

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER PO-4057

Appeal PA19-00348

Liquor Control Board of Ontario

August 4, 2020

Summary: The LCBO denied access to a one-page statistical graph on reported retail shop theft losses for the 2019 fiscal year, relying on the discretionary exemptions in sections 14(1)(e), (i) and (l), and 18(1)(c) and (d) of the *Freedom of Information and Protection of Privacy Act*. The requester appealed the LCBO's decision. In this order, the adjudicator does not uphold the LCBO's decision and orders the LCBO to disclose the record.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F31, as amended, sections 14(1)(e), (i) and (l) and 18(1)(c) and (d).

Orders Considered: Orders MO-2233, MO-2363, PO-1990, PO-2014-I, PO-2020, PO-2632 and PO-2758.

Cases Considered: *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] The appellant submitted a request to the Liquor Control Board of Ontario (the LCBO) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records relating to LCBO theft losses for the most recent fiscal year. The LCBO sought clarification from the appellant, who confirmed that he sought access to the final versions of briefing materials, policies, memos and media lines addressing shop theft at the LCBO and the amount that is being lost through shop theft.

[2] The LCBO issued a decision granting the appellant complete access to the media lines, but denying him access to the remaining records responsive to his request. To deny access, the LCBO relied on the discretionary exemptions in sections 14 (law enforcement) and 18 (economic interests), among other statutory provisions. The appellant was not satisfied with the LCBO's decision and appealed it to the Office of the Information and Privacy Commissioner/Ontario (the IPC). During mediation, the appellant narrowed the scope of his request to one record containing statistics. In response, the LCBO maintained its position that this record qualifies for exemption under sections 14(1)(e) (endanger life or safety), 14(1)(i) (endanger security), 14(1)(l) (facilitate commission of unlawful act), and 18(1)(a), (c) and (d) (economic and other interests) of the *Act*.

[3] A mediated resolution was not possible and the appeal was moved to the adjudication stage of the appeal process. I decided to conduct an inquiry and began my inquiry by inviting representations from the LCBO, since it bears the burden of proving that the record falls within one of sections 14(1)(e), (i) and (l), or 18(1)(a), (c) and (d) of the *Act*. The LCBO provided representations in which it withdrew its reliance on section 18(1)(a) of the *Act*. The LCBO also asked that I keep portions of its representations confidential and not share them with the appellant. I did not share any of the LCBO's representations with the appellant because, after considering them, I concluded it was not necessary for me to seek representations from the appellant. In this order, I set out only the representations over which the LCBO did not claim confidentiality.

[4] For the reasons set out below, I find that the record is not exempt and I order the LCBO to disclose it.

RECORD:

[5] The sole record at issue is a one-page statistical graph titled "Reported Retail Shop Theft Loss in Retail Dollars between P1 Fiscal 2018/2019 to P1 Fiscal 2019/2020." The record contains 15 numbers: 14 representing the reported shop theft loss retail amounts over 14 periods throughout 2018 and 2019 in Ontario, and one representing the total reported shop theft loss for Fiscal 2018/2019 in retail dollars.

ISSUES:

- A. Does the record qualify for exemption under section 14(1)(e), (i) or (l)?
- B. Does the record qualify for exemption under section 18(1)(c) or (d)?

DISCUSSION:

A. Does the record qualify for exemption under section 14(1)(e), (i) or (l)?

[6] The LCBO relies on sections 14(1)(e), (i) and (l) of the *Act* to withhold the record. These sections state:

14 (1) A head may refuse to disclose a record where the disclosure could reasonably be expected to,

(e) endanger the life or physical safety of a law enforcement officer or any other person;

(i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required;

(l) facilitate the commission of an unlawful act or hamper the control of crime.

[7] As the institution refusing access to the record, the LCBO bears the burden of proving its exemption claim. The LCBO must provide evidence that disclosure of the record could reasonably be expected to result in one or more of the harms in sections 14(1)(e), (i) and (l). It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.¹

Section 14(1)(e): endanger life or physical safety

[8] The LCBO submits that publicly disclosing the record will increase the likelihood of shop theft, which, in turn, will endanger employees, customers and law enforcement officers. It explains that every shop theft incident on its premises has the potential to threaten the life or physical safety of individuals because it sells bottles that can be used as weapons or shattered during the commission of shop theft. It asserts that disclosure of the record will increase shop theft on its premises and it explains the basis for its assertion in its confidential representations. The LCBO also claims that disclosure of the record would allow potential thieves to determine the best times to carry out shop thefts.

[9] The LCBO's representations, including those that are confidential, do not demonstrate that disclosure of the record could reasonably be expected to result in a risk of harm under section 14(1)(e) that is well beyond the merely possible or speculative. The representations focus on an existing risk of harm that is inherent to the LCBO's business—its glass bottles being used as weapons to endanger physical safety. They also include an unsupported, speculative claim that disclosure of the information in the record would assist thieves in strategizing about the best time to steal. In describing the section 14(1)(e) harms, the representations do not address or correspond to the limited, specific information in the record. The representations also fail to establish that it is the disclosure of the record that could reasonably be expected to endanger the life or safety of individuals, as required for the application of section 14(1)(e) of the *Act*. Accordingly, I find that section 14(1)(e) of the *Act* does not apply to the record.

¹ *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras 52-54.

Section 14(1)(i): security

[10] The LCBO submits that disclosing the record would endanger the security of the procedures it has established to combat shop theft. It asserts that disclosure of “period-to-period” shop theft figures would give criminals the opportunity to analyze the efficacy of these procedures.

[11] These representations from the LCBO, along with its confidential representations, do not demonstrate that disclosure of the record could reasonably be expected to result in a risk of harm under section 14(1)(i) that is well beyond the merely possible or speculative. The record, which lists 15 shop theft loss amounts in a fiscal year, does not contain any information about security procedures the LCBO refers to in its representations, and the LCBO does not explain how someone could deduce information on the efficacy of its security procedures from it. I find that section 14(1)(i) of the *Act* does not apply to the record.

Section 14(1)(l): facilitate commission of an unlawful act

[12] The LCBO submits that disclosure could allow individuals to use the information to target its stores and products. The LCBO states it is concerned about the increased incidences of organized and brazen shoplifting, including thefts spearheaded by gangs and thefts targeting specific products. Finally, the LCBO asserts that in addition to facilitating criminals’ ability to engage in shop theft, disclosure of the record would hamper the ability of the LCBO and law enforcement agencies to develop pre-emptive strategies to combat thieves.

[13] The LCBO does not support, in either its confidential or non-confidential representations, its assertions on section 14(1)(l) with details or information that connect the risk of harm to the disclosure of the record. It does not explain how disclosure of the shop theft totals in the record could be used by criminals to facilitate shop theft. It points to an existing, significant problem—organized and targeted theft—and suggests that because it faces this problem, it should not have to disclose the information in the record that shows just how significant a problem shoplifting is. The LCBO’s unsupported assertions do not demonstrate that disclosure of the record could reasonably be expected to result in a risk of harm under section 14(1)(l) that is well beyond the merely possible or speculative. Accordingly, I find that section 14(1)(l) of the *Act* does not apply to the record.

B. Does the record qualify for exemption under section 18(1)(c) or (d)?

[14] Section 18(1)(c) and (d) of the *Act* state:

A head may refuse to disclose a record that contains,

(c) information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information where the disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy of Ontario[.]

[15] Like section 14, the application of section 18(1)(c) or (d) requires the LCBO to provide detailed evidence about the potential for harm that demonstrates a risk of harm that is well beyond the merely possible or speculative. Failure to provide detailed evidence will not necessarily defeat the LCBO's claim for exemption where harm can be inferred from the surrounding circumstances.²

Section 18(1)(c): prejudice to economic interest

[16] Section 18(1)(c) protects the ability of institutions to earn money in the marketplace by recognizing that institutions may have economic interests and compete for business with other public or private sector entities, and by providing discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to the institution's economic interests or competitive positions.³ The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's interests or competitive position.⁴

[17] In its representations, the LCBO states that it competes in the liquor retailing industry in Ontario with private sector liquor retailers for customers and market share. It notes that these other retailers also face shop theft challenges, but are not subject to legislation requiring the public disclosure of their losses from theft. It states that retailers closely guard the confidentiality of shop theft records, sharing them in a limited fashion under specific circumstances, such as for analysis, but generally not disclosing them publicly. The LCBO argues that requiring it to divulge its record relating to shop theft would put it at a serious disadvantage. First, it would reveal year to year trends in theft and impacts on specific stores—retail information that is highly sensitive—and second, disclosure of the information without the knowledge of the impact of shop theft losses within the Canadian retail industry as a whole could result in major reputational harms to the LCBO, which would impact its competitive position.

[18] The LCBO's submissions are not sufficient to demonstrate a risk of harm that is well beyond the merely possible or speculative. The LCBO's representations on the risk of prejudice to its economic interests or competitive position as a result of disclosure of the record, are speculative at best. The LCBO, as it notes in its representations, is a Crown corporation with a statutory monopoly over retail liquor sales in the province. It also confirms, in its submission on section 18(1)(d) below, that it has the ability to control many aspects of the retailing of alcohol in Ontario. Accordingly, it is fair to say that the LCBO's competitive position is secure, despite the existence of private sector alcohol retailers. While shop theft is a significant challenge for the LCBO and other retailers who

² See Orders PO-2020 and MO-2363.

³ Orders P-1990 and MO-2233.

⁴ Orders PO-2014-I, MO-2233, PO-2632 and PO-2758.

do not report their losses publicly, this fact does not demonstrate that disclosure of the information in the record could reasonably be expected to prejudice the LCBO's economic interests or competitive position. The LCBO has not established the application of section 18(1)(c) and I find that this exemption does not apply to the record.

Section 18(1)(d): injury to financial interests

[19] This exemption is intended to protect the broader economic interests of Ontarians.⁵ The LCBO submits that its ability to realize profits by effectively managing its operating costs, including its ability to protect physical and human assets, is fundamental to the ability of the Ontario government to manage the economy of Ontario. It states that the government benefits from the LCBO's ability to control prices, points of sale, marketing methods and other aspects of the retailing of alcohol in Ontario, and from the \$2.37 billion in dividends it transferred to the provincial government in 2019. The LCBO argues that disclosure of the record could reasonably be expected to prejudice its economic interests and, by extension, those of the Ontario government. It submits that disclosure would result in a reasonable expectation of injury to Ontario's ability to manage the provincial economy.

[20] The LCBO concludes by stressing that the impact of shop theft on the retail industry in general cannot be understated, and it highlights the results of a survey conducted by the Retail Council of Canada in late 2019, using data from 24 Canadian retailers. It also notes that its Resource Protection Department has expended considerable resources as part of its crime prevention strategy in response to shop theft.

[21] The LCBO's submissions on the application of the section 18(1)(d) exemption are not sufficient to establish a risk of harm that is well beyond the merely possible or speculative. The LCBO's submissions are speculative and do not address the specific information in the record and how its disclosure could reasonably be expected to result in injury to its financial interests. Its general anecdotal statements about shop theft as a national retail challenge and the significant amount of money it remits to the provincial Consolidated Revenue Fund, are not persuasive evidence supporting the claim that disclosure of the record at issue could reasonably be expected to bring about the harms in section 18(1)(d).

[22] Moreover, considering the limited global figures set out in the record, which are not specific to any store or location, and provide no insight beyond the total losses figure for one fiscal year, I find that the section 18(1)(c) and (d) harms cannot be inferred from the circumstances surrounding the potential disclosure of the record.

[23] In summary, I find that none of the exemptions claimed by the LCBO applies to the record, and I do not uphold the LCBO's decision to deny access to it.

⁵ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] 118 OAC 108, [1999] OJ No 484 (CA), leave to appeal to Supreme Court of Canada refused (January 20, 2020), Doc. 27191 (SCC); see also Order MO-2233.

ORDER:

1. I order the LCBO to disclose the record to the appellant by **September 9, 2020**, but not before **September 1, 2020**, and to copy me on the disclosure letter.
2. The timelines in order provision 1 above may be extended if the LCBO is unable to comply due to the current Covid-19 situation, and I remain seized to consider any resulting extension request.

Original signed by _____

Stella Ball
Adjudicator

August 4, 2020