Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER PO-4202-I

Appeal PA19-00215

Liquor Control Board of Ontario

October 28, 2021

Summary: This interim order concerns a journalist's request to the Liquor Control Board of Ontario (LCBO) for records relating to the LCBO's decision-making after reports emerged about sexual misconduct by an individual associated with a company with which the LCBO does business. The LCBO withheld responsive records, in full, on the basis of various exemptions from the right of access in the *Freedom of Information and Protection of Privacy Act*. In this interim order, the adjudicator finds that the discretionary solicitor-client privilege exemption at section 19 applies to most of the records. She also finds that one discrete portion of one record is not responsive to the request, and that the remainder is exempt under section 13(1) (advice or recommendations). Although the appellant journalist made public interest arguments in favour of disclosure, the adjudicator finds the public interest override at section 23 does not apply to the particular information exempt under section 13(1). However, she finds that the public interest in disclosure is a relevant factor that the LCBO failed to take into consideration when it decided to withhold records under section 19. She orders the LCBO to re-exercise its discretion under section 19.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31, sections 13(1), 13(2)(l)(i), and 13(3), 19, and 23.

OVERVIEW:

[1] The appellant is a journalist who has written a series of articles about allegations of sexual misconduct made against an individual associated with a company with which the Liquor Control Board of Ontario (LCBO) does business. The appellant states that the

allegations prompted vigorous debate about workplace harassment and drew condemnation from members of the food and wine industry in Canada, many of whom discontinued their relationships with the company. In her reporting, the appellant identified the LCBO as a notable exception, in that it initially decided to continue to stock, display and sell the company's products. However, the day after the appellant reported that news, the LCBO announced that it would halt new orders of the company's products, based on its concerns about the allegations.

[2] Several months later, the appellant reported that the LCBO had decided to resume purchases of the company's products. She reported that the LCBO did not respond to questions about how it had reached this decision, beyond releasing a statement that it had been made after "careful review and consideration."

[3] Under the *Freedom of Information and Protection of Privacy Act* (the *Act*), the appellant made a request to the LCBO for all records leading up to the decision to temporarily halt and then to resume new orders of the company's products. After discussions with the LCBO, the request was clarified to encompass all records, covering a specified time period, about the rationale to temporarily halt new orders and then resume new orders of the company's products. The appellant clarified during her discussions with the LCBO that she is not interested in obtaining records about the logistics of implementing the decision, such as the particulars of affected purchase orders or about the removal of products from retail store shelves.

[4] In response to the request, the LBCO issued a decision denying access to 14 responsive records, in full, on the basis of discretionary exemptions at sections 13 (advice or recommendations), 18 (economic or other interests) and 19 (solicitor-client privilege) of the *Act*, as well as the mandatory exemption for third party information at section 17 of the *Act*. The LCBO also withheld some information on the ground it is not responsive to the request.

[5] The appellant appealed the LCBO's decision to the Information and Privacy Commissioner/Ontario (the IPC). During the mediation stage of the appeal process, the LCBO provided the appellant with an index of records that more clearly describes the records at issue. They are 13 email chains, some with attachments, and one record that is described as a file from the LCBO's legal department. Also during mediation, the appellant asserted a public interest in disclosure of the records, raising the potential application of the "public interest override" at section 23 of the *Act*.

[6] As the issues could not be resolved at mediation, the appeal was moved to the adjudication stage, where an IPC adjudicator conducted an inquiry. During this stage, the IPC notified the company named in the request, as it is an affected person whose interests may be engaged by the appeal. The affected person supports the LCBO's claim of solicitor-client privilege, which the LCBO applied to withhold the majority of the records at issue. The LCBO and the appellant provided representations, which were exchanged between the parties, except for portions of the LCBO's representations that

met the IPC's confidentiality criteria as described in the IPC's *Code of Procedure*.

[7] The appeal was transferred to me to continue the inquiry.[1] In this interim order, I find that the discretionary solicitor-client privilege exemption at section 19 applies to most of the records. However, I do not uphold the LCBO's exercise of discretion under section 19, because the LCBO does not appear to have taken into consideration the public interest in disclosure, which is a relevant factor in the exercise of discretion. I also find that one discrete portion of one record is not responsive to the request, and that the remaining portion is exempt because its disclosure would reveal advice or recommendations protected by section 13(1). The public interest override does not apply to the particular information that is exempt under section 13(1). Because of my findings, it is not necessary for me to consider the other exemption claims made by the LCBO. I remain seized of the appeal to address issues arising from this interim order.

RECORDS:

[8] There are 14 records at issue in the appeal: 13 records are email chains, some with attachments, and one record is described as a file from the LCBO's legal department. The LCBO provided copies of these records to the IPC.

ISSUES:

A. Is some of the information at issue not responsive to the request?

B. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 2-14?

C. Did the LCBO properly exercise its discretion under section 19?

D. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the withheld portion of Record 1? Did the LCBO properly exercise its discretion under section 13(1)?

E. Is there a compelling public interest in disclosure of the information withheld under section 13(1) that clearly outweighs the purpose of the exemption?

---

[1] I reviewed the file, including the representations made by the parties, and determined that I did not need further information before making my decision.

DISCUSSION:

A. Is some of the information at issue not responsive to the request?

[9] The LCBO has identified discrete portions of some records as non-responsive to the request. In the LCBO's submission, these portions do not reasonably relate to the appellant's clarified request, which is for records about the rationale for the LCBO's decision to stop and then to resume new orders of the company's products. The LCBO says these withheld portions are email chains or attachments to emails that do not address the rationale for the decision, but instead address other matters. As an example, the LCBO says it withheld as non-responsive a draft communications plan that outlines how the LCBO intended to communicate its decision. This type of information is not reasonably related to the rationale for the decision, the LCBO says.

[10] The complainant agrees with the characterization of her clarified request. She says her interest is in obtaining records that would help the public understand the nature and extent of the "careful review and consideration" that the LCBO has publicly stated it undertook before deciding to lift its temporary suspension of the company's products. However, the appellant questions the claim that a record like a draft communications plan would not shed light on the rationale behind the LCBO's decision. She notes, for example, that a communications plan might include a plan to address questions about why a decision was made.

[11] I have examined the portions of the records at issue under this heading. I agree with the LCBO that it properly withheld a discrete portion of Record 1 (an email chain) because it is not responsive to the request. I confirm for the appellant's benefit that this portion (which sets out a communications strategy) does not address potential questions about why the LCBO made its decision, or otherwise reasonably relate to her request for records about the rationale for its decision.

[12] The LCBO also withheld as non-responsive discrete portions of records over which it has also claimed solicitor-client privilege. I do not need to address these portions of the records under this heading because, as will be seen below, I find they form part of the solicitor-client privileged communications contained in those records, and are exempt on that basis.

B. Does the discretionary solicitor-client privilege exemption at section 19 apply to Records 2-14?

[13] For the majority of the records, the LCBO claims solicitor-client privilege. Specifically, the LCBO submits that the records are subject both to common law and statutory solicitor-client communication privilege, and statutory litigation privilege.

[14] The common law and statutory privileges are found in section 19 of the *Act*. The relevant portions of section 19 state:

> 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[.]

[15] The first branch of the section 19 privilege, found in section 19(a) ("subject to solicitor-client privilege"), is based on common law. The second branch, as found in section 19(b) ("prepared by or for Crown counsel..."), contains statutory privileges created by the *Act*. The statutory exemption and common law privileges, although not identical, exist for similar reasons.

[16] For the reasons that follow, I find that all the records at issue under this heading are subject either to solicitor-client communication privilege (whether under the common law or the statutory privilege), or the statutory litigation privilege, or both.

Solicitor-client communication privilege

[17] The rationale for the common law solicitor-client communication privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[2] This privilege protects direct communications of a confidential nature between a lawyer and client, or the client's agents or employees, made for the purpose of obtaining or giving professional legal advice.[3] The privilege covers not only the legal advice and the request for advice, but also communications between the lawyer and client aimed at keeping both informed so that advice can be sought and given.[4] The privilege may also apply to the lawyer's working papers directly related to seeking, formulating or giving legal advice.[5] Confidentiality is an essential component of the privilege.

[18] Like the common law solicitor-client communication privilege, the statutory privilege covers records prepared for use in giving legal advice.

[19] The LCBO states that most of the records at issue are email chains involving its general counsel (who is also its senior vice-president and corporate secretary) and LCBO senior managers, which were sent and received for the purpose of obtaining or giving legal advice on the matter involving the company. The LCBO says that this general counsel was involved at all stages in this matter, and that her involvement at all times was in her capacity as general counsel (rather than in one of her other roles, such

---

[2] Orders PO-2441, MO-2166 and MO-1925.
[3] *Descôteaux v. Mierzwinski* (1982), 141 DLR (3d) 590 (SCC).
[4] *Balabel v. Air India*, [1988] 2 WLR 1036 at 1046 (Eng CA); *Canada (Ministry of Public Safety and Emergency Preparedness) v. Canada (Information Commissioner)*, 2013 FCA 104.
[5] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex CR 27.

as corporate secretary). The LCBO observes that the Supreme Court of Canada has recognized that in the case of in-house counsel with more than one role within an organization, the determination of whether counsel was acting as a lawyer, or in another capacity, will be made on a case-by-case basis.[6] The appellant does not challenge this claim.

[20] I am satisfied that in these records, general counsel's involvement was in her capacity as a lawyer, and not in one of her other, non-legal, roles. This is based on my consideration of the LCBO's representations, and the records themselves. These records contain advice from general counsel (and requests for that advice) that is legal in nature, concerning issues arising from the sexual misconduct allegations.

[21] Some of these email records include, as separate attachments or directly within their body, information that the LCBO has described (in the alternative to its solicitor-client privilege claims) as information that is not responsive to the appellant's request, or as exempt third party information. Generally speaking, these portions consist of background information and documents that inform the discussions captured in the records. With respect to these particular portions of the records, the LCBO acknowledges that in some cases, the information by itself would not be exempt, and, in at least one case, is even available publicly. However, in the context in which it appears, the LCBO asserts privilege over this information because it forms part of the "continuum of communications"[7] between lawyer and client.

[22] I agree. Consistent with the interpretation applied by the courts, the IPC has recognized that solicitor-client privilege cannot be applied in an overly restrictive manner. The privilege has been found to apply to all communications made within the framework of the solicitor-client relationship.[8] It has also been described as a "class-based" privilege that generally protects entire communications, and not merely specific items within those communications that involve actual legal advice.[9] Applying this approach, with which I agree, I find that this type of background information is part of the solicitor-client privileged communications, and not subject to severance for this reason. (As a result, it is not necessary for me to consider the LCBO's alternative claims for this information.)

[23] This is also an answer to the appellant's argument that the records are likely to contain discussions and information other than direct legal advice; the appellant asks that the former be severed and disclosed in accordance with the IPC's past statements

---

[6] *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 (CanLII).
[7] Referring to the term employed by the court in *Balabel v. Air India*, cited above.
[8] *Descôteaux v. Mierzwinski*, cited above.
[9] *Ontario (Minister of Finance) v. Information and Privacy Commissioner*, 102 OAC 71, 46 Admin LR (2d) 115, [1997] OJ No 1465 (QL).

on the distinction between "information" and "advice." The appellant may be referring to the IPC's findings in the context of the *Act*'s exemption for advice or recommendations (which is a separate exemption that I discuss further below). In the context of solicitor-client privilege, the IPC has consistently followed common law principles when assessing the possibility of severing solicitor-client privileged communications.[10] For the same reasons given above, I conclude that the entirety of the email records addressed to or from general counsel and various agents of her client, the LCBO—meaning both the explicit legal advice, and other information exchanged for the purpose of giving or receiving that advice—are exempt on the basis of solicitor-client communication privilege.

[24] For other email records, in which the LCBO's general counsel is not a direct sender or recipient, the LCBO also claims solicitor-client communication privilege. The LCBO submits that its general counsel was a party to the communications, through meetings or discussions outside the email chains, and that these emails contain requests for information sought by its general counsel, or relay advice provided by her.

[25] The appellant objects to this claim, which she sees as an attempt to impermissibly expand the scope of solicitor-client privilege. She raises concerns that the LCBO is attempting to shield virtually all aspects of discussion related to this matter, and to arbitrarily extend privilege to anybody. The appellant also suggests that such a wide application of solicitor-client communication privilege implies a waiver of privilege.

[26] I understand the appellant's concerns about the potential improper expansion of solicitor-client privilege when that privilege is claimed for records going beyond direct communications between a lawyer and client. However, in the case before me, having had the benefit of examining the records, I find they are not borne out here.

[27] In these records, I find that the discussions between LCBO senior employees were part of an information-gathering exercise that was requested by general counsel (sometimes explicitly), or that was otherwise intended to inform the request for legal advice. I observe that many of the email records that do not include general counsel are reproduced in other records, in which the email chain continues with the presence of general counsel (and which records I found, above, are solicitor-client privileged). I also observe that many of these email records (in which general counsel is not a sender or recipient) are reproduced in record 14, which is a compilation of documents (including emails) retrieved from the LCBO's legal department file. These circumstances support my finding that these email records too are part of the continuum of communications between lawyer and client, and so equally subject to solicitor-client communication privilege. This is the case whether under the common law or the

---

[10] Among others, see IPC Orders MO-2198, MO-2486, and MO-3409.

statutory privilege, as the LCBO's general counsel is Crown counsel within the meaning of section 19(b).

[28] Lastly on this topic, there is no evidence before me that any of these privileged communications were shared outside the solicitor-client relationship, or that privilege was waived in some other manner, either expressly or by implication. The LCBO asserts that these communications were maintained in confidence among its general counsel, external counsel and members of LCBO's senior management (all of whom are parties to the solicitor-client relationship), and I have no basis to find otherwise. The LCBO also submits, and I accept, that to the extent there were any public statements regarding the LCBO's position in view of the sexual misconduct allegations, the content of those communications did not relay the substance of any of the legal advice it received and that is contained in the records.

Statutory litigation privilege

[29] The remainder of the records (as well as some of the communications-privileged records addressed above) are subject to the statutory litigation privilege in section 19(b), for the reasons that follow.

[30] The statutory litigation privilege applies to records prepared by or for Crown counsel "in contemplation of or for use in litigation." It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[11] The statutory litigation privilege also protects records prepared for use in the mediation or settlement of litigation.[12]

[31] During the inquiry stage, the IPC withheld the majority of the LCBO's representations on this topic from the appellant, as they met the IPC's confidentiality criteria. As a result, the appellant did not have the benefit of knowing much of the basis for the LCBO's statutory litigation claim. She questions whether litigation was actually in contemplation at the time of the records' creation, and, even if so, whether there is active litigation.

[32] Unlike the appellant, I have had the benefit of seeing both the LCBO's confidential representations on this topic, and the records themselves. Based on the evidence, I am satisfied that the records were created by or for Crown counsel in contemplation of litigation, including for use in the settlement of anticipated litigation, and within the required the "zone of privacy" contemplated by this privilege. They are

---

[11] See *Ontario (Attorney General) v. Holly Big Canoe,* 2006 CanLII 14965 (ON SCDC); *Ontario (Ministry of Correctional Service) v. Goodis*, cited above.
[12] *Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681.

therefore protected by the statutory litigation privilege. As with solicitor-client communication privilege, the courts and the IPC have recognized that settlement privilege is a class privilege, so that severance of privileged records is neither appropriate nor required.[13] On the appellant's question about whether there is active litigation between the LCBO and other parties, I note that termination of litigation does not end the statutory litigation privilege in section 19.[14] I also find no evidence here that the statutory litigation privilege has been waived.

[33] In conclusion, for the reasons given above, I find that all the records at issue under this heading are subject to solicitor-client communication privilege (common law and statutory), or the statutory litigation privilege, or both. This finding is subject to my consideration of the LCBO's exercise of discretion under section 19, which I consider next.

C. Did the LCBO properly exercise its discretion under section 19?

[34] The solicitor-client privilege exemption at section 19 is discretionary (the institution "may" refuse to disclose), meaning the institution can decide to disclose information even if the information qualifies for exemption.

[35] An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so. In addition, the IPC 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, or it fails to take into account relevant considerations.

[36] In either case, the IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.[15] The IPC cannot, however, substitute its own discretion for that of the institution.[16]

[37] Some examples of relevant considerations are listed below. However, not all of these will necessarily be relevant, and additional considerations may be relevant:[17]

- the purposes of the *Act*, including the principles that:
    - information should be available to the public,

---

[13] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 (CanLII). See also IPC Orders MO-3743 and MO-4022-F.
[14] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 OR (3d) 167 (CA).
[15] Order MO-1573.
[16] Section 54(2).
[17] Orders P-344 and MO-1573.

  - individuals should have a right of access to their own personal information,
  - exemptions from the right of access should be limited and specific, and
  - the privacy of individuals should be protected,
- the wording of the exemption and the interests it seeks to protect,
- whether the requester is seeking his or her own personal information,
- whether the requester has a sympathetic or compelling need to receive the information,
- whether the requester is an individual or an organization,
- the relationship between the requester and any affected persons,
- whether disclosure will increase public confidence in the operation of the institution,
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person,
- the age of the information, and
- the historic practice of the institution with respect to similar information.

[38] During the inquiry, the IPC asked the parties to address the LCBO's exercise of discretion under any applicable discretionary exemptions on which the LCBO relies.

Parties' representations, and my findings

[39] A large portion of the appellant's representations addresses the public's interest in knowing more about the LCBO's relationship with the company whose namesake is at the centre of serious allegations. The appellant submits that as a Crown entity with a virtual monopoly on alcohol sales in the province, the LCBO makes decisions that are of interest to the public, and especially so where its decision relates to allegations of sexual misconduct in a period of heightened scrutiny of these issues. In so arguing, the appellant refers to the "override" available in section 23 of the *Act* to overcome a finding that information is properly withheld under certain listed exemptions.

[40] In response, the LCBO submits that it exercised its discretion properly under section 19. It says that it took into account a number of relevant factors, including the following factors that it specifically cites: the purposes of the *Act*, and "especially the privacy of a certain individual identified in the records;" the wording of the exemption and the interests it seeks to protect; the fact that the information sought was not the

appellant's own personal information; and the nature of the information, including its sensitivity. The LCBO submits that it did not consider any irrelevant factors.

[41] In response to the appellant's public interest arguments, the LCBO says that the public interest override at section 23 does not apply to the section 19 exemption. But it says that to the extent there is a public interest in the matters reflected in the records, this interest weighs strongly in favour of non-disclosure. The LCBO does not elaborate on this position, which appears to be related to its arguments about the weight to be accorded to solicitor-client privilege. It may also be related to the concern the LCBO has expressed about the effect of disclosure on the privacy of an affected party.

[42] The LCBO's brief submissions on this topic do not persuade me that in making its decision on the appellant's access request, the LCBO considered the public interest in disclosure of records that are otherwise covered by solicitor-client privilege. However, I am persuaded there is a strong public interest here, and that the LCBO failed to take into account this relevant consideration in its exercise of discretion under section 19.

[43] I accept the appellant's evidence that in light of the seriousness of the allegations, and the growing public awareness around workplace and sexual harassment, there is a strong public interest in knowing how a Crown entity made business decisions in matters affected by these issues. The appellant makes a cogent argument that disclosure of the records would serve the *Act*'s essential purpose to shed light on the workings and decision-making of a prominent government organization, and would enrich the public discourse. She suggests, moreover, that disclosure could have the effect of bolstering confidence in the LCBO, by revealing the extent of its considerations before it made significant and highly publicized business decisions.

[44] I note that in response to the present request, the LCBO has released no records. The appellant has also demonstrated that the LCBO has made little public comment on this matter to date. I agree with the appellant that the dearth of information provided by the LCBO so far supports an argument that there is a greater, and not lesser, degree of public interest in these particular records.

[45] The LCBO notes, correctly, that the public interest override at section 23 of the *Act* does not apply to the section 19 exemption. But in confirming the constitutionality of the *Act*'s failure to extend the public interest override to solicitor-client privileged records, the Supreme Court noted that consideration of the public interest is incorporated into the language of the exemption.[18] The LCBO has not demonstrated that there was any such consideration when it made its decision under section 19.

[46] I will therefore order the LCBO to re-exercise its discretion under section 19. The

---

[18] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 (CanLII).

LCBO is to provide me with the results of its re-exercise of discretion, in accordance with the terms set out at the end of this interim order.

D. Does the discretionary exemption at section 13(1) for advice or recommendations given to an institution apply to the withheld portion of Record 1? Did the LCBO exercise its discretion under section 13(1)?

[47] Because of my findings above, there remains only one record to consider in this appeal. The LCBO withheld one portion of Record 1 on the ground it reveals advice or recommendations protected by section 13(1). For the reasons that follow, I uphold the LCBO's decision.

[48] Section 13(1) of the *Act* 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.

[49] Section 13(1) exempts certain records containing advice or recommendations given to an institution. This exemption aims to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[19]

[50] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to a suggested course of action that will ultimately be accepted or rejected by the person being advised. Recommendations can be express or inferred.

[51] "Advice" has a broader meaning. It includes "policy options," which are the public servant or consultant's identification of alternative possible courses of action. "Advice" includes the views or opinions of a public servant or consultant as to the range of policy options to be considered by the decision-maker even if they do not include a specific recommendation on which option to take.[20]

[52] Section 13(1) applies if disclosure would "reveal" advice or recommendations, either because the information itself consists of advice or recommendations or the information, if disclosed, would permit the drawing of accurate inferences as to the

---

[19] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para 43.
[20] See above at paras. 26 and 47.

nature of the actual advice or recommendations.[21]

[53] At issue under section 13(1) is one portion of Record 1. (I found, above, that the remaining portion of this record is not responsive to the appellant's request.) This portion is an email communication between LCBO senior managers that refers to a potential course of action. I am satisfied that this withheld portion qualifies for exemption because its disclosure would permit the drawing of accurate inferences about actual advice or recommendations given to senior decision-makers at the LCBO. This is evident to me from the withheld information itself, and the role of the party communicating this information to the others.

[54] The appellant asks me to consider whether the exceptions at section 13(2)(l)(i) and section 13(3) of the *Act* apply in the circumstances. These are mandatory exceptions that, if applicable, prevent an institution from withholding under section 13(1) the types of information listed below:

> (2) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,
>
> > (l) the reasons for a final decision, order or ruling of an officer of the institution made during or at the conclusion of the exercise of discretionary power conferred by or under an enactment or scheme administered by the institution, whether or not the enactment or scheme allows an appeal to be taken against the decision, order or ruling, whether or not the reasons,
> >
> > > (i) are contained in an internal memorandum of the institution or in a letter addressed by an officer or employee of the institution to a named person[.]
>
> (3) Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record where the record is more than twenty years old or where the head has publicly cited the record as the basis for making a decision or formulating a policy.

[55] Neither of these exceptions applies here. The withheld portion of Record 1 does not constitute "reasons," an "order," or a "ruling," within the meaning of section 13(2)(l). And while the appellant proposes that certain records could be caught by

---

[21] Orders PO-2084, PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] OJ No 163 (Div Ct), aff'd [2005] OJ No. 4048 (CA), leave to appeal refused [2005] SCCA. No 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] OJ No 4047 (CA), leave to appeal refused [2005] SCCA No 563.

section 13(3), because the LCBO publicly stated that it conducted a "review" before resuming its relationship with the company, I have no evidence that this particular email communication was publicly cited as the basis for its decision-making, as required by section 13(3).

[56] Lastly, I uphold the LCBO's exercise of discretion under section 13(1). While the appellant made a number of cogent arguments in favour of disclosure (including public interest arguments, which I consider again under the next heading); I find no defect in the manner in which the LCBO weighed these against other relevant considerations favouring non-disclosure, including the nature of the information at issue, and the important interests protected by the section 13(1) exemption.

[57] I therefore uphold the LCBO's exemption claim under section 13(1).

E. Is there a compelling public interest in disclosure of the information withheld under section 13(1) that clearly outweighs the purpose of the exemption?

[58] Unlike section 19, section 13(1) is a listed exemption to which the "public interest override" at section 23 may apply. Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, 15.1, 17, 18, 20, 21 and 21.1 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[59] For section 23 to apply, two requirements must be met:

- there must be a compelling public interest in disclosure of the records; and
- this interest must clearly outweigh the purpose of the exemption.

[60] The *Act* does not state who bears the onus to show that section 23 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that clearly outweighs the purpose of the exemption.

[61] I have considered the information at issue under this heading, being one discrete portion of Record 1 that the LCBO withheld under section 13(1). I have also considered the appellant's arguments about the public's interest in addressing issues around workplace and sexual harassment, and in understanding the LCBO's decision-making process in the context of serious allegations levied against a party to one of its business relationships. I accept that the appellant has shown, including through her own reporting, that there is a public interest in these matters.

[62] However, assuming without deciding that this interest rises to the level of a "compelling" public interest within the meaning of section 23, I cannot conclude that

the interest in disclosure of the information at issue here would clearly outweigh the purpose of the exemption applied to withhold it. The particular extract at issue does not directly respond to the legitimate public interest concerns identified by the appellant. I am not persuaded that its disclosure would have the effect of informing or enlightening the public on these broader issues. I also found, above, that disclosure of this information would reveal exempted advice or recommendations, which section 13(1) protects in recognition of the importance of promoting candor and completeness, and of avoiding actual or perceived partisanship, in public servants' participation in the decision-making process.[22]

[63] In these circumstances, I conclude that the public interest override does not apply.

ORDER:

1. I order the LCBO to re-exercise its discretion under section 19, having regard to the considerations set out in this interim order.

2. The LCBO must provide me with the results of its re-exercise of discretion, including any decision to disclose records and/or its explanation for continuing to withhold all or parts of the records, by **November 26, 2021**.

   I may share the LCBO's representations on its exercise of discretion with the appellant, unless they meet the confidentiality criteria identified in the IPC's *Code of Procedure*. If the LCBO believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to these portions.

3. I uphold the remainder of the LCBO's decision.

4. I remain seized of this appeal to address the LCBO's re-exercise of discretion, and any other issues that may arise from this interim order.

Original Signed by: October 28, 2021

Jenny Ryu
Adjudicator

[22] *John Doe v. Ontario (Finance)*, cited above, at paras 43 and 45.