitor's submissions on behalf of his clients. The LCBO submits that this personal information was compiled and is identifiable as part of an investigation into a possible violation of the Liquor Licence Act. I accept the submissions of the LCBO and I find that disclosure of the record would constitute an unjustified invasion of personal privacy under section 21(3)(b). I find that section 21(4) has no application in the circumstances of this appeal and the appellant has not raised section 23. Accordingly, I find that Record 12 is exempt from disclosure under section 49(b) of the Act.

DISCRETION TO REFUSE REQUESTER'S OWN INFORMATION/SOLICITOR-CLIENT PRIVILEGE

Under section 49(a) of the Act, the LCBO has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 49(a) states as follows:

A head may refuse to disclose to the individual to whom the information relates personal information,

where section 12, 13, 14, 15, 16, 17, 18, **19**, 20 or 22 would apply to the disclosure of that personal information. [emphasis added]

In order to determine whether the exemption provided by section 49(a) applies in this case, I will consider the application of section 19 to Records 1 - 6, 10, 12 and 14.

Section 19 consists of two branches, which provide the Ministry with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the LCBO must provide evidence that the record satisfies either of two tests:

1. (a) there is a written or oral communication, **and**
(b) the communication must be of a confidential nature, **and**
(c) the communication must be between a client (or his agent) and a legal advisor, **and**
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

The LCBO is relying on both branches of the exemption to withhold access from the records. I will first consider the application of Branch 2 to the records.

The LCBO submits that the records relate to the investigation of the appellant, the possibility of charges and the status of the prosecution once charges were laid. The records detail the ongoing discussions between in-house counsel and the prosecuting Crown attorney, between counsel and

between staff and counsel, on the advisability of prosecuting and the status of the prosecution when charges were laid together with related matters. The LCBO states that at the time that the records were created, litigation was either contemplated or ongoing.

I have reviewed the representations of the LCBO together with the information in the records. I am satisfied that the records were prepared by or for Crown counsel for use in giving legal advice, or in contemplation of litigation, or for use in litigation. Accordingly, I find that the records qualify for exemption under Branch 2 of the section 19 exemption and are exempt under section 49(a) of the Act.

REASONABLENESS OF SEARCH

Where a requester provides sufficient details about the records which he is seeking, it is my responsibility to ensure that the LCBO has made a reasonable search to identify any records which are responsive to the request. The Act does not require the LCBO to prove with absolute certainty that the requested records do not exist. However, in order to properly discharge its obligations under the Act, the LCBO must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the appellant's request.

The appellant indicates that he believes that e-mail records, responsive to the request, must exist. As noted above, the appellant has not provided any submissions.

With its representations, the LCBO has provided an affidavit sworn by a lawyer for the LCBO (the lawyer), who states that he made enquiries of the Director of Loss Prevention and Security and a Policy Analyst in the Policy & Issues Management department in his efforts to locate responsive e-mail records. The lawyer states that he was informed by both individuals that there are no e-mail records and that employees in those departments do not normally send or receive communications by e-mail. The lawyer goes on to say that the legal department makes very little use of e-mail, that he searched the relevant files in the department and no e-mail records were found.

Having reviewed the representations of the LCBO, I am satisfied that it has taken all reasonable steps in the circumstances of this appeal to identify and locate the requested records.

ORDER:

1. I uphold the decision of the LCBO to deny access to the records.
2. I uphold the LCBO's decision on its search and dismiss this part of the appeal.

Original signed by: _____
Mumtaz Jiwan

November 20, 1996

Inquiry Officer