



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2537-F

Appeal PA-040297-1

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 a copy of a report concerning an “investigation conducted during 2000 and/or 2001 into the LCBO Resource Protection Department”. The requester specified that the Ontario Provincial Police (OPP) Anti-Racket Squad conducted the investigation.

The LCBO located a responsive record, namely a two-page letter with an attached report, and denied access pursuant to two exemptions, including section 14(2)(a) (law enforcement) of the *Act*. The requester (now the appellant) appealed the LCBO’s decision.

Mediation did not resolve the appeal, and the matter was transferred to the adjudication stage of the appeal process. I conducted an inquiry into the appeal, and sought and received representations from the parties. Following the receipt of representations, I issued Interim Order PO-2508-I. I found that the record at issue was entirely exempt under section 14(2)(a) of the *Act*. I also found that the “public interest override” at section 23 does not apply since, based on its wording, it cannot apply to a record that is exempt under section 14 of the *Act*.

However, section 14(2)(a) is a discretionary exemption, and permits an institution to disclose information, despite the fact that it could withhold it. I considered this issue in Order PO-2508-I, and stated:

... the main thrust of the appellant’s submissions relate to the public interest in disclosure. In particular, they relate to the need for transparency and accountability with respect to the results of the investigation. In my view, this is a relevant factor in relation to the exercise of discretion. In this regard, the LCBO submits:

[t]he absence of a public interest override with respect to exempt law enforcement records suggests that the legislators viewed the public interest in retaining the confidentiality of law enforcement records as outweighing the public interest in disclosure.

The absence of section 14 from the list of exemptions that can be overridden under section 23 does not change the fact that the exemption is discretionary, and discretion should be exercised on a case-by-case basis. The LCBO’s submission suggests that it would never be appropriate to disclose such records in the public interest, or in order to promote transparency and accountability, in the context of the exercise of discretion. I disagree, and in my view, such a position would be inconsistent with the requirement to exercise discretion based on the facts and circumstances of every case.

Accordingly, in my view, the LCBO failed to consider a relevant factor, namely the desirability of disclosing this record, in whole or in part, in order to promote the important purposes of transparency and accountability.

Elsewhere in its representations, the LCBO submits that under section 14(2)(a), a record that qualifies as a “report” is exempt in its entirety, and severance is not required. While this may be true in relation to the exemption itself, it is not determinative in the context of the exercise of discretion. It is within the LCBO’s discretion to sever the record and disclose part of it, even if the whole thing meets the requirements of section 14(2)(a).

I will therefore order the LCBO to re-exercise its discretion, and in that regard, to consider the possibility of disclosing the record, with appropriate severances to protect vital interests such as confidential sources or personal privacy.

Accordingly, provision 2 of Order PO-2508-I stated:

I order the LCBO to re-exercise its discretion in accordance with the discussion of that issue, set out above, and to advise the appellant and myself of the result of this re-exercise, in writing. If the Ministry continues to withhold all or part of the information, I also order it to provide the appellant and myself with an explanation of the basis for exercising its discretion to do so. The Ministry is required to send the results of its re-exercise, and its explanation, no later than **October 19, 2006**. If the appellant wishes to respond to the Ministry’s re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 21 days of the date of the LCBO’s correspondence by providing me with written representations.

The LCBO re-exercised its discretion and did not change its decision to withhold the entire record. It provided representations explaining this decision to me, but not to the appellant. Subsequently, after a telephone call from this office, the LCBO provided a severed version of its representations to the appellant. I reviewed the severances and decided that not all of the excised material met the requirements of *Practice Direction 7* (Sharing of Representations), issued by this office, and ordered the disclosure of the LCBO’s representations to the appellant, with two brief severances. These representations were provided to the appellant, who was invited to respond. The appellant did not provide representations in response.

As well, prior to the resolution of the issue concerning severances to the LCBO’s representations, the appellant contacted this office and objected to the findings in Order PO-2508-I, particularly my decision that the section 14(2)(a) exemption applies. I responded to these objections in a reconsideration decision in letter form. I declined to reconsider the order.

The sole issue before me in this final order is whether the LCBO properly re-exercised its discretion.

DISCUSSION:

EXERCISE OF DISCRETION

An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573].

This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

In relation to its re-exercise of discretion, the LCBO submits:

The disclosure of the report, even with severances, would be likely to identify to the requestor the ... individuals to whom the investigation and allegations related.

While the LCBO has considered the desirability of nevertheless releasing a severed version of the report in order to promote the interests of transparency and accountability, the LCBO is of the view that on the facts of this particular case and weighing the various relevant considerations in exercising its discretion, the privacy interests of the individuals involved outweigh the interest in public disclosure of the report....

As noted, the appellant did not respond to the LCBO's representations provided pursuant to Order PO-2508-I.

I have carefully reviewed the LCBO's representations and considered the LCBO's re-exercise of its discretion in the overall context of this appeal. Based on the information provided by the LCBO, I am now satisfied that it considered relevant factors (including personal privacy) in deciding to exercise its discretion not to disclose the record at issue, and did not consider irrelevant ones. Its re-exercise of discretion was therefore proper.

ORDER:

I uphold the LCBO's decision.

Original Signed By: _____

John Higgins

Senior Adjudicator

December 28, 2006 _____