



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-710**

**Appeal P-9300186**

**Liquor Control Board of Ontario**



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## **BACKGROUND:**

The Liquor Control Board of Ontario (the Board) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to records pertaining to a forensic accounting investigation into allegations of improper foreign currency trading by Board staff undertaken by a named accounting firm (the accounting firm) on behalf of the Board. The Board located 45 responsive records but denied access to these records in their entirety under sections 13, 17, 19 and 21 of the Act. The requester appealed the Board's decision to deny access to the Commissioner's office.

During the mediation stage of the appeal, the appellant agreed not to pursue access to the names and titles of individuals employed by the accounting firm where they appear with their corresponding hourly rates in Schedule B of Record 1 and in Record 36. Further mediation of the appeal was not successful, and notice that an inquiry was being conducted to review the decision of the Board was sent to the appellant, the accounting firm, the Board and a former employee of the Board whose conduct was the primary focus of the investigation. Representations were received from the Board, the appellant and the accounting firm.

## **RECORDS:**

The records at issue in this appeal, along with the exemptions claimed for each document, are described in Appendix A to this order.

## **ISSUES:**

The issues to be determined in this appeal are the following:

- A. Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 42.
- B. Whether the mandatory exemption provided by section 17(1) of the Act applies to Records 1, 2, 4 to 23, 38, 44 and 45.
- C. Whether the discretionary exemption provided by section 19 of the Act applies to all of the records with the exception of Records 2 and 4.
- D. Whether the records contain "personal information" as defined in section 2(1) of the Act, and, if so, to whom does the information relate?
- E. If the answer to Issue D is yes, and the records contain the personal information of individuals other than the requester, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the records.
- F. In the event that sections 13, 17 and/or 21 are found to apply to the records, whether section 23 of the Act applies to override these exemptions.

## **SUBMISSIONS/DISCUSSION:**

### **ISSUE A: Whether the discretionary exemption provided by section 13(1) of the Act applies to Record 42.**

Section 13(1) of the Act states that:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

Record 42 consists of a one-page document entitled "Auditor's Criticism of Foreign Currency Activities" prepared by the Board's Director of Communications. In its representations, the Board states that this document "constitutes his recommended communications strategy with respect to the issues dealt with in the Record."

In Order 118, former Commissioner Sidney B. Linden made the following comment on the nature of the term "advice".

In my view, advice for the purposes of section 13(1) of the Act must contain more than mere information. Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

I find that the disclosure of Record 42 would reveal the advice or recommendation of a public servant and that section 13(1) applies to exempt this document from disclosure. I further find that none of the exceptions to the section 13(1) exemption which are described in section 13(2) of the Act are applicable to Record 42.

### **ISSUE B: Whether the mandatory exemption provided by section 17(1) of the Act applies to Records 1, 2, 4 to 23, 38, 44 and 45.**

In their representations, either the Board or the accounting firm have claimed the application of section 17(1) to Records 1, 2, 4 to 23, 38, 44 and 45. Sections 17(1)(a), (b) and (c) of the Act state that:

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, where the disclosure could reasonably be expected to,

- (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;

For a record to qualify for exemption under sections 17(1)(a), (b) or (c) the party resisting disclosure, in this case the Ministry and the accounting firm, 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; **and**
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 (a), (b) or (c) of subsection 17(1) will occur.

[Order 36]

I will discuss the application of each part of the test to the 25 records for which the section 17 exemption has been claimed.

## **PART ONE**

I have carefully reviewed the records at issue and find that all of them, with the exception of Records 9, 11, 12, 14, 16, 17, 20 and 23, contain financial or commercial information within the meaning of section 17(1). Accordingly, insofar as Records 1, 2, 4, 5, 6, 7, 8, 10, 13, 15, 18, 19, 21, 22, 38, 44 and 45 are concerned, the first part of the test has been satisfied.

## **PART TWO**

### **Record 1**

Record 1 is the engagement contract for the provision of services which was entered into between the accounting firm and the Board. Two Schedules are also appended to the engagement contract. I find that the body of the contract was not "supplied" to the Board within the meaning of section 17(1). Rather, it was created as a result of negotiation between the Board and the accounting firm.

Schedule A to the contract, however, contains detailed information regarding the methodologies and techniques to be employed by the accounting firm in the course of its investigation. I find that this information was supplied by the accounting firm to the Board and remains in the contract in the form originally submitted by the firm. Further, I agree with the submissions of

the accounting firm that the information contained in Schedule A was supplied with an implicit expectation of confidentiality and that this expectation was reasonable in the circumstances.

Schedule B to the contract sets out the names of the individuals employed by the accounting firm and the hourly rates to be paid for their work in accordance with the contract. As stated in the background section of this order, the appellant is not seeking the names of these individuals. Along with this information, the total expected costs for each of the five tasks identified in the contract are listed with the expected method of invoicing and payment from the Board. In its representations, the accounting firm describes how the information contained in Schedule B came to be included in the contract. I agree that the hourly rates and total fees for each task were supplied to the Board within the meaning of section 17(1). Further, taking into account the circumstances surrounding the creation of Record 1, and the representations of the parties, I find that the information was supplied implicitly in confidence and that the expectation of confidentiality on the part of the accounting firm was reasonable.

By way of summary, I find that the second part of the test has been met only insofar as Schedules A and B of Record 1 are concerned.

## **Record 2**

Record 2 is an agreement entered into between the accounting firm and the Board extending the time for the completion of the contract outlined in Record 1. I find that the information contained in Record 2 was the result of negotiation between the parties and was not "supplied" within the meaning of section 17(1) of the Act.

## **Records 4 and 5**

Records 4 and 5 are the draft and final versions of an engagement letter which formed the basis of the proposal made by the accounting firm to perform the work later outlined in the engagement contract and Schedules described as Record 1. These documents describe in some detail the work to be undertaken by the accounting firm on behalf of the Board in the course of its forensic audit investigation. Each document is marked "Private and Confidential". I find that the information contained in Records 4 and 5 was supplied in confidence to the Board and that the expectation of confidentiality by the accounting firm was reasonably held. Accordingly, part two of the test has been met for these records.

## **Record 6**

Record 6 is a letter from a management consultant employed by the accounting firm to the Chairman of the Board which contains his comments and recommendations concerning a plan prepared by the Board's staff. The letter is marked "Private and Confidential" and includes suggestions as to certain strategic plans to be implemented by the Board. I find that the information was supplied to the Board by an employee of the accounting firm with a reasonably-held expectation of confidentiality. The second part of the section 17(1) test has, therefore, been satisfied.

## **Record 7**

Record 7 is a "Private and Confidential" letter from the accounting firm to the Director of Legal Services at the Board seeking clarification as to the specific terms of one portion of the engagement contract entered into between these parties. Attached to the letter is an invoice covering Phase I and part of Phase II of the work to be undertaken by the accounting firm. The information contained in Record 7 was clearly supplied by the firm to the Board with an expectation of confidentiality. Following my review of Record 7, the circumstances surrounding its creation and the representations of the parties, I find that the expectation of confidentiality was reasonably held.

### **Record 8**

Record 8 is a "Private and Confidential" letter from the accounting firm to the Executive Vice President of the Board to which is appended a detailed estimate of costs to complete several tasks which are described in Record 1. As with Record 7, I find that the information contained in Record 8 was supplied to the Board with a reasonably-held expectation of confidentiality.

### **Record 10**

Record 10 is a letter marked "Private and Confidential" from the accounting firm to the Board's Director of Legal Services in which the author considers the interpretation of an insurance policy held by the Board. I find that the information contained in Record 10 regarding the policy was not supplied by the accounting firm to the Board. Rather, it contains information supplied by the Board to the firm. Accordingly, I find that the second part of the section 17(1) test has not been satisfied insofar as Record 10 is concerned.

### **Record 13**

Record 13 is similar in nature to Record 8, being a detailed breakdown of cost estimates from the accounting firm to the Board. For the reasons indicated in my discussion of Record 8, I find that the second part of the test has been met for Record 13.

### **Record 15**

Record 15 is similar in nature to Record 7, including the attachment of an invoice. I find that this record also satisfies the requirements of the second part of the test.

### **Record 18**

Record 18 is a covering letter marked "Private and Confidential" addressed to the Director of Legal Services for the Board by the accounting firm, to which is attached a detailed listing of tasks to be performed and the accounting firm's time budget as of the date of the covering letter. I find that the information contained in the attachment was supplied by the accounting firm to the Board with a reasonably-held expectation of confidentiality.

### **Record 19**

Record 19 is a letter marked "Privileged, Private and Confidential" from the accounting firm to the Board's Director of Legal Services in which confirmation is sought for the broadening of the

investigation being undertaken to include certain additional tasks. The letter outlines in detail the estimated time to perform the work and the fees to be charged for these services. For the reasons described in my discussion of Record 18, I find that the second part of the section 17 test has been satisfied insofar as Record 19 is concerned.

### **Record 21**

Record 21 is a letter from the accounting firm to the Board's Director of Legal Services requesting that the Board request the disclosure of certain documents from a third party which relate to Phase III of the contract. In my view, this record is of an administrative nature and does not contain information which was "supplied" by the accounting firm to the Board. Accordingly, the second part of the section 17(1) test has not been satisfied.

### **Record 22**

Record 22 consists of a covering letter to which is attached a list of vendors to the Board. This list was created from a report supplied by the Board to the accounting firm. The contents of the list were not, therefore, supplied by the accounting firm to the Board for the purposes of section 17(1).

### **Record 38**

Record 38 is a letter from the Board's Director of Legal Services to the accounting firm, sent in response to a letter designated as Record 44 in this appeal. The letter authorizes the firm to interview certain individuals in connection with the forensic accounting investigation. It also makes reference to the fees permissible for this work. I cannot agree with the position taken by the accounting firm that this information was supplied to the Board within the meaning of section 17(1) of the Act.

### **Record 44**

Record 44, as noted in my discussion of Record 38, is a letter from the accounting firm to the Board requesting authorization to interview certain individuals in connection with the fulfilment of its audit work. In my view, this record contains only information which the firm has received from the Board and does not contain information which has been supplied by the firm to the Board. Accordingly, the second part of the section 17(1) test has not been met for Record 44.

### **Record 45**

Record 45 is the final report of the accounting firm entitled LCBO Treasury Investigation. It is marked "Privileged, Private and Confidential" and consists of a 22-page report to which are attached nine Appendices. The first appendix is Record 1, the engagement agreement. In my discussion of Record 1, I found that only Schedules A and B to the engagement contract meet the second part of the section 17(1) test. I find that the remainder of the report and the Appendices, with the exception of the body of Appendix 1, contain information which was supplied with a reasonably-held expectation of confidentiality to the Board by the accounting firm.

By way of summary, I find that the second part of the section 17(1) test has been met for Schedules A and B of Record 1, Records 4, 5, 6, 7, 8, 13, 15, 18, 19 and 45 (with the exception of the body of the engagement contract contained in Appendix 1). I will now consider the application of the third part of the section 17(1) test to these records.

### **PART 3**

To satisfy part three of the test, the Board and/or the accounting firm must present evidence that is detailed and convincing, and which describes a set of facts and circumstances which would lead to a reasonable expectation that the harms described in sections 17(1)(a), (b) or (c) of the Act would occur if the information is disclosed.

In its representations, the accounting firm indicates that the disclosure of the information contained in these records would result in serious harm to its competitive position. It argues that the disclosure of its "Time and Task Budgets" would reveal to its competitors the techniques and methodologies which it employs when it undertakes a forensic accounting audit of the nature requested by the Board. It further states that the disclosure of the hourly rates and invoice information contained in a number of the remaining records would undermine its competitive position as other accounting firms which perform work of this nature could use this information to usurp its position in the marketplace.

In its representations, the Board indicates that the disclosure of the information contained in the records would 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", as described in section 17(1)(b). The Board adds that the disclosure of the information contained in the records would result in the accounting firm and similar organizations refusing to disclose detailed information to the Board. The result is that the Board will be prejudiced if it undertakes similar sorts of investigations in the future.

The accounting firm reiterates the position taken by the Board in its representations regarding the application of section 17(1)(b). It adds that much of the information contained in the records supplied by it to the Board enabled the Board to perform portions of the investigation itself, thereby saving considerable sums of money. The accounting firm indicates that, should this information be disclosed, it will be reluctant to provide such detailed material to government agencies in the future, and that it is in the public interest that it continue to do so.

### **Schedules A and B of Record 1**

Schedule A of Record 1 is entitled "Work and Services to be Performed" and consists of five pages of very detailed information about the exact nature of the work to be performed and the strategy to be employed by the accounting firm in the course of its forensic accounting investigation. I find that the disclosure of this information could reasonably be expected to cause harm to the competitive position of the firm. Accordingly, I find that this portion of Record 1 is properly exempt from disclosure.

Schedule B, with the names of individual employees of the firm removed, consists of a list of hourly rates, along with fixed ceiling prices for each of the five tasks outlined in the body of the engagement contract. In my view, the disclosure of this information, without having it linked to



the names of individuals, could not reasonably be expected to prejudice significantly the competitive position of the accounting firm. Nor have I been provided with convincing evidence that such disclosure would result in information of this sort no longer being provided to Government. This is the case particularly since accounting firms will be required to provide such costing information should they wish to secure government contracts. Accordingly, I find that sections 17(1)(a) and (b) have no application to Schedule B of Record 1.

#### **Records 4 and 5**

Records 4 and 5 contain information of a similar nature to that contained in Schedule A of Record 1. I find that these records include information regarding the techniques and methodologies to be employed by the accounting firm in the course of its forensic audit. Further, I agree that the disclosure of this information could reasonably be expected to significantly prejudice the firm's competitive position. I find, therefore, that section 17(1)(a) applies to exempt this information from disclosure.

#### **Record 6**

Record 6 contains comments and recommendations from the accounting firm to the Board regarding a plan prepared by Board staff. I find that the disclosure of the information would not produce any of the harms contemplated by sections 17(1)(a) or (b) of the Act. The competitive position of the accounting firm would not be prejudiced by its disclosure. Further, I have not been provided with sufficient evidence to allow me to find that it is likely that such information would no longer be provided to the Board should disclosure take place. Accordingly, I find that sections 17(1)(a) and (b) do not apply to exempt Record 6 from disclosure.

#### **Records 7 and 15**

Records 7 and 15 consist of covering letters and invoices submitted by the accounting firm to the Board's Director of Legal Services. I note that the invoices contain global figures with regard to the amounts billed for fees and disbursements as well as the number of hours of work performed by various employees on this file.

In Order M-258, Inquiry Officer Anita Fineberg had occasion to review the application of section 10 of the Municipal Freedom of Information and Protection of Privacy Act, which is the equivalent of section 17 of the Provincial Act in the context of invoices submitted by an accounting firm for forensic audits conducted within a municipal institution. In that order, she found that:

Given the nature of the work performed by the affected party and the industry within which it operates, I am not satisfied that I have been provided with sufficient or specific enough evidence to conclude that disclosure of any of the information contained in the records could reasonably be expected to prejudice **significantly** the competitive position or interfere **significantly** with the contractual or other negotiations of the accounting firm (section 10(1)(a) of the Act). In addition, the Board and the affected party have failed to establish that such disclosure could reasonably be expected to result in one of the types of harms specified in section 10(1)(c) of the Act.

In the circumstances of this appeal, I am also of the view that the disclosure of the information contained in the invoices cannot reasonably be expected to result in the harms contemplated by sections 17(1)(a), (b) or (c). Accordingly, I find that Records 7 and 15 are not exempt from disclosure under section 17(1) of the Act.

### **Records 8, 13, 18 and 19**

Records 8, 13, 18 and 19 contain detailed outlines of work to be performed by the accounting firm on behalf of the Board. The accounting firm submits that the information in these records, if disclosed, would reveal certain forensic accounting techniques which are unique to this particular firm. I agree that because of the intrinsic value of the information contained in Records 8, 13, 18 and 19, its disclosure could reasonably be expected to result in significant harm to the competitive position of the accounting firm.

### **Record 45**

Under my discussion of Record 1, I have found that Schedule A of Record 1, which is attached to Record 45 as Appendix 1, is exempt from disclosure under section 17(1). The body of Record 45 and the remaining eight Appendices contain recommendations and findings by the firm concerning the mandate of its audit investigation. These documents, however, do not contain information whose disclosure would **significantly** harm the competitive position of the accounting firm. They do not contain information whose disclosure would reveal the firm's methodology or techniques used in the conduct of forensic audits of this sort to its competitors. Rather, the findings and recommendations relate solely to the operation of the Board's Treasury Department.

To conclude, section 17(1)(a) does not apply to exempt Record 45, with the exception of Schedule A to Appendix 1, from disclosure.

By way of summary, I have found that section 17(1)(a) applies to exempt from disclosure Schedule A of Record 1 (also described as Schedule A to Appendix 1 of Record 45) and Records 4, 5, 8, 13, 18 and 19.

In the representations received from the Board and the accounting firm, the application of section 17(1)(b) to the records is also raised. The accounting firm is most concerned with the disclosure of information relating to its methodologies and techniques, information which I have held to be exempt from disclosure under section 17(1)(a). In my view, accounting firms will continue to provide detailed information to government institutions when they are retained to perform forensic accounting work. I agree that it is important that accounting firms share with the government institutions which retain them as much information as possible in order to ensure that the public receives full value for the fees paid. In my view, the key point here is that such firms must continue to provide cost-related information if they wish to secure government contracts. The possibility that this information will be disclosed ought not to cause them to reveal less of this information in the future.

**ISSUE C: Whether the discretionary exemption provided by section 19 of the Act applies to all of the records with the exception of Records 2 and 4.**

**[IPC Order P-710/June 23, 1994]**

Section 19 of the Act states:

A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide the Board with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege (Branch 1); and
2. a record which was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

In order to qualify for exemption under Branch 1 (the common law solicitor-client privilege), the Board must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**  
(b) the communication must be of a confidential nature, **and**  
(c) the communication must be between a client (or his agent) and a legal advisor, **and**  
(d) the communication must be directly related to seeking, formulating or giving legal advice;

OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

[Order 49]

Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; and
2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

[Order 210]

As noted above, the Board has claimed the application of section 19 to all of the records at issue in this appeal, save Records 2 and 4. The majority of the records consist of correspondence from the accounting firm to the Board's Director of Legal Services, through whom all requests for

**[IPC Order P-710/June 23, 1994]**

information, reports and accounts were forwarded. I find that most of these records relate to the conduct of the forensic audit investigation and were not prepared either for use in giving legal advice or in contemplation of or for use in litigation by or for Crown counsel.

The Board has claimed the application of Branch 2 of the section 19 exemption to apply to Records 1, 3, 6, 7, 9, 10, 11, 12, 14, 15, 16, 17, 19 through 39, 43A and B, 44 and 45. It has also claimed that Branch 1, the common law solicitor-client privilege, applies to Records 39, 40 and 41.

## **Branch 1**

### **Record 39**

I agree with the submission of the Board that this record is a written communication of a confidential nature between a legal advisor and her client. However, the memorandum relates solely to the conduct of the forensic audit investigation by the accounting firm and does not relate to the seeking, formulating or giving of legal advice. Further, I cannot agree that Record 39 was created or specifically obtained for a lawyer's brief for existing or contemplated litigation. Accordingly, Record 39 is not exempt from disclosure under Branch 1 of the section 19 exemption.

### **Record 40**

Again, I find that this memorandum is a written communication of a confidential nature between a client and its legal advisor. For the reasons stated in my discussion of Record 40, I find that the record does not relate to the seeking, formulating or giving of legal advice. The test to establish the common law solicitor-client privilege has not, therefore, been met.

### **Record 41**

Record 41 is an eight-page document prepared by a Board Policy Analyst. I have not been appraised of its intended recipient, nor have I been advised as to whether the Policy Analyst responsible for the creation of this record is a Crown counsel. Accordingly, I find that section 19 does not apply to exempt Record 41 from disclosure.

## **Branch 2**

The Board has claimed the application of Branch 2 of the section 19 exemption to Records 1, 3, 6, 7, 9, 10, 11, 12, 14, 15, 17, 21, 22, 25, 31, 33, 34, 36, 37, 38, 39, 43A and B, 44 and 45. I have carefully reviewed the contents of each of the records and have concluded that the majority of these records were not created by or for Crown counsel for a lawyer's brief for existing or contemplated litigation. I find that the dominant purpose for which these records were created was to formalize the accounting firm's investigation of the Board's Treasury Department. A record would be considered to have been created "in contemplation of litigation" if the **dominant** purpose for its preparation was contemplated litigation and if there was a reasonable prospect of litigation, not just a theoretical possibility (Order 52).

Although litigation may have been a possibility at the point in time when these records were created, I am not satisfied that the contemplation of litigation was the **dominant** purpose for the creation of these records. Accordingly, I find that the majority of these records do not qualify for exemption under Branch 2 or the second part of Branch 1 of section 19.

Records 7, 15, 16, 20, 23, 24, 26, 27, 28, 29, 30, 32, 35 and 39, however, represent communications of a confidential nature between a client and a legal advisor which are directly related to seeking, formulating or giving legal advice. Accordingly, I find that these records are exempt from disclosure under Branch 1 of the section 19 exemption.

**ISSUE D: Whether the records contain "personal information" as defined by section 2(1) of the Act, and, if so, to whom does the information relate?**

During the course of the mediation of the appeal, the appellant has withdrawn his request for access to certain information which may identify by name the individuals listed in Schedule B of Record 1 and Record 36. As the names and titles of individuals have been removed from this information, it is no longer "personal information" under section 2(1) of the Act.

Many of the records contain information which relates to the work performance of the former Treasurer of the Board. In its representations, the Board submits that the information "relates to financial transactions in which the individual has been involved in his capacity as Treasurer". I find that information of this sort relates to the former Treasurer in his professional, and not his personal, capacity and, therefore, does not qualify as his personal information.

I have reviewed the records and find that only Records 11, 40, 41 and 45 contain information of the former Treasurer in his personal capacity. Record 22 contains the names of both individuals and corporations who are vendors of goods and services to the Board. As this information relates to the business activities of these individuals, I find that it does not qualify as their "personal information" within the meaning of section 2(1) of the Act.

**ISSUE E: If the answer to Issue D is yes, and the records contain the personal information of individuals other than the requester, whether the mandatory exemption provided by section 21 of the Act applies to the personal information contained in the records.**

Under Issue D, I found that Records 11, 40, 41 and 45 contain personal information of persons other than the appellant. Section 21(1) of the Act is a mandatory exemption which prohibits the disclosure of personal information to any person other than the individual to whom the information relates. There are a number of exceptions to this rule, one of which is found in section 21(1)(f) of the Act. This section provides that an institution must refuse to release personal information of other individuals except if the disclosure does not constitute an unjustified invasion of personal privacy.

Sections 21(2), (3) and (4) of the Act provide guidance in determining whether the disclosure of the personal information would constitute an unjustified invasion of personal privacy. I have carefully reviewed the contents of the five records and find that neither sections 21(3) nor (4) apply to the personal information in question.

If none of the presumptions in section 21(3) are applicable, the Board must consider the relevance of the factors listed in section 21(2), as well as all other relevant circumstances that apply in the case.

In its representations, the Board relies on the considerations outlined in sections 21(2)(e), (f) and (i) of the Act which weigh in favour of protecting the privacy interests of the former Treasurer and the individuals named in Record 22. I will now consider each of these factors.

#### **Pecuniary or Other Harm - Section 21(2)(e)**

The applicability of this clause is not dependent on whether the damage or harm envisioned is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved (Order P-256).

In its representations, the Board indicates that the disclosure of the personal information contained in the records could unfairly expose the former Treasurer to pecuniary harm by making his search for employment more difficult. The former Treasurer, through his counsel, has declined to make any representations on this aspect of the appeal. In my view, the Board has not presented evidence to establish a sufficient connection between the release of the records and the possible pecuniary or other harm which the former Treasurer might suffer. Further, I find that the content of the records themselves does not establish this connection. Accordingly, I find that section 21(2)(e) is not a relevant consideration in the circumstances of this appeal.

#### **Highly Sensitive Information - Section 21(2)(f)**

I agree with the Board's position that the personal information contained in these records which relates to the former Treasurer may properly be characterized as "highly sensitive". More specifically, I find that all of Records 11, 40, and portions of Records 41 and 45 contain such information. This consideration is a relevant factor weighing in favour of the protection of the privacy of the former Treasurer.

#### **Unfair Damage to Reputation - Section 21(2)(i)**

The personal information contained in these records include certain allegations against the former Treasurer. In determining whether the former Treasurer's reputation might be unfairly damaged by the release of such information, it is relevant to consider the outcome of the forensic audit investigation into the conduct of that individual.

I believe, however, that in interpreting section 21(2)(i), it is also necessary to reflect on the nature of the allegations raised, the type of records at issue and the position occupied by the Government employee whose conduct is being questioned. In Order P-256, former Assistant Commissioner Tom Mitchinson had occasion to interpret section 21(2)(i) in an appeal where the record at issue was an audit report pertaining to employee expense claims.

In that order, Assistant Commissioner Mitchinson made the following statements which, I believe, are also applicable to this appeal:

In my view, the public has a right to expect that expenditures made by employees of government institutions during the course of performing their employment related responsibilities are made in accordance with established policies and procedures ... In submitting expense claims for reimbursement, government employees should do so on the basis that they may be called upon to substantiate each and every expenditure, both internally to the management staff of the institution, and externally to the general public ...

I have carefully reviewed the contents of the records and the representations provided to me. I have taken into account both the position of the former Treasurer and the expectation that such an individual would have that his conduct would be carefully scrutinized. Based on these considerations, I conclude that the release of an investigation report, Record 45, which probes the appropriateness of the former Treasurer's foreign currency trading activities cannot be said to **unfairly** damage that individual's reputation. The result, therefore, is that section 21(2)(i) is not a relevant consideration in determining whether the disclosure of the information would constitute an unjustified invasion of personal privacy.

To summarize, therefore, I find that one consideration set out in section 21(2) of the Act (highly sensitive information) favours the protection of the privacy of the former Treasurer. I have not been provided with any representations from the appellant which raise any of the considerations set out in section 21(2) favouring the disclosure of personal information.

In conclusion, I find that the disclosure of the personal information contained in Records 11 and 40 in their entirety, and portions of Records 41 and 45 would constitute an unjustified invasion of the personal privacy of the former Treasurer. This information should, therefore, not be disclosed to the appellant.

To assist the Board, I have highlighted the information which should not be disclosed in Records 41 and 45 in yellow on the copy of the records which is being sent to the Board's Freedom of Information and Privacy Co-ordinator with a copy of this order.

**ISSUE F: In the event that sections 13, 17 and/or 21 are found to apply to the records, whether section 23 of the Act applies to override these exemptions.**

I have found in my discussion of Issues A, B, C and E that Record 42 is exempt from disclosure under section 13(1) of the Act; that Schedule A of Record 1 (which is also Schedule A to Appendix 1 of Record 45), Records 4, 5, 8, 13, 18 and 19 are exempt from disclosure under section 17(1) of the Act, and that Records 11 and 40 in their entirety and portions of Records 41 and 45 are exempt from disclosure under section 21.

There are certain requirements in section 23 of the Act which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in the disclosure of the record; and this compelling public interest must **clearly** outweigh the purpose of the exemption, as distinct from the value of the disclosure of the particular record in question (Orders 16 and P-658).

Commissioner Tom Wright reviewed the application of section 23 in Order P-241 where he indicated that:

**[IPC Order P-710/June 23, 1994]**

The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. 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 the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

In his representations, the appellant states his reasons for claiming the application of section 23 to the withheld records as follows:

The existence of a speculative foreign exchange hedging program by a public body in which substantial sums of money may have been lost or put at unnecessary risk is surely a matter of compelling public interest and should be made available to the LCBO's main stake holder, the taxpayers of this province.

The Board has taken the following position with regard to the application of section 23 to the records which have been withheld from disclosure:

The Board has determined that the appellant has failed to establish a compelling public interest that would justify an override of the exemptions. The Records all relate to a dispute between the Board and a former employee, which dispute is being dealt with in the proper forum, the Courts.

It must be noted that, as a result of this appeal, the appellant will receive a substantial amount of information relating to the forensic audit investigation undertaken by the accounting firm of the Board's Treasury Department, including most of the final audit report. In my view, the public interest in the disclosure of the results of that investigation will be met with the disclosure of the information which is subject to this order. I am not convinced that there exists a **compelling** public interest in the disclosure of the remaining information which clearly outweighs the protection of the various interests, economic and otherwise, of the former Treasurer, the accounting firm and the Board which are recognized under sections 13, 17 and 21 of the Act.

## **ORDER:**

1. I uphold the Board's decision not to disclose Schedule A of Record 1 (which is also Schedule A to Appendix 1 of Record 45), Records 4, 5, 7, 8, 11, 13, 15, 16, 18, 19, 20, 23, 24, 26, 27, 28, 29, 30, 32, 35, 39, 40 and 42, and those portions of Records 41 and 45 which are highlighted in the copy of the records provided to the Board's Freedom of Information and Privacy Co-ordinator with a copy of this order.



2. I order the Board to disclose Records 1 (except Schedule A), 2, 3, 6, 9, 10, 12, 14, 17, 21, 22, 25, 31, 33, 34, 36, 37, 38, 43 and 44 as well as those portions of Records 41 and 45 which are **not** highlighted on the copy of the records provided to the Board's Freedom of Information and Privacy Co-ordinator within thirty-five (35) days of the date of this order, and not earlier than the thirtieth (30th) day following the date of this order.
3. In order to verify compliance with the provisions of this order, I order the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2, **only** upon request.

Original signed by: \_\_\_\_\_

Donald Hale  
Inquiry

\_\_\_\_\_ June 23, 1994

Officer

## APPENDIX A

<b>INDEX OF RECORDS AT ISSUE</b>			
<b>RECORD NUMBER</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTION( S) CLAIMED</b>	<b>DECISION ON RECORD</b>
1	Engagement contract dated June 3, 1992	17, 19, 21	Schedule A Not Disclosed
2	Amending agreement dated December 1, 1992	17	Disclosed
3	Letter dated January 13, 1993	19, 21	Disclosed
4	Letter dated June 3, 1992	17, 19, 21	Not Disclosed
5	Undated draft letter	17, 19, 21	Not Disclosed
6	Letter dated July 24, 1992	17, 19, 21	Disclosed
7	Invoice dated July 31, 1992 with attached letter dated July 29, 1992	17, 19, 21	Not Disclosed
8	Letter dated July 30, 1992 with attached Tasks and Time Budget	17, 19, 21	Not Disclosed
9	Letter dated July 31, 1992	17, 19, 21	Disclosed
10	Letter dated August 6, 1992	17, 19, 21	Disclosed
11	Letter dated August 7, 1992	17, 19, 21	Not Disclosed
12	Letter dated August 12, 1992	17, 19, 21	Disclosed
13	Letter dated August 12, 1992 with attached Tasks and Time Budget	17, 19, 21	Not Disclosed
14	Letter dated August 24, 1992	17, 19, 21	Disclosed
15	Invoice dated August 25, 1992	17, 19, 21	Not Disclosed
16	Letter dated August 26, 1992	17, 19, 21	Not Disclosed
17	Covering letter dated August 26, 1992 without attachment	17, 19, 21	Disclosed
18	Covering letter dated August 26, 1992 (same as 17) with attached Tasks and Time Budget	17, 19, 21	Not Disclosed

<b>INDEX OF RECORDS AT ISSUE</b>			
<b>RECORD NUMBER</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
19	Letter dated September 2, 1992	17, 19, 21	Not Disclosed
20	Letter dated September 11, 1992	17, 19, 21	Not Disclosed
21	Letter dated November 2, 1992	17, 19, 21	Disclosed
22	Letter dated November 10, 1992 with attached list	17, 19, 21	Disclosed
23	Letter dated November 16, 1992	17, 19, 21	Not Disclosed
24	Memorandum to file dated July 24, 1992	19, 21	Not Disclosed
25	Memorandum to file dated August 27, 1992	19, 21	Disclosed
26	Memorandum to file dated September 3, 1992	19, 21	Not Disclosed
27	Memorandum to file dated September 17, 1992	19, 21	Not Disclosed
28	Memorandum to file dated September 28, 1992	19, 21	Not Disclosed
29	Memorandum to file dated October 1, 1992	19, 21	Not Disclosed
30	Memorandum to file dated October 8, 1992	19, 21	Not Disclosed
31	Memorandum to file dated November 4, 1992	19, 21	Disclosed
32	Letter dated July 23, 1992	19, 21	Not Disclosed
33 and 34	Letter dated July 23, 1992	19, 21	Disclosed
35	Draft of Record 32	19, 21	Not Disclosed
36	Letter dated July 27, 1992	19, 21	Disclosed
37	Letter dated August 26, 1992	19, 21	Disclosed
38	Letter dated January 8, 1993	17, 19, 21	Disclosed
39	Memorandum dated August 26, 1992	19, 21	Not Disclosed
40	Memorandum dated October 1, 1992	19, 21	Not Disclosed
41	Memorandum dated July 15, 1992	19, 21	Disclosed in part
42	Communications Strategy dated November 12, 1992	13	Not Disclosed

<b>INDEX OF RECORDS AT ISSUE</b>			
<b>RECORD NUMBER</b>	<b>DESCRIPTION OF RECORDS WITHHELD IN WHOLE OR IN PART</b>	<b>EXEMPTION(S) CLAIMED</b>	<b>DECISION ON RECORD</b>
43A and 43B	Letters dated August 6, 1992 and September 30, 1992	19, 21	Disclosed
44	Letter dated January 6, 1993	17, 19, 21	Disclosed
45	Investigation Report dated February 5, 1993	17, 19, 21	Disclosed in part