

Information and Privacy Commissioner,  
Ontario, Canada



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

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## FINAL ORDER PO-4228-F

Appeal PA19-00215

Liquor Control Board of Ontario

January 20, 2022

**Summary:** This final order follows Interim Order PO-4202-I, in which the adjudicator ordered the Liquor Control Board of Ontario (LCBO) to re-exercise its discretion under section 19 of the *Freedom of Information and Protection of Privacy Act*. In response to a journalist's request, the LCBO had denied access to records relating to its decision-making following reports of sexual misconduct by an individual associated with a company with which the LCBO does business. In the interim order, the adjudicator found that the LCBO had failed to take into account the public interest in disclosure when deciding to withhold some of these records, in full, under the discretionary solicitor-client privilege exemption at section 19. In this final order, the adjudicator considers the LCBO's re-exercise of discretion under section 19. She concludes that the LCBO has now properly exercised its discretion, including by taking into account the relevant factor of the public interest in disclosure. On this basis, the appeal is closed.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 19.

**Orders and Investigation Reports Considered:** Interim Order PO-4202-I.

### OVERVIEW:

[1] This final order addresses the sole issue to be decided following Interim Order PO-4202-I. The interim order addressed a journalist's appeal of a decision by the Liquor Control Board of Ontario (LCBO) to withhold all records about its decision-making following reports of sexual misconduct by an individual associated with a company with

which the LCBO does business. In Interim Order PO-4202-I, I found that various exemptions to the right of access in the *Freedom of Information and Protection of Privacy Act* (the *Act*), including the discretionary solicitor-client privilege exemption at section 19, applies to the records. However, I found that in applying section 19, the LCBO failed to take into account the public interest in disclosure of the records, which is a relevant factor for consideration under this discretionary exemption. As a result, I ordered the LCBO to re-exercise its discretion under section 19, taking into account all relevant factors (including the public interest in disclosure), and not taking into account irrelevant factors. I remained seized of the appeal to address this matter.

[2] In accordance with the interim order, the LCBO re-exercised its discretion and provided me with representations to explain its decision to continue to withhold records in full under section 19. I invited the appellant to respond to the LCBO's representations, which she declined to do.

[3] In this final order, I conclude that the LCBO has now properly exercised its discretion under section 19. While the LCBO maintains its decision to withhold the records, it is entitled to do so, because I already found (in the interim order) that solicitor-client privilege applies to these records, and I now find (in this final order) that the LCBO properly exercised its discretion under section 19. On this basis, I close the appeal.

## **DISCUSSION:**

### **Did the LCBO properly re-exercise its discretion under section 19?**

[4] The sole issue to be addressed in this final order is whether the LCBO properly re-exercised its discretion under the solicitor-client privilege exemption at section 19 of the Act. Section 19 is a discretionary exemption (the institution "may" refuse to disclose), meaning the LCBO can decide to disclose information even if the information qualifies for exemption.

[5] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC 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, or it fails to take into account relevant considerations. In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>1</sup> The IPC cannot, however, substitute its own discretion for that of the institution.<sup>2</sup>

[6] For the reasons that follow, I conclude that the LCBO has now properly exercised its discretion, including by taking into account a relevant factor that it failed to consider

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<sup>1</sup> Order MO-1573.

<sup>2</sup> Section 54(2).

previously.

[7] Interim Order PO-4202-I contains a detailed summary of the circumstances of the request and the appeal. In that interim order, I explained my reasons for finding that certain records responsive to the appellant's request are subject to solicitor-client privilege, either under the common law, or the statutory privilege, or both. I found that the records contain privileged solicitor-client communications about issues arising from the sexual misconduct allegations, or are records created by or for Crown counsel in contemplation of or for use in litigation relating to the allegations, or both.

[8] However, I was persuaded by the appellant's evidence of a public interest in the disclosure of records concerning the LCBO's relationship with a company whose namesake is at the centre of serious allegations. I found that in light of the seriousness of the allegations, and the growing public awareness around workplace and sexual harassment, there is a strong public interest in knowing how the LCBO, a Crown entity, made business decisions in matters affected by these issues.

[9] In the interim order, I recognized that the appellant had made these arguments by referring to the "public interest override" available in section 23 of the *Act*. In some circumstances, section 23 can apply to overcome a finding that information is properly withheld under certain listed exemptions; however, as the LCBO correctly noted, section 19 is not among the listed exemptions. I noted, however, that in confirming the constitutionality of the *Act's* failure to extend the public interest override to solicitor-client privileged records, the Supreme Court recognized that consideration of the public interest is incorporated into the language of the exemption.<sup>3</sup>

[10] After considering the LCBO's brief submissions on its exercise of discretion (which addressed only factors favouring non-disclosure), in combination with the LCBO's failure to disclose any information at all in response to the appellant's request, I concluded in Interim Order PO-4202-I that the LCBO had not considered the public interest as it is required to do in exercising its discretion under section 19. As a result, I ordered the LCBO to re-exercise its discretion, taking into account the guidance provided in the interim order.

[11] In accordance with the interim order, the LCBO re-exercised its discretion under section 19, and provided me with representations to explain how it had done so.

[12] In these representations, the LCBO explains that after re-examining all relevant factors, including the public interest in disclosure, it has decided to continue to withhold records to which section 19 applies. The LCBO submits that while it considered public interest considerations favouring disclosure, as outlined in the interim order, it weighed these against a strong, countervailing, public interest in preserving solicitor-client privilege, which weighs heavily against disclosure.

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<sup>3</sup> *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).

[13] The LCBO notes that the interim order recognized that both solicitor-client communication privilege and settlement privilege are “class” privileges, and that the Supreme Court has affirmed that where such privilege exists, it is to be treated as nearly absolute.<sup>4</sup> An applicant for disclosure must demonstrate that there are compelling policy reasons that outweigh the public interest in preserving the privilege and that justify making an exception to the general rule; such exceptions are rare, and, the LCBO asserts, none exists here.

[14] In addition, the LCBO relies on its previous representations in which it outlined a number of other factors that it took into consideration in deciding to withhold the records, including: the purposes of the *Act*; the fact the information sought is not the appellant’s own personal information; the nature of the information contained in the records; and the LCBO’s historic practice with respect to similar information.

[15] While the LCBO arrived at the same decision following its re-exercise of discretion under section 19, I am satisfied that it has done so after considering all relevant factors—including, namely, those factors favouring disclosure. The LCBO now explicitly acknowledges the existence of a public interest in disclosure of the records, and it explains how it weighed this relevant factor in its decision-making. There is also no evidence to suggest the LCBO took into account irrelevant factors, or exercised its discretion in bad faith, or otherwise improperly exercised its discretion under section 19.

[16] While I provided the appellant with non-confidential portions of the LCBO’s representations, she declined to provide representations in response. At the request of the affected party (being the individual against whom the sexual misconduct allegations were made), I also provided him with the LCBO’s non-confidential representations (with the LCBO’s consent); however, I did not invite the affected party’s representations on this topic, because they are not necessary for me to decide this issue.

[17] In the circumstances, and for all the reasons given above, I conclude that the LCBO properly re-exercised its discretion under section 19. I therefore uphold the LCBO’s decision to withhold records under section 19.

[18] As this is the only issue left to be decided in the appeal, the appeal is now closed.

**ORDER:**

I uphold the LCBO’s re-exercise of discretion under section 19. I dismiss the appeal.

Original Signed by: \_\_\_\_\_

January 20, 2022 \_\_\_\_\_

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<sup>4</sup> Among others, see: *Solosky v. The Queen*, 1979 CanLII 9 (SCC); *Descôteaux v. Mierzwinski*, 1982 CanLII 22 (SCC); *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII); and *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, cited above.

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Jenny Ryu  
Adjudicator