Information and Privacy Commissioner,
Ontario, Canada

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

ORDER PO-4410

Appeal PA20-00476

Liquor Control Board of Ontario

June 26, 2023

Summary: This order deals with an access request made under the *Freedom of Information and Protection of Privacy Act* to the Liquor Control Board of Ontario (the LCBO) for access to agreements relating to warehousing services between the LCBO and an affected party. The LCBO granted partial access to the responsive records. It denied access to the withheld information under the mandatory exemption at section 17(1) (third party information) and the discretionary exemption at section 18(1) (economic and other interests). In this order, the adjudicator finds that the exemptions in sections 17(1) and 18(1) do not apply, and orders the LCBO to disclose the withheld information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, sections 17(1), 18(1)(c) and 18(1)(d).

Orders Considered: Orders MO-4320, PO-4302, PO-4122, PO-4057, PO-3620, PO-3579 and PO-2758.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of an access decision made by the Liquor Control Board of Ontario (the LCBO). The appellant's access request, made under the *Freedom of Information and Protection of Privacy Act* (the *Act*), was for the following information:

> "… a copy of [a specified request for proposal] as well as the resultant … contract under which this new warehouse operate. …"

[2] After notifying a named company[1] (the affected party), the LCBO issued a decision in which it granted partial access to four responsive records (agreements). The LCBO took the position that the withheld portions of the agreements qualified for exemption under sections 17(1) (third party information) and/or 18(1) (economic and other interests).[2]

[3] The appellant appealed the LCBO's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution with the parties. Mediation did not resolve the appeal and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[4] During the inquiry, the adjudicator initially assigned to this appeal invited the LCBO, the appellant and the affected party to provide representations on the issues in this appeal. She received representations from all the parties.[3] This appeal was subsequently transferred to me to continue the adjudication. I reviewed the parties' representations and decided that I did not require further submissions before making my decision.

[5] For the reasons that follow, I find that the exemptions in section 17(1) and section 18(1) do not apply. I therefore order the LCBO to disclose the withheld information.

RECORDS:

[6] The information at issue relates to the rates and charges as described in Schedule "B" to the Storage and Services Agreement (the agreement), and additional rates and rate charges as described in the subsequent amending agreements.

[7] The information at issue are identified in the Index of Records as follows:

Record #	Date	Description of Records	Total Pages	Page #'s	Exemption Claim
1	7/17/2019	Storage and Services Agreement	16	14 and 15	section 17(1) and section 18(1)

[1] The affected party did not make submissions in response to the LCBO's notification of the appeal.
[2] The LCBO confirmed in its decision that "there was no Request for Proposal for this Agreement as it was a direct award contract."
[3] The parties' representations were shared in accordance with the confidentiality criteria in IPC *Practice Direction 7* and section 7.07 of the IPC's *Code of Procedure*.

2	10/9/2019	Amending Agreement	3	19	section 17(1) and section 18(1)
3	1/22/2020	Amending Agreement	4	22 and 23	section 17(1) and section 18(1)
4	2/24/2020	Amending Agreement	4	26 and 27	section 17(1) and section 18(1)

ISSUES:

A. Does the mandatory exemption at section 17(1) apply to the information at issue?

B. Does the discretionary exemption at sections 18(1)(c) or (d) apply to the information at issue?

DISCUSSION:

A: Does the mandatory exemption at section 17(1) apply to the information at issue?

[8] The affected party submits that the mandatory exemption at sections 17(1)(a), (b) or (c) of the *Act* applies to the withheld information.[4]

[9] The purpose of section 17(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[5] where specific harms can reasonably be expected to result from its disclosure.[6]

[10] Section 17(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

[4] In its representations, the LCBO stated that it withdrew its reliance on section 17(1) and relies on any submissions provided by the affected party.
[5] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> …

[11] For section 17(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

[12] For the reasons that follow, I find that section 17(1) does not apply because part 2 of the three-part test is not satisfied – the information must have been supplied to the institution in confidence, either implicitly or explicitly.

[13] Part 2 of the test provides that the information at issue must have been "supplied in confidence" to the institution, either implicitly or explicitly. Information may qualify as "supplied" for the purposes of section 17(1) if it was directly supplied to an institution by a third party or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information that is directly supplied by a third party.[7]

[14] Previous orders of the IPC have held that the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1).[8] The terms of a contract are generally treated as mutually generated rather than "supplied" by a third party.

[15] There are two exceptions to the general rule that contracts are not "supplied":

---

[7] Orders PO-2020 and PO-2043.
[8] Orders MO-1706, PO-2371 and PO-2384.

the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[9] The "immutability" exception applies where the contract information is supplied by the third party, but the information is not susceptible to negotiation.[10]

[16] From my review of the records, I find that they are not supplied by the affected party for the purposes of section 17(1). I find that the agreements for warehousing service are contracts between the LCBO and the affected party, which have been mutually generated and not "supplied" by the affected party, for the purposes of section 17(1).

[17] In the absence of any representations from the affected party on part 2 of the test,[11] there is no reasonable basis for me to conclude that the general rule by which records containing the terms of a contract are not "supplied" for the purposes of section 17(1) should not apply. Accordingly, I am not satisfied that either the "inferred disclosure" or the "immutability" exception applies to the agreements.

[18] As I find that the information at issue was not "supplied" by the affected party, it is not necessary for me to consider whether the records meet the "in confidence" requirement of part 2 of the test or the harms requirement in part 3.

[19] As noted above, for the third party information exemption to apply, the party resisting disclosure must establish that all three parts of the test in section 17(1) are met. I am not satisfied that the information at issue was supplied by the affected party and find that the exemption does not apply to the information at issue.

B: Does the discretionary exemption at sections 18(1)(c) or (d) apply to the withheld information?

[20] The LCBO relies on sections 18(1)(c) and (d), which 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 whose disclosure could reasonably be expected to be injurious to the financial interests of the Government of Ontario or the

[9] Order MO-1706.
[10] For example, financial statements. See Order PO-2384.
[11] The affected party submitted representations but its representations solely addressed part 3 of the test.

> ability of the Government of Ontario to manage the economy of Ontario;

[21] The purpose of section 18(1) is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*. [12]

[22] The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[13]

[23] For sections 18(1)(c) and (d) to apply, the institution must provide detailed evidence about the potential for harm. 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. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[14]

[24] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 18(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[15]

Representations

[25] I have reviewed all of the LCBO's and the appellant's representations and attachments, and below I summarize the portions of their representations relevant to the issue of sections 18(1)(c) and (d).

LCBO's initial representations

Section 18(1)(c)

[26] With respect to economic interests, the LCBO refers to Order PO-2405, as an example of an order of this office that recognized that it has economic interests that are capable of being impacted by the harms in section 18(1).

---

[12] Toronto: Queen's Printer, 1980.
[13] Orders P-1190 and MO-2233.
[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[15] Order MO-2363.

[27] The LCBO says that it has an economic interest in maintaining a flexible and efficient chain by providing an optimized and reliable fulfillment and transportation network to support its retail and wholesale operations. It says that it has an economic interest in negotiating competitive warehousing arrangements. The LCBO explains that its supply chain and wholesale department consistently seeks to maintain cost-effective warehousing arrangements in response to potential overflows of inventory or supply chain disruptions, including procuring and negotiating with third party logistics (3PL) for additional warehousing space.

[28] The LCBO says that all of the above economic interests are shared with the Government of Ontario. It explains that the LCBO is one of the government's largest revenue sources and remits most of its revenue in the form of dividend to the province's Consolidated Revenue Fund. Consequently, it argues that the Government of Ontario has an economic and financial interest in the profitability of its retail stores and wholesale business.

[29] With respect to competitive position, the LCBO explains that the rates and charges (the withheld information) were negotiated and agreed upon with the affected party reflect a situation in which it critically required temporary warehousing in order to fulfill retail and wholesale demand as a result of the supply chain disruptions that occurred in the summer of 2019. It argues that disclosure of the withheld information will provide 3PLs with figures which are not reflective of the rates and charges that it would seek to obtain during a normal procurement process or under similarly unique conditions. It also argues that disclosure would also generate an opportunity for 3PLs to bid and negotiate in a manner that would increase its costs of warehousing.

[30] The LCBO relies on Order PO-3620, where Lambton College successfully argued that portions of its agreement with a company acting as an affiliate who provided courses and programs to the college should be withheld under section 18(1)(c), as the disclosed information could be prejudicial to future negotiations with affiliates and potential affiliates. It argues that Adjudicator Ryu's reasoning in PO-3620 applies to the rates and charges described in the agreement at issue.

Section 18(1)(d)

[31] The LCBO explains that the Government of Ontario benefits from its ability to maintain a flexible supply chain network that can support retail and wholesale sales of alcohol in Ontario. This is reflected from the $2.38 billion in dividends transferred to the Ontario government by it which predominantly flows from the LCBO's retail operations.

[32] The LCBO relies on IPC Order PO-3579, where Adjudicator James found that the disclosure of the withheld information could reasonably be expected to harm the institution's (OLG's) negotiating position in respect of future lease negotiations with other landlords. It argues that although the records are different in this appeal, similar conditions with respect to the LCBO and warehousing exist as they did in PO-3579. As

such, the LCBO argues that disclosing the rates and charges in the agreement can be expected to adversely prejudice negotiations for warehousing.

Appellant's initial representations

Section 18(1)(c)

[33] In response to the LCBO's reliance on Order PO-3620, the appellant argues that it is not analogous to this appeal. It points out that the institution in PO-3620 provided clear and detailed evidence of the potential harms related to disclosure of the records at issue through an affidavit.

[34] The appellant argues that in contrast the LCBO did not provide any clear or direct information to the potential harms that disclosure of the information at issue would have on the institution aside from general statements related to the LCBO's ability to bargain future agreements with 3PLs. The appellant also argues that the LCBO provided no evidence related to direct competitors for these 3PLs or warehousing services.

[35] The appellant also argues that the LCBO offered no evidence of any current or ongoing negotiations but speculates that disclosure would harm its future warehousing agreement negotiations.

[36] The appellant points out that the LCBO's arguments in this appeal are not dissimilar to its arguments raised in Order PO-4122. In that case, the LCBO led evidence related to aggregate information about the value of the revenues it provided to the province, the number of leases it negotiated on an annual basis and the value of the lease payments it made. The appellant points out that despite this evidence, Adjudicator Jepson found that the LCBO ultimately failed to provide any information to identify or explain how disclosure of the withheld information could impact any of those indicators

[37] The appellant submits that in this case the LCBO failed to even provide the number of agreements related to warehousing services and 3PLs or the number of negotiations currently underway, much less information that identifies or explains how disclosure would affect current or future warehousing agreements.

Section 18(1)(d)

[38] The appellant argues that the LCBO's submissions on section 18(1)(d) are nearly identical to its submissions in Order PO-4057, an appeal related to the disclosure of a document outlining information of thefts at LCBO locations. It argues that Adjudicator Ball found that these submissions were not sufficient to establish a risk of harm that was beyond the merely possible or speculative or disclosure could reasonably result in injury to its financial interests.

[39] The appellant argues that the LCBO has failed to establish how disclosure of the information at issue could reasonably be expected to result in injury to Ontario's economic interests.

The parties' replies

[40] The LCBO provided confidential reply representations and a confidential affidavit[16] describing how disclosure of the withheld information (the rates and charges) would be detrimental. The affiant argues that as the rates and charges were negotiated on an urgent basis for temporary warehousing arrangement, their disclosure would create a misleading impression of the LCBO's rate structure. He also argues that disclosure would further impact the LCBO's ability to solicit bids and negotiate with third parties, as third parties may justify drastically increased rates that exceed industry standards by performing calculations and extrapolations based on the disclosed rates and charges. The affiant further argues that there is a possibility that potential third parties, being unaware of the unique circumstances under which the agreement was negotiated, will decline to submit bids with the assumption that the LCBO's rate structure is too low, resulting in a lower number of competitive bids and likely increasing the LCBO's costs for future warehousing agreements.

[41] The affiant also argues that warehousing costs form a major component of his division's expense and, therefore, he is concerned with the impact of disclosure of operational costs associated with warehousing. He acknowledges that a greater portion of his division's costs are in relation to inbound and outbound transportation (which cannot be controlled by the LCBO) unlike the costs of warehousing.

[42] In addition, the affiant argues that costs of warehousing are additionally driven by the amount of warehousing space that is utilized and peak periods of demands. As such, the LCBO has an acute need to maintain 3PL warehousing in order to maintain regular operations.

[43] Finally, the affiant states that he anticipates that the LCBO will require more warehousing space in the future. As such, the LCBO will very likely be engaged in finding additional warehousing space to support its operations. The affiant argues that disclosure of the rates and charges, if known to 3PLs, will negatively impact the LCBO's ability to negotiate cost-effective warehousing agreements and reduce the LCBO's ability to compete for much sought after warehousing space.

[44] In response, the appellant argues that the LCBO's claim that disclosure of the information would have a significant impact on future negotiations is entirely speculative and highly unlikely. It points out that the information sought is very specific and is from a fixed period of time that is nearly 3 years ago and most importantly from before the global pandemic.

---

[16] The affidavit was sworn by the Vice President Distribution and Logistics of the Supply Chain and Wholesale Division at the LCBO.

[45] The appellant explains that all aspects of social, economic and political life have been affected by the global pandemic – including supply chain issues and the cost of commercial spaces and warehouses. It points out that we are living in a "new normal" where the so-called "emergency" rates brokered by the LCBO in the summer of 2019 may now even be favourable to the LCBO.

[46] The appellant argues the fact that costs have risen is not relevant to the question of whether the information at issue should be exempt under the *Act*.

[47] It also argues that it strains common sense and reason to believe that disclosure of the agreement with one specific party in 2019 would have an impact on the economic or competitive position of the LCBO or would somehow be injurious to the financial interests of the Government of Ontario or the ability of the Government of Ontario to manage the economy.

Analysis and findings

[48] In this appeal, the LCBO submits that the exemptions in sections 18(1)(c) and (d) of the *Act* apply to the withheld information. The purpose of section 18(1) is to protect certain economic interests of institutions.

[49] For sections 18(1) (c) or (d) to apply, the LCBO must demonstrate that disclosure of the withheld information "could reasonably be expected to" lead to the specified result. To meet this test, the LCBO must provide detailed evidence to establish a "reasonable expectation of harm".

[50] I have carefully reviewed the withheld information and the LCBO's representations. I am not persuaded that the LCBO has established that disclosure of the withheld information could reasonably be expected to prejudice its economic interests or its competitive position or 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.

[51] The LCBO says that disclosure of the withheld information would negatively impact its ability to negotiate cost-effective warehousing agreements. As examples of future negotiation, the LCBO points out that it will need to initiate new procurement processes for warehousing service in Ottawa and London as those agreements were due to expire in fall 2022. However, I am not persuaded that disclosure of the withheld information would negatively impact the LCBO's ability to negotiate unspecified future agreements as the rates and charges are constantly changing in this competitive marketplace for warehousing services.

[52] With regard to the LCBO's concern that the disclosure of the withheld information could reasonably be expected to compromise its ability to negotiate future agreements, I refer the LCBO to Order PO-2758. In that decision, Senior Adjudicator Higgins reviewed the decision of McMaster University to deny access under section

18(1)(c) to the payment terms of vending contracts it signed with various third parties. After considering McMaster University's claim that the disclosure of the information at issue would establish a precedent of a "floor or ceiling" for any prospective supplier in advance of negotiations, Senior Adjudicator Higgins stated:

> … McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

[53] This line of reasoning has been followed in numerous orders of this office where similar arguments were put before the adjudicator.[17] I agree with and adopt the reasoning of Senior Adjudicator Higgins in Order PO-2758 for this appeal. In the present appeal, the LCBO has not established that the commercial reality set out in PO-2758 would not also apply to any future agreements it must negotiate.

[54] I accept the LCBO's argument that there is a demand for warehouse space due to the boom in e-commerce. However, the fact that there is more competition for warehouse space for the LCBO and its competitors does not prejudice the LCBO's economic interests, competitive position or financial interests. The LCBO is a business and, as such, must operate in a competitive marketplace.[18]

[55] I have reviewed Orders PO-3620 and PO-3579 (which the LCBO relies on) and am not persuaded that they apply in this case. The institutions in both those orders provided clear and detailed evidence of the potential harms related to disclosure. Although both those orders deal with the institution's ability to negotiate future agreements, the withheld information at issue was different from the information at issue in this appeal. I note that in PO-3620, Adjudicator Ryu found that only the licensing fees paid by affiliates to the college were exempt under section 18(1)(c), while in PO-3579 the information at issue were withheld portions of a lease agreement.

[56] The LCBO also argues that increase warehousing expenses affects the province's financial interests. However, the LCBO does not demonstrate how 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. I accept that if the LCBO has to pay higher warehousing costs then this would reduce the amount of money coming

---

[17] Orders MO-2490, PO-2990, PO-3011 (upheld in *HKSC Developments LP v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776) and PO-3311 (upheld in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*, 2015 ONSC 1392).
[18] See Orders MO-2363 and PO-2758.

into the provincial coffers. However, the LCBO has not established that this would be injurious to Ontario's financial interests or its ability to manage the provincial economy. Moreover, I am not persuaded that the section 18(1)(d) harms can be inferred from the withheld information themself or the circumstances surrounding the potential disclosure of the withheld information.

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

ORDER:

1. I order the LCBO to disclose the withheld information to the appellant by **July 31, 2023** but not before **July 24, 2023**.

2. In order to verify compliance with this order, I reserve the right to require the LCBO to provide me with a copy of the records disclosed upon request.

Original signed by: June 26, 2023

Lan An
Adjudicator