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

ORDER PO-2594

Appeal PA-060102-1

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

> A copy of any report giving the amount of aggregate hauled from [a named gravel pit]…managed by a [named company] during the years of 1999 to the present. Presumably these reports are held by the Ministry of Natural Resources.

After locating a record containing the responsive information, the Ministry issued a decision letter to the requester which stated:

> I have decided to deny access to the record indicating the amount of aggregate hauled for a [named] pit under section 17 of the *Act*, where disclosure of the record would "prejudice significantly the competitive position." This provision applies to the record because it contains the tonnage production from a specific gravel pit. Further more, MNR Policy No. AR.9.02.00 states that the tonnage portion of the Production Report is confidential.

The requester, now the appellant, appealed this decision to the Commissioner's office. Initially, I sought representations from the Ministry and the named company (the affected party). I received representations from both the Ministry and the affected party. After reviewing those representations, I decided that it was not necessary for the appellant to make any representations in order to dispose of the issues in this appeal.

The record at issue in this appeal consists of two pages. Each page contains a one-line spread sheet. The first spread sheet identifies the affected party and the location of the named gravel pit. The second spread sheet provides the tonnage production for the pit for the years requested.

THIRD PARTY INFORMATION

The Ministry claims the responsive information is exempt under the mandatory exemption in section 17(1)(a), which states:

> 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, if the disclosure could reasonably be expected to,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

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 paragraphs (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: Type of Information

The record in this appeal deals with the statistical tonnage production from a gravel pit operated by the affected party. In its representations, the affected party points out that licence fees in this industry are paid at a per tonne rate determined by the *Aggregate Resources Act*. The Ministry takes the position that the records qualify as "commercial information" as defined in past orders of this office, i.e., information that relates solely to the buying, selling or exchange of merchandise.

In my view, the information in the record qualifies as commercial information for the purposes of section 17(1) given the definition of those terms in previous orders from this office. As noted by the Ministry, commercial information has been found to relate to the buying, selling or exchange of merchandise or services, and I am satisfied that the gravel pit's tonnage information meets this definition.

Accordingly, I find that the first part of the test is met.

Part 2: Supplied in Confidence

In its representations on the application of the second part of the test, the Ministry states:

> …the information is required to be submitted by section 14.1 of the Aggregate Resources Act and by clause 1 of the Regulation made pursuant to that Act. In submitting the information, the affected party is supplying the information as contemplated by the Freedom of Information and Protection of Privacy Act.
>
> Ministry staff has always treated this information as confidential. In the User Guide for the Aggregate and Permit System (ALSP) which is the computer

> system by which the aggregate information is stored and accessed by the Ministry, it clearly provides on page 2 that some information is confidential and that production data for individual licensee[s] should not be released/divulged to anyone outside of the Ministry. Most aggregate producers, like the affected party, are aware that it is the Ministry policy and practice to treat tonnage information as confidential.

The affected party explains in its representations that it relies on the Ministry guidelines and policies which state that this information is confidential and that the Ministry will refuse any request for access to the information. The affected party attached to its representations copies of a Ministry policy from 2006 which the affected party interpreted to mean that production reports will not be disclosed in response to requests made under the *Act*.

As noted in the Ministry's representations, the *Aggregate Resources Act* and the related regulation require pit and quarry licensees to make annual reports to the Ministry showing the quantity of material removed from their sites. I am satisfied that the information in these reports is supplied to the Ministry as contemplated by section 17(1) of the *Act*.

The Ministry's representations also refer to two orders issued by this office that support the position that production information is supplied to the Ministry in confidence. In Orders P-725 and P-925, Inquiry Officer Mumtaz Jiwan found that information relating to the production of quarries, amount of tonnes excavated and royalties and deposits payable was information that was supplied to the Ministry implicitly in confidence.

Based on the affected party's representations and the approach adopted in the two orders cited above, I am satisfied that the affected party supplied this information to the Ministry implicitly in confidence and that the second part of the test has been satisfied.

Part 3: Harms

I note that a long line of orders from this office have established that the party or parties resisting disclosure, in this case the Ministry and the affected party, must present detailed and convincing evidence of the harm alleged. Specifically, these parties must describe a set of facts and circumstances that could lead one to conclude that there is a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed. Speculation of possible harm is not sufficient. In the present appeal, I have concluded that insufficient evidence has been presented for me to reach such a conclusion.

In its representations, the affected party states:

> Part 3 of the test is met under Section 17(1)(a) as disclosure of the information will prejudice our competitive position. The information is tonnes sold from a pit and our competitors are not aware of the volume we ship. Knowing volumes

> would alert them to the size of our market and cause them to focus efforts on taking some of that market share from us.

Further, the affected party states:

> …we are negotiating lease arrangements for gravel extraction from lands in the area of the pit. It would be disadvantageous to have either the landowners or our competitors learn the tonnage being shipped from the pit nearby.

The affected party does not however, go on to provide any detail as to why or how these harms would result from the disclosure of the record.

The Ministry states:

> The aggregate industry is a highly competitive business. There are many pits and quarries in the general vicinity of the affected party's operation that can provide the same material as the affected party. Any information regarding the production or reserves of the affected party may be used by a competitor to gain an unfair advantage when bidding on a contract.

Again, the Ministry has not provided me with the necessary evidentiary link between the disclosure and the harm alleged.

In Order PO-2435, I commented on the lack of particularity often present in representations provided to this office in support of a claim under section 17(1) of the *Act*. In that order, I stated:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

I am not persuaded by the representations of either party that the disclosure of this record could jeopardize or harm the affected party in the marketplace as required under section 17(1). The concerns raised by the parties are general and lack specifics of the kinds of harms or interference expected as a result of disclosure.

The affected party and the Ministry have made general statements regarding the harms that could result from the disclosure of the requested record. However, specific questions remain unanswered:

- The affected party claims that disclosure of these amounts will alert competitors to the size of their market and cause them to focus efforts on taking market share away. However, the affected party does not connect the size of its market to the effort expended by other companies to gain a competitive advantage. Presumably companies are always attempting to take business away from competitors even in the absence of specific knowledge of the size of the competitors' operations.

- While the affected party may not want landowners in the area to know the specific tonnage of aggregate removed from the site, it does not explain how this knowledge will put it at a disadvantage in negotiating leases on additional lands. Left unanswered is the impact that the relative size of aggregate extraction has on negotiating leases for other properties in the area.

- I accept the Ministry's statement that the aggregate industry is a "highly competitive business." However, no detail or evidence is provided to support the statement that the disclosure of production information may be used by a competitor to gain an unfair advantage when bidding on a contract. As noted above, no detail is provided to me to indicate that the size of the affected party's tonnage will increase or decrease the efforts of competitors to compete for contracts.

The Ministry's representations make reference to the reporting requirements of the *Aggregate Resources Act*. I note that a licence from the Ministry is required to operate a pit or quarry in Ontario. That licence sets as a condition the maximum number of tonnes of aggregate that may be removed from the site in any calendar year.

This maximum amount is also set out in the licence application which the Ministry is required to post on the environmental registry under the *Environmental Bill of Rights* for a minimum of 30 days. This posting provides the public and/or the municipality with an additional opportunity to comment on the proposal. As a result, although the exact amount of aggregate removed by an operator in a particular year will not be publicly available, the approved amount will be public knowledge. The general public, including competitors, will therefore have some knowledge of the general parameters of aggregate removal from any particular pit or quarry. This makes the need for very specific evidence of the harm that could result from the disclosure of the *actual amount* even greater. Such evidence is lacking in this case.

Finally, reference has been made to Orders P-725 and P-925 by the Ministry. Those orders are cited above to support the position that information in the record at issue in this case was supplied to the Ministry by the affected party in confidence. I note, however, that the orders came to different conclusions when determining whether the third part of the section 17 test had been met. In Order P-725, Inquiry Officer Jiwan found that the third party company had

provided detailed representations on the negative impact that disclosure of the information in the records would have on its competitive position and upheld the Ministry's decision to deny access to the record. However, in Order P-925, Inquiry Officer Jiwan came to the opposite conclusion, based on the lack of evidence of harm before her. These cases, cited by the Ministry, clearly point out the need for detailed and convincing evidence of the harm that could result from disclosure.

Based on my review of the representations and the record itself, I do not find that the necessary supporting evidence was tendered to satisfy the requirements of the third part of the test. Because all three parts must be met, I find that the record at issue does not qualify for exemption under section 17(1) of the *Act* and I will order the Ministry to disclose it to the appellant.

ORDER:

I order the Ministry to disclose the withheld information contained in the records to the appellant no later than **August 15, 2007** but not before **August 10, 2007**.

Original signed by: July 11, 2007
Brian Beamish
Assistant Commissioner