

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 308-1999
May 7, 1999**

****** This Order has been subject to Judicial Review ******

**INQUIRY RE: A refusal by the Liquor Distribution Branch of the Ministry of
Small Business, Tourism and Culture to disclose records to a customer**

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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 March 17, 1999 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review by the applicant of the Liquor Distribution Branch's decision to deny access to some information in Liquor Distribution Branch records.

2. Documentation of the inquiry process

On September 11, 1998 the applicant, a customer, wrote to the Liquor Distribution Branch to request the following records:

- all information about him from a named Liquor Distribution Branch store;
- all information about him from the office of the Director, Store Operations; and
- all information about him from the Loss Prevention Department

On October 8, 1998 the Liquor Distribution Branch responded by providing some of the requested records and withholding or severing others under sections 13(1), 14, 15, 16, 19, and 22 of the Act. It also told the applicant that certain portions of one record were outside the scope of the request. On November 12, 1998 the applicant wrote to my Office to request a review of the Liquor Distribution Branch's response. The ninety-day time limit for the review began on November 12, 1998 and was due to expire on

February 10, 1999. Mediation led to the disclosure of all information previously withheld under sections 15 and 16 and of some information previously withheld under section 22.

On January 21, 1999 the applicant indicated his wish that the remaining issues proceed to an inquiry before the Information and Privacy Commissioner. He also stated that he would need additional time to prepare his initial submission. The parties subsequently consented to an extension of the review timelines to accommodate the inquiry. On February 16, 1999 the Office issued a Notice of Written Inquiry to the applicant, the Liquor Distribution Branch, and third parties.

The Liquor Distribution Branch then issued another new decision letter to the applicant, together with a complete copy of the re-severed records. The second revised decision included the disclosure of identifying information of some third parties, with their consent, and some changes in the application of sections 13(1), 19, and 22 to the records. It also included a revision of the decision on the “store manager’s diary” from “completely withheld” to “outside the scope” of the Act, pursuant to section 3(1) of the Act. It also revised the decision on the “store journal” by disclosing some information previously withheld under sections 19 and 22 and disclosing other information identified as outside the scope of the request.

At the Liquor Distribution Branch’s request, after my Office issued the notice of written inquiry, I granted intervenor status to the Ministry of Women’s Equality. The parties consented to a second extension of the inquiry deadline to March 17, 1999 to accommodate this change.

3. Issue under review and the burden of proof

In this inquiry, I reviewed the Liquor Distribution Branch’s application of sections 3(1), 13(1), 14, 19(1)(a), and 22(1) of the Act to withheld information and records from the Loss Prevention Department; the office of the Director, Store Operations; and a named Liquor Distribution Branch store.

These sections read as follows:

Scope of this Act

3(1) This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

....

Policy advice, recommendations or draft regulations

13(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice or recommendations developed by or for a public body or a minister.

....

Legal advice

14. The head of a public body may refuse to disclose to an applicant information that is subject to solicitor client privilege.

Disclosure harmful to individual or public safety

19(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to

- (a) threaten anyone else's safety or mental or physical health,
- or

....

Disclosure harmful to personal privacy

22(1) The head of a public body must refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

- (2) In determining under subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body must consider all the relevant circumstances, including whether

...

- (e) the third party will be exposed unfairly to financial or other harm,

....

- (3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

- (a) the personal information relates to a medical, psychiatric or psychological history, diagnosis, condition, treatment or evaluation,

...

- (d) the personal information relates to employment, occupational or educational history,

....

Section 57 of the Act establishes the burden of proof on the parties in an inquiry. Under section 57(1), where access to information in the record has been refused under sections 13(1), 14, or 19(1)(a), 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. Under section 57(2), if the record or part that the applicant is refused access to under section 22 contains personal information about a third party, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

Section 57 of the Act is silent as to the burden of proof where a public body has relied on section 3(1) of the Act to exclude records. For reasons expressed in Order No. 170-1997, June 12, 1997, I find that the Liquor Distribution Branch has the burden of proof. Accordingly, it is up to the Liquor Distribution Branch to prove that the withheld record (the "store manager's diary") is not covered by the Act on the basis of section 3(1); i.e., that the record is not in the custody or under the control of the public body.

4. Procedural objections

The applicant objected to my inviting the Ministry of Women's Equality as an intervenor in this inquiry. Since I control the choice of intervenors on the basis of sections 54 and 56 of the Act, this objection is without merit.

5. The records in dispute

The records in dispute consist of internal correspondence, several Branch Incident Reports, and the "store manager's diary."

6. The applicant's case

The applicant learned from the RCMP interrogation of him that a particular Liquor Distribution Branch store had compiled personal information about him, which he labels false, incorrect, and misleading, and which has done him "great harm since."

7. The Liquor Distribution Branch's case

The Liquor Distribution Branch states that the applicant asked for all of his personal information held in three Liquor Distribution Branch offices. He is a long-time customer of a particular store, where he has increasingly spent time speaking with staff members about matters unrelated to the purchase of liquor products:

In recent years the Applicant's comments, correspondence, and behaviour have been a cause for concern for various of the staff members of the Store, and in particular for the Store Manager. (After a series of incidents,)

... the Applicant was banned from the Store for a one-month period....
(Submission of the Liquor Distribution Branch, paragraph 3.04)

The Liquor Distribution Branch states that the applicant has been given full descriptive information about this series of incidents, which involved a special order request and accompanying allegations of fraternization and improper behaviour with female store staff in particular. The Liquor Distribution Branch submitted several affidavits *in camera*.

8. The Ministry of Women's Equality's submission as an intervenor

The following key points are made in the submission:

- The purpose of this memorandum is to submit ... the Ministry of Women's Equality's position that threats to women's safety in the workplace must be taken very seriously, and to support the decision of the Liquor Distribution Branch to sever information in the records that could reasonably expect to threaten the safety or that would reveal the personal information of Liquor Distribution Branch employees.
- The Ministry of Women's Equality submits that there is a need to use a gender analysis when applying exceptions under the Act, in particular sections 19 and 22. It is government policy to apply gender analysis in developing legislation, policy and programs. The Ministry of Women's Equality has the lead role in promoting this policy.
- Violence against women is a serious problem in our society and the majority of cases of stalking are men stalking women. As a result, a gender analysis identifies that extra precautions are required to ensure the safety of women.
- Harassing behaviour may begin as seemingly innocuous behaviour, such as annoying telephone calls, and may escalate into violent behaviour. Harassment may not include an explicit threat but may have a cumulative negative effect on the victim.
- The safety of women in the workplace has gained public attention. Women are now more aware of the potential dangers facing them in their workplace and are being encouraged to be proactive in protecting themselves. Employers are examining their work sites to ensure that they have protection in place for their female employees.

9. Discussion

I have read a full description of the Liquor Distribution Branch's perspective on the relationship between the applicant and a particular store and its employees. (See submission of the Liquor Distribution Branch, pp. 3-7) I have also read the voluminous submission and reply submission of the applicant, most of which had nothing to do with the decision on access to records that I am authorized to make under the Act.

Section 19(1)(a): Disclosure harmful to individual safety or mental or physical health

The Liquor Distribution Branch has used this section to protect the safety and mental health of various third parties, and it has done so in accordance with my previous Orders. See Order No. 28-1994, November 8, 1994, p. 8; Order No. 60-1995, October 31, 1995; and Order No. 80-1996, January 23, 1996, p. 6.

The Liquor Distribution Branch has chosen to withhold the names, signatures, employee numbers, home telephone numbers, and home addresses of individuals that appear in Branch Incident Reports. It has also withheld a signature and a sentence in a narrative portion of similar records.

As indicated below in my detailed review of the first ten records in dispute, I find that the Liquor Distribution Branch has applied section 19(1)(a) correctly in this inquiry.

Section 22(1): Disclosure harmful to personal privacy of third parties

The Liquor Distribution Branch is especially relying on sections (22)(3)(a) and (d) to withhold various forms of personal information about its employees, in a manner directly comparable to what it has protected under section 19.

As indicated below, I find that the Liquor Distribution Branch has applied section 22 correctly to the first ten records in dispute in this inquiry.

Section 14: Legal advice

The Liquor Distribution Branch has correctly withheld two records on the basis of section 14 that involve, as noted again below, a lawyer for Legal Services Branch of the Ministry of Attorney General giving advice to the Liquor Distribution Branch, its client.

Section 13(1): Policy advice and recommendations

As noted below, the Liquor Distribution Branch has appropriately withheld a “very small amount” of information from the first ten records in dispute that would reveal, either explicitly or implicitly, advice developed by or for it about how to deal with this applicant.

Review of the Records in Dispute

I have reviewed the information in dispute on the basis of a detailed grid kindly prepared by the Liquor Distribution Branch, which I follow below:

1. Branch Incident Report, 02/25/98: The Liquor Distribution Branch has appropriately withheld personal details of an employee, who filed a Branch Incident Report, on the basis of sections 19 and 22 of the Act.
2. Branch Incident Report, 2/25/98: The Liquor Distribution Branch has appropriately withheld personal details of an employee, who filed a Branch Incident Report, on the basis of sections 19 and 22 of the Act.
3. Branch Incident Report, 02/27/98: The Liquor Distribution Branch has appropriately withheld personal details of an employee, who filed a Branch Incident Report, on the basis of sections 19 and 22 of the Act.
4. Branch Incident Report, 03/24/98: The Liquor Distribution Branch has appropriately withheld personal details of the individual employee who filed the Branch Incident Report and advice that she received from a law enforcement official on the basis of sections 13, 19, and 22 of the Act.
5. E-mail message dated 3/27/98: The Liquor Distribution Branch has appropriately withheld one sentence and two partial sentences on the basis of section 22 of the Act.
6. E-mail message dated 3/30/98: The Liquor Distribution Branch has appropriately withheld a personal detail of an employee on the basis of section 22 of the Act.
7. E-mail message, 4/8/98: The Liquor Distribution Branch has appropriately withheld parts of an e-mail sent by a Liquor Distribution Branch investigator on the basis of sections 13(1) and 22(1) of the Act.
8. Notes of a June 17, 1998 telephone call: The Liquor Distribution Branch has appropriately withheld a signature on this record on the basis of sections 19 and 22 of the Act.
9. Memorandum. The Liquor Distribution Branch has correctly withheld, on the basis of section 14 of the Act, a memorandum from its Legal Services Branch lawyer to one of its executives.
10. E-mail message: The Liquor Distribution Branch has appropriately withheld an e-mail exchange between one of its managers and a lawyer from the Legal Services Branch of the Ministry of Attorney General on the basis of section 14 of the Act. The record also includes one sentence containing third party personal information that is properly withheld under section 22 of the Act.

Custody and control of the Store Manager's Diary

The Liquor Distribution Branch correctly submits that an applicant can only obtain access, under the Act, to a record that is in the custody or under the control of a public body:

It is the Public Body's position that the Store Manager's Diary was not in the custody of the Public Body, nor was it under the control of the Public Body, when the Applicant made his request for access to records under the Act. (Submission of the Liquor Distribution Branch, paragraph 7.04)

The Liquor Distribution Branch's position on custody issues with respect to the diary includes the following points, with my own response added in parentheses, at least with respect to the present inquiry:

- Custody of records requires more than that the records be located on particular premises; (Submission of the Liquor Distribution Branch, paragraph 7.06) (I agree)
- “In order for a public body to have custody of records, the public body must have immediate charge and control of these records, including some legal responsibility for their safekeeping, care, protection, or preservation.” (I agree)
- “The Public Body submits that the use of the word ‘custody’ in the Act reflects a deliberate choice of the Legislature to clearly limit the Act’s application to only ‘government’ records, and not to personal records of employees that happen to be located on public body premises.” (Submission of the Liquor Distribution Branch, paragraph 7.07) (Thus a public body does not have custody of the wallet or purse of an employee, a personal scheduler of non-work related activities, or a “diary,” in the traditional sense of the term, that an employee stores at work for privacy and safekeeping, and perhaps even writes in during lunch breaks at work. This does not mean, however, that the public body should automatically accept an employee’s assertion that a document does not contain any work-related information. A proper review of the document, and the circumstances surrounding its creation, must be conducted.)

The Liquor Distribution Branch's position on control issues with respect to the diary includes the following points:

- “...in order for a public body to have control over a record for the purposes of the Act, the public body must have a legal right to obtain a copy of the record in order to respond to a request under the Act.” (Submission of the Liquor Distribution Branch, paragraph 7.09) (I agree)
- “...the Public Body submits that a handing over of a record to a public body on the mistaken assumption that this was required does not give the public body control over the record.” (Submission of the Liquor Distribution Branch, paragraph 7.12) (I agree)

The Liquor Distribution Branch's ultimate position is that its store manager made a mistake when she forwarded her diary to the Liquor Distribution Branch's Information and Privacy Office:

She did not know that she did not have to send records that were not in the custody or under the control of the Public Body. The fact that she sent it does not imply that the Public Body has any right to obtain it; it was simply sent in error. (Submission of the Liquor Distribution Branch, paragraph 7.11)

The Liquor Distribution Branch submits that the diary in dispute is a 'personal record' of the Store Manager, not a record of the public body. (Submission of the Liquor Distribution Branch, paragraph 7.15)

I have read all of the store manager's twelve pages of handwritten entries, prepared over the course of three months, about the behaviour of the applicant in this inquiry. (I regret that I cannot describe the diary and its circumstances in greater detail without revealing *in camera* submissions.) It is evident that she was keeping this "record" about a customer in the context of her employment as store manager of this particular store. I note that there is nothing in the "diary" about anything other than the series of episodes involving this applicant, which makes it quite an unusual "diary" in the normal sense of the term. It is a record pertaining to a particular customer and various employees of the Liquor Distribution Branch. The record was created within the employment relationship and for purposes related to the store manager's role. As such, the Liquor Distribution Branch has the legal right to obtain a copy of the record to respond to this request under the Act.

I find that the store manager's diary is a record under the Act and is in the custody, or under the control, of the Liquor Distribution Branch. The Liquor Distribution Branch must now apply the exceptions under the Act to this record and then provide the applicant with a decision regarding its disclosure.

10. Order

I find that the Liquor Distribution Branch is required to refuse access to the information in dispute under section 22 of the Act. Under section 58(2)(c), I require the head of the Liquor Distribution Branch to refuse access to the information in dispute.

I find that the Liquor Distribution Branch was authorized to withhold information in the records in dispute under sections 13(1), 14 and 19(1) of the Act. Under section 58(2)(b), I therefore confirm the decision of the Liquor Distribution Branch to refuse to disclose the information withheld under sections 13(1), 14, and 19(1) of the Act.

I have concluded that the store manager's diary is a record in the custody or under the control of the Liquor Distribution Branch within the meaning of section 3(1) of the

Act. Under section 58(3)(a), I require the head of the Liquor Distribution Branch to respond under sections 4(2) and 8(1) of the Act to the applicant's request for records regarding disclosure of the store manager's diary.

David H. Flaherty
Commissioner

May 7, 1999