

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-4302

Appeal PA19-00299

Liquor Control Board of Ontario

September 16, 2022

**Summary:** The LCBO denied an access request that sought a record of shop theft incidents province-wide between January 2008 and March 2019, and a record of monthly shop theft incidents at all Toronto locations between January 2018 and March 2019. The LCBO relied on the discretionary exemptions in sections 14(1)(e), (i) and (l) (law enforcement), 18(c) and (d) (economic and other interests), and 20 (danger to safety or health) to withhold the records. In this order, the adjudicator does not uphold the LCBO's decision and orders the LCBO to disclose the records to the requester.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, sections 14(1)(e), (i) and (l), 18(c) and (d), and 20.

**Orders and Investigation Reports Considered:** Order PO-4057.

**Cases Considered:** *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

### OVERVIEW:

[1] This order does not uphold the decision of the Liquor Control Board of Ontario (the LCBO) to deny access to statistical information about LCBO shop thefts at the provincial level and at the LCBO location level for the city of Toronto.

[2] The appellant, a member of the media who has published articles about LCBO shop theft, submitted an access request to the LCBO under the *Freedom of Information*

*and Protection of Privacy Act* (the *Act*) for the following information:

1. List the total number of recorded incidents of theft/shoplifting from the LCBO (province-wide) from 2008 to the most recent data available.
2. For each LCBO location in Toronto, list the total number of recorded incidents of theft/shoplifting broken down by month from January 2018 to present.

[3] The LCBO issued a decision denying the appellant access to the records responsive to her request. To deny access, the LCBO relied on the discretionary exemptions in sections 14 (law enforcement), 18 (economic interests), and 20 (danger to safety or health) of the *Act*.

[4] The appellant was not satisfied with the decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. During mediation, the LCBO maintained its position that the responsive records qualify for exemption under sections 14(1)(e) (endanger life or physical safety), 14(1)(i) (endanger security of a system or procedure), 14(1)(l) (facilitate commission of unlawful act or hamper the control of crime), 18(1)(c) and (d) (economic and other interests), and 20 of the *Act*. In response, the appellant raised the possible application of the public interest override in section 23 of the *Act* as an issue in the appeal.

[5] The appeal was not resolved at mediation and it was moved to the adjudication stage of the appeal process. I conducted an inquiry into the appeal and invited representations from the parties. The LCBO provided representations that contained confidential parts and, in accordance with the IPC *Code of Procedure and Practice Direction Number 7*, I shared only the non-confidential parts of the LCBO's representations with the appellant. I also shared the appellant's representations with the LCBO, which provided a confidential reply. In this order, I refer only to the non-confidential representations of the LCBO, however, I have reviewed and considered the parties' complete representations. I do not uphold the LCBO's decision to withhold the records at issue, and I order it to disclose the records to the appellant.

## **RECORDS:**

[6] The first record at issue is a one-page record titled "Total # of Recorded Incidents of Theft/Shoplifting from the LCBO (province-wide) Date Range: January 2008 to March 2019" (total provincial thefts record) that lists a number for each year and a grand total.

[7] The second record at issue is 27 pages long and is titled "Total # of Recorded Incidents of Theft/Shoplifting by month for each LCBO location in Toronto, Date Range: January 2018 to March 2019" (monthly Toronto thefts record).

## **ISSUES:**

- A. Do the records qualify for exemption under the law enforcement exemptions at sections 14(e), (i) or (l)?
- B. Do the records qualify for exemption under the economic and other interests exemptions at sections 18(1)(c) or (d)?
- C. Do the records qualify for exemption under the threat to safety or health exemption at section 20?

## **DISCUSSION:**

### **A. Do the records qualify for exemption under the law enforcement exemptions at sections 14(e), (i) or (l)?**

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

(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.

[9] As the institution refusing access to a record, the LCBO bears the burden of proving its exemption claim.<sup>1</sup> The LCBO must provide evidence that disclosure of the records could reasonably be expected to result in one or more of the harms in sections 14(1)(e), (i) and (l). It must demonstrate that the risk of harm is real and not just a possibility,<sup>2</sup> however, it does not have to prove that disclosure will in fact result in such harm.

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

[10] The LCBO submits that publicly disclosing the records will increase the likelihood of shop theft, which, in turn, will endanger the life or physical safety of law

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<sup>1</sup> Section 53 of the *Act*.

<sup>2</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

enforcement officers, and LCBO employees and customers. 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 records could reasonably be expected to 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 records would allow potential thieves to determine the best times to carry out shop thefts.

[11] The appellant challenges the LCBO's claim of the section 14(1)(e) exemption. She argues that disclosure of the records would make people more aware of the thefts and would put pressure on the LCBO to do something about them, thus making employees and the public more safe. She notes that after the first stories about LCBO shop thefts were published, the LCBO put more security personnel in some of its stores. The appellant also cites Order PO-4057 as a precedent for disclosing the information at issue. She notes that in Order PO-4057, I found that none of the section 14(1)(e), (i) and (l) exemptions applied to a statistical graph showing the LCBO's 2019 reported retail shop theft losses, and I ordered the LCBO to disclose that statistical graph. The LCBO provides confidential reply representations in response to the appellant's submissions.

[12] The LCBO's representations, including those that are confidential, do not demonstrate that disclosure of the records 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 — and the assertion that disclosure of the information in the records would increase the likelihood of shop theft, which would, in turn, endanger law enforcement officers, and LCBO employees and customers. I have considered the complete representations of the parties, including the LCBO's confidential submissions. While I acknowledge the harms about which the LCBO is concerned, I find that the LCBO has failed to establish that it is the disclosure of the records at issue 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 records.

***Section 14(1)(i): endanger security of a system or procedure***

[13] The LCBO submits that disclosing the records would endanger the security of the procedures it has established to combat shop theft. It asserts that disclosure of year to year shop theft figures — set out in the total provincial thefts record — would give criminals the opportunity to analyze the efficacy of its measures to combat losses. The LCBO asserts that the likelihood of shop theft and the corresponding endangerment to law enforcement officers, and LCBO employees and customers, would increase if the records at issue were publicly disclosed.

[14] The appellant challenges the LCBO's claim of section 14(1)(i) and notes that

Order PO-4057 rejected the same exemption claim by the LCBO over a record detailing the LCBO's 2018/2019 losses from retail shop theft. The LCBO provides confidential reply representations in response to the appellant's submission.

[15] The LCBO's confidential and non-confidential representations do not demonstrate that disclosure of the records 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 records, which list the total annual incidents of shop theft from the LCBO province-wide and the monthly Toronto incidents of shop theft by LCBO location, do 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 the records at issue. The LCBO's arguments in its confidential representations are contingent on circumstances that may arise, but they do not convince me that it is the disclosure that could lead to the harms. The LCBO's confidential arguments do not sufficiently connect the disclosure of the records at issue to the harms envisioned by section 14(1)(i) and they do not persuade me that the records qualify for exemption. I find that section 14(1)(i) of the *Act* does not apply to the records.

***Section 14(1)(l): facilitate commission of an unlawful act or hamper the control of crime***

[16] The LCBO submits that disclosure of the records would enable unscrupulous individuals to pinpoint vulnerabilities within its retail store network, with a particular focus on the Toronto market (in the case of the monthly Toronto thefts record), and it notes that information on its retail store locations is readily available online. It asserts that if information regarding shop theft incidents at specific LCBO locations were disclosed, criminals would have the opportunity to corroborate information about which locations are more likely to have security measures and which locations are more vulnerable to theft. The LCBO states it is concerned about the increased incidence 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 records would hamper the ability of the LCBO and law enforcement agencies to develop pre-emptive strategies to combat thieves.

[17] The appellant submits that the LCBO's claim of the section 14(1)(l) exemption is unfounded. She argues that LCBO stores are already vulnerable to theft, which is why the theft statistics are so high, and disclosing the records will not change that fact. She states that LCBO shop theft is so common she has witnessed it herself, and she includes links to published stories of eyewitness accounts of LCBO shop theft. She asserts that court records show that people stealing from the LCBO are robbing the same or multiple stores repeatedly with no fear of being confronted or prosecuted. She also relies on Order PO-4057 as she does in her submissions on sections 14(1)(e) and (i) above. The LCBO provides confidential reply representations in response to the

appellant's submission.

[18] The LCBO does not support, in either its confidential or non-confidential representations, its claim of the section 14(1)(l) exemption with details or information that connect the risk of harm to the disclosure of the two records at issue. Although it asserts that disclosure of the total provincial thefts record and the monthly Toronto thefts record could be used by criminals to "corroborate information about which locations are more likely to have security measures and which locations are more vulnerable to theft," it does not explain how the specific information in the records could be used to facilitate the commission of an unlawful act or hamper the control of crime. The LCBO points to an existing problem — organized and targeted theft — and attempts to use that as justification for withholding, under section 14(1)(l), the information in the records that shows just how significant a problem shop theft is. The LCBO's confidential representations amount to general arguments that address something other than the risk of harm posed by the disclosure of the specific information in the records. These representations, about how disclosure could facilitate criminals' ability to engage in shop theft, are insufficient to establish the application of section 14(1)(l). The LCBO's representations do not demonstrate that disclosure of the records 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 records.

**B. Do the records qualify for exemption under the economic and other interests exemptions at sections 18(1)(c) or (d)?**

[19] The LCBO also relies on sections 18(1)(c) and (d) to withhold the records. These sections 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[.]

[20] 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 record itself or the surrounding circumstances.<sup>3</sup>

***Section 18(1)(c): prejudice to economic interests or competitive position***

[21] 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 position.<sup>4</sup> The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.<sup>5</sup>

[22] 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 they are not subject to legislation that requires 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 records 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. The LCBO concludes by stating that it and its Resource Protection Department have expended considerable resources as part of its crime prevention strategy in response to shop theft, and disclosure of the records would increase its costs of doing business, which will negatively impact its revenue.

[23] The appellant states that she does not understand how disclosure could prejudice the LCBO's economic interests considering it has a monopoly on liquor sales, except for wine and beer stores. The appellant argues that it is the taxpayer whose economic interests are being impacted by LCBO shop theft and that publicizing theft data is not going to drive down LCBO product prices or stop people from shopping at the LCBO. The appellant submits that the information in the records is just data that will show whether there is a problem and what the scope of the problem is; it will not injure the LCBO's economic interests. The appellant also cites Order PO-4057, referred to above, and notes that I did not uphold the application of the section 18(1)(c) and (d) exemptions to the total amount of theft losses in the record at issue in that matter.

[24] The LCBO's representations, on the risk of prejudice to its economic interests or competitive position as a result of disclosure of the records, are not sufficient to

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<sup>3</sup> See Orders PO-2020 and MO-2363.

<sup>4</sup> Orders P-1990 and MO-2233.

<sup>5</sup> Orders PO-2014-I, MO-2233, PO-2632 and PO-2758.

demonstrate a risk of harm that is well beyond the merely possible or speculative. As I noted in paragraph 18 of Order PO-4057, dealing with an appeal in which the LCBO provided representations similar to the ones it provides in this appeal, the LCBO is a Crown corporation with a statutory monopoly over retail liquor sales in the province, the ability to control many aspects of the retailing of alcohol and a secure competitive position, despite the existence of private sector alcohol retailers. While shop theft is a considerable challenge for the LCBO and for other retailers who, I acknowledge, may not report their losses publicly, this fact does not demonstrate that disclosure of the information in the records could reasonably be expected to prejudice the LCBO's economic interests or competitive position.

[25] The LCBO's confidential representations on this issue attempt to connect the disclosure of the records with prejudice to its economic interests or competitive position by arguing that the LCBO will incur specific increased costs; however, I do not accept that the disclosure of the records at issue is what will cause any potential increased costs. Rather, it is the existence of a shop theft problem itself that may increase certain LCBO costs, depending on how the LCBO chooses to address shop theft. I agree with the appellant that the data in the records is just data. It provides a snapshot of the extent of LCBO shop theft for a given period of time at all Toronto stores on a monthly basis and province wide. I am not persuaded by the LCBO's attempt to conflate the existence of a shop theft problem and the associated economic challenges with the disclosure of the records at issue, and to assert that this demonstrates the harm in section 18(1)(c). I find that the LCBO has not demonstrated that this exemption applies to the records, nor can the harms in section 18(1)(c) be inferred from the records or the circumstances surrounding the potential disclosure of the records.

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

[26] This exemption is intended to protect the broader economic interests of Ontarians.<sup>6</sup> 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 provincial government to manage the economy of Ontario. It states that the Ontario 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 roughly \$2.3 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.

[27] The appellant denies that section 18(1)(d) applies to the records. Her

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<sup>6</sup> 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.



representations on this issue are identical to those she provides for section 18(1)(c), which are set out above. The LCBO also provides confidential reply representations in response to the appellant's submissions.

[28] The LCBO's representations 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. While the LCBO's representations demonstrate that shop theft affects the LCBO's financial interests, they do not demonstrate that disclosure of the records could reasonably be expected to be injurious to the financial interests of Ontario or to Ontario's ability to manage the provincial economy. Shop theft exists. The information in the records is historical statistical information of shop theft that has already occurred, losses the LCBO has already incurred. The LCBO's representations do not address the specific information in the records or explain how disclosure of that specific information could reasonably be expected to injure the financial interests of the province.

[29] The LCBO's general anecdotal statements about shop theft as a national retail challenge and the significant amount of money it remits to the provincial government, are not persuasive evidence supporting the claim that disclosure of the records at issue could reasonably be expected to bring about the harms in section 18(1)(d). Moreover, I am not persuaded that the section 18(1)(d) harms can be inferred from the records themselves or the circumstances surrounding the potential disclosure of the records. I find that the section 18(1)(d) exemption does not apply to the records.

### **C. Do the records qualify for exemption under the threat to safety or health exemption at section 20?**

[30] The last exemption relied on by the LCBO to withhold the records at issue is the discretionary exemption in section 20 that addresses a threat to safety or health and states:

A head may refuse to disclose a record where the disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

[31] The application of this exemption requires the institution to provide the same kind of detailed evidence about the potential for harm required for the application of section 14(1)(e), which I addressed in paragraphs 9 to 13 above. The LCBO's representations on section 20 are the same ones it makes for section 14(1)(e). As I have already found that the LCBO's representations do not demonstrate that section 14(1)(e) applies to the records and these representations are the same ones the LCBO provides for section 20, I need not repeat them here. I find that the LCBO's representations do not demonstrate a risk of the harm contemplated by section 20 that is well beyond the merely possible or speculative. As a result, I find that section 20 does not apply to the records.

[32] In summary, I find that none of the exemptions claimed by the LCBO applies to the records, and I do not uphold the LCBO's decision to deny access to them. Because I order the LCBO below to disclose the records to the appellant, it is not necessary for me to consider the possible application of the public interest override raised by the appellant.

**ORDER:**

I order the LCBO to disclose the records to the appellant by **October 18, 2022**, and to copy me on its disclosure letter.

Original Signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ September 16, 2022