



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

ORDER PO-1687

Appeal PA-980301-1

Liquor Control Board of Ontario



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BACKGROUND:

The Liquor Control Board of Ontario (the LCBO) has the power under the Liquor Control Act to authorize manufacturers of Ontario wine to operate stores (winery retail stores) for the sale of their wine to the public, and the authority to determine municipalities in which stores can be located.

The LCBO states that during 1993 it adopted a policy to restrict the authorization of new winery retail stores to locations in designated viticultural areas. According to the LCBO, this policy precluded the authorization of new winery stores in urban areas, but did not restrict winery retail stores that had been authorized prior to the adoption of the policy from relocating to urban areas.

Before the new policy came into effect, a named winery was authorized by the LCBO to operate a winery retail store in a designated viticultural area. However, due to a change in specified circumstances, this winery submitted a proposal to relocate its pre-1993 winery retail store to an urban location, and applied to the LCBO for a new winery retail store authorization for its existing location.

NATURE OF THE APPEAL:

The LCBO received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all information, LCBO deliberations, correspondence or memoranda, as well as the reasons for any decisions made by the LCBO in relation to approvals, authorizations and transfers granted to the named winery. The requester is a law firm representing a different winery.

The LCBO located 40 responsive records. Before responding to the request, the LCBO notified the named winery (the affected party), pursuant to section 28 of the Act, seeking its views on the possible disclosure of the records. After considering the affected party's response, the LCBO issued its decision to the appellant, granting access to two records and denying access to the other 38 records. The LCBO claimed that 11 of these records were not responsive to the request, and relied on one or more of the following exemption claims for the other 27 records:

- advice and recommendations - section 13(1)
- third party information - sections 17(1)(a) and (c)
- economic and other interests of Ontario - section 18(1)(g)
- solicitor-client privilege - section 19

The LCBO provided the requester with an index of those records to which access had been denied.

The requester (now the appellant) appealed the LCBO's denial of access to the 27 records. During mediation, the LCBO disclosed 11 of these records to the appellant. The 16 records remaining at issue are Records 10-13, 18-19, 23-26, 32, 34-36 and 40 in their entirety, and the parts of Record 14 that are responsive to the request. The records consist of letters and other correspondence, applications, memoranda and other internal documents (including drafts), meeting minutes and handwritten notes.

I sent a Notice of Inquiry to the LCBO, the appellant and the affected party. Representations were received from the LCBO and the affected party. In its representations, the LCBO withdrew the section 18(1)(g) exemption claim.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The LCBO claimed section 19 as the basis for exempting Records 12, 25, 34-36 and 40.

This exemption reads as follows:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

Section 19 consists of two branches, which provide a head 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 records satisfy 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]

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 P-1342]

Communication Privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice. The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation (see Order P-1551).

This privilege has been described by the Supreme Court of Canada as follows:

... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship ...

[Descôteaux v. Mierzwinski (1982), 141 D.L.R. (3d) 590 at 618, cited in Order P-1409]

The privilege has been found to apply to “a continuum of communications” between a solicitor and client:

... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as “please advise me what I should do.” But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

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[Balabel v. Air India, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409]

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [Susan Hosiery Ltd. v. Minister of National Revenue, [1969] 2 Ex. C.R. 27, cited in Order M-729].

These six records all consist of typewritten or handwritten notes addressed to LCBO's General Counsel from various LCBO employees, seeking advice and/or direction regarding the issues raised by and surrounding the affected party's application. In many cases, the records also contain handwritten advice of counsel in response.

The LCBO submits that all of these records represent written communications of a confidential nature between LCBO employees and a legal advisor, and that these communications are directly related to requesting, formulating or giving legal advice. The LCBO further submits that these records constitute a "continuum of communications" between a solicitor and client regarding the processing of the affected party's application, and therefore meet the requirements of common law solicitor-client communications privilege. I concur. Each of these records was prepared by or for counsel in the context of her work in processing of the affected party's application, and I find that the LCBO has established the necessary relationship between these records and their subsequent use in providing confidential legal advice. Therefore, I find that Records 12, 25, 34-36 and 40 qualify for exemption under section 19.

THIRD PARTY INFORMATION

The LCBO originally claimed sections 17(1)(a) and or (c) as the basis for exempting Records 10, 11, 12, 18, 19, 24, 25, 26 and 32. In its representations, the LCBO withdrew this claim for Record 26, and also clarified that this exemption is only being claimed for the third paragraph of Record 19. Because section 17 is a mandatory exemption, I will consider its possible application to Records 19 and 26 in their entirety. Also, because I found that Records 12 and 25 qualify for exemption under section 19, I will not deal with them further in my section 17 discussion.

Sections 17(1)(a) and (c) of the Act state:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

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For the records to qualify for exemption under sections 17(1)(a) or (c), the LCBO and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**
2. the information must have been supplied to the Ministry in confidence, either implicitly or explicitly; **and**
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a) or (c) of subsection 17(1) will occur.

[Order 36]

Requirement One

“Commercial information” has been defined in past orders to mean information which relates solely to the buying, selling or exchange of merchandise or services. The term “commercial” information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order P-493).

The LCBO submits that the records contain commercial information concerning the assessment of the affected party’s original premises and production limits and/or the affected party’s plans for relocating and opening a new winery retail store.

The affected party adds that the records contain the following information:

... marketing and communications plan; information such as our target market, sales potential, and the vinification style of our wines ...

In my view, the information contained in Records 10, 11, 18, 24, 26, 32, and the second and third paragraphs of Record 19 sets out specific details regarding the business operation of the affected party or the business plan of the affected party to relocate and conduct its business. I find that the information in these records satisfies the definition of “commercial information” for the purposes of section 17(1).

Requirement Two

In order to satisfy the second requirement, the LCBO and/or the affected party must show that the information was **supplied** to the Ministry, either implicitly or explicitly **in confidence**.

Supplied

The LCBO and the affected party both submit that the information contained in the records was supplied to the LCBO by the affected party in the context of the affected party's application to relocate its winery retail store.

Records 10, 11 and 32 are copies of the affected party's actual application to the LCBO, which were clearly supplied by the affected party to the LCBO.

Records 18, 19 and 24 are LCBO internally generated documents. Previous orders of this Office (e.g. Orders P-36, P-204, P-251 and P-1105) have found that information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution. Records 18 and 24, as well as the second and third paragraphs of Record 19, all refer to information previously supplied by the affected party in the context of its application. Consequently, while the actual records were not supplied by the affected party, their content would reveal the information that was supplied, and I find that Records 18 and 24 and the second and third paragraphs of Record 19 were "supplied" for the purposes of section 17(1).

Record 26 is a draft letter to the affected party from the LCBO setting out its policy requirements for the affected party's current business operation, together with marginal notes made by LCBO employees. This record is comprised solely of information generated by the LCBO, and its disclosure would not reveal information supplied by the affected party. Therefore, I find that Record 26 was not supplied by the affected party for the purposes of section 17(1).

In Confidence

In order to establish that Records 10, 11, 18, 24, 32, and the second and third paragraph of Record 19 were supplied either explicitly or implicitly in confidence, the LCBO and/or the affected party must demonstrate that an expectation of confidentiality existed at the time the records were submitted (Order M-169), and that this expectation was based on reasonable and objective grounds. To do so, it is necessary to consider all circumstances, including whether the information was:

- (1) Communicated to the LCBO on the basis that it was confidential and that it was to be kept confidential.
- (2) Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the LCBO.
- (3) Not otherwise disclosed or available from sources to which the public has access.
- (4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The LCBO states that due to the sensitivity of the information contained in the records, there was an implicit understanding that this information was supplied in confidence. The LCBO also points out that the application form (Record 11) includes a statement that the LCBO “will consider all information as confidential”. The LCBO submits that the affected party would expect the LCBO not to disclose the records to other parties, and also submits that the confidentiality of similar commercial information has been recognized by the courts in the context of civil litigation.

The affected party submits:

When information was supplied to the LCBO regarding our marketing and communications plan ... we believed that this information was proprietary and therefore to be kept confidential. The inference of confidentiality was in the fact that this was business operation information that would otherwise not be available to the public just as information supplied to a bank is confidential. In addition to this, nowhere on the request for information from the LCBO did it state that the LCBO required the express written consent of the company to disclose any information to other bodies outside of the LCBO.

I find that the affected party, with support from the LCBO and in the absence of any evidence to the contrary, has established a reasonable expectation that information contained in Records 10, 11, 18, 24, 32, and the third paragraph of Record 19 was supplied to the LCBO either explicitly or implicitly in confidence.

As far as the second paragraph of Record 19 is concerned, this information relates solely to the affected party's intention to relocate its business, which is publicly known. In my view, it is not reasonable to expect that this information would have been supplied in confidence, and I find that the second paragraph of Record 19 fails to satisfy the second requirement of the section 17(1) test.

Requirement Three

To discharge the burden of proof under the third part of the test, the LCBO and the affected party must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

Lastly, as to Part 3, the use of the words “**detailed and convincing**” do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof

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in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

Section 17(1)(a)

The affected party submits that disclosure of the records could interfere with its competitive position in the marketplace. The affected party states:

If this information is revealed to a competitor, they are able to gain unfair advantage over the audience we target which could have an adverse affect on sales. Furthermore, if sales reduce, we must reduce our overall operation affecting what little employees we have.

The LCBO adds the following in support of this claim:

The Records disclose business problems encountered by the [affected party], as well as information concerning the [affected party's] proposals for production and marketing plans. Given the nature of this information, it is reasonable to conclude that the disclosure of this information to the [appellant] could prejudice the competitive position of the [affected party] vis-à- vis the [appellant].

Based on my independent review of the contents of the records and the submissions of both the LCBO and the affected party, I find that I have been provided with detailed and convincing evidence describing a set of facts and circumstances that could lead to a reasonable expectation that the harms described in section 17(1)(a) would occur if Records 10, 11, 18, 24, 32, and the third paragraph of Record 19 were disclosed to the appellant.

Accordingly, I find that these records or parts of records satisfy all three requirements of the test for exemption under section 17(1)(a) of the Act. Because no other discretionary exemptions have been claimed for the rest of Record 19, and no other mandatory exemptions apply, it should be disclosed to the appellant, subject only to the severance of the third paragraph.

ADVICE OR RECOMMENDATIONS

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The LCBO claims that Records 12, 13, 14, 18, 23, 24, 25, 26 and 40 qualify for exemption pursuant to section 13(1) of the Act. I have already determined that Records 12, 18, 24, 25 and 40 qualify for exemption under either sections 17(1)(a) or 19. Therefore, I will restrict my discussion of section 13(1) to Records 13, 14, 18 and 23.

Section 13(1) of the Act states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

This exemption is subject to the exceptions listed in section 13(2).

It has been established in a number of previous orders that advice or recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as “advice” or “recommendations”, the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process. Information that would permit the drawing of accurate inferences as to the nature of the actual advice and recommendation given also qualifies for exemption under section 13(1).

In Order 94, former Commissioner Sidney B. Linden commented on the scope of this exemption. He stated that it “... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making”.

The LCBO describes Record 13 as an internal memorandum from a staff member of the Liquor Licence Board of Ontario (the LLBO) to a senior policy advisor of the LCBO. The LCBO’s only representation with respect to this record is the following statement:

Record 13 contains an account of legal advice and recommendations that were received by the author or Record 13 from [a named lawyer at the LLBO].

In my view, this record is more accurately described as a direction from the LLBO to the LCBO on how to deal with the affected party’s licence application. It is not in the form of advice or recommendations, nor does it reveal the advice or recommendations of a public servant. Therefore, I find that Record 13 does not qualify for exemption under section 13(1).

Record 14 is a copy of the minutes of the LCBO’s Wine Issues Meeting on February 4, 1997. There are 11 items listed in these minutes but only one (Item 6) is responsive to the request. The LCBO has not provided any representations in respect of this record. Having reviewed it, I find that Item 6 neither contains nor would reveal any advice or recommendations; it simply sets out the action that will be taken,

from an LCBO policy perspective, in relation to issues arising from the affected party's relocation application. Therefore, I find that Item 6 of Record 14 does not qualify for exemption under section 13(1).

Record 23 is a copy of a one-page letter from the LCBO to the affected party. It includes a series of handwritten margin notes as well as an attached page of other handwritten notes. The LCBO states:

Marked on Record 13 (sic) are a number of hand written notes among members of the LCBO Policy Department discussing the LCBO's options concerning actions that could be taken, and advice and recommendations regarding such options.

While I accept that the handwritten notes were made by employees of the LCBO, for the most part, they do not contain nor would they reveal advice or recommendations. With the exception of certain notations on the attached page of notes, they simply provide a factual account of each employee's involvement in this matter and/or direction as to what steps should be taken. The content of the letter itself is clearly not a communication among public servants.

The attached page of notes contains questions raised by one LCBO employee, and answers provided by another. I find that these answers in some instances are accurately characterized as advice and recommendations, and qualify for exemption under section 13(1). The rest of the attached page and all of the remaining portions of Record 23 do not qualify for exemption under this section, and should be disclosed to the appellant.

Record 26 is a one-page unsigned draft letter from the LCBO to the affected party, and includes a series of marginal handwritten notes. The LCBO states that this record "contains advice and recommendations of actions to be taken by [the affected party] to comply with LCBO requirements". I accept that disclosure of Record 26, in draft form, would reveal the advice or recommendations of a public servant as to the content of the final version of the letter and the action to be taken. In my view, the advice and recommendations formed an integral part of the deliberative process of decision-making regarding the processing of the affected party's relocation application, which relates directly to the actual business of the LCBO (see Orders P-94 and P-434). Accordingly, I find that Record 26 qualifies for exemption under section 13(1).

ORDER:

1. I order the LCBO to disclose Record 13 in its entirety, and parts of Records 14, 19 and 23. I have attached a highlighted version of Records 14, 19 and 23 with the copy of this order sent to the LCBO's Freedom of Information and Privacy Co-ordinator, which identifies those portions which should **not** be disclosed. Disclosure of these records must be made to the appellant by **July 21, 1999** but, not before **July 16, 1999**.
2. I uphold the LCBO's decision to deny access to the remainder of the records.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the LCBO to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____

_____ June 15, 1999

Tom Mitchinson
Assistant Commissioner