



**Information and Privacy
Commissioner/Ontario**

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

ORDER PO-2767

Appeal PA07-308

Liquor Control Board of Ontario



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BACKGROUND OF THE APPEAL:

Established in 1962, the Liquor Control Board of Ontario (LCBO) Agency Store Program is designed to serve Ontario consumers in geographic areas which do not have reasonable access to an LCBO store. Under the Agency Store program, the LCBO authorizes local retailers to sell alcoholic beverages along with other retail goods.

The Agency Store Program is administered by the LCBO's Retail Planning Department, which issues Request for Proposals (RFPs) for agency stores in various communities. All proposals are evaluated by a three person Agency Store Selection Committee (Selection Committee), which reviews agency store applications as well as site survey reports regarding any business premises where any agency store is proposed to be operated.

This appeal deals with a request for information relating to two RFP's to operate an agency store.

NATURE OF THE APPEAL:

The LCBO received a five-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to applications submitted in response to two RFPs. One RFP relates to an application submitted by a company in the requester's deceased wife's name (the first RFP). The other RFP relates to an application submitted by a company in both the requester's and his deceased wife's name (the second RFP).

In response to the requests, the LCBO issued a decision granting access in full to some of the records, and denying access to other records, in whole or in part. The LCBO provided the requester with a Schedule of Exemptions and Severances, specifying the exemptions of the *Act* it claims apply to the records withheld in part or entirely. These exemptions include sections 13(1) (advice and recommendations), 17(1) (third party information), 18(1) (economic interests), 19 (solicitor-client privilege) and 21(1) (personal privacy) of the *Act*.

The requester (now the appellant) appealed the LCBO's decision to deny access to some of the requested records.

During mediation, the appellant agreed to remove the records the LCBO identified as non-responsive from the scope of the appeal. In addition, following third party notification, the appellant confirmed that access to the information relating to third parties was no longer sought, and section 17(1) was removed from the scope of the appeal. Also during mediation, the appellant advised the Mediator that he only required access to the withheld information relating to the first RFP. Accordingly, because section 21(1) was only applied to information contained in the records relating to the second RFP, it was removed as an issue in the appeal. At the end of mediation, the only portions of the records remaining at issue related to the first RFP that were withheld pursuant to sections 13(1), 18(1) and 19.

The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeal process, in which an adjudicator conducts an inquiry under the *Act*. This office commenced its inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the LCBO. The LCBO provided representations in response. In its representations,

the LCBO indicated that it no longer relied on section 18(1) to withhold the Site Survey Report relating to the first RFP (Records E-12) and was prepared to release this record to the appellant.

The LCBO's representations clarify its position that Records S1, S2, S3 and S4 are exempt under section 13 and that Records S1, S2, S4 and E1 to E6 are exempt under section 19. Accordingly, the LCBO's representations mark the first time it claims that the discretionary exemption at section 19 also applies to Record S4. The confirmation of appeal this office sent to the LCBO indicated that it had a specified time in which to raise any new discretionary exemptions. The LCBO failed to raise the possible application of section 19 to Record S4 within the specified time period. Therefore, the late raising of this discretionary exemption was added as an issue to this appeal.

The non-confidential portions of the LCBO's representations were provided to the appellant, along with a Notice of Inquiry setting out the facts and issues of the appeal, including the issue as to whether the LCBO ought to be entitled to rely on the discretionary exemption at section 19 to Record S4.

The appellant provided representations in response. The appellant's representative indicated that the appellant was not prejudiced by the late raising of the discretionary exemption at section 19 to Record S4. Accordingly, the late raising of section 19 to Record S4 has been removed as an issue in this appeal.

The appellant's representative also indicated that the appellant takes issue with the scope of the appeal. In this regard, the appellant's representative argues that the scope of appeal was not narrowed at mediation, as described in the Mediator's Report.

The appellant's representations were shared with the LCBO which was given an opportunity to provide reply representations on the issues arising from the appellant's representations. The LCBO provided reply representations to this office, including their position relating to the scope of the appeal raised in the appellant's representations. I will address this issue as a preliminary issue.

PRELIMINARY ISSUE:

Should the appellant be allowed to expand the scope of appeal beyond the records identified in the Mediator's Report?

The Mediator's Report, relating to this appeal, states:

The records remaining at issue consist of information relating to the evaluation of the proposal submitted by the appellant's deceased wife, in response to [the first RFP]. The records include LCBO Interdepartmental correspondence, memos, e-mails, site survey report, scoring summary and a fact sheet which have been denied in parts and in full.

The Mediator's Report was provided to the appellant and the LCBO. The Mediator's Report set out the issues that had been resolved and indicated the issues remaining in dispute, which were being transferred to the adjudication stage of the appeal process.

This office commenced its inquiry by sending a Notice of Inquiry to the LCBO. The Notice of Inquiry identified the records and exemptions at issue based on the information contained in the appeal file, including the Mediator's Report.

The representations filed on behalf of the appellant state:

[The appellant] disagrees with what the LCBO and IPC state to be the records remaining at issue. [The appellant] states that all of the records as listed on the Schedule of Exemptions and Severances prepared by the LCBO ... remain in issue, with the exception of Record E-12, as that has now been provided to [the appellant]. The [Schedule of Exemptions and Severances] also includes copies of Records S1 through S11... It is also [the appellant's] position that the scope of this appeal was not narrowed at the mediation, which we understand was held via conference call.

The LCBO was given an opportunity to respond to the appellant's position that the scope of appeal was not narrowed at mediation. In their reply representations, the LCBO states:

It is submitted that it is not open to the Appellant at this late date, some seven months after the issuance of the Mediator's Report and after the LCBO has already made its submissions, to now object and take the position that additional records remain at issue. Moreover, the information contained in the Mediator's Report and later included in the Notice of Inquiry corresponds with the LCBO's understanding of the matters resolved during mediation.

Having regard to the representations of the parties, it appears that the Mediator's Report correctly stated the records remaining in issue at the end of mediation. As previously mentioned, the appellant was not represented by counsel during the mediation process. Accordingly, he communicated with the Mediator directly during the mediation process. It appears that the appellant's representative provided advice to the appellant during the adjudication stage, which the appellant accepts, that access to all of the responsive records should be pursued, rather than those records agreed to during the mediation stage.

Paragraph 6.05 of the IPC's *Code of Procedure* provides that parties to an appeal have 10 days after a Mediator Report is issued to contact the Mediator to request that the report be amended to correct an error or omission. If the Mediator is contacted by one or both of the parties, the Mediator will consider their comments and determine whether the Mediator's Report should be revised. If the parties do not comment on the Mediator's Report, the file is transferred to the adjudication stage.

I have reviewed the file relating to this appeal and there is no evidence that the appellant or his representative contacted the Mediator within 10 days of the issuance of the Mediator's Report to dispute the records identified as remaining at issue. Accordingly, I am satisfied that the Mediator's Report accurately identifies Records S1-S4 and E1-E6 as the sole records at issue in this appeal.

If the appellant wishes to pursue access to records responsive to the second RFP he may submit a new request under the *Act* for them.

RECORDS AT ISSUE:

Record	General Description of Withheld Information or Record	Pages	Exemption under the Act	Access Granted
S1	Selection Committee Notes: Handwritten comments on the scoring sheets made by two LCBO Agency Store Selection Committee members	2	Section 13(1)	Partial access granted
	Typewritten notes prepared by Chair of the Selection Committee	1	Section 19	Partial access granted
S2	Withheld information on Fact Sheet	2	Sections 13(1) and 19	Partial access granted
S3	Withheld information contained on LCBO Interdepartment/Store Correspondence	2	Section 13(1)	Partial access granted
S4	Withheld information contained on e-mail	1	Sections 13(1) and 19	Partial access granted
E1	Internal Memorandum to LCBO General Counsel	1	Section 19	Withheld in full
E2	Internal Memorandum to LCBO General Counsel	1	Section 19	Withheld in full
E3	Internal Memorandum to LCBO General Counsel	1	Section 19	Withheld in full
E4	E-mail chain between LCBO General Counsel and staff	1	Section 19	Withheld in full
E5	E-mails between LCBO General Counsel to staff	2	Section 19	Withheld in full
E6	Internal Memorandum LCBO's Legal Department to staff	7	Section 19	Withheld in full

DISCUSSION:

As previously mentioned, the LCBO submits that Records S1 to S4 are exempt under section 13(1) and that Records S1, S2, S4 and E1 to E6 are exempt under section 19. As the LCBO takes the position that the majority of records are exempt under section 19, I will start my discussion with whether these records qualify for exemption under that section.

SOLICITOR-CLIENT PRIVILEGE

General principles

Section 19 of the *Act* states as follows:

A head may refuse to disclose a record,

- (a) that is subject to solicitor-client privilege;
- (b) that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation;
or
- (c) that was prepared by or for counsel employed or retained by an educational institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 19(c) has no application in this appeal. Sections 19(a) and (b) contain the two branches described below. For Records S1, S2, S4 and E1 to E6 to qualify for exemption under section 19, the LCBO must establish that one or the other (or both) branches apply.

Branch 1 of the section 19 exemption appears in section 19(a) and encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 19 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Branch 2 of the section 19 exemption arises from sections 19(b) and (c). As previously mentioned, section 19(c) has no application in this appeal. Section 19(b) is a statutory exemption that is available in the context of Crown counsel giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

The LCBO's representations state that "no issue arises concerning litigation privilege and the only relevant aspect of the branch one privilege is solicitor-client privilege."

Accordingly, this order will focus on the LCBO's submission that the Records S1, S2, S4 and E1 to E6 qualify for solicitor-client communication privilege under section 19(a).

Branch 1: common law solicitor-client privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

. . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege [Orders PO-2483, PO-2484].

Representations of the Parties

The LCBO's representations state:

The records at issue in this case involve the privilege attaching to the advice from in-house legal counsel, namely the LCBO's internal Legal Department. That Department consists of [six lawyers] and is responsible for providing advice and legal assistance to the LCBO's Board of Directors and the various client groups and departments within the LCBO.

The LCBO made the following arguments in their representations:

- The withheld typewritten notes on the last page of the Selection Committee's notes (Record S1) prepared by the Chair of the Selection Committee members consists of a summary of the legal advice received by the Selection Committee from in-house legal counsel.
- The withheld entries contained on the Fact Sheet (Record S2) and the withheld portions of the e-mail (Record S4) summarize legal advice provided by in-house counsel.
- The internal memorandums and e-mails (Records E1 to E6) between LCBO staff and its legal department were withheld in their entirety as these records consist of communications to and from the LCBO's in-house counsel in connection with the agency store competition, made for the purpose of giving or receiving legal advice.

The LCBO also claim that information at issue was consistently treated as confidential and that privilege was not waived.

In response to the LCBO's representations, the appellant submits that:

- the severed portions of the typewritten notes prepared by the Chair of the Selection Committee (Record S1) does not appear to be a direct communication involving the LCBO's in-house counsel. Rather, the typewritten comments appear to be a summary of a conference call with other Selection Committee Members;
- the withheld information contained in the Fact Sheet (Record S2) and e-mail (Record S4) do not appear to be a direct communication involving in-house counsel; and
- it cannot agree or disagree with the LCBO's claim that the memorandums and e-mails (Records E1 to E6) constitute solicitor-client records as these records have been withheld in their entirety.

The appellant does not submit that the LCBO waived or lost any privilege that may have attached to any of the records at issue.

Decision and Analysis

I have carefully reviewed Records S1, S2, S4 and E1 to E6, and in my view, the information at issue falls under two broad categories:

1. Communication between LCBO staff and in-house counsel; and
2. Communication between LCBO staff which refers to information obtained by or provided to in-house counsel.

I will first consider whether the exemption at section 19 applies to Records E1 to E6, which represent communications between LCBO staff and in-house counsel. I will then go on to determine whether the exemption applies to Records S1, S2 and S4, which represent communications between LCBO staff about information obtained or provided to in-house counsel.

If I find that the solicitor-client communication privilege applies to any of the records, I do not need to consider whether any privilege has been waived as the appellant has not raised this as an issue and I am satisfied that it does not apply in the circumstances of this appeal. However, I must go on to determine if the LCBO properly exercised its discretion to deny the appellant access to any records I may find exempt under section 19.

a) Communication between LCBO staff and in-house counsel (Records E1 to E6)

These six records, total 13 pages and consist of memorandums and e-mails between LCBO staff and in-house counsel. The LCBO has withheld these records in their entirety. The records represent communications either directly to or from the LCBO's General Counsel, who is the head of LCBO's Legal Department.

In my view, these records qualify under the solicitor-client communication privilege aspect of Branch 1 of section 19(a) as they were made for the purpose of seeking, formulating and/or giving legal advice relating to the agency store application. I also accept the LCBO's evidence that the communications were made in confidence.

I am also satisfied that the records form part of "a continuum of communications" between the LCBO staff members and their in-house counsel as described in *Balabel*. Finally, with respect to the memorandum found at Record E6, I find that this record also represents in-house counsel's working papers directly related to seeking, formulating or giving confidential legal advice to LCBO staff about a legal issue.

Accordingly, I find that Records E1 to E6 qualify for exemption under section 19.

b) Communication between LCBO staff which refers to information obtained by or provided to in-house counsel (Records S1, S2 and S4)

These three records consist of:

- the withheld typewritten notes contained on the last page of Selection Committee's notes (Records S1);

- the withheld portions of the November 2003 and December 2003 entries contained in the Fact Sheet (Record S2); and
- the withheld portion of an e-mail between LCBO staff (Record S4).

The appellant argues that these records cannot qualify for solicitor-client communication privilege as they do not constitute direct communications between the LCBO and in-house counsel. The LCBO does not dispute the appellant's description of the records. However, the LCBO argues that the records summarize legal advice obtained by in-house counsel.

In Order PO-2624, Adjudicator Laurel Cropley considered whether e-mails exchanged between an institution's staff member qualified for solicitor-client communication privilege. In that Order, she stated:

Previous orders of this office (Orders PO-2087, 2223 and 2370) have found that e-mail communications passing between non-legal Ministry staff that refer directly to legal advice originally provided by legal counsel to other Ministry staff would reveal privileged communications and were, therefore, exempt from disclosure under section 19. That is precisely the case in the current appeal. As I noted above, the records consist of e-mail chains. While some of the e-mails in the chains were not directly sent to legal counsel, they clearly address the subject matter for which legal counsel had been consulted, often refer to the need for the communications to be sent to legal and/or reveal the legal advice provided by counsel. In the end, these e-mails form part of the chain that was ultimately sent to legal counsel. In this context, these e-mails form part of the "continuum of communications" recognized in *Balabel* as falling within the solicitor-client communication privilege.

I agree and adopt Adjudicator Cropley's reasoning for the purposes of this appeal. In my view, Records S1, S2 and S4 qualify for solicitor-client communication privilege as they clearly address the subject matter for which in-house counsel was consulted – the agency store application. I have carefully reviewed the records and am satisfied that the withheld portions refer to legal advice provided by counsel or identify information required by counsel to formulate a legal opinion. In my view, disclosure of this information would reveal legal advice received or requested by the LCBO and thus would form part of "a continuum of communications" between the LCBO and its counsel. I also accept the LCBO's evidence that the communications contained in Records S1, S2 and S4 were made in confidence.

Having regard to the above, I find that Records S1, S2 and S4 qualify for exemption under section 19.

Summary

I find that Records S1, S2, S4 and E1 to E6 are exempt under section 19. Accordingly, I will consider whether the LCBO properly exercised its discretion to withhold these records from the appellant below, following my discussion of section 13(1).

ADVICE TO GOVERNMENT

Next I will determine whether the following records qualify for exemption under section 13(1):

- the withheld handwritten notes contained on two scoring sheets (Record S1);
- the withheld portion of the July 2004 entry contained in the Fact Sheet (Record S2); and
- the withheld portion of a memorandum between LCBO staff (Record S3).

The LCBO also claimed that the withheld portion of the e-mail at record S4 qualifies for exemption under section 13(1). However, it is not necessary that I consider the application of section 13(1) to this information as I already found it is exempt under section 19.

Section 13(1) states:

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.

The purpose of section 13 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

“Advice” and “recommendations” have a similar meaning. In order to qualify as “advice or recommendations”, the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563]

Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.), aff'd [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563; Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564]

The LCBO made the following submissions in support of its position that the remaining information at issue contains an explicit recommendation by a public servant, suggesting a particular course of action:

- The withheld handwritten notes contained on two scoring sheets (Record S1) contain the specific recommendations made by the Senior Director, Policy and Government Relations and Director of the Retail Planning Department/Chair of the Agency Store Selection Committee. Both individuals are members of the

three person Selection Committee. The third member of the Selection Committee did not make any handwritten comments.

- The withheld portion of the July 2004 entry contained in the Fact Sheet (Record S2) summarizes the recommendations made by the Selection Committee.
- The withheld portion of a memorandum between LCBO staff (Record S3) contains a recommendation made by the Agency Stores Assistant to the Director of the Retail Planning Department/Chair of the Agency Store Selection Committee.

In his representations, the appellant questions whether the withheld information contains advice or recommendations. In support of his position, the appellant argues that the withheld comments contained on the scoring sheets (Record S1) follow the heading “additional comments” not “advice or recommendations”.

The LCBO’s reply representations state:

While it is true that the withheld handwritten notes of two members of the Selection Committee [contained in Record S1] is not entitled “advice” or “recommendations”, the withheld information contain recommendations and in both instances start with the word “recommend” and follow with the Committee member’s specific recommendation.

I have carefully reviewed the withheld portions of Records S1, S2 and S3 and find that they qualify for exemption under section 13(1) on the basis that disclosure would reveal the advice and recommendations of either Selection Committee members or LCBO staff to other LCBO staff who have the authority to accept or reject the recommendations in question.

In particular, I am satisfied that the handwritten notes made at the bottom of the scoring sheets by two Selection Committee members represent advice or recommendations which recommend a specific course of action that could then be accepted or rejected by the Director of Retail Planning Department/Chair of the Selection Committee. It is this individual who is to prepare a draft recommendation (subject to the Legal Department’s review) to be submitted to the LCBO’s Board of Directors. The LCBO’s Board of Directors are to either reject or accept the Selection Committee’s recommendations in making a decision to grant an agency store authorization to a particular applicant. Similarly, I find that disclosure of this same information summarized and contained in the July 2004 entry of the Fact Sheet found at Record S2 would also reveal the Selection Committee’s advice and recommendations to LCBO staff.

Finally, I am satisfied that the withheld portion of the memorandum found at Record S3 contains the advice and recommendation of the Agency Stores Assistant, which can be ultimately accepted or rejected by the Director of Retail Planning Department, who is also the Chair of the Selection Committee.

The appellant takes the position that the withheld portions of Records S1, S2 and S3 fall within one or more of the mandatory exceptions at section 13(2). In particular, the appellant submits that the mandatory exceptions at section 13(2)(a) applies to Record S2 and sections 13(2)(c), (j) and (k) applies to Records S1, S2 and S3. If the information falls into one of these categories, it cannot be withheld under section 13 despite a finding that the information qualifies as “advice” or “recommendations”. These sections read:

(2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

- (a) factual material;
- (c) a report by a valuator, whether or not the valuator is an officer of the institution;
- (j) a report of an interdepartmental committee task force or similar body, or of a committee or task force within an institution, which has been established for the purpose of preparing a report on a particular topic, unless the report is to be submitted to the Executive Council or its committees;
- (k) a report of a committee, council or other body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;

The word “report” appears in several parts of section 13(2). This office has defined “report” as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)].

In support of his position that the mandatory exceptions at sections 13(2)(a), (c), (j) and (k) apply, the appellant states:

The severed parts of the individual scoring sheets are with respect to “Additional Comments”. [The appellant] submits that the “Additional Comments” section would clearly be an account of the scoring results and information considered. The severed section is not titled “Advice” or “Recommendations” as is clearly labelled on the bottom portion of the overall Summary sheet. Each individual scoring sheet is signed by a “Selection Committee Member”. [The appellant] submits that as each Selection Committee Member’s score is then transferred onto the Summary sheet which provided “Recommendations”, that as a whole, the Selection Committee is akin to an interdepartmental committee or similar body

established for the purpose of preparing a report on a particular topic and making recommendations and therefore, those documents fall within the exceptions of section 13(2)(j) and (k). Further, it is submitted that each Selection Committee Member would be akin to that of a valuator as stated in section 13(2)(c) as the Selection Committee Member is in effect evaluating [the agency store applicant] on their suitability to operate an LCBO agency store. It is therefore respectfully submitted that the portions of Record S2 that were severed based on section 13, should be released and disclosed in their entirety.

With respect to Record S2, it is submitted that this document would fall under the exception afforded by section 13(2)(a).

...

With respect to [Record S3], as [the appellant] is not privy to the severed information, [the appellant] does not take a position as to whether or not the severed provisions are permitted pursuant to section 13 and therefore will defer to the decision of the IPC with respect to the release of the severed portions of those records.

Section 13(2)(a): factual material

The LCBO submits that any factual information contained in the records, including Record S2, has already been provided to the appellant. The LCBO argues that disclosure of the July 2004 entry contained in Record S2 would allow a knowledgeable reader to infer the nature of the exempt advice or recommendation as the facts contained in the withheld portion are closely integrated with the recommendation.

As noted above, the appellant submits that the withheld information contained in the Fact Sheet (Record S2) only contains factual information.

In Order 24, former Commissioner Sidney B. Linden articulated what constitutes factual material for the purposes of the mandatory exception at section 13(2)(a). His reasoning has been applied and adopted in many orders from this office. In that order, the former Commissioner states:

In my view the overwhelming majority of records providing advice and recommendations to government would inevitably contain some factual information. However, I feel that this is not sufficient to meet the requirements of subsection 13(2)(a). The institution submits, and I agree, that 'factual material' does not refer to occasional assertions of fact, but rather contemplates a coherent body of facts separate and distinct from the advice and recommendations contained in the record. The clearest example would be an appendix or schedule of factual information supporting a policy document.

In this case, the factual information in the records is interwoven with the advice and recommendations and cannot reasonably be considered a separate and distinct body of fact. As such, it does not meet the criteria of ‘factual material’ under subsection 13(2)(a), and the mandatory exception provided by that subsection is not available to the requester in the circumstances of this appeal.

Having regard to the representations of the parties and the record itself, I find that any factual information contained in the withheld portion of Record S2 is interwoven with the information I found constitutes the advice and recommendations of the Selection Committee. In my view, it is not possible to separate the factual information from the advice and recommendations contained in the withheld portion of this record. As a result, I find that the exception in section 13(2)(a) has no application to Record S2.

I will now go on to determine whether the mandatory exceptions at sections 13(2)(c), (j) or (k) apply to the portions of Records S1, S2 and S3 I found qualify as “advice” or “recommendations”.

Sections 13(2)(c), (j) and (k)

The word “report” appears in the wording of the exceptions at sections 13(2)(c), (j) and (k). In Order PO-1709, former Senior Adjudicator David Goodis stated that the first question to consider is whether the record qualifies as a “report”. He goes on to state that previous orders of this office have defined the word “report”, as contained in section 13(2) as well as in other sections, as follows:

The word “report” is not defined in the Act. However, it is my view that in order to satisfy the first part of the test i.e. to be a report, a record must consist of a formal statement or account of the results of the collation and consideration of information. Generally speaking, results would not include mere observations or recordings of fact. [Orders 200, M-265, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)] [Emphasis in Original]

I agree and adopt former Senior Adjudicator Goodis’ reasoning for the purposes of this appeal. Following this reasoning, I must first determine whether the information at issue contained in Records S1, S2 and S3 constitute a “report”.

The LCBO argues that information at issue does not qualify as a “report” within the meaning of sections 13(2)(c), (j) and (k) as the withheld portions of these records do not consist of a “formal statement or account of the results of the collation and consideration of information.”

With respect to the withheld information prepared by the Selection Committee contained in Record S1 and summarized in Record S2, the LCBO submits that Selection Committee members

“simply complete scoring sheets, they do not prepare any formal statement or report.” The LCBO explains the Selection Committee role as follows:

It is submitted that the Agency Store Selection Committee was not established for the purpose of preparing a report and does not in fact do so. Rather, the committee reviews applications, completes scoring sheets and makes a recommendation about whether an agency store authorization should be issued in a particular case. Put differently, the LCBO’s Retail Planning Department (which includes the agency store Selection Committee) issues RFP’s for agency stores, reviews the applications received, assigns scores to the various applicants in accordance with the criteria set out in the RFP and then makes a recommendation as to whether an authorization should be issued or not. It does not prepare any report as part of that function and was not established for the purpose of preparing reports on that or any other topic.

In my view, the only evidence provided by the appellant in support of his position that the information in the records constitutes a “report” for the purposes of sections 13(2)(c), (j) and (k) is his submission that the withheld comments made by two Selection Committee members “would clearly be an account of the scoring results and information considered.”

I have carefully reviewed the representations of the parties along with the records at issue and agree with the LCBO’s characterization of Records S1, S2 and S3. In my view, the information contained in withheld portions of these records do not qualify as a “report” within the meaning of sections 13(2)(c), (j) or (k) as defined in Order PO-1709.

In my view, the information in Records S1, S2 and S3 cannot be characterized as a formal statement or account of the results of the collation and consideration of information. In this regard, I note that the information at issue is not part of a report which collates and gives consideration of all the information gathered by the LCBO. Rather, the withheld information contained in Records S1, S2 and S3 amount to mere observations of the individuals providing their “advice” or “recommendations” about whether an agency store authorization should be issued. Also the individuals providing the “advice” or “recommendations” do not appear to have been assigned the task of preparing a comprehensive report reviewing all of the information related to the agency store application at issue.

As I have found that the information at issue cannot be described as a “report” for the purposes of section 13(2), it is not necessary for me to consider whether the exceptions at sections 13(2)(c), (j) or (k) apply.

EXERCISE OF DISCRETION

General principles

The sections 13(1) and 19 exemptions are discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. 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)].

The information I found that qualifies for exemption under the *Act* consists of:

- communications between LCBO staff and in-house counsel;
- communications between LCBO staff which refers to information obtained by or provided to in-house counsel;
- the withheld handwritten notes contained on two scoring sheets;
- the withheld portion of the July 2004 entry contained in the Fact Sheet; and
- the withheld portion of a memorandum between LCBO staff.

The LCBO submits that the appellant has provided no evidence that it exercised its discretion in bad faith or for an improper purpose in deciding to withhold the above information from the appellant. The LCBO states that it took into consideration the following relevant considerations:

- The purpose of the *Act*, including the principles that information should be available to the public and exemptions from the right of access should be limited and specific and concluded that the information at issue relates to the LCBO's review and evaluation of applications made in response to the first RFP as opposed to containing information about the appellant.
- The purposes of the exemptions at sections 13(1) and 19 of the *Act*.

- There is no evidence that the appellant has a sympathetic or compelling need for disclosure of the information at issue, particularly taking into consideration the significant amount of information the LCBO has already released.
- The LCBO considers the withheld information sensitive and significant.

The appellant does not argue that the LCBO exercised its discretion in bad faith, for an improper purpose or that the LCBO took into consideration irrelevant factors. However, the appellant argues that the LCBO failed to consider two relevant factors. First, the appellant submits that the LCBO should have considered whether some of the information at issue is contained in published decisions of the LCBO which involve himself and his family. Second, the appellant argues that the LCBO should take into consideration the status of proceedings involving himself and his family.

I have carefully reviewed the representations of the parties and am satisfied that the LCBO properly exercised its discretion and in doing so took into account relevant considerations. I also find that the LCBO did not exercise its discretion in bad faith, for an improper purpose or took into account irrelevant considerations. In making my decision, I took into account that the LCBO applied the exemptions claimed to the records in a limited and specific manner. As a result, a significant amount of information was released to the appellant.

With respect to the information that was not disclosed to the appellant, I am satisfied that the LCBO properly exercised its discretion to withhold this information. Having regard that the purpose of sections 13(1) and 19 is to protect confidential communications between government employees or government employees and their legal counsel, I am also satisfied that the withheld information is significant and sensitive to the LCBO.

Finally, in considering the appellant's submission that the LCBO failed to take into consideration relevant factors, I reviewed the information I found exempt under sections 13(1) and 19, along with the published decisions attached to the appellant's representations and confirm that the information at issue is not contained in the published decisions. I am also not satisfied that the status of proceedings involving the appellant and his family have any relevancy to a determination as to whether the LCBO properly exercised its discretion taking into consideration the purposes of those exemptions.

Accordingly, I find that the factors raised by the appellant have no application in the circumstances of this appeal.

Having regard to the above, I find that the LCBO properly exercised its discretion not to disclose the information I found exempt under sections 13(1) and 19 of the *Act*.

ORDER:

I uphold the LCBO's decision to deny access to the records at issue and dismiss the appeal.

Original signed by: _____
Jennifer James
Adjudicator

_____ March 19, 2009