



Information and Privacy
Commissioner/Ontario

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

FINAL ORDER P-1361

Appeals P-9600200 and P_9600381

Liquor Control Board of Ontario



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NATURE OF THE APPEALS:

This order represents my final order in respect of the outstanding issues from Interim Order P_1268, and the additional issues raised in this 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 all records relating to the appellant's civil and criminal cases involving the LCBO.

The appellant is a former employee of the LCBO and was the subject of an investigation which resulted in criminal charges being laid. The appellant was not convicted, but he was suspended from his job and subsequently terminated. The appellant then filed a civil suit against his former employer, which was settled in July, 1995.

The LCBO identified 81 pages of responsive records and denied access to them, claiming that they fall within the parameters of section 65(6) of the Act, and therefore outside the scope of the Act. The appellant appealed this decision, and also claimed that additional records should exist. Appeal P-9600200 was opened and Interim Order P-1268 was issued as a result.

In that order, former Assistant Commissioner Tom Mitchinson ordered the LCBO to conduct a further search for responsive records and, in the event that additional responsive records were located, to issue a decision with respect to any new records in accordance with the provisions of the Act. The former Assistant Commissioner did not address the issue of jurisdiction and this office remained seized of the jurisdictional issue raised by section 65(6).

As a result of the LCBO's further search, an additional seven-page record (a memorandum dated October 1, 1991 from "Investigative Services" to "Loss Prevention") was located. The LCBO issued its decision that this record also fell within the parameters of section 65(6) of the Act.

The appellant appealed this decision and continued to claim that additional records should exist. Appeal P-9600381 was opened. This final order will address the jurisdictional issue raised in both P-9600200 and P-9600381 as it relates to the records (81 pages and seven pages) together with the appellant's claim that further records still exist.

During mediation of this appeal, the LCBO provided the appellant and this office with an index of records and a copy of its records retention schedule. The records at issue in this appeal consist of Records 1-39 (which include the seven-page record located in the additional search), as described and listed in the index.

The appellant identified the following specific additional records which he believes should exist:

1. An investigative report dated on or about July or August, 1991, compiled by two named employees of the LCBO in District # 2.

2. Records related to the initiation of the investigation, dated on or about April, 1991, including the identity of the individual that authorized the investigation.
3. Records related to the termination of the appellant's employment on October 31, 1991, including the identity of the individual that authorized the termination.

This office sent a Notice of Inquiry to the appellant and the LCBO. Representations were received from the LCBO. The appellant indicated that the information he had provided to this office during the course of both appeals constitutes his representations.

DISCUSSION:

REASONABLENESS OF SEARCH

As stated in Interim Order P-1268, where an appellant provides sufficient details about the records which he is seeking and the institution (in this case the LCBO) indicates that further records do not exist, it is my responsibility to ensure that the LCBO has made a reasonable search to identify any records which are responsive to the request. The Act does not require the LCBO to prove with absolute certainty that further records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the LCBO must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate records responsive to the request.

The LCBO states that another search for responsive records was conducted in accordance with the provisions of Interim Order P-1268. Specifically, the Legal Services, Human Resources, Retail, Corporate Affairs and Loss Prevention and Security divisions of the LCBO, all conducted further searches for additional records. One additional seven-page record was located.

The LCBO also contacted the OPP at the Noelville detachment and the Sudbury District Headquarters to request any and all information pertaining to the appellant. The LCBO states that it was advised by the OPP that its retention schedule for records, with the exception of officer's memo books, is the current year plus two years. The OPP confirmed that, therefore, it did not have any records relating to the appellant. With respect to the officer's memo book, the LCBO was advised that the appellant had been provided with a copy of the officer's notes.

As indicated previously, the LCBO has provided the appellant with an index of records. The LCBO has also provided the appellant with a copy of a memorandum, dated October 10, 1996, prepared by the LCBO Investigator explaining his inquiries with the OPP.

I have carefully reviewed the representations of the parties. I find that the LCBO's search for records responsive to the request was reasonable in the circumstances of this appeal.

RECORDS

In reviewing the records, I noted that Record 1 consists of an Authorization and Direction, letter from the counsel for the LCBO, photocopies of two cheques and a covering letter. Record 2 consists of the duplicate copy of the Authorization and Direction, a duplicate copy of the letter from the counsel for the LCBO, copies of the same two cheques (as in Record 1) and a copy of a contract application. I note also that Record 6 is yet another duplicate of counsel's letter in Records 1 and 2, that Record 7 is a duplicate of the Authorization and Direction in Records 1 and 2. Therefore, I will consider the application of section 65(6) to all parts of Record 1 and any discussion of Record 2 will be limited to the contract application. My findings on Record 1 will apply equally to the duplicates in Records 2, 6 and 7.

JURISDICTION

The remaining issue in this appeal is whether the records fall within the scope of sections 65(6) and (7) of the Act. These provisions read as follows:

- (6) Subject to subsection (7), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

- (7) This Act applies to the following records:
 1. An agreement between an institution and a trade union.
 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
 3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.

4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

The interpretation of sections 65(6) and (7) is a preliminary issue which goes to the Commissioner's jurisdiction to continue an inquiry.

Section 65(6) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in 65(7) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

Section 65(7)

Section 65(7)2 states that the Act applies to an agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.

I have reviewed all the records and I find that the Minutes of Settlement and Release which form part of Record 19 clearly relate to an agreement between the appellant and the LCBO that ended the civil proceedings before the court. I find that the Offer to Settle and the draft Minutes of Settlement and Release forming part of Record 3 also clearly relate to an agreement between the appellant and the LCBO which ended the civil proceedings between the appellant and the LCBO.

The term "court" is widely understood to mean a judicial body presided over by a judge. It is clear that a court is a body which can have "proceedings" before it. These proceedings were in relation to the appellant's claim for wrongful dismissal stemming from his termination of employment with the LCBO and, therefore, relate to an employment-related matter.

Therefore, I find that the Act applies to the Offer to Settle and the Minutes of Settlement and Release which form part of Records 3 and 19. The remaining pages of Records 3 and 19 do not fall within the exception provided by section 65(7) of the Act.

Section 65(6)

I will now consider the application of section 65(6)3 to the remaining records listed in the index provided by the LCBO to the appellant and this office.

In order to fall within the scope of paragraph 3 of section 65(6), it must be established that:

1. the record was collected, prepared, maintained or used by the institution or on its behalf; **and**
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Requirements 1 and 2

The LCBO submits that the records were collected, prepared, maintained or used in relation to a wrongful dismissal suit launched by the appellant in the Ontario Court (General Division), court proceedings involving criminal charges against the appellant, and/or anticipated proceedings before a Board of Referees under the Unemployment Insurance Act in relation to the appellant's claim for Unemployment Insurance Benefits. The LCBO further submits that these proceedings relate to the employment of the appellant within the meaning of section 65(6) and arose in the context of, and are attributable to the alleged circumstances of, his employment.

The appellant submits that section 65(6) does not apply as the records do not relate to anticipated proceedings, were not collected, maintained or used by the LCBO and are not employment related.

I have carefully reviewed the records and I find that they were either collected, prepared, maintained and/or used by the LCBO. I find also that the collection, preparation, maintenance or use of the records was in relation to meetings, consultations, discussions or communications between the LCBO and its counsel, between counsel for the LCBO and the appellant, between the LCBO and the Public Service Pension Board, between Employment and Immigration Canada and the LCBO and internally between the LCBO staff. I find therefore that Requirements 1 and 2 have been met.

Requirement 3

I am satisfied that the above-noted records pertain to the appellant, as an employee of the LCBO and relate either to communications regarding his termination, his wrongful dismissal suit and subsequent settlement and/or his claim for Unemployment Insurance benefits. In my view, these matters are "employment related matters" for the purpose of section 65(6)3.

The remaining component is whether these employment related matters can be characterized as matters "in which the institution has an interest".

In Order P-1242, former Assistant Commissioner Tom Mitchinson established that an "interest" must be a legal interest in the sense that the matter in which the LCBO has an interest must have the capacity to affect the LCBO's legal rights or obligations. I agree with the former Commissioner's reasoning and approach and adopt it for the purposes of this appeal.

In my view, matters related to the LCBO's decision to terminate the appellant, the appellant's application for Unemployment Insurance Benefits, the appellant's wrongful dismissal suit and the subsequent settlement are all matters in which the LCBO has an interest. These matters relate to the LCBO's obligations as an employer under the Labour Relations Act and the Employment Standards Act. This is reflected in the various negotiations which resulted in the settlement agreement. Similarly, the LCBO also has certain obligations under section 105 of the

Unemployment Insurance Act. I find therefore, that the LCBO has an interest in these matters and Requirement 3 has been met.

In summary, I find that the Offer to Settle with draft Minutes of Settlement and Release in Record 3 and the Minutes of Settlement and Release in Record 19 fall within the exception in section 65(7) and are therefore subject to the Act. I will order the Ministry to issue a decision in respect of these parts of Records 3 and 19. I find that the remaining records together with the remaining parts of Records 3 and 19 fall within the parameters of section 65(6)3 and are excluded from the scope of the Act.

ORDER:

1. I order the LCBO to issue a new decision to the appellant by **April 7, 1997**, with no recourse for a time extension, with respect to the Offer to Settle and draft Minutes of Settlement and Release in Record 3 and the Minutes of Settlement and Release in Record 19.
2. I uphold the LCBO's decision with respect to the remaining records including the remaining parts of Records 3 and 19.
3. In order to verify compliance with the provisions of this final order, I reserve the right to require the Ministry to provide me with a copy of the decision letter issued to the appellant in accordance with Provision 1.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ March 6, 1997