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

INTERIM ORDER PO-2508-I

Appeal PA-040297-1

Liquor Control Board of Ontario

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

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 a copy of a report concerning an "investigation conducted during 2000 and/or 2001 into the LCBO Resource Protection Department". The requester specified that the Ontario Provincial Police (OPP) Anti-Racket Squad conducted the investigation.

The LCBO located a responsive record, namely a two-page letter with an attached report, and denied access pursuant to the law enforcement exemptions in sections 14(1)(g) (intelligence information) and 14(2)(a) (law enforcement report) of the *Act*.

The requester, now the appellant, appealed the LCBO's decision.

During the mediation stage of the appeal process, the LCBO issued a revised decision letter, in which it stated that it was now denying access to the responsive record pursuant to sections 14(1)(d), 14(2)(a), 14(2)(c), (law enforcement) and 21(1)(personal privacy) of the *Act*. Section 14(1)(g) was removed as an exemption being claimed.

Also during mediation, the appellant advised that, in his view, there is a compelling public interest in disclosure of the entire record at issue. As a result, section 23 of the *Act*, the public interest override provision, was added as an issue in the appeal.

Mediation did not resolve the issues in dispute, and the file was transferred to the adjudication stage of the appeal process for an inquiry.

I began my inquiry by sending a Notice of Inquiry to the LCBO, and received representations in return.

I then sent a Notice of Inquiry to the Ministry of Community Safety and Correctional Services (MCSCS) as an affected party. The OPP is part of MCSCS, and I determined that the OPP might have an interest in the disclosure of the record. MCSCS responded with representations.

Based on my examination of the record and the representations I had received, I then narrowed the scope of my inquiry to the section 14(2)(a) exemption. I sent a modified Notice of Inquiry to the appellant along with a severed version of the LCBO's representations and the complete representations of MCSCS, inviting representations on Section 14(2)(a) only. I did not ask the appellant to provide representations on the public interest override at section 23 of the *Act* because section 14 is not one of the sections that can be overridden by section 23.

The appellant responded with representations.

RECORD:

The record consists of a 2-page letter from the OPP to the LCBO, and a 5-page report described as a "summary of the investigation." The summary report is attached to the cover letter and all pages are consecutively numbered from 1 to 7.

PRELIMINARY ISSUE:

In his initial request set out above, the appellant indicated that he was seeking a "report". The LCBO responded to his request and this inquiry proceeded based on a 5-page summary of the report and its cover letter, described above, and not the full report prepared by the OPP. The record itself refers to the full report and indicates that it is in the custody of the OPP.

In his representations the appellant states:

> First of all, to clarify: In her March 21, 2005 letter to your office, I believe LCBO legal counsel is referring to the 5-page summary of the OPP investigation. However, I am seeking the full investigative report in addition to the 5-page summary.

After receiving the appellant's representations, this office contacted the LCBO to determine if it had a copy of the full report. The LCBO responed that it had never received the full report from the OPP.

I would suggest to the LCBO that, given the wording of the request, it would have been appropriate for the LCBO to have transferred the request to MCSCS in relation to the full report, as well as responding, as it did, in relation to the record it did have in its custody.

However, this did not occur. The Mediator's Report clearly described the record at issue as a letter with an attached 5-page summary report. Each of the parties had an opportunity to comment on the Mediator's Report within a prescribed time period and none of the parties did so. In my view, this was the appropriate stage for the appellant to point out that, in his view, the full report ought to be considered as a responsive record. He did not do so. Under the circumstances, I am not prepared to expand the scope of this inquiry to include the question of whether the request should be transferred to MCSCS to deal with the full report. If the appellant continues to seek access to this record, he should submit a new request to MCSCS.

DISCUSSION:

LAW ENFORCEMENT REPORT

Section 14(2)(a) states:

> (2) A head may refuse to disclose a record,
>
> (a) that is a report prepared in the course of law enforcement, inspections or investigations by an agency which has the function of enforcing and regulating compliance with a law;

The term "law enforcement" is used in several parts of section 14, and is defined in section 2(1) as follows:

> "law enforcement" means,
>
> (a) policing,
>
> (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
>
> (c) the conduct of proceedings referred to in clause (b)

The word "report" means "a formal statement or account of the results of the collation and consideration of information". Generally, results would not include mere observations or recordings of fact [Orders P-200, MO-1238, MO-1337-I].

The title of a document is not determinative of whether it is a report, although it may be relevant to the issue [Order MO-1337-I].

The term "law enforcement" has been found to apply in the following circumstances:

- a police investigation into a possible violation of the *Criminal Code* [Orders M-202, PO-2085]

For a record to qualify for exemption under section 14(2)(a) of the *Act*, the Ministry must satisfy each part of the following three part test:

1. the record must be a report; **and**

2. the report must have been prepared in the course of law enforcement, inspections or investigations; **and**

3. the report must have been prepared by an agency which has the function of enforcing and regulating compliance with a law.

In Order 221, former Commissioner Tom Wright made the following comments about Part 1 of the test:

> The word "report" is not defined in the Act. However, it is my view that in order to satisfy the first part of the test, i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact.

The LCBO states as follows in its representations:

> Both the letter and the investigative summary in the present case are formal statements of the results of the collection and consideration of the information obtained during the investigation. They are not merely notes or a collection of raw data. Rather, they analyze the relevant information, provide conclusions and make recommendations. Similar to the law enforcement record referred to in Order P-1020, both records describe the incidents which led to the OPP's involvement, the action taken by the OPP, the results of those actions and a consideration of how the matter should be resolved.
>
> …
>
> … Both documents were prepared by members of the Investigations Bureau, Criminal Investigations Branch of the OPP, which was the agency that performed the investigation. Moreover, the covering letter refers to the attached investigation summary as an "investigation report"…. The letter further states the "the report attached is a summary of the investigation"….

MCSCS states as follows in its representations:

> The record at issue constitutes a formal written account of a specific law enforcement investigation undertaken by the OPP. The OPP is a policing agency which has the function of enforcing the laws of Canada and the Province of Ontario. The record at issue was prepared by the OPP Criminal Investigations Branch at the conclusion of the OPP investigation. The record documents the background of the investigation, the conduct of the investigation and the conclusions/recommendations resulting from the OPP investigation.

The appellant provided representations as well, but they do not directly address the application of the section 14(2)(a) exemption. The appellant's representations essentially argue that there is a public interest in disclosure of this information, which relates to the public interest override found in section 23 of the *Act*. However, as noted previously, section 23 does not include section 14 as an exemption that can be overridden by a compelling public interest in disclosure.

Having reviewed the record and the representations of the parties, I am satisfied that both the letter and the summary report constitute a formal statement or account of the results of the collation and consideration of information, and therefore, even if viewed as separate records, both qualify as "reports." It is also apparent that they were prepared in the course of a law enforcement investigation conducted by the OPP in relation to the *Criminal Code*. In addition, it is abundantly clear that the OPP has the function of enforcing and regulating compliance with the *Criminal Code*. Therefore, I am satisfied that all three parts of the test under section 14(2)(a) have been met and I find the entire record is exempt from disclosure.

As I have found that the 5-page summary and cover letter are exempt from disclosure under section 14(2)(a) of the *Act*, I am not required to consider the application of the other exemptions claimed by the LCBO or the application of the public interest override found at section 23 of the *Act*.

EXERCISE OF DISCRETION

The section 14(2)(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

The LCBO submits that, in deciding to withhold the information, it considered:

- the purposes of the *Act*;
- the wording of the exemptions and the interests they seek to protect;
- whether the requester is seeking his or her own personal information;
- whether the requester has a sympathetic or compelling need to receive this information;
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person;
- the age of the information.

The appellant submits that the OPP has "no problem" with disclosure, which if demonstrated, would be a relevant factor to consider in applying a law enforcement exemption. I am not in possession of any evidence in support of this assertion, which is contradicted by the fact that, on behalf of the OPP, MCSCS provides arguments in support of non-disclosure, and defers to the LCBO on the question of the exercise of discretion.

As already noted, the main thrust of the appellant's submissions relate to the public interest in disclosure. In particular, they relate to the need for transparency and accountability with respect to the results of the investigation. In my view, this is a relevant factor in relation to the exercise of discretion. In this regard, the LCBO submits:

> [t]he absence of a public interest override with respect to exempt law enforcement records suggests that the legislators viewed the public interest in retaining the confidentiality of law enforcement records as outweighing the public interest in disclosure.

The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO's submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.

Accordingly, in my view, the LCBO failed to consider a relevant factor, namely the desirability of disclosing this record, in whole or in part, in order to promote the important purposes of transparency and accountability.

Elsewhere in its representations, the LCBO submits that under section 14(2)(a), a record that qualifies as a "report" is exempt in its entirety, and severance is not required. While this may be true in relation to the exemption itself, it is not determinative in the context of the exercise of discretion. It is within the LCBO's discretion to sever the record and disclose part of it, even if the whole thing meets the requirements of section 14(2)(a).

I will therefore order the LCBO to re-exercise its discretion, and in that regard, to consider the possibility of disclosing the record, with appropriate severances to protect vital interests such as confidential sources or personal privacy.

ORDER:

1. I uphold the LCBO's decision that the letter and summary report are exempt under section 14(2)(a).

2. I order the LCBO to re-exercise its discretion in accordance with the discussion of that issue, set out above, and to advise the appellant and myself of the result of this re-exercise, in writing. If the Ministry continues to withhold all or part of the information, I also order it to provide the appellant and myself with an explanation of the basis for exercising its discretion to do so. The Ministry is required to send the results of its re-exercise, and its explanation, no later than **October 19, 2006**. If the appellant wishes to respond to the Ministry's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the LCBO's correspondence by providing me with written representations.

3. I remain seized of this matter pending the resolution of these issues.

Original signed by: September 27, 2006
John Higgins
Senior Adjudicator