

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER PO-3485

Appeal PA13-464-2

Liquor Control Board of Ontario

April 28, 2015

**Summary:** The LCBO received a request for access to records describing the alcohol purchases made by individual embassies, consulates, consular posts and/or their agents. The records at issue consist of completed Diplomatic Institution Order Forms and Diplomatic Sales Invoices. The LCBO denied access to portions of the records on the basis of the exemptions in sections 15(b) (relations with other governments) and 17(1) (third party information). During this appeal, the possible application of the mandatory exemption in section 17(2) (tax information) was raised. This order finds that the information at issue contained in the responsive records was gathered for the purpose of determining tax liability, and qualifies for exemption under section 17(2). It also finds that the public interest override in section 23 does not apply to the exempt information, and upholds the LCBO's fee.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(2), 23, 57(1)(b); *Vienna Convention on Diplomatic Relations; Foreign Missions and International Organizations Act*, R.S.C. 1991, c.41, section 11.1.

### OVERVIEW:

[1] 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 records for each of the past five years describing the alcohol purchases made by individual embassies, consulates, consular posts and or their agents, including details of what was

purchased and the specific costs. Also requested were the names of these embassies, consulates or consular posts.

[2] The LCBO issued an interim decision and fee estimate, as it determined that the request involved a large number of records. The LCBO's interim decision was to grant partial access to the records requested, with severances made pursuant to sections 15 (relations with other governments), 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The LCBO noted that the name of the embassy or consulate, name of the staff member and provincial sales tax exemption number would be severed.

[3] Based upon a representative sample of records, the LCBO estimated that there are approximately 8,320 pages of responsive records (64 sales per period x 2 pages per sale x 13 periods x 5 years). Accordingly, the LCBO provided a fee estimate of \$5,824.00 for photocopying and severing the responsive records, and requested a deposit of one half of the estimated fee (\$2,912.00) in order to proceed with processing of the request. The LCBO also noted that, pursuant to section 27 of the *Act*, it would require a time extension of 90 days from the date of receipt of the deposit in order to complete the processing of the request.

[4] The requester appealed the LCBO's fee estimate and this office opened appeal PA13-464. During the mediation of that appeal, the LCBO provided the requester with a severed sample copy of the record, which consisted of two documents – an order form and an invoice. In discussions with the mediator, the requester indicated that he was concerned about paying such a large fee for access to records that would likely contain severances and that he was primarily interested in obtaining access to the severed information, such as the name of the embassy. On that basis, the appellant wished to proceed to the adjudication stage of the appeal process to determine whether the exemptions were properly applied to the records at issue.

[5] As the LCBO's decision was not a final decision, the parties agreed that a final decision would be necessary in order for an adjudicator to address the application of the exemptions claimed for the records. Therefore, the parties agreed that the timeframe of the request should be revised in order to reduce the fee significantly so that the LCBO could issue a final decision to the appellant. With assistance from the LCBO's manager, the timeframe of the request was narrowed to include only the period April 1 to April 27, 2013. As a result, the LCBO conducted a search and located 162 pages of responsive records. Since the LCBO issued a final decision to the requester, appeal PA13-464 was closed.

[6] As a result, the LCBO received a revised request under the *Act* for access to records for the period April 1 to April 27, 2013 of the alcohol purchases made by individual embassies, consulates, consular posts and or their agents, including details of what was purchased and the specific costs. Also requested were the names of these embassies, consulates or consular posts.

[7] The LCBO issued a final decision to the appellant in which it advised that partial access was granted to the records, with severances made pursuant to sections 15, 17(1)(c) and 21 of the *Act*. The LCBO also provided a fee of \$117.40, based upon the photocopying and severing of 162 pages of records.

[8] The requester (now the appellant) appealed the LCBO's decision.

[9] During mediation, the appellant advised that he does not wish to pursue access to the names or phone numbers of any individuals, the designations of any individuals, or the ID numbers of any individuals. He also advised that he does not wish to pursue access to the sales tax exemption number or any portions of the records that are being withheld as non-responsive. He confirmed that he is only interested in receiving the name and address of the embassy or consulate, details of the products that were ordered, and the price paid.

[10] In light of this, the LCBO advised that it was withdrawing its reliance on the personal privacy exemption in section 21(1) and it is no longer at issue in this appeal. However, the LCBO confirmed that it continues to deny access to the names and addresses of the embassies and consulates pursuant to the exemptions in sections 15 and 17(1)(c) of the *Act*.

[11] The appellant advised the mediator that he was also appealing the LCBO's fee for severing the records. He confirmed that he is not appealing any photocopying charges. Accordingly, the fee for preparation time (\$81.00) is also an issue in dispute.

[12] As no further mediation was possible, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I decided to seek the representations of the LCBO, initially. In the Notice of Inquiry provided to it, I added as an issue in the appeal the possible application of the mandatory exemption in section 17(2) of the *Act* to the information contained in the records.

[13] I received the representations of the LCBO respecting the application of sections 15 and 17(2) to the records, as well as the appropriateness of the fee charged for the preparation of the records. The LCBO also provided me with copies of two lengthy documents which it refers to in its representations, the *Vienna Convention on Diplomatic Relations* and the federal *Foreign Missions and International Organizations Act*, which are available online. The LCBO submitted copies of an LCBO memorandum dated February 24, 2012, three newspaper articles, two dated July 20, 2013 and another dated July 30, 2013, and a blank HST/GST Rebate Form, which are referred to in its representations.

[14] I then sought and received representations from the appellant in response to the LCBO's submissions, a complete copy of which were shared, with the exception of the attachments which are available online. Upon receipt of the appellant's representations, I also sought and received further representations from the LCBO by way of reply.

[15] In this order, I uphold the LCBO's decision on the basis that the information relating to purchases made by embassies and consulates is exempt from disclosure under section 17(2) of the *Act*. In addition, I uphold the LCBO's fee of \$81 for the cost to prepare the records for disclosure and find that the public interest override provision in section 23 of the *Act* has no application to the information which I have found to be exempt under section 17(2).

### **RECORDS:**

[16] The records remaining at issue consist of certain information contained in Diplomatic Institution Order Forms and Diplomatic Sales Invoices, totaling 162 pages, identifying the embassies and consulates which made the purchases, as well as the products purchased and the amounts paid.

### **ISSUES:**

- A. Do the records contain information that is exempt from disclosure under the mandatory exemption in section 17(2)?
- B. Does the discretionary exemption in section 15(b) apply to the information in the records?
- C. Is the information in the records exempt under the mandatory exemption in section 17(1)(c)?
- D. Is there a compelling public interest in the disclosure of the information contained in the records as contemplated by section 23?
- E. Is the LCBO's fee for the preparation of the records calculated in accordance with section 45(1)?

## **DISCUSSION:**

### **Issue A: Do the records contain information that is exempt from disclosure under the mandatory exemption in section 17(2)?**

[17] Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

### **Representations of the parties**

[18] The LCBO takes the position that the records at issue contain financial information relating to taxation which was supplied to the government by the diplomatic missions. It provides extensive representations with respect to the international treaty obligations which govern the treatment of foreign missions, embassies and consulates in Canada. Specifically, it outlines the privileges and immunities which apply to foreign missions under the terms of the *Vienna Convention on Diplomatic Relations*, to which Canada is a signatory, as well as the federal *Foreign Missions Act*.<sup>1</sup> These instruments require that each signatory country grant exemptions from all "customs, duties, taxes and related charges" for items acquired for both the official and personal use of staff with diplomatic missions.

[19] As a result, the LCBO submits that its:

. . . program for selling liquor to diplomatic missions is guided by not only provincial legislation in respect of the importation and sale of liquor but also by its national and international obligations under various legislation and treaties. The net result is that diplomatic missions are entitled to purchase liquor from the LCBO without being charged duties and taxes on LCBO products.

[20] The LCBO also provides an overview of how the diplomatic mission ordering program of the LCBO operates. It states:

In February of 2012, all Diplomatic Missions who are entitled to purchase alcoholic beverages from the LCBO duty and tax free, were sent a letter outlining the structure of the program and the key elements that are required for accessing the program. The letter set out to clarify the program and indicated that it was only accessible to certain individuals working inside various Diplomatic Missions who were authorized by the

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<sup>1</sup> R.S.C. 1991, c.41.

Department of Foreign Affairs and International Trade ("DFAIT") and who were in possession of an accredited foreign representatives identity card. The program additionally extended to enumerated senior officials and their families holding office in certain international organizations.

[21] The LCBO provided a copy of the February 2012 letter, and goes on to state that:

The letter further stipulated that orders must be placed using the Diplomatic Institution Order Forms. These forms require that the Diplomatic Mission identify the type and quantity of LCBO product, an explanation of usage in the event that the products were to be used at a commercial address for a function, the name of the accredited staff member who is placing the order, along with their DFAIT Identity Card Number and the name and address of the Diplomatic Mission. The official seal of the Diplomatic Mission must be stamped on each order form.

Before the Diplomatic Institution Order Form may be submitted to the LCBO, the Diplomatic Mission must have the order stamped by the Canada Border Services Agency ("CBSA"). The Diplomatic Institution Order may then be submitted to the LCBO at one of two locations (an Ottawa location for embassies and a Toronto location for Consulates). Orders may only be picked up by an authorized representative of the Diplomatic Mission or their designate.

The LCBO applies a formula to products sold to Diplomatic Missions which has the net effect of reducing the cost of its liquor substantially. With the exception of GST/HST, all other taxes, duties and markups are subtracted from the cost of the liquor. Diplomatic Missions then have the option to request rebate for the GST/HST directly from the Canada Revenue Agency by submitting a form.

The only documents that are generated by the LCBO in respect of the Diplomatic Mission Ordering Program is the Diplomatic Institution Order Form and Diplomatic Sales Invoice. While each Diplomatic Mission is provided with a copy of both documents, the LCBO retains two copies of each, one in the warehouse and one in the office of the location where orders are received. The documents are maintained in the strictest of confidence and securely stored onsite at each location for one year. After the one year period, they are sent to secure offsite storage and ultimately disposed of in accordance with the LCBO's destruction of records policy.

[22] With respect to the application of section 17(2), the LCBO submits that this mandatory exemption prohibits the release of the information at issue. It states:

Section 17(2) codifies the right to confidentiality of financial records relating to taxation. The section affords privacy protection to financial information which of necessity is supplied to a governmental institution to oversee compliance with our taxation regime but otherwise is deserving of protection. While there are confidentiality provisions embedded in a variety of legislation (including the *Act*) which protect the confidentiality of tax information for individual taxpayers, section 17(2) more broadly affords protection to such information to other entities which would include Diplomatic Missions.

The information at issue, and in particular the order, quantity and price, would reflect the exemptions that are granted to Diplomatic Missions under the Vienna Conventions from "customs, duties, taxes and related charges." ...

[23] The LCBO also submits that under the program, Diplomatic Missions pay to the LCBO the GST/HST for liquor products which is subsequently returned to each Diplomatic Mission once a rebate form is submitted to the CRA. It identifies the process by which this information is provided to the CRA, and states:

The information that is submitted to the CRA [on the rebate forms] is derived entirely from the information contained on the Diplomatic Order Forms.

[24] For this reason, the LCBO also takes the position that the disclosure of the information requested from the records "would invariably mean the release of information that is, of necessity, supplied to a governmental institution (the CRA) and which reflects the confidential tax information of the Diplomatic Missions."

[25] The LCBO also relies upon the decision in Order PO-2655 in which Adjudicator Bernard Morrow found that information relating to certain tax refunds paid by the Government of Ontario qualified as information that was obtained on a tax return because the amount of the refund is "generated by a completed tax return." It argues that Order PO-2655 held that information related to a taxation scheme falls within the ambit of the exemption in section 17(2), even if the information in the record may not be identical to that contained in the record at issue in that appeal.

[26] The appellant takes a different view of the application of section 17(2) to the information in the records at issue. He begins by stating that the records clearly do not reveal information that was "obtained on a tax return", submitting that the forms and invoices in question preceded any tax return and that, in any event, information

pertaining to a specific retail transaction is not included on either a personal or corporate tax return. The appellant then points out that, if the LCBO's position is accepted, "documents pertaining to any transaction with government involving the payment or refund of sales taxes - a very broad category - would be exempt from disclosure."

[27] The appellant then submits that the responsive information was not "gathered for the purpose of determining tax liability or collecting a tax." He is of the view that this exemption does not apply on its plain wording – that the records contain information "gathered" for the purchase and sale of alcohol only, suggesting that the LCBO's reliance on GST/HST rebate forms is a "red herring" as these are not the records at issue. He further submits that:

- All of the information contained in the records is necessary to purchase and sell alcohol through a remote ordering system.
- The GST/HST rebate form referred to by the LCBO is not a tax return. In any event, the LCBO admits that the rebate form it references contains information derived from the Records - it was not the other way around.
- Even if some of the Responsive Information is relevant to determining the reimbursement of sales tax to Diplomatic Missions by the LCBO, this is not the test under section 17(2). The information intended to be protected from disclosure under section 17(2) is "relatively narrow."<sup>2</sup>

[28] Finally, the appellant argues that Order PO-2655, cited in the LCBO's representations, does not assist the LCBO because:

... That decision denies a request for disclosure of a list of uncashed tax refund cheques - a record that follows the filing of tax returns and is derived from a tax return, unlike the Records at issue here. Contrary to what the LCBO argues, Adjudicator Morrow did not extend section 17(2) to "information that related to the taxation scheme for which there is a presumption of confidentiality." Rather, he found that refund amounts "generated by a completed tax return" are exempt, even if the refund amount on the cheque varies from what the corporation claiming the refund indicated on its tax return.

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<sup>2</sup> The appellant refers to Order PO-2655 in support of this point.



## **Analysis and findings**

[29] As a preliminary observation, I note that the request in this appeal is for records of "... alcohol purchases made by individual embassies, consulates, consular posts and/or their agents" including details of what was purchased by whom, and the specific costs. Although the Diplomatic Institution Order Forms at issue in this appeal clearly contain information responsive to the request, by their nature they only contain responsive information reflecting the alcohol purchases made by the embassies or consulates through the use of the forms. Embassies, consulates or their agents can also purchase alcohol from LCBO retail outlets without using the forms; however, if they do so, they cannot take advantage of the exemption from all "customs, duties, taxes and related charges." They would have to pay the regular retail price, including taxes and duties. In that respect, the responsive Order Forms only reflect the alcohol purchases where an embassy or consulate took advantage of the tax exemption regime available to it.

[30] I also note that the LCBO indicates that diplomatic missions are entitled to directly import their own liquor for their personal consumption or official use in accordance with the relevant provisions of the *Foreign Missions Act*. If diplomatic missions choose to directly import their own liquor, there is no need for them to go through the Diplomatic Mission Ordering Program or to use the Diplomatic Institution Order Forms to take advantage of the applicable tax exemption.

[31] However, if a Diplomatic Mission wishes to apply to the LCBO for a tax exemption from paying taxes and duties on the liquor it purchases from the LCBO, it must use the Diplomatic Institution Order Forms at issue in this appeal. It must qualify as a Diplomatic Mission as specifically authorized by the DFAIT, must place its orders using the Diplomatic Institution Order Forms and comply with the specific requirements of the Diplomatic Mission Ordering Program. In addition, the forms must be submitted by the designated authorized individuals for each diplomatic mission.

[32] The information at issue in the records, which consist of completed copies of the Diplomatic Institution Order Form and Diplomatic Sales Invoice, clearly does not meet the definition of "information that was obtained on a tax return"; nor was it "gathered for the purpose of collecting a tax" for the purposes of section 17(2). However, in my view, the information at issue was "gathered for the purpose of determining tax liability", as contemplated by section 17(2) and qualifies for exemption on that basis.

[33] To begin, I find that the wording of section 17(2) requires a head to refuse to disclose a record that reveals information "gathered for the purpose of determining tax liability". I find that this includes, by necessity, any information gathered for the purpose of determining that a tax need not be paid (i.e.: determining that there is no tax liability).

[34] On my review of the Diplomatic Institution Order Forms at issue in this appeal, I am satisfied that their disclosure would reveal information gathered for the purpose of determining that a tax need not be paid. The detailed process set out above through which an embassy or consulate can apply for an exemption from tax liability (specific documents, particular processes and individuals) are established to ensure that only particular entities that qualify under the program can apply for the tax exemption. The information on these Diplomatic Institution Order Forms is gathered for the purpose of determining whether excise or duties are payable or not. I also note that the form itself states that it reflects a request for shipment of the identified goods "free from Excise duties and Excise taxes ...." As a result I am satisfied that disclosure of the information contained in the completed Diplomatic Institution Order Forms would reveal information that was gathered for the purpose of determining tax liability.

[35] In addition, I am satisfied that disclosure of the accompanying sales invoice would reveal the information gathered on the Diplomatic Institution Order Forms. As noted by the LCBO, this information is "derived entirely from the information contained on the Diplomatic Order Forms." As a result, I find that disclosure of these records would also reveal information that was gathered for the purpose of determining tax liability.

[36] Addressing the appellant's arguments, I accept that the section 17(2) exemption must be read "narrowly", and that it cannot apply to "documents pertaining to any transaction with government involving the payment or refund of sales taxes." However, given the specific information at issue, the nature of the Diplomatic Institution Order Forms and the reasons why they are completed, as well as the specific requirements that must be met in order to complete the forms, I am satisfied that the exemption applies to the information in these forms.

[37] I have also considered the appellant's position that, on its plain wording, the information was not "gathered" for the purpose of determining tax liability or collecting a tax, but instead was part of a transaction involving the purchase and sale of alcohol. In my view, considering the specific purpose of the forms, I do not accept this narrow interpretation of the type of information at issue.

[38] I accept the appellant's position that the GST/HST rebate forms are not at issue in this appeal. However, I have found that the information before me, the Diplomatic Institution Order Forms and invoices, is exempt under section 17(2).

[39] Finally, I note that the appellant's arguments in this appeal appear to support a finding that the information sought in this appeal would reveal section 17(2) information. In his arguments in support of the position that there exists a public interest in the information, the appellant refers to the "large discounts" that are available to participants and the "lost revenue" to the province that is a consequence of this program. The appellant argues that the public "effectively subsidizes the program"

and must “pay higher taxes to cover the cost of the foregone revenue from this source,” presumably as a result of the lost tax revenue. These reasons suggest that the request was made to determine the amount of taxes lost by the government through tax exemptions as a result of the program.

[40] As a result of my findings under section 17(2), it is not necessary for me to determine whether the information at issue is also exempt under sections 15(b) or 17(1), as described in Issues B and C above.

**Issue D: Is there a compelling public interest in the disclosure of the information contained in the records as contemplated by section 23?**

[41] The appellant submits that there is a strong public interest in the disclosure of the records, as contemplated by section 23, which states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[42] For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[43] The *Act* is silent as to who bears the burden of proof in respect of section 23. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>3</sup>

**Compelling public interest**

[44] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government.<sup>4</sup> Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to

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<sup>3</sup> Order P-244.

<sup>4</sup> Orders P-984 and PO-2607.

the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>5</sup>

[45] A public interest does not exist where the interests being advanced are essentially private in nature.<sup>6</sup> Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.<sup>7</sup> A public interest is not automatically established where the requester is a member of the media.<sup>8</sup> The word "compelling" has been defined in previous orders as "rousing strong interest or attention".<sup>9</sup>

[46] Any public interest in *non*-disclosure that may exist also must be considered.<sup>10</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".<sup>11</sup>

[47] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation<sup>12</sup>
- the integrity of the criminal justice system has been called into question<sup>13</sup>
- public safety issues relating to the operation of nuclear facilities have been raised<sup>14</sup>
- disclosure would shed light on the safe operation of petrochemical facilities<sup>15</sup> or the province's ability to prepare for a nuclear emergency<sup>16</sup>
- the records contain information about contributions to municipal election campaigns<sup>17</sup>

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<sup>5</sup> Orders P-984 and PO-2556.

<sup>6</sup> Orders P-12, P-347 and P-1439.

<sup>7</sup> Order MO-1564.

<sup>8</sup> Orders M-773 and M-1074.

<sup>9</sup> Order P-984.

<sup>10</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>11</sup> Orders PO-2072-F, PO-2098-R and PO-3197.

<sup>12</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

<sup>13</sup> Order PO-1779.

<sup>14</sup> Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and Order PO-1805.

<sup>15</sup> Order P-1175.

<sup>16</sup> Order P-901.

<sup>17</sup> *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

[48] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations<sup>18</sup>
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations<sup>19</sup>
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding<sup>20</sup>
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter<sup>21</sup>
- the records do not respond to the applicable public interest raised by appellant<sup>22</sup>

[49] The appellant argues that the Diplomatic Mission Ordering Program (the program) operated by the LCBO on behalf of diplomatic missions located in Ontario provides large discounts to participants that result in lost revenue to the province. He argues that the public effectively subsidizes the program as they, in turn, must pay higher taxes to cover the cost of the foregone revenue from this source. The appellant also submits that there exists a public interest in identifying “significant users” of the program in order to enable the public to scrutinize the LCBO’s conduct and its operation of the program. The disclosure of the information in the records would enable the public to assess whether the program is operating appropriately and determine how much revenue is being lost. I also note that the appellant has published several newspaper stories about the possible abuse of the program by certain diplomatic missions.

[50] In response, the LCBO maintains that the program is not a subsidy program and is required as a result of Canada’s treaty obligations under the Vienna Conventions and by section 11.1 of the federal *Foreign Missions and International Organizations Act*, S.C. 1991, c. 41. Under those treaties and legislation, a country that hosts diplomatic missions “must grant exemptions from all ‘customs, duties, taxes and related charges’ for items required of diplomatic missions for both official and personal use.” The LCBO points out that although it is the only entity entitled to purchase and sell liquor in Ontario, it operates the program to facilitate the diplomatic missions in their ordering process. It also indicates that diplomatic missions are entitled to directly import their

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<sup>18</sup> Orders P-123/124, P-391 and M-539.

<sup>19</sup> Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

<sup>20</sup> Orders M-249 and M-317.

<sup>21</sup> Order P-613.

<sup>22</sup> Orders MO-1994 and PO-2607.

own liquor as a result of the *Foreign Missions Act*. It further states that the program assists diplomatic missions "to access alcohol products at a cost that does not include Canadian customs, duties, taxes and related charges" and that it "uses a formula, which is publicly available and has widely been reported in the media, for ensuring that diplomatic missions do not pay 'customs, duties, taxes and related charges' which is a reflection of Canada's assumed obligations under international treaty law."

[51] The LCBO goes on to argue that because it is obligated by Canada's treaty obligations and by federal law to operate the program, "its administration of the program could not attract significant public interest on the provincial level." It also submits that the LCBO is not subsidizing the purchase of liquor by diplomatic missions; instead, it is taking the "same approach that has been adopted throughout the world by all countries signatory to the Vienna Conventions."

[52] Based on my review of the representations of the parties, I am not satisfied that there exists a public interest in the disclosure of the information in the records that is sufficiently compelling to warrant the application of section 23 in this appeal.

[53] The appellant provides two different bases for his position that the public interest override applies to the records. First, he states that the Diplomatic Mission Ordering Program provides large discounts to participants that result in lost revenue to the province, and that the public effectively subsidizes the program because the public must pay higher taxes to cover the cost of the "foregone revenue." This suggests that there is a public interest in the disclosure of the total amount of tax revenue foregone as a result of the program. However, I note that the request in this appeal is not for the global, total amounts, but is instead aimed at specific information about the order forms for each of the specific diplomatic missions. The LCBO's response to a request for a global amount may have been different. I also note that any request for the global amounts contained in the records at issue would not include any tax revenue that was foregone as a result of a diplomatic mission choosing to import its own liquor directly.

[54] In support of his second ground, the appellant states that there is a public interest in identifying "significant users" of the program, to enable the public to scrutinize the LCBO's conduct and its operation of the program, and to identify any possible abuse of the program. Although there may be an interest in this sort of information, the appellant has provided little evidence to support a public interest in this issue that would rise to the level of a "compelling public interest". It is also not clear to me how the disclosure of the requested information would necessarily identify possible abuses of the program. The Diplomatic Institution Order Form itself addresses this concern by stating that:

Any diversion of usage or resale of above goods is contrary to Canadian Law and Regulations.

[55] Further, I note that the program which was operated by the LCBO at the time the records at issue were prepared, April 2013, was supplanted by a different flat-rate discount arrangement for diplomatic missions in June 2013, according to several Canadian Press stories dated July 20 and 30, 2013 which the LCBO attached to its initial representations. As a result, the information in the records that reflects the operation of the program in April 2013 is no longer current and has been replaced by a different program. In my view, any public interest in the subject matter of the records before me is somewhat lessened by the fact that the program reflected therein is no longer operating in the same manner.

[56] Considering all of the circumstances, I do not accept the appellant's position that there is a compelling public interest in the disclosure of the information contained in the responsive records. As a result, I find that section 23 has no application to the information remaining at issue in the records in this appeal.

**Issue E: Is the LCBO's fee for the preparation of the records calculated in accordance with section 45(1)?**

[57] The appellant disputes the \$81 fee estimate imposed by the LCBO for the cost of preparing the records for disclosure. This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

[58] Section 57(1) requires an institution to charge fees for requests under the *Act*. Section 57(1)(b) enable an institution to charge for the cost of preparing a record for disclosure and reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (b) the costs of preparing the record for disclosure;

[59] More specific provisions regarding fees are found in section 6 of Regulation 460. This section reads:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.

3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

### **Calculation of fee**

#### **Preparation for disclosure - Section 57(1)(b)**

[60] Section 57(1)(b) includes time for

- severing a record<sup>23</sup>
- a person running reports from a computer system<sup>24</sup>

[61] Generally, this office has accepted that it takes two minutes to sever a page that requires multiple severances.<sup>25</sup>

#### ***Section 57(1)(b) does not include time for***

- deciding whether or not to claim an exemption<sup>26</sup>
- identifying records requiring severing<sup>27</sup>
- identifying and preparing records requiring third party notice<sup>28</sup>

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<sup>23</sup> Order P-4.

<sup>24</sup> Order M-1083.

<sup>25</sup> Orders MO-1169, PO-1721, PO-1834 and PO-1990.

<sup>26</sup> Orders P-4, M-376 and P-1536.

<sup>27</sup> Order MO-1380.

<sup>28</sup> Order MO-1380.



- removing paper clips, tape and staples and packaging records for shipment<sup>29</sup>
- transporting records to the mailroom or arranging for courier service<sup>30</sup>
- assembling information and proofing data<sup>31</sup>
- photocopying<sup>32</sup>
- preparing an index of records or a decision letter<sup>33</sup>
- re-filing and re-storing records to their original state after they have been reviewed and copied<sup>34</sup>
- preparing a record for disclosure that contains the requester's personal information [Regulation 460, section 6.1].

### **Representations of the parties**

[62] The LCBO argues that the fee of \$81 is reasonable and is in accordance with the requirements of the *Act* insofar as the preparation of the records for disclosure is concerned. Specifically, the LCBO seeks to charge a fee covering one minute per page for the severing of exempt information from the 162 pages of records. It goes on to submit that the appellant is a commercial enterprise, a newspaper, and "should be expected to pay reasonable fees for the preparation of the records and it is fair and equitable for it to do so."

[63] The appellant argues that charging a fee based on one minute to sever each of the 162 pages of the records is not reasonable. It expresses its concern about the possible cost of obtaining access to records relating to the program covering a much longer period of time than the one months' worth of records sought in this appeal.

[64] In my view, upon an examination of the exempt information contained in the records, I am satisfied that one minute per page is a reasonable estimate of the time required to sever the exempt information from each of the 162 pages of the records. I find that the LCBO has satisfied its onus to demonstrate that the fee for preparation of the records is in accordance with the requirements of section 57(1)(b). Accordingly, I dismiss this aspect of the appeal.

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<sup>29</sup> Order PO-2574.

<sup>30</sup> Order P-4.

<sup>31</sup> Order M-1083.

<sup>32</sup> Orders P-184 and P-890.

<sup>33</sup> Orders P-741 and P-1536.

<sup>34</sup> Order PO-2574.

**ORDER:**

I uphold the LCBO's decision to deny access to the remaining portions of the records and its fee estimate of \$81 for the cost of preparing the records for disclosure.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ April 28, 2015