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

ORDER PO-2779

Appeal PA07-376

Liquor Control Board of Ontario

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BACKGROUND OF THE APPEAL:

This order addresses records related to the Liquor Control Board of Ontario (LCBO) Agency Store Program. In the course of the appeal, the LCBO provided this office with details about the Agency Store Program.

Established in 1962, the LCBO Agency Store Program is designed to serve Ontario consumers in geographic areas which do not have reasonable access to an LCBO retail store. The LCBO explains that under the Agency Store Program it authorizes local retailers to sell alcoholic beverages along with other retail goods.

According to the LCBO, 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 received are evaluated and a successful operator will be awarded an "Authorization" to operate an agency store in a given community. Although Authorizations are generally awarded for a five-year term, the start and end dates for the terms for each of the agency stores will vary as competitions are carried out on a timetable determined by the Retail Planning Department. The LCBO states that there are currently over 200 agency stores in Ontario.

The LCBO explains that the Authorizations issued by the LCBO set out various requirements for the operation of an agency store. One such requirement is that agency store operators are required to purchase all alcoholic beverages (other than Ontario beer) directly from a supplying LCBO retail store.

The LCBO also explains that the Authorizations require that agency store operators comply with the *Liquor License Act*. Among other things, the *Liquor License Act* prohibits the sale of alcoholic beverages to minors or intoxicated persons. Under the terms of the Authorization, the LCBO requires that agency store operators record the number of times that anyone attempting to purchase beverage alcohol is asked for identification, as well as the number of times that an individual is refused service either because they are underage or because they are intoxicated. The LCBO states that, on a monthly basis, each agency store submits the information collected to its supplying store and the LCBO compiles a yearly report of each agency store's "challenge and refusal" statistics.

NATURE OF THE APPEAL:

The LCBO received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) from an individual, on behalf of an organization, for access to the following information:

1. **Social Responsibility Issues** - Copies of the LCBO's statistics on the "challenge and refusal program" in liquor stores. These are requested for the years 2004/05, 2005/06, and 2006/07 broken down by store. This should include both LCBO stores and agency stores, and it would be helpful if the stores could be identified by their number and location. These statistics

should include age challenged - served and refused, intoxicated refused, and others challenged and refused plus totals by store.

…

2. **Financial Information** - Net sales (by individual store, including store name, number and location) for all LCBO and agency liquor stores for the fiscal year ending March 31, 2007.

3. **LCBO Mini and Custom Stores and Kiosks** - Financial information (benchmarks) on the 28 LCBO mini and custom stores and 3 kiosks including: Annual Net $ Sales (March 31, 2007)…

4. **Agency Store Contract Expiry Dates** - Agency store contract expiry dates, including information on when each contract is up for renewal. In addition I request copies of any written polices of the LCBO on how the renewal process works.

5. **Beer Framework Agreement Documents and Beer Supply Information** - Copies of all documents and correspondence related to the Beer Framework Agreement and copies of the most up to date Beer Framework agreement and all its related Appendices. A list of any agency stores that have begun to receive beer supplies from The Beer Store since January 1, 2007.

The LCBO located responsive records and, pursuant to section 28 of the *Act*, notified the agency store operators as they might be affected by the disclosure of the records. A number of the agency store operators objected to the release of the information related to their stores on the basis that it was their commercial information. Subsequently, the LCBO granted partial access to the responsive records, withholding portions under the exemptions at section 17(1)(a) and (c) (third party information) and section 18(1)(c) (economic and other interests) of the *Act*.

The requester, now the appellant, appealed the LCBO's decision.

During the course of mediation, the appellant clarified that she seeks access to all of the information that was withheld under sections 17(1) and 18(1) of the *Act* in relation to parts 1, 2, and 4 of the request. The appellant further clarified that there are no issues in dispute with respect to parts 3 and 5 of the request.

I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues to the LCBO. The LCBO provided representations addressing the exemption claims, and also indicating that it was no longer relying on certain exemptions for certain identified records.

At the same time that I sent the Notice of Inquiry to the LCBO, I also sent a Notice of Inquiry to the operators of 202 agency stores to solicit their views on the disclosure of the information at issue. Two of the Notice of Inquiries were returned to this office unopened. Of the 39 agency

stores that responded, 3 had no objection to the disclosure of any of the information, while 2 agency stores had no objection to the disclosure of the agency store numbers related to the challenge and refusal statistics and the contract expiry dates but did object to the disclosure of the net dollar sales of their agency store. The remaining 34 agency stores that responded to the Notice of Inquiry objected to the disclosure of all of the information at issue.

I then sent a copy of the Notice of Inquiry to the appellant, enclosing a copy of the LCBO's representations and summarizing the representations received by the agency store operators. The appellant provided representations in response.

As the appellant's representations raised issues to which I believed the LCBO should be given an opportunity to reply, the appellant's representations were shared with the LCBO. The LCBO provided reply representations.

RECORDS:

The information at issue in this appeal consists of the following information:

- Record 1: The agency store identification numbers on the challenge and refusal statistics for 2004-2005, 2005-2006 and 2006-2007. The statistics have been disclosed.

- Record 2: The net dollar sales of beverage alcohol sold by the LCBO and purchased by agency stores for 2006-2007 (fiscal year ending March 31, 2007). All agency store numbers and names have been disclosed. The combined total dollar amount of all agency store purchases has been disclosed.

- Record 3: The agency store contract expiry dates, including agency store number and name.

I note that for Record 1, in an attempt to disclose as much information as possible, the LCBO has disclosed the challenge and refusal statistics to the appellant but has severed the agency store identification numbers. This effectively provides the appellant with the requested statistics broken down by agency store but renders the particular store anonymous. Therefore, technically speaking, the information that remains at issue in Record 1 is not the challenge and refusal statistics themselves but the agency store identification numbers. However, given that in the context of this appeal, disclosure of the agency store identification numbers would reveal the challenge and refusal statistics for individual agency stores, the parties have made representations on whether the statistics themselves are subject to the exemptions claimed. Accordingly, I will make my determination on the application of the exemptions to Record 1 on that basis.

DISCUSSION:

THIRD PARTY INFORMATION

In its decision letter, the LCBO claimed that sections 17(1)(a) and (c) apply to exempt portions of Records 1 and 2 and all of Record 3 from disclosure. In its representations, the LCBO advised that it was no longer claiming that sections 17(1)(a) and (c) apply to Record 3. As a result, it did not address the application of the exemption to Record 3 in its representations. However, as section 17(1) is a mandatory exemption and the majority of the agency store operators who responded to the Notice of Inquiry objected to the disclosure of the information contained in Record 3, I will address it in my analysis below.

Sections 17(1)(a) and (c) read:

> 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;
>
> …
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The LCBO submits that Records 1 and 2 contain information that qualifies as commercial and/or financial information. Commercial and financial information have been discussed in prior orders of this office as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The LCBO submits that the information in Record 1, the challenge and refusal statistics, relates directly to the sale of liquor by agency store operators and therefore qualifies as commercial information.

The LCBO also submits that Record 2 "reveals the costs and quantity of goods purchased by the [agency store] operators to maintain their inventories" and therefore, that the information falls within the scope of both "commercial information" and "financial information."

The agency stores operators that responded to the Notice of Inquiry generally perceived the information contained in all of Record 1, 2 and 3 to be the highly sensitive and confidential commercial and financial information of a private business.

In its representations, the appellant submits that she does not dispute that the information contained in Record 1 qualifies as commercial information. She also advises that she does not dispute that the sales information contained in Record 2 qualifies as commercial or financial information. The appellant does not make specific representations on the type of information contained in Record 3.

Based on my review of Records 1, 2 and 3, I accept that all of them clearly contain commercial and/or financial information as those terms have been defined in prior orders. First, given that the challenge and refusal statistics in Record 1 demonstrate circumstances where steps were taken to ensure a sale to a minor or intoxicated person did not occur, in my view, the information relates to the sale of liquor by the agency store operators which falls within the definition of commercial

information. Second, the dollar amounts listed in Record 2 identify the net total purchases of beverage alcohol by individual agency stores from the LCBO and therefore relate to the buying and selling of merchandise. In my view, this information qualifies as both commercial and financial information. Finally, as the agency store contract expiry dates in Record 3 identify the period that a particular agency store is authorized to purchase liquor from the LCBO and, in turn, sell it to the public, I find this information relates to the buying and selling of merchandise between the LCBO and the agency stores and falls within the definition of commercial information.

Accordingly, I find that all of this information qualifies as commercial and/or financial information within the meaning of those terms and therefore, that part 1 of the section 17(1) test has been met.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

Orders MO-1706 and PO-2371 discuss two exceptions to the general rules that the contents of a contract will not normally qualify as having been "supplied". These may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit an accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by a third party to the institution. The "immutability" exception applies to information that is immutable or not susceptible of change.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

1. communicated to the institution on the basis that it was confidential and that it was to be kept confidential

2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

3. not otherwise disclosed or available from sources to which the public has access

4. prepared for a purpose that would not entail disclosure [Order PO-2043]

Representations

The LCBO takes the position that the challenge and refusal statistics in Record 1 were supplied to the LCBO in confidence by the agency store operators. It submits that the information is compiled by the agency stores and supplied to the LCBO in order for the agency stores to demonstrate that they are fulfilling their obligations under their Authorizations, and under the *Liquor License Act*. The LCBO submits that because the information is required as a condition to maintain an agency store's Authorization, it is similar in nature to information provided as a condition of a license, as contemplated in Order M-708. The LCBO submits that in Order M-708, former Assistant Commissioner Tom Mitchinson found that information that was provided to the City of Sault Ste Marie by a lottery licensee was "supplied' to the City because it was required as a term of its license.

The LCBO further submits that the challenge and refusal statistics were supplied "in confidence" as they are only provided to the LCBO. It submits that the LCBO has consistently treated the detailed statistics broken down by store as confidential and only a limited number of employees have access to this information. The LCBO also submits:

> There is a reasonable expectation on the part of the operators that information relating to whether sales have been made in compliance with legislation is strictly confidential and is not publicly available. One agency store operator advised the

> LCBO that he was and is under the impression that all commercial and financial information is supplied to the LCBO in confidence.

With respect to the sales information contained in Record 2, the LCBO explains that beverage alcohol is sold to the agency store operators at prices established by the LCBO and that individual operators cannot negotiate the terms of sale. The LCBO submits that while the sales information is not directly supplied to the LCBO by the agency stores, its disclosure would permit accurate inferences to be drawn about an operators financial stability and therefore, that it is "highly sensitive information [that was] submitted to the LCBO in confidence."

The LCBO submits that given that independently privately run businesses have an expectation that sensitive financial information such as details of purchases from a supplier and sales volumes will remain confidential, "it is reasonable that [agency stores] all have an implicit expectation that their business dealings with others will be confidential." It submits:

> Financial information such as financial statements of private businesses has been held by the IPC to have been provided in confidence to an institution in numerous cases [PO-1179, PO-1360, and PO-1875]. The annual dollar amount of purchases from the LCBO by an operator comprises an important element of its financial statements as part of its cost of goods sold. As a private business, the operator has a reasonable expectation that this information would not be revealed by the party from whom it had made purchases.

Of the agency store operators who responded to the Notice of Inquiry, the majority state that they perceive the information at issue to be highly sensitive confidential information that they would only disclose for tax or banking purposes, or to someone who wished to purchase their business. They submit that the information was supplied in confidence to the LCBO for information purposes only and it was supplied with the clear expectation that it remain confidential. They also submit that given the nature of the information and the fact that to date the LCBO has kept this information in confidence, their expectation of confidence is reasonable. Some of the operators state specifically that when they entered into a contract with the LCBO they assumed that all information within that contract including reporting requirements (such as challenge and refusal statistics) and contract expiry dates would be kept confidential and not shared with an outside party.

The appellant does not dispute that the challenge and refusal statistics contained in Record 1 were supplied to the LCBO however, she submits that the LCBO has not provided any persuasive evidence to demonstrate that the agency store operators had a reasonable expectation of privacy with respect to that information. She submits that regardless of the position of the agency store operators, there cannot be a reasonable expectation that statistical information compiled for the purpose of monitoring or demonstrating compliance with a regulatory regime would remain confidential. She submits:

> The practice of requiring proper identification and of refusing to sell alcohol to those who are underage or intoxicated is a publicly notorious practice, which takes place publicly in the presence of not only store staff but members of the public at large. The very transaction of challenge or refusal is open and public in its nature, and no expectation of confidentiality can attach to it. Under these circumstances, it is submitted that no reasonable expectation of confidentiality can attach to the mere number of occasions on which challenges and refusals are made.

The appellant submits that the sales information in Record 2 was not "supplied" to the LCBO by the agency stores. The appellant submits that the information is a record of sales from the LCBO to the agency stores and that it cannot be said to have been "supplied" to the LCBO because it is information that the LCBO maintains in its own right about its own sales transactions. She submits:

> In this respect, [the information] was never "supplied" to the LCBO, but is merely information which the LCBO has due to its involvement as one party to the sales transaction.

The appellant submits, even if it could be said that the information was "supplied" by the agency stores it cannot be said to have been supplied "in confidence" because there is no reasonable expectation that sales from the LCBO to the agency stores would be kept confidential. She submits:

> [T]he information relates to the sales to a third party *by a public institution*. It is submitted that in the absence of a very clear representation of confidentiality, there is a presumption concerning transactions with public institutions of openness and disclosure, consistent with the purposes of the *Act*. Far from a presumption of confidentiality, the significant difference of environment between the purely private sector and the regulated environment of sales of alcohol would suggest not a presumption of confidentiality but a presumption of potential disclosure.

The appellant also submits that there is no explicit expectation of confidentiality because there is no evidence of any written or other representations from the LCBO to the agency stores that such data would be kept confidential. Additionally, she submits that there can be no implicit expectation of confidentiality "given what is at issue is the purchase and transfer of a publicly regulated product."

Analysis and findings

Record 1

The challenge and refusal statistics are gathered by the individual agency store operators and provided to the LCBO in accordance with requirements established by the Authorization. In my

view, this information is clearly "supplied" to the LCBO by the agency stores as required by the first component of part 2 of the section 17(1) test.

With respect to whether the challenge and refusal statistics were supplied "in confidence", although I have some evidence that some agency stores had an expectation of confidentiality, it is not clear to me that the requirements for a reasonable expectation of confidentiality as set out above, have been met. However, in light of my finding below with respect to the application of part 3 of the section 17(1) test, the harms component, to Record 1, it is not necessary for me to determine whether the challenge and refusal statistics were supplied "in confidence" within the meaning of part 2 of the test.

Record 2

As described by the LCBO, Record 2 is a summary of net dollar purchases by all LCBO agency stores which can also be characterized as the net dollar sales by the LCBO to the agency stores. The appellant submits that this information cannot be said to have been "supplied" to the LCBO because it is information that relates to the LCBO's own sales. I agree with the appellant that the particular information at issue cannot be said to have been supplied to the LCBO by agency stores because these amounts were compiled by the LCBO.

In Order P-373, which was upheld by the Court of Appeal in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.), former Assistant Commissioner Tom Mitchinson examined records listing the names and addresses of employers participating in particular Workers' Compensation Board programs with the fifty highest surcharges for a particular year, together with the net total surcharge for each employer. Former Assistant Commissioner Mitchinson found that the surcharge amounts were not "supplied" within the meaning of part 2 of the section 17(1) test because they were calculated by the Board. The former Assistant Commissioner stated:

> In my view, the surcharge amounts were not "supplied" to the Board by the affected persons; rather, they were calculated by the Board. While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected person from the surcharge amounts themselves.

I agree with Assistant Commissioner Mitchinson's reasoning and adopt it for the purposes of the current appeal.

In the circumstances of this appeal, the net dollar amounts listing the total figure of LCBO sales to individual agency stores were calculated by the LCBO. The LCBO submits that although this information was not "directly supplied", its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the agency stores. In my view, it appears that this dollar figure was arrived at by the LCBO by compiling the dollar amounts of all the separate purchase orders or similar information received from a particular agency store over the course of the identified year. As with the information in P-373, although the net dollar

amounts in Record 2 were calculated using information that was supplied by the agency store operators, it is not possible to discern the actual information provided by the agency store operators from the net figures themselves. Accordingly, I find that the net dollar amounts of purchases made by agency stores were not "supplied" within the meaning of part 2 of the section 17(1).

As I have found that the "supplied" component of part 2 of the three-part section 17(1) test has not been established for Record 2, it is not necessary for me to consider the "in confidence" component of part 2 for this information. Additionally, as all three parts of the test must be established for the exemption at section 17(1) to apply and part 2 has not been met for Record 2, it is not necessary for me to address part 3, the harms component, to find that the record is not exempt under section 17(1).

Record 3

Having reviewed Record 3, I find that the contract expiry dates cannot be said to have been "supplied" by the agency store operators to the LCBO. Record 3 is a list of all of the agency stores and their contract expiry dates. By that very description it is clear that the expiry dates listed in the record form part of the contractual agreement reached between the LCBO and each agency store operator. As noted above, the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purposes of section 17(1). Rather, they are treated as having been mutually generated, even where the contract is preceded by little or no negotiation. In the circumstances of this appeal, the contract expiry date is a term of the contract or Authorization between the LCBO and each individual agency store.

As noted above, there are two exceptions to the rule that the contents of a contract will not normally qualify as having been "supplied." With respect to the "inferred disclosure" exception, there is no evidence before me that would suggest that this disclosure of the contract expiry dates would permit a person to make an accurate inference with respect to underlying non-negotiated confidential information supplied by the agency stores to the LCBO. With respect to the "immutability" exception, in my view, the contract expiry dates are clearly not information that could be considered to be immutable or not susceptible of change. Accordingly, I find that neither of the two exceptions applies to the information in Record 3.

In short, I find that the information contained in Record 3 forms part of the contractual agreement between the LCBO and the agency stores. As neither of the exemptions for contractual information apply, it cannot, therefore be said that the agency stores "supplied" this information to the LCBO. Consequently, I find that the "supplied" component of part 2 of the three-part section 17(1) test has not been established for Record 3. As a result, it is not necessary for me to consider the "in confidence" component of part 2 of the three-part test for this information. Additionally, as all three parts of the test must be established for the exemption at section 17(1) to apply and part 2 has not been met, it is also not necessary for me to consider whether part 3, the harms component, applies to Record 3.

Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

The LCBO and the agency store operators take the position that the harms in section 17(1)(a) and (c) could reasonably be expected to result were the information at issue in Records 1 and 2 disclosed. The agency store operators take the position that the harms in section 17(1)(a) and (c) also apply to Record 3. As I have found that Record 2 was not "supplied" and that Record 3 was not "supplied in confidence" within the meaning of part 2 of the test, the exemption at section 17(1) cannot apply to either of these records and it is not necessary for me to address the harms component of the test. However, I will go on to determine whether the LCBO and the agency stores have established the harms component of the three-part test for Record 1.

Representations

The LCBO submits generally that because the agency store operators run their businesses in small communities the disclosure of the information at issue could reasonably be expected to prejudice their competitive position within their communities and also lead to undue loss. The LCBO states that one agency store operator has advised the LCBO that disclosure of the information would increase the safety risks for his staff due to robbery or theft since individuals could discern which agency store has the highest number of sales and thus, more inventory and cash on hand.

The LCBO also states generally that other operators have expressed concern that disclosure of the information at issue would reveal how profitable agency stores are which could reasonably be expected to result in loss of business due to increased competition from other local businesses.

The representations related to the harms component of the section 17(1) test submitted by the agency store operators focus primarily on disclosure of the sales information in Record 2 which I have already found does not meet the requirements of part 2 of the test. However, some of the agency stores operators made specific arguments on how the harms in sections 17(1)(a) and/or (c) could reasonably be expected to occur were the challenge and refusal statistics, in particular, disclosed. These arguments are as follows:

- The disclosure of the challenge and refusal statistics may interfere significantly with contractual negotiations with the LCBO, which may in turn affect the agency stores negatively.

- The challenge and refusal statistics are contractual requirements and any statistics related to a particular agency store are related to the operator's individual contract. The disclosure of this information could be used to prejudice the operator's position for a new contract and could be used against other agency stores to show inconsistencies of information reported. It could be used by a third party to compare agency stores against other agency stores or agency stores against LCBO outlets and a third party could and probably would question the quality and integrity of these reports. This would have the potential of damaging the reputation of an agency store and financially impacting the business of the agency store and would cause harm to the agency store operator's current and future business.

- Were the information (including challenge and refusal statistics) released it could be used in a negative way by the community and, in some cases jeopardize the operators' (and employees') safety due to increased attempted thefts and the fact that many operators make night deposits.

- The information could be misconstrued in local media, creating contempt within the community.

The appellant submits that there is no evidentiary basis for any suggestion that the release of the challenge and refusal statistics in Record 1 could give rise to prejudice the agency's stores' competitive position or any undue loss or gain. She submits that the arguments put forward by the LCBO with respect to the application of the exemptions at sections 17(1)(a) and/or (c) are entirely speculative.

Specifically responding to the submissions of the LCBO that outlined concerns expressed by the agency store operators, the appellant submits that "there is no basis to conclude that any commercial enterprise would be any more susceptible to robbery or theft than any other, in the absence of specific evidence to support such a conclusion." She also submits:

> It is equally speculative to assert, as the LCBO has done, that the disclosure could prejudice the competitive position of the Agency stress. While the LCBO asserts that there may be some concern that the competitive environment could be included by the release of the information, there is simply no evidence that this is the case, in the form of any survey data or any other data suggesting that the apparent profitability of agency stores would be enhanced to such a degree as to entice competitors into the bidding process.

Finally, the appellant submits that the LCBO's representations do not provide the requisite "detailed and convincing" to support a claim that the harms in section 17(1)(a) or (c) could reasonably be expected to occur.

Analysis and findings

I have carefully reviewed the representations of the parties as well as the information in Record 1 and I find that the LCBO and the agency stores have not provided the "detailed and convincing" evidence required to establish that the harms contemplated in sections 17(1)(a) or (c) of the *Act* could reasonably be expected to occur were the information related to the challenge and refusal statistics disclosed.

I am not persuaded by the arguments put forward by the LCBO and the agency stores that disclosure of the information in Record 1 could reasonably be expected to increase the safety risks to agency stores and their employees due to robbery, nor am I persuaded that disclosure of this specific information would result in a loss of business due to increased competition. Additionally, I find that the agency store operator's argument that disclosure could be used to prejudice his position for a new contract or to damage the reputation of his store thereby impacting his business to be speculative at best. The challenge and refusal statistics, which are broken down by agency store, list the number of individuals who were challenged on age or for other reasons and either allowed to purchase beverage alcohol or refused because they were underage, intoxicated or for some other reason. In my view, it is not evident how disclosure of this type of information could reasonably be expected to result in either prejudice to the agency stores' competitive position or an undue loss on their part. Moreover, I find that neither the LCBO nor the agency store operators have provided the requisite detailed and convincing evidence to establish that disclosure of this type of information could reasonably be expected to give rise to the contemplated harms. As a result, I find that part 3 of the section 17(1) test has not been met for the information in Record 1. As all three parts of the test must be met, Record 1 does not qualify for exemption under section 17(1).

ECONOMIC AND OTHER INTERESTS

The LCBO takes the position that section 18(1)(c) of the *Act* applies to the information related to the challenge and refusal statistics in Record 1 and the sales information in Record 2.

Section 18(1)(c) reads:

> 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 purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

Section 18(1)(c) does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Order PO-2014-I].

Representations

The LCBO takes the position that the disclosure of the challenge and refusal statistics for each agency store, as well as the net sales information for each agency store, would create significant prejudice to its economic interests as contemplated by section 18(1)(c) of the *Act*.

The LCBO submits that the Agency Store Program is a vital part of LCBO's overall business because sales to agency stores contribute to its overall revenues. It submits:

> [There] will be an impact on [the LCBO's] economic interest if the number of private businesses applying to become operators is reduced due to concerns over the release of their own sensitive financial or commercial information to the pubic. The LCBO cannot provide notable proof of this result since information of this nature has not been required to be released to date and has been kept

> confidential by LCBO. We clearly expect that some potential operators will not apply in response to an RFP knowing that information about their inventory purchases can be made available to competitors (or anyone making access requests) or that information relating to their challenge and refusal statistics will be subject to release.

The LCBO submits that it has received feedback from operators that reveals that there is a "strong likelihood that the quantity and/or quality of applications will suffer if sensitive financial and commercial information of these local private businesses is disclosed." The LCBO explains that if a competition resulted in either no applicants or unsuitable applicants it could not open an agency store in that area resulting in a loss of revenue for the LCBO. The LCBO submits:

> While we cannot provide irrefutable evidence that the disclosure would impact the economic interest of the LCBO, the feedback from existing operators does suggest there would be an impact on the applications received.

The appellant submits that the evidence provided by the LCBO is not sufficiently "detailed and convincing" required to establish that the information that remains at issue should be withheld on the basis of section 18(1)(c) of the *Act*. The appellant submits:

> The LCBO has made a number of assertions, without evidentiary foundation, that amount to speculation that fewer operators will enter the process to provide agency store services, or that the quality of bids will suffer. There is, however, no evidence other than speculation of these outcomes. Although the LCBO has noted that "feedback" from existing operators suggests that there would be an impact on applications received, there is no detail provided as to the specific feedback, from whom, from how many operators, or if it was itself equivocal or speculative. In short, there is no trustworthy foundation from which it can safely be concluded that the economic interest or the competitive position of the LCBO would be in any way prejudiced.

Analysis and finding

I have considered the arguments put forward by the parties in their representations. I have also carefully reviewed the information in Record 1 and Record 2. I agree with the appellant's submissions to the effect that the LCBO has not provided the "detailed and convincing" evidence of harm required to establish that disclosure of the information at issue could reasonably be expected to prejudice the economic interests or the competitive position of the LCBO as contemplated by section 18(1)(c).

I accept that a portion of the LCBO's revenue comes from agency store sales and, therefore, I acknowledge that were there a decrease in the number of agency stores selling beverage alcohol the LCBO could reasonably be expected to experience a loss in revenue. However, I am not persuaded that disclosure of the information related to the challenge and refusal statistics or the net dollar amounts of sales of LCBO products could reasonably be expected to result in the

LCBO being unable to open agency stores in certain unspecified areas because there were either no applicants or unsuitable applicants. Without further evidence to link the disclosure of the specific information that remains at issue with the identified harms and such a result, I find the LCBO's argument to be speculative at best. Accordingly, I am not persuaded that disclosure of the information in Records 1 or 2 could reasonably be expected to result in the harm contemplated by section 18(1)(c). Therefore, I find that the exemption does not apply.

ORDER:

1. I order the LCBO to disclose Records 1, 2, and 3 to the appellant no later than **May 29, 2009** but not earlier than **May 25, 2009**.

2. To verify compliance with the provisions of this order, I reserve the right to require the LCBO to send me a copy of the records disclosed to the appellant pursuant to order provision 1.

Original Signed by: April 23, 2009
Catherine Corban
Adjudicator