



**Information and Privacy  
Commissioner/Ontario**  
**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER P-1294**

**Appeal P-9600248**

**Liquor Control Board of Ontario**



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## **NATURE OF THE APPEAL:**

The Liquor Control Board of Ontario (the LCBO) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to the minutes of the March 28, 1996 LCBO Directors' meeting together with any decisions of the LCBO and related materials provided to it. In particular, the requester sought access to information provided by breweries to the LCBO to justify their applications for increases in the price of beer. The LCBO granted partial access to the responsive records. The LCBO denied access to the remaining records on the basis of the exemptions provided by sections 17(1) (third party information) and 18(1) (economic and other interests).

The requester appealed the decision to deny access.

During mediation, the appellant reduced the scope of his request to the applications for price increases from three different breweries. The records contain information about price and production costs for the products of each brewery: Records 13 (8 pages), 14 (4 pages) and 15 (21 pages). The appellant also raised the possible application of section 23 of the Act (the so-called public interest override).

This office provided a Notice of Inquiry to the appellant, the Board and the three breweries identified in the records (the affected parties). The parties were asked to comment on the application of the exemptions claimed by the Board (sections 17(1) and 18(1)) and section 23 of the Act. Representations were received from all parties.

In its representations, one of the affected parties consented to the disclosure of the following parts of Record 15: pages 1-5, 9-13, 17, 18, 20 and 21 in their entirety and parts of pages 6-8, 14-16 and 19. In addition, the LCBO has indicated that it is no longer relying on section 18(1)(c) as it relates to Record 15. Accordingly, the records that remain at issue are Records 13 and 14 in their entirety and the withheld portions of pages 6-8, 14-16 and 19 of Record 15.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

Section 17(1) of the Act states, in part:

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 section 17(1)(a), (b) or (c), the LCBO and/or the affected parties must satisfy each element of the following:

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) will occur.

All three components set out above must be met in order for the exemption to apply (Order 36). I will consider each component in turn.

### **TYPE OF INFORMATION**

The records at issue contain fax cover sheets and covering letters. The records also contain information about product costs and prices. Commercial information has been defined as information which relates solely to the buying, selling or exchange of merchandise or services (Order P-493) while financial information refers to specific data on the use and distribution of monies such as overhead or operating costs (Order P-80). I find that the withheld information in Record 15 qualifies as commercial and financial information. I find that pages 3, 5, 6, 7 and 8 of Record 13 and pages 2 and 3 of Record 14, in their entirety, also contain information that qualifies as commercial and financial information for the purposes of this appeal.

I find that the remaining parts of the records (pages 1, 2 and 4 of Record 13 and pages 1 and 4 of Record 14) do not contain financial or commercial information. Nor do they qualify as containing a trade secret or scientific, technical, or labour relations information according to the definitions established in previous orders of the Commissioner. No other mandatory exemption applies to the information that I have found does not satisfy the first component of section 17(1) and I need not consider it further under third party information. However, the LCBO has claimed that the discretionary exemption in section 18(1)(c) applies to Records 13 and 14 and I will consider this information in my discussion of the application of section 18(1) below.

### **SUPPLIED IN CONFIDENCE**

In order to satisfy the second component, the LCBO and/or the affected parties must establish that the information in the records was supplied to the LCBO **and** that it was supplied, in confidence, either implicitly or explicitly.

Previous orders of the Commissioner have found that in order to determine that a record was supplied in confidence, either explicitly or implicitly, it must be demonstrated that an expectation of confidentiality existed and that it had a reasonable basis (Order M-169).

The affected parties point out that the records are explicitly marked "Commercially Confidential" or "Private and Confidential" and were therefore, supplied explicitly in confidence. The affected parties submit that the supplier cost information has always been held in confidence by the LCBO and therefore the expectation of confidentiality on the part of the suppliers was reasonable. The affected parties state that this information is considered "sensitive information" and the covering letter pertaining to Record 14 specifically instructs the LCBO not to make any copies of this sensitive information. The LCBO confirms the affected parties' assertions that the information was supplied explicitly in confidence.

The appellant argues that since the information is used by a public body, the LCBO, to make decisions in which consumers have a direct interest, the information cannot be characterized as "confidential". The appellant submits that, accordingly, any expectation of confidentiality cannot be reasonable.

I have reviewed the representations of the parties together with the records at issue. I am satisfied that the records were supplied to the LCBO explicitly in confidence.

## **HARMS**

In order to satisfy the third component of the exemption, the affected parties and/or the LCBO must demonstrate that disclosure of the information in the records could reasonably be expected to result in one of the harms specified in (a), (b) or (c) of section 17(1).

One of the affected parties points out that if a competitor gains access to the component cost of its products as a percentage of production cost or the weighted average percentage change, the information can be used by the competitors to price their own products to advantage and result in significant prejudice to the competitive positions of the affected parties. The affected party states that if the records are disclosed, its suppliers will know what, if any, part of their price increase has been absorbed by the brewery or if it has been passed on to the customer. As a result, the suppliers, in subsequent negotiations, can seek to extract higher price increases in the anticipation that it can be passed on to the customer. The affected party submits that this and related information can be used by its suppliers and interfere significantly in future negotiations. This will result in undue loss to the affected party and undue gain to its suppliers.

The LCBO states that the records contain detailed pricing and costing information relevant to the products and business operations of each of the affected parties. The LCBO points out that the affected parties are in competition with one another and with other parties in the industry and therefore, the information can be used by others in costing and pricing their own products to gain a competitive advantage over the affected parties.

The appellant submits that there is effectively no price difference between the different brands of beer and disclosure of the information would have no impact on the pricing or competitive positions of the affected parties.

I find that disclosure of the information in the records could reasonably be expected to both prejudice significantly the competitive position of the affected parties under section 17(1)(a) and result in undue loss to them under section 17(1)(c). On this basis, I find that the third component of the exemption has been satisfied and the records are exempt from disclosure under section 17(1) of the Act.

I have highlighted the pages of Records 13, 14 and 15 that I have found to be exempt under section 17(1) of the Act on the copy of the records provided to the LCBO's Freedom of Information and Privacy Co-ordinator with a copy of this order.

### **ECONOMIC & OTHER INTERESTS**

I will now consider whether the discretionary exemption under section 18(1)(c) applies to the remaining portions of Records 13 and 14.

Section 18(1)(c) states as follows:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution.

The LCBO explains that its purpose as a crown agency is to make profit from the sale of liquor, which profit goes to the Consolidated Revenue Fund. To maximize profit transfers to the Province, the LCBO requires the breweries to provide cost justification for price increases. In this manner, the LCBO balances the competing interests of profit maximization and consumer price protection. The LCBO submits that the breweries have a legitimate interest in having their costing/pricing information protected and the LCBO, similarly, has a legitimate interest in continuing to obtain this information in order to fulfil its mandatory obligations under its statute and to ensure that the beer market remains competitive.

The appellant argues that the LCBO is a "regulatory monopolist" in that it has control over the beer market through its regulation and participation in the wholesale and retail markets. The appellant submits that on that basis, disclosure of the records would not prejudice the economic interests or the competitive position of the LCBO.

I have reviewed the information in the records together with the representations of the parties. I note that I have previously found the costing and pricing information in the records to be exempt under section 17(1) of the Act. I find that the LCBO has not provided me with sufficient evidence to conclude that the disclosure of the remaining information in Records 13 and 14 could reasonably be expected to result in the harms contemplated under section 18(1)(c). Accordingly, I find that this information does not qualify for exemption and should be disclosed to the appellant.

### **PUBLIC INTEREST IN DISCLOSURE**

The appellant has raised the issue of a public interest in the disclosure of the records at issue. Section 23 of the Act states as follows:

An exemption from disclosure of a record under sections 13, 15, **17, 18**, 20 and 21 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. (Emphasis added)

There are two requirements contained in section 23 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 disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

The appellant submits that there is a compelling public interest in the way in which beer prices are determined in Ontario. The appellant states that one of the primary determinants is the manufacturing costs of the breweries and therefore, consumers require access to this information in order to provide meaningful input and to challenge any price increases.

The LCBO states that part of its mandate in fixing beer prices in Ontario is to protect the public interest. The LCBO submits that this is achieved through the process of obtaining justification for cost increases from the applicant breweries. The LCBO denies that a compelling public interest exists in the disclosure of the records.

I have carefully reviewed the representations of the parties together with the records at issue in this appeal. I find that there is no compelling public interest in the disclosure of the records that I have found to be exempt under section 17(1) of the Act. In my view, section 23 has no application in the circumstances of this appeal.

## **ORDER:**

1. I uphold the LCBO’s decision to deny access to the highlighted pages of Records 13, 14 and 15 as shown on the copy of the records provided to the LCBO’s Freedom of Information and Privacy Co-ordinator.
2. I order the LCBO to disclose the remaining pages of Records 13, 14 and 15 (the non-highlighted pages) to the appellant by sending a copy to him by **December 23, 1996** but not before **December 18, 1996**.
3. I reserve the right to require the LCBO to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 2.

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

November 18, 1996

Mumtaz Jiwan  
Inquiry Officer