



Information and Privacy
Commissioner/Ontario

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

ORDER P-905

Appeal P-9400420

Liquor Control Board of Ontario



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Liquor Control Board of Ontario (the LCBO) received a request for access to records relating to its pricing policy on products imported from France and, specifically, for the pricing structure of a particular product sold through LCBO Vintages outlets. The LCBO located records responsive to the request and denied access to them, in their entirety, claiming the application of the following exemptions contained in the Act:

- third party information - section 17(1)
- economic and other interests - sections 18(1)(c) and (e).

The requester appealed the LCBO decision. During the mediation of the appeal, the LCBO disclosed to the appellant its pricing structure for products which are sold through regular LCBO outlets. It continued to rely on the exemptions contained in sections 17(1) and 18(1)(c) and (e) and refused to disclose records containing information relating to the pricing structure of the requested product. In addition, the LCBO maintained that records relating to its pricing policy for Vintages products do not exist. The appellant seeks access to the pricing structure of the named product and argues that records relating to the LCBO's pricing policy for Vintages products should exist.

A Notice of Inquiry was provided to the appellant and the LCBO. Representations were received from both parties.

DISCUSSION:

THIRD PARTY INFORMATION

The record at issue is a two-page computer-generated document entitled "Imported Cost Book" which contains information about the pricing structure of the named product for its 1988, 1989 and 1990 vintages. The record describes the acquisition cost, mark-up, taxes, retail cost and profit margin placed on the product in the calendar years 1993 and 1994.

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the LCBO and/or the affected party 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.

Part One of the Test

The record contains information relating to the price paid by the LCBO for the named product, as well as its insurance and freight costs, taxes which are exigible, profit margin and mark-up. I find that this information may properly be characterized as commercial information within the meaning of section 17(1) of the Act.

Part Two of the Test

The second part of the test has two elements. First, the information must be **supplied** to the LCBO and secondly, it must be supplied **in confidence**, either implicitly or explicitly.

In its representations, the LCBO states that the information was supplied to it by the seller of the product. I am satisfied that the unit price information contained in the record was supplied to the LCBO within the meaning of section 17(1) of the Act. The remaining information relating to the other elements which comprise the final selling price of the product were not supplied to the LCBO. However, the disclosure of several of these elements would enable the appellant to determine the pricing information which was supplied to the LCBO. In particular, the disclosure of the mark-up placed on the product would reveal the price which was quoted by the supplier, as the appellant is aware of the retail price charged by the LCBO.

The next matter to be determined is whether the unit price information was supplied to the LCBO in confidence, either implicitly or explicitly. In Order M-169, Inquiry Officer Holly Big Canoe made the following comments with respect to the application of the second part of section 10(1) of the Act, the equivalent provision to section 17 in the Municipal Freedom of Information and Protection of Privacy Act:

In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

I adopt this interpretation for the purposes of this appeal.

The LCBO submits that the supplier of the named product quoted its price to the LCBO on the implicit understanding that the quotation would be kept in confidence. It indicates that if the price paid by the LCBO for the named product were made known to other retailers around the world, such information would be used to press the supplier for more favourable prices.

Based on the information provided to me in the context of the wine industry, I find that the information

contained in the record which relates to the price paid by the LCBO to the seller was supplied in confidence within the meaning of section 17(1) of the Act. Accordingly, I find that the second part of the section 17(1) test has been satisfied only with regard to that portion of the record.

Part Three of the Test

To satisfy part three of the test the LCBO must present evidence which is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harms described in section 17(1)(a), (b) or (c) would occur if the information contained in the record was disclosed.

The LCBO submits that the disclosure of the information regarding the sale price and mark-up of the named product would result in the supplier being prejudiced significantly in its dealings with other customers, as is contemplated by section 17(1)(a). It argues that other customers of the supplier would insist on receiving the same price considerations as those given to the LCBO, thereby interfering with the contractual negotiations which may take place between the supplier and its other customers.

The appellant did not directly address the issue of possible harm to the supplier's competitive position in his representations. He points out, however, that the LCBO has purchased only a small fraction of the total output of the named product. He adds that because the transaction represents only a minor portion of the supplier's sales, the disclosure of the pricing information would have a minor impact on either the supplier or the LCBO.

I find that in the context of the wine distribution industry, price information is carefully guarded by sellers and buyers. Further, I find that the disclosure of the unit price and mark-up contained in the record could reasonably be expected to result in pressure being exerted on the supplier by other customers for the kind of concession on price which may have been granted to the LCBO in this situation. Accordingly, I find that there exists a reasonable expectation that harm to the competitive position of the supplier would occur if the pricing information contained in the record were to be disclosed.

Section 17(1)(a) of the Act applies, therefore, to exempt from disclosure the pricing information and mark-up contained in the record. I have provided the LCBO's Freedom of Information and Privacy Co-ordinator with highlighted copies of the records indicating those portions which are not to be disclosed. Because I have found that this information is exempt under section 17(1), it is not necessary for me to consider the application of section 18.

REASONABLENESS OF SEARCH

In the second part of his request, the appellant seeks access to the pricing policy of the LCBO as it relates to its "Vintages" products. In its decision letter dated December 1, 1994, the LCBO disclosed its general pricing policy for non-Vintages products. It also maintained that a documented policy does not exist with respect to Vintages products as the base price for each is negotiated directly with the manufacturer or

supplier of the product.

The appellant submits that a policy exists which governs the pricing of non-Vintages products and that, accordingly, such a policy should also exist for Vintages products. The general pricing policy does not exempt Vintages products and a formula or policy directive from the management of the LCBO must exist to assist LCBO staff in arriving at the appropriate price for these products.

With its representations, the LCBO attached copies of its Board resolutions regarding pricing of Vintages products for the years 1994 and 1995. At my request, a copy of the 1994 resolution was forwarded to the appellant.

The LCBO also submits the affidavit of its Freedom of Information and Privacy Co-ordinator in which she describes the nature and the extent of the searches which she undertook for records responsive to this part of the appellant's request. Searches for records were made in the LCBO's Merchandising Division, Policies and Issues Management Department and Finance Division. In addition, inquiries were made of the Vice-Presidents of the Finance and Merchandising Divisions as to whether records responsive to the request exist. The deponent was advised that a written policy or formula for the pricing of Vintages products does not exist, other than the direction outlined in the Board resolution which was disclosed to the appellant.

After considering the representations of the parties and in light of the disclosure which has now taken place, I find that the search for records responsive to the request undertaken by the LCBO was reasonable in the circumstances of this appeal.

ORDER:

1. I uphold the decision of the LCBO to deny access to those portions of the records which I have highlighted on the copy of the records provided to the LCBO's Freedom of Information and Privacy Co-ordinator with a copy of this order.
2. I order the LCBO to disclose to the appellant within twenty-one (21) days of the date of this order those portions of the records which are not highlighted on the copy which I have provided to the LCBO's Freedom of Information and Privacy Co-ordinator with a copy of this order. The highlighted portions should **not** be disclosed.
3. In order to verify compliance with this order, I reserve the right to require that the LCBO provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

April 13, 1995

Donald Hale
Inquiry Officer