

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 238-1998
May 29, 1998**

INQUIRY RE: A request by Pacific Western Brewing Company for a record in the custody of the Ministry of Attorney General, Liquor Distribution Branch

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1. Description of the review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner (the Office) on February 3, 1998 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of the response of the Ministry of Attorney General, Liquor Distribution Branch (the public body), to a request by Pacific Western Brewing Company (the applicant) for an unsevered copy of a letter written by Labatt Brewing Company (the third party) to the public body.

At the time of the request for the record, the Liquor Distribution Branch was part of the Ministry of Attorney General. The Liquor Distribution Branch now is part of the Ministry of Small Business, Tourism and Culture.

2. Documentation of the inquiry process

On November 7, 1997 Pacific Western Brewing Company requested a copy of an August 22, 1997 letter that Labatt Brewing Company had sent to the Ministry of Attorney General, Liquor Distribution Branch. The record is a two-page letter and an accompanying one-page financial table. In response to this request, the public body reviewed the letter and decided to consult the third party under section 23 of the Act before making a decision to disclose, sever, or withhold the record. The Liquor Distribution Branch notified the applicant of its decision to consult the third party on November 17, 1997.

The applicant objected to the Liquor Distribution Branch's decision to consult the third party. On November 27, 1997 the applicant requested a review by the Information and Privacy Commissioner of the public body's decision to consult Labatt Brewing Company under section 23 of the Act.

Following consultations with the third party, the Liquor Distribution Branch responded to the applicant on December 11, 1997 by partially disclosing a copy of the August 22, 1997 letter. It severed small amounts of third-party business information from the two-page letter, and most of the information from the accompanying table, on the basis of section 21(1) of the Act.

The applicant requested an inquiry by the Information and Privacy Commissioner on December 12, 1997. The Liquor Distribution Branch and Labatt Brewing Company agreed to disclose additional information from the letter and table on January 9, 1998. On January 12, 1998 my Office gave notice to the applicant, the public body, and the third party of the written inquiry to held on February 3, 1998.

3. Issues under review and the burden of proof

There are two issues to be reviewed by the Information and Privacy Commissioner. The first is whether the Liquor Distribution Branch was justified in its decision to consult Labatt Brewing Company under section 23 of the Act before making a decision to disclose, sever, or withhold the requested record. The second issue is whether the Liquor Distribution Branch correctly applied section 21 to the requested record, resulting in partial disclosure of the record.

The relevant parts of sections 21 and 23 are as follows:

Disclosure harmful to business interests of a third party

- 21(1) The head of a public body must refuse to disclose to an applicant information
- (a) that would reveal
 - (i) trade secrets of a third party, or
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party,
 - (b) that is supplied, implicitly or explicitly, in confidence, and
 - (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

- (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
- (iii) result in undue financial loss or gain to any person or organization, or
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Notifying the third party

- 23(1) If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be exempted from disclosure under section 21 or 22, the head must give the third party a written notice under subsection (3).

Section 36 of the *Liquor Distribution Act*, R.S.B.C. 1996, c. 268, is relevant to the application of section 21(1)(b) of the Act to the record under review:

36. For the purposes of section 21(1)(b) of the *Freedom of Information and Protection of Privacy Act*, information in the custody or under the control of the branch, whether or not supplied to the branch, is deemed to be supplied to the branch implicitly or explicitly in confidence, if the information concerns the branch's
- (a) acquisition of liquor from a manufacturer, manufacturer's agent, distributor, authorized importer of liquor or other person who supplies liquor to the branch, or
 - (b) sale of liquor acquired by the branch from a person referred to in paragraph (a).

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1) of the Act, where access to information in a record has been refused under section 21, it is up to the public body to prove that the applicant has no right of access to the record or part of the record.

Section 57 is silent with respect to a decision by a public body to consult a third party under section 23 of the Act. I have asked the Liquor Distribution Branch and the applicant to make submissions on which party bears the burden of proof for this issue. The third party was also invited to make submissions on this issue.

4. The record in dispute

The record under review in this inquiry is an August 22, 1997 letter sent by Labatt Brewing Company to the Liquor Distribution Branch, with an attached one-page financial table. The letter references the positioning of the applicant's products in B.C. liquor stores. The severed information relates to the third party's channel market share and estimated financial information. The information severed from the table, which is entitled Channel Market Share, discloses the third party's assessment of the beer marketplace.

5. Pacific Western Brewing Company's case

Pacific Western Brewing Company objects to the Liquor Distribution Branch's application of section 21 of the Act to the records in dispute, arguing that the excepted information is not detailed information and could not be harmful to the interests of Labatt:

Furthermore, the letter included a legal threat, and cannot be found to have been supplied explicitly or implicitly in confidence. As well, the attached chart from Labatt Brewing Company contained information about the position of other brewers in the market, which shows that this is not protected information within the industry. (Submission of the Applicant, p. 1)

The position of Pacific Western Brewing Company is that the records in dispute do not meet any of the three-part tests for the application of section 21: "...the information is not trade secrets or detailed commercial information, it was not supplied implicitly or explicitly in confidence and there is no potential harm to the third party." (Submission of Pacific Western Brewing Company, p. 2)

I have presented below Pacific Western Brewing Company's detailed submissions on the application of specific sections of the Act.

6. The Liquor Distribution Branch's case

The Liquor Distribution Branch points out that the applicant, Pacific Western Brewing Company, and the third party, Labatt Brewing Company, are manufacturers of beer and competitors in the beer industry. The Liquor Distribution Branch acquires beer from both the applicant and the third party for sale in its stores.

The record in dispute is a letter to the Liquor Distribution Branch from the third party which addresses the positioning of beer products in its B.C. liquor stores. The Liquor Distribution Branch, after obtaining representations from the third party, decided to sever portions of the record under section 21 of the Act. It submits that it severed information which would disclose the third party's calculation of its channel market share

for beer sales and the third party's assessment of the channel market share for various players in the beer industry. The Liquor Distribution Branch advises that there is a Liquor Distribution Branch channel for the sale of beer through B.C. liquor stores and an LRS channel for the sale of beer through licensed beer and wine stores. The Liquor Distribution Branch also severed estimated financial information about the third party from the record in dispute.

The Liquor Distribution Branch submits that it has severed the records in dispute to protect the following kinds of information:

- Labatt's calculation of its channel market share for beer sales and its assessment of the channel market share for various players in the beer industry. A channel refers to a type of market outlet, either through B.C. liquor stores or through licensed beer and wine stores.
- Estimated financial information about Labatt. (Submission of the Liquor Distribution Branch, paragraph 1.03, 4.01)

The Liquor Distribution Branch submits that it properly applied section 23 of the Act and that it has appropriately applied the three-part test under section 21 of the Act to the records in dispute.

I have presented below the Liquor Distribution Branch's submissions on the detailed application of sections of the Act.

7. Labatt Brewing Company Limited's case as a third party

Labatt submits that the information severed by the Liquor Distribution Branch from the records in dispute is fully protected by section 21 of the Act. I have presented below aspects of its detailed submission.

8. Discussion

Section 21(1): The head of a public body must refuse to disclose to an applicant information (a) that would reveal (i) trade secrets of a third party, or (ii) commercial, financial, labour relations, scientific or technical information of a third party,

Pacific Western Brewing Company submits that the information chart in the records in dispute cannot be protected under this subsection, because it contains information about other brewers: "The information is not detailed enough, and could not be used by Pacific Western or any other brewer to the detriment of Labatt's competitive position." It makes the same claims about the information concerning Labatt Brewing Company's loss of profits. (Submission of Pacific Western, pp. 1-2)

The Liquor Distribution Branch submits that the information severed reflects commercial and financial information of Labatt Brewing Company. Having reviewed the information that has been severed by the Liquor Distribution Branch, I find it clearly constitutes commercial and financial information of Labatt Brewing Company for purposes of section 21(1)(a) of the Act. (Submission of the Liquor Distribution Branch, paragraphs 5.07 and 5.08; see also the Submission of Labatt Brewing Company, p. 1)

Section 21(1)(b): that is supplied, implicitly or explicitly, in confidence, and

Pacific Western Brewing Company submits that there was no explicit expectation of confidentiality expressed in the letter in dispute and asserts that Labatt could not supply information about other brewers in confidence to the Liquor Distribution Branch: “The information was supplied on a voluntary basis in order to effect Liquor Distribution Branch action which would be to the detriment of Pacific Western.... there are no indicia of implicit confidentiality.” (Submission of the Applicant, p. 2)

The Liquor Distribution Branch submits that the severed information is deemed to be supplied to it implicitly or explicitly in confidence on the basis of section 36 of the *Liquor Distribution Act*. (Submission of the Liquor Distribution Branch, paragraph 5.09) I agree with the Liquor Distribution Branch that the information in dispute falls into this category. I further agree with the Liquor Distribution Branch that “it is reasonable to conclude that it was implicitly supplied in confidence and with an expectation that it would be kept out of the hands of competitors.” The third party has so represented to the Liquor Distribution Branch and to this inquiry. (Submission of the Liquor Distribution Branch, paragraph 5.10)

The Liquor Distribution Branch has thus met the second part of the section 21 test. (Submission of the Applicant, p. 2)

Section 21(1)(c): the disclosure of which could reasonably be expected to (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party, ... (iii) result in undue financial loss or gain to any person or organization, or

Pacific Western Brewing Company submits that the only threat of harm in the records in dispute is to its interests, since “Labatt is trying to interfere with its competitor’s relationship with the Liquor Distribution Branch. It relies upon unsubstantiated statistics and legal threats. Pacific Western deserves the opportunity to challenge the information presented to the Liquor Distribution Branch.” (Submission of Pacific Western Brewing Company, p. 2) Labatt Brewing Company, which controls a significant portion of the beer market, can affect the competitive position of Pacific Western Brewing Company, not vice versa.

The Liquor Distribution Branch submits that it is quite clear in this inquiry that disclosure of the information in dispute could harm significantly the competitive position

of Labatt Brewing Company or result in undue financial loss to it and undue financial gain to the applicant. (Submission of the Liquor Distribution Branch, paragraph 5.12; see Order No. 126-1996, September 17, 1997; Order No. 187-1997, August 21, 1997)

Labatt Brewing Company submits that disclosure of the information in dispute would result in significant harm to its interests in the entire brewing industry in British Columbia and elsewhere: “This type of information would provide all competitors of Labatt not only direct confirmation of Labatt’s position in the retail market place but valuable insights into the broader competitive dynamics of the marketplace from Labatt’s perspective.” (Submission of Labatt Brewing Company, p. 2) Moreover, Labatt Brewing Company went to a significant amount of work and expense to generate the data that it now seeks to protect. Disclosure would result in undue competitive advantage to regional brewers, to Pacific Western, and to non-British Columbia-based competitors. (See also Affidavit of Kevin McLaughlin, who prepared some of the information in dispute, paragraphs 2, 4, 5, 7, 8, and 9)

I am satisfied, based on my review of the record and the submissions of the Liquor Distribution Branch and the third party, that disclosure of the severed information could reasonably be expected to harm significantly the competitive position or interfere significantly with the negotiating position of the third party for purposes of section 21(1)(c) of the Act.

I therefore find that the Liquor Distribution Branch has met each of the three parts of the section 21 test and has discharged its burden of proof of demonstrating that the applicant has no right of access to the information that has been severed from the record in dispute.

Section 23(1): Notifying the third party

If the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 21 or 22, the head must give the third party a written notice under section 23(3).

The applicant argued that the Liquor Distribution Branch had no reasonable basis to notify Labatt as a third party under section 23, because the records in dispute are not protected by section 21 of the Act. (Submission of Pacific Western Brewing Company, p. 3) In light of my conclusion that the Liquor Distribution Branch properly withheld the severed information on the basis of section 21 of the Act, then regardless of the burden of proof under this section, the applicant’s arguments must fail. There is nothing in the information before me which would suggest that the public body improperly discharged its obligations under section 23(1) of the Act.

9. Order

Section 58(1) of the Act requires me to dispose of the issues in an inquiry by making an order under this section. I find that the Liquor Distribution Branch had a duty to consult the third party under sections 23(1) and 23(3) of the Act prior to making its decision under section 21(1) of the Act, since the Liquor Distribution Branch intended to disclose information in the record that might be excepted from disclosure under section 21(1).

Under section 58(3)(a) of the Act, I require the Liquor Distribution Branch to perform its duty to consult the third party under sections 23(1) and 23(3) of the Act. However, since I have found that the Liquor Distribution Branch consulted the third party prior to making its decision under section 21(1), I find that it has complied with this Order and discharged its duty under sections 23(1) and 23(3).

I also find that the Liquor Distribution Branch was required to sever third-party business information from the record under section 21(1) of the Act. Under section 58(2)(c) of the Act, I require the Liquor Distribution Branch to withhold the information severed under section 21(1).

David H. Flaherty
Commissioner

May 29, 1998