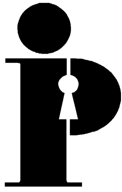

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2562

Appeal PA-040335-1

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 the "listing files" concerning "replacement listings" requested by a named winery (the affected party). The requester, through its counsel, specified that the responsive records include "all product review sheets related to four [of the affected party's] replacement products and any other documents including letters of guarantee and confirmations for the period between September 2002 and May 2004." The LCBO identified the responsive records and gave notice of the request to the affected party under section 28(1) of the *Act*. The affected party objected to the release of the information requested by the requester and provided representations in support of its objection to the LCBO.

The LCBO reviewed the affected party's representations and decided to grant partial access to the records. Access was denied to portions of the records pursuant to section 17(1) of the *Act*. The information the LCBO decided to release was subsequently disclosed.

The requester (now the appellant) appealed the LCBO's decision. The appeal was not settled in mediation and, consequently, a Mediator's Report was issued and the file was moved to the adjudication stage of the appeal process. Following the issuance of the Mediator's Report, the LCBO issued a revised decision letter (the first revised decision letter) granting access to four additional records that the affected party consented to release. Those records included a letter dated February 28, 2003 from the affected party to the LCBO and a portion of three LCBO forms entitled "Section E – Notice of Results" that refer to tasting results for three wine samples provided by the agent for the affected party to the LCBO.

The appellant still sought access to the remaining records, and I therefore commenced my adjudication of the appeal by issuing a Notice of Inquiry to the LCBO and the affected party inviting them to provide representations. The LCBO submitted representations in response. The affected party did not provide new representations but indicated that it intended to rely upon the representations it provided to the LCBO when it was notified of the request. A copy of those representations was also attached to the representations of the LCBO.

The LCBO then issued a second revised decision letter in which it released some further records and identified the records remaining at issue. The appellant was not satisfied with the records that were disclosed and advised that it wished to pursue the appeal with respect to the records that were remaining at issue.

I then issued a second Notice of Inquiry, this time to the appellant, and invited its representations. I also provided the representations of the LCBO, with one portion severed, and a copy of the affected party's representations, which were also subject to a minor severance. In response, the appellant's counsel provided brief representations whose focus was clarification of the scope of the appeal.

I sent a copy of the appellant's representations to the LCBO and the affected party and requested further representations on the scope of the appeal only. The LCBO filed reply representations in which it identified eleven records that, in its opinion, were responsive to the request as described by the appellant.

I sent the reply representations to the appellant asking for sur-reply representations with respect to the scope of the appeal only. The appellant's counsel responded by advising that he was content to limit the scope of the appeal to documentation relating to the de-listing decision by the LCBO of the four wines referred to above. He agreed that the scope of the appeal should be limited to the records that were described in the reply representations of the LCBO, assuming that the records identified included "all relevant documentation relating to the de-listing."

RECORDS:

The LCBO initially identified approximately 150 pages of records related to the four replacement products. Some of these records were subsequently disclosed, as described above. In addition, the scope of the appeal has been substantially narrowed as a result of the appellant's initial representations, the LCBO's reply and the appellant's sur-reply. Given the appellant's statement in sur-reply that he is content with the records proposed by the LCBO as long as they include "all relevant documentation relating to the de-listing," I have reviewed all of the undisclosed records to confirm the scope of the appeal, as discussed in the following section of this order.

DISCUSSION:

BACKGROUND

The Liquor Control Board of Ontario (the LCBO) is a non-share capital corporation established under the *Liquor Control Act* whose authority includes the operation of retail stores for the sale of alcoholic beverages to the public. The LCBO's representations in this appeal provide a useful description of the process whereby potential products are considered and accepted for sale in its stores. This process is briefly described here by way of background.

Periodically, the LCBO publishes a "needs letter" setting out the types of products that are of interest to the LCBO. In response to that needs letter, a supplier or its agent would submit the following documentation:

a) A Product Review Sheet;
b) A single page marketing plan;
c) A price quotation; and
d) One bottle of the product as a sample.

Following a review of this documentation and the sample of the product, the LCBO either rejects or gives its initial approval to the product. If the latter, the LCBO asks the supplier or agent to submit a more detailed application, called a Product Profile and Marketing Plan, for review.

If the LCBO decides to proceed with the purchase, following review of the Product Profile and Marketing Plan, the LCBO issues a letter of intent and the supplier or its agent is required to indicate its agreement with the terms of the letter of intent in writing. Among other things, the

supplier or its agent may have to agree to re-price or re-quote the product to meet the projected selling price after the freight charges are determined.

A supplier has the right to request that any of its products accepted for sale pursuant to this process be replaced by other products that it offers for sale. In those circumstances, the supplier prepares the same set of documents referred to above and delivers a sample of the proposed replacement product. If the LCBO approves of the replacement product, it invites the supplier to prepare and deliver a Product Profile and Marketing Plan for review. As with the procedure described above, the process for replacement products is complete once the LCBO delivers a letter of intent and the terms of that letter are accepted by the supplier in writing. The only difference in this process is that the LCBO does not initiate matters with a "needs letter."

RESPONSIVENESS OF RECORDS/SCOPE OF THE APPEAL

This issue arose as a result of the following statement by the appellant's counsel in his initial representations:

> My client is only concerned with documentation related to the circumstances and timing of the request to de-list its four products and replace those four products with new products from the third party winery. *Information such as sales forecast, proposed retail prices and marketing support which may have been "supplied" in confidence, is not being sought by this Appellant. As I indicated earlier, we are also not seeking any technical information with respect to the actual wines themselves.* (enphasis added)

Following this clarification of the request, the records remaining in dispute were described by the LCBO, in its reply representations, as follows:

1. letter from affected party to the LCBO dated December 18, 2002
2. e-mail from affected party to LCBO dated January 29, 2003
3. letter from affected party to the LCBO dated February 28, 2003
4. e-mail from the affected party to the LCBO dated June 20, 2003
5. letter from the affected party to the LCBO dated October 3, 2003
6. Product Review Sheet for each of the replacement products
7. Special Purchase Summary Sheet for each of the replacement products
8. letters of intent from the LCBO to the affected party for each of the replacement products, two of which are dated June 20, 2003 and two of which are dated December 18, 2003
9. letters from the affected party to the LCBO agreeing to the terms of the letters of intent, two of which are dated July 4, 2003 and two of which are dated January 8, 2004
10. Requirements for Listing – Product Life Cycle for each of the replacement products
11. letter from the affected party to the LCBO dated October 28, 2002

I will follow the numbering system in this list in order to identify these records when they are discussed further in this order.

Several of the records in the list set out above are no longer at issue. Record 3 was released to the appellant pursuant to the first revised decision letter issued following the completion of mediation. In addition, records 1, 5 and 10 were released pursuant to the second revised decision letter. As these records have already been released to the appellant, they are no longer at issue in this appeal

As discussed above, I have reviewed all of the undisclosed records provided to this office in connection with the appeal to confirm the scope of the appeal based on the appellant's comments in this regard. I determined that some records not identified by the LCBO in its reply representations contain responsive information. I find that in addition to the records identified by the LCBO, the following contain responsive information:

- the letter dated November 24, 2003 from the affected party to the LCBO (record 12);

- the Product Profile and Marketing Plan for each of the replacement products (records 13-16).

In summary, records 2, 4, 6, 7, 8, 9 and 11, as identified and numbered by the LCBO, are at issue in this appeal. Record 12 and records 13-16, identified in my review as responsive, are also at issue.

The LCBO's reply representations raise the further issue of what portions of the identified records are responsive. The LCBO stated that "… if the IPC orders the release of any records, any information that does not relate to the delisting of the products in question should be severed from such records." The appellant had an opportunity to comment on this issue in sur-reply but made no direct or indirect reference to the issue of severance.

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour (Orders P-134, P-880). Having reviewed the appellant's comments about the scope of the request, I have concluded that records relating to the delisting of the four products in question and their replacement with other products are responsive, and the only information in them that will be severed as non-responsive is information identified by the appellant as such, i.e., "information such as sales forecast, proposed retail prices and marketing support" and technical information about the wines.

I now turn to consider the information in each of the records at issue to determine whether that information is responsive to the appellant's request.

Record 2

This is an e-mail from the agent for the affected party to the LCBO that confirms the request of the affected party for the exchange of four products with four replacement products. This record includes responsive and non-responsive information. The non-responsive information relates to potential purchasers of the replacement products. It is marketing information and is therefore non-responsive.

Record 4

This is an e-mail dated June 20, 2003 from the agent for the affected party to the LCBO. Like record 2, it contains responsive and non-responsive information. It contains comments about proposed pricing of the replacement products, which are not responsive, nor is information about the affected party's participation in a wine show. This record contains only a limited amount of responsive information.

Record 6

This is the Product Review Sheet for each of the four replacement products. They were prepared by the affected party and submitted to the LCBO. These records include the following non-responsive information: the sugar and alcohol content of each proposed wine, sales information, the amount to be spent in promotional support, the price per case, the estimated retail price and the tasting panel results. Attached to several of the Product Review Sheets is a marketing plan that is also not responsive to the request.

Record 7

This record includes five "Special Purchase Summary Sheets", one for each of the four replacement products and one handwritten draft. They were prepared by the LCBO. I find that the marketing information and proposed pricing information for the replacement products is non-responsive.

Records 8 and 9

Record 8 consists of four letters of intent from the LCBO relating to each of the four replacement products. Record 9 consists of four letters from the affected party responding to the letters of intent. I find that the proposed retail prices of the replacement products in records 8 and 9 are not responsive to the appellant's request. In two of the four letters that comprise record 9, there is discussion of pricing, and I also find this to be non-responsive.

Record 11

This record is a letter dated October 28, 2002 from the agent for the affected party to the LCBO. I find that the proposed retail prices for the replacement products mentioned in the letter are non-

responsive. The last paragraph of the letter relates to pricing arrangements and I also find that it is not responsive.

Record 12

This is a brief letter dated November 24, 2003 from the affected party to the LCBO. Paragraph one contains retail pricing information that I find to be non-responsive.

Records 13-16

These records are preprinted LCBO forms entitled "Product Profile and Marketing Plan" that have been completed by the agent for the affected party. There are four of these plans, one for each of the four replacement products.

Sections A and B contain information regarding the application process provided by way of instruction by the LCBO to the affected party. All of the information in those two sections is responsive information.

Section C includes detailed product information. I find that the information in this section is non-responsive, except for the contents of paragraphs 3, 4, 5, 6 and 7.

Section D is entitled "Market Information" and contains market support information. I find that this information is not responsive to the appellant's request.

Section E contains information about the marketing support plans of the affected party for the product. Like section D, I find that this information is not responsive to the appellant's request.

Section F is a checklist of information that must be included with the marketing plan and Section G contains the evaluation criteria to be applied by the LCBO as well as the actual score awarded to the product. I find that sections F and G are non-responsive to the appellant's request.

I now turn to consider the application of section 17(1) of the *Act* to the portions of the records at issue that are responsive.

THIRD PARTY INFORMATION

The LCBO claims that the records at issue are exempt pursuant to sections 17(1)(a), (b) and (c). These sections 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;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, and MO-1706].

For section 17(1)(a), (b) or (c) to apply, the institution and/or the third 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 institution 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The LCBO takes the position that the information contained in the records is "commercial information". Previous orders have defined this term as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

I adopt this definition for the purposes of this appeal.

In its representations, the LCBO submits that the records at issue contain information about goods offered for sale by the affected party and the sale of those goods by the LCBO to the public and that this amounts to "commercial information". As previously noted, the affected party did not file new representations at the inquiry stage, but relied instead on its representations to the LCBO at the request stage, and from those representations it is clear that the affected party considers the information contained in the records "commercial information". The appellant made no submissions on this issue.

I have reviewed the records at issue and find that they contain information that falls within the definition of commercial information as the information in these records clearly relates to the buying, selling and exchange of products of the third party. Accordingly, part one of the test for the application of section 17(1) has been met.

Part 2: supplied in confidence

The LCBO submits that records 6, 9, 12 and 13-16 were supplied by the affected party and/or its agent to the LCBO. The LCBO submits that although records 7 and 8 were prepared by the LCBO, these records would reveal or permit the drawing of inferences with respect to the information supplied by the affected party or its agent. The LCBO made no submissions on this issue with respect to records 2, 4 and 11. I note that the LCBO's submissions focus on information that is not at issue because it is non-responsive, including information regarding the replacement products in relation to marketing, the price to be charged to the LCBO, and retail pricing.

The affected party's letter to the LCBO states that the information contained in the records was "supplied" to the LCBO in confidence, without addressing the particular requirements of section 17(1) of the *Act,* and that the records should be exempt from disclosure.

The appellant's counsel did not make any submissions on this issue.

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

Previous orders of this office have found that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. [Orders PO-2018, MO-1706, and PO-2371; see also *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.)]

Adjudicator Corbin applied this approach in Order PO-2453, where the records at issue included details of bid information prepared in response to a Request for Quotation issued by the Ministry of Natural Resources. The record included information such as the successful bidders' pricing, and the total price of the quotation bid. Although the request in that case did not include a contract between the successful bidder and the Ministry, the Adjudicator rightly assumed that the information in the bid formed the basis of a contract for service between the affected party and the Ministry. Adjudicator Corbin stated:

> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.

There are circumstances where the usual conclusion that the terms of a negotiated contract were not supplied is not applicable. These exceptions to the usual rule are referred to as the "inferred disclosure" and "immutability" exceptions. The inferred disclosure exception applies where "disclosure of the information in a contract would permit accurate inference to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706; PO-2371; PO-2384]

If I find that information was "supplied" to the institution, I must then assess whether it was "supplied in confidence". In order to satisfy the "in confidence" component of part two of the test, the party resisting disclosure must establish that the expectation of confidentiality, implicit or explicit, was based on reasonable and objective grounds. In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.
- Treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization.
- Not otherwise disclosed or available from sources to which the public has access.
- Prepared for a purpose which would not entail disclosure. [Order PO-2043]

I now turn to consider the application of these principles to the records at issue in this appeal. In my view, the product listing process established by the LCBO is similar to other government procurement processes except for some differences in terminology. The "needs letter" looks

very much like a Request for Proposals, and the documentation provided by the suppliers and/or agents in response to the needs letter is part of a bidding process.

In this case, there was no "needs letter" because the new listings were initiated by the affected party by means of record 6, the four "product review sheets". In response to this, the LCBO issued the letters of intent, which were followed by the affected party's letters accepting the terms of the letters of intent. Record 12 stipulates further contractual terms. Taken together, these documents set out the contractual terms agreed to by the parties. In this instance, the components of the agreements in respect of each of the four replacement products were: (1) the four "Product Review Sheets" comprising record 6, and the further terms noted in record 12, (2) the LCBO's letters of intent comprising record 8, and (3) the letters from the affected party accepting and confirming their terms, which comprise record 9. The four agreements reached by means of these records include terms such as:

1. An identification of the replacement product to be supplied by the supplier;
2. In the case of the replacement of a current product, the details of the product to be replaced and any financial arrangements associated with the de-listing of that product;
3. The retail price of the replacement product;
4. Details of the label that will go on the replacement product;
5. Shipping container specifications;
6. The size of the first purchase order; and
7. Some details of the supplier's marketing plan.

As I have noted, some of these components are not at issue, but the nature of the terms is relevant to my conclusion that records 6, 8, 9 and 12 together constitute agreements of a contractual nature.

As well, the LCBO's description of the process pursuant to which the records were prepared and delivered to it by the affected party makes it clear that these records were in fact prepared and delivered as part of a negotiation process. I find that the contents of the four agreements arrived at by means of records 6, 8, 9 and 12 were negotiated contractual terms and were therefore not "supplied" as that term is used in section 17(1).

I have not been provided with any submissions to support a conclusion that any of the information at issue in records 6, 8, 9 and 12 is "immutable" or that disclosure of that information would permit accurate inferences to be drawn with respect to underlying non-negotiated confidential information of the affected party. I therefore find that the "immutability" and "inferred disclosure" exceptions do not apply. Records 6, 8, 9 and 12 do not meet part 2 of the test and are not exempt under section 17(1).

Of the non-contractual records remaining at issue, records 2, 4, 11 and 13-16 were provided by the affected party to the LCBO. Record 7 was prepared by the LCBO, based in part on information it had received from the affected party. I find that records 2, 4, 11 and 13-16, and

the information provided by the affected party in record 7, were "supplied" to the LCBO by the affected party.

On the question of whether the information in these records was supplied "in confidence", I note that with the exception of records 13-16, there is no express reference to confidentiality in the records. Records 13-16 all state that "the LCBO cannot guarantee the confidentiality of the information provide in this document, however all efforts will be made to maintain confidentiality." Given the overall context of records 2, 4, 11 and 13-16, and the similar information in record 7, I find that it would be reasonable for the affected party to expect that the non-contractual information would be kept confidential. On the other hand, no reasonable expectation of confidentiality attaches to information in these records that is also reflected in the contractual terms, and in any event, I find that in this appeal, it would be absurd to withhold that information where it is being disclosed elsewhere. Accordingly, I find that the information in these records that is not also reflected in contractual terms was provided in confidence and meets part 2 of the test.

Part Three: harms

The affected party and the LCBO made extensive submissions on the subject of the competitive and commercial harm that the affected party could reasonably be expected to suffer as a result of disclosing the information contained in the records. The LCBO also submits (in relation to section 17(1)(b)) that disclosure could reasonably be expected to result in similar information no longer being supplied to it, and that it is in the public interest for the supply of similar information to continue. The affected party echoes this submission.

I note, however, that all references in the representations to specific kinds of information whose disclosure could reasonably be expected to cause harm under section 17(1)(a), (b) or (c) relate to information that has been found to be unresponsive to the request, such as proposed pricing and marketing strategies.

I have carefully reviewed the responsive portions of the records that remain at issue. As noted, the representations of the LCBO and the affected party do not directly address this information, and in my view, I have not been provided with "detailed and convincing" evidence to support a conclusion that disclosure of this information (including the responsive information in records 6, 8, 9 and 12, which did not meet part 2 of the test) could reasonably be expected to result in the harms dealt with in sections 17(1)(a), (b) and (c) of the *Act*. Apart from references to information that is no longer at issue, the representations are far too general to persuade me that these harms could reasonably be expected.

In conclusion, I find that the responsive portions of the records at issue are not exempt under section 17(1). They should be disclosed to the appellant.

ORDER:

1. I order the LCBO to disclose the responsive portions of records 2, 6, 7, 8, 9, 11, 12 and 13-16 to the appellant by sending it copies of these records on or before **May 8, 2007** but not before **May 3, 2007**. The non-responsive portions are highlighted on a copy of these records that is being provided to the LCBO with a copy of this order. The highlighted information should **not** be disclosed.

2. I uphold the LCBO's decision to deny access to the remaining records and parts of records.

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

Original signed by: March 30, 2007
John Higgins
Senior Adjudicator