



**Information and Privacy
Commissioner/Ontario**

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

INTERIM ORDER P-1268

Appeal P-9600200

Liquor Control Board of Ontario



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télé: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

NATURE OF THE APPEAL:

The appellant is a former employee of the Liquor Control Board of Ontario (the LCBO) who was the subject of an investigation. He was suspended from his job and subsequently terminated. The appellant was also charged under the Criminal Code of Canada, but was not convicted of any offences. The appellant began a civil action against the LCBO for wrongful dismissal. This law suit was settled in July 1995.

The appellant submitted a request under the Freedom of Information and Protection of Privacy Act (the Act) for all records relating to his civil and criminal cases involving the LCBO.

The LCBO identified 81 pages of responsive records, consisting of correspondence, an "Authorization and Direction", copies of cheques, draft agreements/offers to settle, minutes of settlement, a chronology of events, summary statements, a copy of a newspaper clipping, various memoranda, and notes to file.

The LCBO denied access to all of the records, claiming that they fall within the parameters of section 65(6) of the Act, and therefore outside the scope of the Act. The LCBO also included the following statement in its response to the appellant:

Also, please note that since some of our records had been transferred to the OPP for investigation, you may wish to approach them directly to obtain a copy of such records. In addition, since the records requested are more than 5 years old, they might have already been archived and/or destroyed.

The appellant appealed the LCBO's decision, and also claimed that additional records should exist. This office sent a Notice of Inquiry to the appellant and the LCBO seeking representations on the jurisdictional issue raised by sections 65(6), and also on the issue of whether the LCBO had conducted a reasonable search for responsive records. Representations were received from both parties.

DISCUSSION:

REASONABLE SEARCH

Where an appellant provides sufficient details about the records which he is seeking and the institution (in this case the LCBO) indicates that further records do not exist, 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 further records do not exist. However, in my view, 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 request.

The LCBO argues that, because section 65(6) applies to the records, the question of reasonable search is irrelevant.

In my view, the existence of the new sections 65(6) and (7) of the Act does not alter an institution's statutory responsibility to undertake reasonable efforts to identify and locate all responsive records. As I have noted in a number of previous orders dealing with these new provisions:

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in section 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

In my view, an institution would generally not be in a position to determine whether a record falls under section 65(6) without first reviewing its contents, and then assessing whether it fits within the scope of this section. Not all so-called "labour relations" or "employment-related" records satisfy the various requirements of sections 65(6)1, 2 or 3, and even if they do, they may fit within the scope of one of the exceptions to these exclusions listed in section 65(7).

Although an appellant will rarely be in a position to indicate precisely which records have not been identified in an institution's response to a request, the appellant must, nevertheless, provide a reasonable basis for concluding that such records may, in fact, exist.

In the case before me, the appellant's request is quite detailed, and outlines the type of information he is seeking, why certain records should exist, and who he feels might have the responsive records. In his appeal letter, the appellant points out that his civil law suit was settled in June 1995, and questions why records would have been destroyed after such a short time period.

The LCBO submits that a memorandum regarding the appellant's request was sent to four individuals: a lawyer, the Director of Loss Prevention and Security, the Freedom of Information Administrator for the Retail Division, and the Freedom of Information Administrator for Human Resources. The LCBO states:

All files were searched, and all records were sent to [the Freedom of Information Co-ordinator]. Only [the Human Resources Administrator] had any records in her possession.

The LCBO points out that the investigation that resulted in the appellant's termination was conducted solely by the Ontario Provincial Police (the OPP), and that, on the advice of the OPP, it did not undertake an independent investigation.

In his request letter, the appellant states that he wants access to all records which led to the decision to launch the OPP investigation. He specifically refers to internal investigative reports, audit report, correspondence, and notebook entries, and names a number of LCBO employees who he feels are likely to have prepared these records.

The LCBO's response letter is quite general and does not touch on the specific points raised by the appellant. In the Notice of Inquiry, the LCBO was asked to:

... provide us with a written summary of all steps taken in response to the appellant's request. In particular, we ask that you consider the following:

1. Was the appellant contacted for additional clarification of his request? If so, please provide details including a summary of any further information the appellant provided.
2. Please provide details of any searches carried out including: by whom were they conducted, what places were searched, who was contacted in the course of the search, what types of files were searched and finally, what were the results of the searches? I would ask that you include details of any searches carried out to respond to the requester's original access request and/or in response to inquiries from this office during the course of mediation.
3. Is it possible that such records existed but no longer exist? If so, please provide details of when such records were destroyed including information about record maintenance policies and practices such as evidence of retention schedules.

Again, the LCBO's representations in response to this Notice are general and do not answer the questions directly. They also do not address the specific comments made by the appellant in his request and appeal letters, or make any reference to the individuals identified by the appellant as potential custodians of responsive records. As far as the issue of the possible destruction of records is concerned, the LCBO's representations make no reference to the retention schedules in place for records of this nature, and do not explain how these schedules apply to the records relating to the civil proceedings. In the absence of any explanation provided in the LCBO's representations, it also appears that certain records have been included which are not responsive to the appellant's request.

In my view, there is another important element to the reasonable search issue which concerns the obligations of the LCBO under section 25(1) of the Act, with respect to responsive records which are not within its custody or control.

Section 25(1) reads as follows:

- (1) Where an institution receives a request for access to a record that the institution does not have in its custody or under its control, the head shall make all necessary inquiries to determine whether another institution has custody or control of the record, and where the head determines that another institution has custody or control of the record, the head shall within fifteen days after the request is received,
 - (a) forward the request to the other institution; and

- (b) give written notice to the person who made the request that it has been forwarded to the other institution.

Section 25(1) imposes mandatory obligations on the LCBO in situations where another institution has custody or control of responsive records. These obligations include making inquiries and, where another institution has a responsive record under its custody or control, forwarding the request to that other institution and notifying the requester that this has been done.

As noted earlier, in responding to the appellant's request, the LCBO identifies the OPP and the Archives of Ontario (the Archives) as possible custodians of responsive records. However, the LCBO does not "make all necessary inquiries" of these organizations, to determine if either of them has responsive records, as section 25(1) requires, nor does it forward the portion of the request involving these records to either of these two institutions. Instead, the LCBO leaves the question of possible records in the custody of the Archives and/or the OPP unanswered, and advises the appellant that he must make a separate request to the OPP for any criminal investigation records.

In my view, section 25(1) of the Act requires the LCBO to respond to the request as it relates to all responsive records within its custody and control, and, after making all necessary inquiries, to forward the request to these other institutions in order to enable them to provide a similar response for those responsive records within their custody and control.

For all of these reasons, I am unable to conclude that the LCBO's search for records was reasonable in the circumstances of this appeal.

Because it is possible that additional responsive records may be located as a result of further searches and/or the proper application of section 25(1), I have decided to defer consideration of the jurisdictional issues raised by sections 65(6) and (7) of the Act.

ORDER:

1. I order the LCBO to conduct a further search for records which are responsive to the appellant's request, as outlined in his request letter and the Notice of Inquiry, and to advise the appellant in writing of the results of this search by **October 17, 1996**. I remind the LCBO of its obligations under section 25(1) of the Act in complying with this provision.
2. In the event that additional responsive records are located in the search referred to in Provision 1, I order the LCBO to render a decision with respect to these records in accordance with the provisions of the Act, treating the date of this interim order as the date of the request, without recourse to a time extension.
3. I order the LCBO to provide me with a copy of the correspondence referred to in Provisions 1 and 2. This should be forwarded to my attention, c/o Information and

Privacy Commissioner/ Ontario, 80 Bloor Street West, Suite 1700, Toronto, Ontario,
M5S 2V1.

4. I remain seized of this appeal.

Original signed by: _____
Tom Mitchinson
Assistant Commissioner

_____ September 27, 1996