



Information and Privacy
Commissioner/Ontario

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

ORDER P-1442

Appeal P_9700105

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 specific records related to the interview process for a job competition in which the requester was an unsuccessful candidate.

The LCBO located responsive records and granted partial access to them. The LCBO withheld the names and other identifying information about other candidates under section 21(1) of the Act (invasion of privacy). The LCBO also withheld the actual interview questions and suggested responses under section 18(1)(c) of the Act (economic and other interests), although access was granted to the requester's responses.

The requester (now the appellant) appealed this decision. During mediation, the appellant indicated that he was not interested in the personal information contained in the records. Accordingly, section 21(1) is no longer at issue in this appeal. He indicated further that he was only interested in receiving the questions asked in the interview and all the possible answers the LCBO was looking for.

This office provided a Notice of Inquiry to the LCBO and the appellant. Because it appears that the records may fall within the parameters of section 65(6) of the Act, the Appeals Officer asked the parties to address the application of this section. If section 65(6) is found to apply, the records will fall outside the scope of the Act and will not be subject to the Commissioner's jurisdiction.

DISCUSSION:

JURISDICTION

The interpretation of sections 65(6) and (7) of the Act is a preliminary issue which relates to the Commissioner's jurisdiction to continue an inquiry. These provisions read:

- (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
- (7) This Act applies to the following records:
1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 65(6) is record-specific and fact-specific. As I indicated above, 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.

The LCBO submits that the records fall within the scope of sections 65(6)1 and 3. I will begin with section 65(6)3.

Section 65(6)3

In order for a record to fall within the scope of paragraph 3 of section 65(6), the LCBO must establish that:

1. the record was collected, prepared, maintained or used by the LCBO or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the LCBO has an interest.

[Order P-1242]

Requirements 1 and 2

In my view, it is clear that job competition records such as interview questions and suggested responses are either collected, prepared, maintained or used by the LCBO, and in many cases, all four. Therefore, Requirement 1 has been established.

In Order P-1258, former Assistant Commissioner Tom Mitchinson dealt with similar types of records. He found with respect to the second requirement that:

I also find that in the context of a job recruitment process:

- an employment interview is a “meeting”;
- deliberations about the results of a competition among the panel are “meetings, discussions or communications”, and sometimes all three; and
- applications, reference letters and letters to the applicants are “communications”.

Moreover, the records generated with respect to these activities would either be for the purpose of, as a result of, or substantially connected to these meetings, discussions or communications, and therefore properly characterized as being “in relation to” them (Order P-1242).

I agree with these conclusions, and I find that interview questions and possible responses are substantially connected to the activities described above, and are properly characterized as being “in relation to” meetings, discussions or communications. Accordingly, I find that Requirement 2 has been established.

Requirement 3

The LCBO indicates that the appellant is a member of the Ontario Liquor Boards Employees’ Union. The LCBO states further that the appellant has filed a grievance under the Collective Agreement in respect of this job competition.

I am satisfied that the appellant is an employee of the LCBO. I agree with former Assistant Commissioner Mitchinson’s finding in Order P-1258 that “it is self-evident that a job competition is an employment-related matter”. With respect to whether or not a job competition is a matter in which the Ministry “has an interest”, the former Assistant Commissioner stated:

The Ontario Human Rights Code (the Code) applies to the Ministry, and includes the following sections which are relevant to the issue of the institution’s legal obligations and the possible effects of failing to observe them:

- 5(1) Every person has a right to equal treatment with respect to employment without discrimination because of race,

ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or handicap.

- 9 No person shall infringe or do, directly or indirectly, anything that infringes a right under this Part. [Note: section 5(1) is in "this Part" - i.e. Part I of the Code.]
- 41(1) Where the board of inquiry, after a hearing, finds that a right of the complainant under Part I has been infringed and that the infringement is a contravention of section 9 by a party to the proceeding, the board may, by order,
- (a) direct the party to do anything that, in the opinion of the board, the party ought to do to achieve compliance with this Act, both in respect of the complaint and in respect of future practices; and
 - (b) direct the party to make restitution, including monetary compensation, for loss arising out of the infringement, and, where the infringement has been engaged in wilfully or recklessly, monetary compensation may include an award, not exceeding \$10,000, for mental anguish.

From these sections, it is clear that, if an employer engages in discrimination in selecting an employee in a job competition, the employer has committed a direct breach of section 5(1) of the Code, and, as a party to a Board of Inquiry proceedings, could be liable in damages. Thus, in my view, it can properly be said, that the job competition process involves legal obligations which the employer must meet.

I agree with this analysis. Accordingly, I find that job competitions are matters in which the LCBO "has an interest", and Requirement 3 is met.

In summary, I find that the records at issue in these appeals were collected, prepared, maintained and/or used by the LCBO, in relation to meetings, discussions and consultations about employment-related matters in which the LCBO has an interest. All of the requirements of section 65(6)3 of the Act have thereby been established by the LCBO. None of the exceptions contained in section 65(7) are present in the circumstances of this appeal. Therefore, the records are excluded from the scope of the Act.

Because of these findings, it is not necessary for me to consider the application of sections 65(6)1 or 18(1)(c).

ORDER:

I uphold the decision of the LCBO to withhold the records at issue.

Original signed by: _____
Laurel Cropley
Inquiry Officer

_____ August 13, 1997