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

ORDER PO-2043

Appeal PA-010208-1

Ministry of Northern Development and Mines

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NATURE OF THE APPEAL:

The Ministry of Northern Development and Mines (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to three specific Mining Licences of Occupation (MLO), dated May 6, 1947, December 17, 1951 and December 27, 1928, respectively. Specifically and in respect of each of the licences, the requester sought access to:

a) all copies from date of issue to present of invoices of rents payable;

b) all records from date of issue to present indicating date and amount of payments made under each;

c) all copies from date of issue to present of receipts issued or acknowledged by the Treasurer of Ontario in respect of payments received under each;

d) all copies from date of issue to present of default notifications prepared and/or delivered under each and

e) any and all documents relevant to the issue whether each of the licences is actually or potentially void. "Documents" in this context should be understood to include any and all notes, memoranda, e-mail writings, disks saved documents, and fax copy correspondence.

In making this request, the requester referred to section 63(2) of the *Act*, which provides that "this *Act* shall not be applied to preclude access to information that is not personal information and to which access by the public was available by custom or practice immediately before this *Act* comes into force". The requester indicated that a former Senior Policy Advisor, Chief Mining Recorder and Supervisor responsible for forfeitures in the Mining Lands Section of the Ministry advised that the records responsive to this request were available to the public from at least 1951 until 1988, where his knowledge ceases. The requester contended that since the custom and practice was that these records were available to the public immediately before the *Act* came into force on January 1, 1988, it is legally entitled to see them.

The requester indicated further that it does not believe that section 17(1) should apply to the records because "it is against public policy as enacted in the *Mining Act* to keep the payments confidential, because all open Crown mineral rights may be staked and recorded." The requester also took the position that the records at issue record payments that are legally required to be made to the Ministry.

The Ministry provided a fee estimate of $1,406.30 in respect of search time and photocopying costs. The Ministry indicated that an estimate of the preparation cost for records to be disclosed had yet to be determined. The requester paid the estimated fee.

Pursuant to section 28 of the *Act*, the Ministry then notified two companies, whose interests may be affected by the disclosure of the records. One of the companies (Company A) holds ownership of the first two Licences, and is co-holder with the second company (Company B) of

the third Licence. The two companies (the third parties) objected to the disclosure of the responsive records. In so objecting, Company B, in addition to making its own submissions, referred to and relied on the submissions made by Company A.

The Ministry notified the third parties that it had decided to grant access to the records, as it was of the opinion that section 17(1) of the *Act* did not apply to them. The Ministry subsequently advised the requester that it had decided to grant access to the responsive records, subject to the third parties' right to appeal. The Ministry also indicated it would remove information that it deemed to be non-responsive from the records.

Company A appealed the Ministry's decision to grant access to the requester. The requester did not appeal the Ministry's decision to withhold non-responsive information.

Mediation of the appeal initiated by Company A was not successful and the appeal was moved to inquiry. I decided to seek representations from Company A, initially. Although Company B did not appeal the Ministry's decision, I notified it as an affected party in this appeal and sought submissions from it on the issues to be adjudicated.

Only Company A submitted representations in response, which I then sent to the requester and the Ministry along with a copy of the Notice of Inquiry, amended to reflect matters arising from Company A's representations, in particular, Company A's contention that the Ministry did not sever out all of the information that was not responsive to the request.

Both the Ministry and the requester submitted representations in response. After reviewing them, I decided to seek representations in reply from Company A, but only with respect to the possible application of the mandatory exemption at section 17(1) of the *Act*. In doing so, I enclosed a copy of the Notice of Inquiry that was sent to the Ministry and requester along with the portions of their representations that address the section 17(1) exemption. I also attached certain portions of the Ministry's and requester's representations that address section 63(2) since they may also be relevant to the application of section 17(1). Because of the findings I have made in this order, it is not necessary for me to consider the possible application of section 63(2).

Resolved Issue

In its submissions, Company A expressed concern regarding the scope of the responsive records identified by the Ministry. In bringing this forward, Company A effectively raised a new issue in this appeal, which I subsequently asked the other parties to address.

With respect to this issue, the Ministry agreed, upon review, that the severing it initially did was not in accordance with the scope of the request. The requester also indicated that he has no objection to all non-responsive information being removed from the records at issue. On this basis, the scope of the responsive records issue has been resolved and I will not address it further.

As a result, the sole issue to be adjudicated is whether the mandatory exemption in section 17(1) of the *Act* applies to the information at issue.

RECORDS:

The records include invoices, receipts, copies of cheques and correspondence. Only the portions of these records that the Ministry has decided to disclose are at issue in this appeal.

DISCUSSION:

THIRD PARTY INFORMATION

General

For a record to qualify for exemption under section 17(1), the party resisting disclosure, in this case Company A, 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 (a), (b) or (c) of subsection 17(1) will occur.

[Orders 36, P-373, M-29 and M-37]

The Court of Appeal for Ontario, in upholding Order P-373 stated:

> With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers. Lastly, as to Part 3, the use of the words **"detailed and convincing"** does not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it

> cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

Type of information

Company A submits that the records contain commercial and financial information.

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. [Order P-493]

The term "financial information" refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. [Orders P-47, P-87, P-113, P-228, P-295 and P-394]

Company A states:

> [Company A] agrees with the definition of "financial information" as set out in the Notice of Inquiry … However, [Company A] submits that the definition of "commercial information" under the cases is broader than the narrow definition cited in the Notice of Inquiry …

Company A describes the information that will be revealed if the records are disclosed, which it contends is "commercial" information, such as the rent actually paid, the dates and amount of payments made, its cheques and internal invoice numbers and voucher numbers, and handwritten references to its internal property code file numbers. Referring to a number of dictionary definitions of this term as discussed in Order P-493, Company A submits:

> "Commercial information" is broadly construed to include information pertaining to or relating to or dealing with commerce. "Commercial information" has been defined as information that relates to the buying, selling or exchange of merchandise or services. It includes invoices and the related notes or correspondence that would reveal the details of services provided or remuneration paid. Indeed, it was found in the *Ontario Hydro* case (P-1705), that where the records containing details of the services and remuneration paid by Hydro to the Third Party's company for the provision of consulting services, "it is clear from the face of the records that they contain commercial and financial information".
>
> Any records containing information which is capable of industrial or commercial application and which has, thereby, an independent commercial value qualify as "commercial" information.

> The exploration and acquisition of mining properties is a fundamental aspect of [Company A's] "commercial" activities.
>
> …
>
> In this case, the property "bought" or acquired by [Company A] were the mining rights described in the MLO's. Prior to obtaining these licences, [Company A] had staked the underlying mining claims and had paid for all the exploration work necessary to become entitled to the MLO's. The price or remuneration payable for the exploration rights granted by the MLO's is the rental due under the licenses of occupation … The information pertains specifically to [Company A's] commercial activities at these properties.

The Ministry acknowledges that the records contain some financial information, stating: "the ministry determined that the amounts due and amounts paid on invoices and receipts respectively were the only financial information and the dates paid were not". The Ministry does not address whether the records contain commercial information.

The requester contends that the payment records consist of "bald invoices and cheques – they contain no subjective information". Although it does not necessarily accept Company A's argument regarding internal invoice numbers and voucher numbers, the requester indicates that it does not require this information and that it does not object to it being severed from the records. At another place in its representations, the requester states:

> This particular case involves accessing information necessary to determine the status of rights affecting Crown/Public Lands. These documents are necessary to determine the status of those rights.

Given the requester's stated purpose in requesting the records and its declaration (above) that certain information is not required for its purposes, I consider Company A's internal invoice numbers and voucher numbers to fall outside the scope of the records at issue in this inquiry. Therefore, this information should not be disclosed to the requester.

Apart from that, the requester takes the position that the records do not contain commercial information and that the only financial information in the records is already public information. Although public availability of information may be relevant to Parts 2 and 3 of the section 17(1) test, it has no bearing on my finding regarding the type of information contained in the records (see: Order MO-1559).

On review of the records, I agree with the Ministry that a number of them contain references to the amounts due or paid with respect to rent and/or taxes. I find that this information meets the definition of "financial information" as defined above.

All of the records at issue pertain to the MLOs held by Companies A and B. While it may be arguable that the types of records at issue are peripheral to the actual commercial activity involved in mining at these sites, they relate to a necessary aspect of this business since obtaining

(and paying for) a MLO is a condition precedent to being able to commence mining at the specified location. Even if the activity could not be directly or indirectly linked to the actual business of the commercial entity, I do not accept the requester's position that section 17(1) cannot apply to it. In my view, the negotiations that precede entering into a "rental agreement" constitute commercial information as it relates to the buying, selling or exchange of goods or services in the sense contemplated by the definition cited above. Similarly, records that reflect the on-going exchange of goods or services also qualify as commercial information. Accordingly, records that relate to each transaction pertaining to the maintenance of the commercial relationship would qualify as commercial information, such as invoices and receipts of the payment transaction, which support the continuation of the lease.

That being said, not all records pertaining to a commercial transaction or a commercial enterprise qualify as "commercial information" on this basis alone. I do not accept Company A's argument that commercial information should be as broadly construed as it suggests. In my view, there must be a direct connection to the buying, selling or exchange of goods or services. This view is reinforced by comments recently made by Assistant Commissioner Mitchinson in Order MO-1564 (addressing whether the records in that appeal qualified as "commercial information" under section 11(a) of the Municipal *Act*):

> MPAC refers to previous orders of this office that have identified commercial information as information such as "price lists, lists of suppliers or customers, market research surveys and other similar information relating to the commercial operation of a business", and points out that it is in the "business" of producing property values, and that the information in the records is used by MPAC both in its day-to-day operations as well as the development of products that have commercial value and application.
>
> I do not accept MPAC's position. The information contained in the records is the technical information and formulae used to produce assessment information. Unlike the "price lists, lists of suppliers or customers, market research surveys and other similar information relating to the commercial operation of a business" referred to by MPAC, the information in the records is the actual product of the work done by MPAC. It does not contain information relating to the actual commercial operation of MPAC.
>
> Furthermore, the fact that this information can be marketed or sold by MPAC does not make it "commercial information", regardless of what the "business" of MPAC is. In Order P-1114, I specifically rejected the "commercial value" argument in relation to the meaning of "commercial information" under the comparable provincial legislation. I also addressed the issue in Order P-1621-I, where I stated:
>
> > … The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information. These two aspects of the exemption must be considered separately. Unless the records themselves contain commercial information, the fact that the

> format in which the information is stored may give the record monetary or potential monetary value will not, on its own, bring the record within the scope of section 18(1)(a).
>
> If considerations of potential commercial value were in themselves determinative of the character of the information, enormous amounts of government information would qualify as "commercial information" which, in my view, could not have been the legislature's intention, and would be inconsistent with one of the fundamental principles of the *Act*, that exemptions from the right of access should be limited and specific.
>
> Further, in a decision quashing Order P-373, in which I applied this interpretation of "commercial information", the Divisional Court alluded to the commercial value of information to the requester in concluding that I had erred in finding that the information was not "commercial". (The Court said that the information had a "commercial effect" because the requester was "in a commercially related business"). However, the Ontario Court of Appeal recently overturned the Divisional Court's decision and restored my Order P-373. The Court of Appeal found that "the Commissioner adopted a meaning of the terms [including "commercial information"] which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable" (see *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1995), 23 O.R. (3d) 31 (Div. Ct.); reversed on appeal, unreported decision, dated September 3, 1998 (Ont. C.A.)).

For the same reasons, I find that the records at issue in this appeal do not contain "commercial information" for the purposes of section 11(a).

Accordingly, information pertaining simply to the "status" of the relationship between the Ministry and Company A or the "status" of Company A vis-à-vis other parties does not qualify as "commercial" as that term has been defined by this office. A number of records at issue fall into this group of records, such as a Ministry of Natural Resources (MNR) telecommunication (Record 1 re: the December 27, 1928 MLO), a letter relating to the status of Company A as a co-owner of this MLO (Record 59) and internal Ministry administrative documents which reflect the amount of rents received and their allocation (although this last group of records contain financial information and thus qualify on this basis). The remaining records document the on-going rental transactions and therefore qualify as commercial.

Based on the above, only Records 1 and 59 fail to meet the first part of the section 17(1) exemption test. Although it is not necessary for me to consider parts 2 and/or 3 for records that do not meet the other part(s) of the section 17(1) exemption test, Company A has made extensive

representations on the records, collectively, and I will, therefore, address all three parts with respect to all of the records at issue.

Supplied in confidence

To meet the second part of the test, it must be established that the information in the records was actually "supplied" to the Ministry, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Ministry (Orders P-203, P-388 and P-393).

In regards to whether the information was supplied "in confidence", part two of the test for exemption under section 17(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly (Order M-169).

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 which would not entail disclosure.

[Order P-561]

In explaining why it decided to disclose the records at issue, the Ministry states:

> [The amounts due and amounts paid on invoices and receipts] had not been supplied in confidence as records and information created by the ministry cannot be supplied to the ministry by a third party and the amount is not confidential as it can be easily calculated using publicly available information. The rental amount for an MLO is the product of a fixed rental rate and the area covered by the MLO in either acres or hectares. The annual rental rates for MLO's are set by regulation (Ontario Regulation 113/91, as amended) and the area covered by a MLO is available from Mining Lands Dispositions

Company A notes that many of the records, such as cheques, internal property code file references and correspondence from it to the Ministry were actually "supplied" by it to the Ministry. Moreover, Company A asserts that information contained in documents prepared by the Ministry would reveal information supplied by it, such as receipts issued by the Ministry. In this regard, Company A states:

> The dates on which this Information was supplied are on or about the various dates on which the correspondence or cheques were sent by [Company A] to the Ministry, or when the contemporaneous receipts were issued. The information was supplied in order to pay the annual rent due for each MLO. Given the passage of time … it is impossible to say who provided the Information but, generally speaking, it would have been provided by employees at [Company A] who were responsible for paying accounts, in the accounts payable or tax departments …

Company A acknowledges that none of the information in the records at issue was provided explicitly in confidence, but in arguing that there was an implicit expectation of confidentiality, Company A states:

> While none of the Records were expressly marked "private and confidential", the payments were made to the [Ministry] and its predecessors by [Company A] pursuant to the confidential business relationship between the parties. It is submitted that [Company A] had a reasonable expectation that such payment Information would be held by the [Ministry] in confidence. Denault, J. noted the following in considering similar provisions under the federal *Access to Information Act*:
>
> > There is a public interest in ensuring that government acts in good faith regarding confidential information that is received by it. … I find that given the government's duty to act in good faith, there is a public interest in fostering the confidential nature of the relationship with the third party. …
>
> In addition, [Company A] consistently treats information about its mining properties, including the payments being made for such properties, as confidential.
>
> In accordance with [Ministry] practice and industry custom, the [Ministry] treated details of the payments requested and received as confidential to the parties. The Records of the [Ministry] which contain [Company A's] confidential financial and commercial Information, or which would permit the drawing of accurate inferences with respect thereto, were not prepared by the [Ministry] for a purpose that would entail disclosure to third parties in the ordinary course.
>
> …

> While the rent payable can perhaps be calculated by reference to the MLO acreage and the rates established by the *Mining Act* and the regulations thereunder from time to time, the actual payment dates as established by the cheques, the cheques stubs, the receipt stamps or other notations on the invoices and as disclosed in the receipts themselves are not known to anyone other than the relevant employees of the [Ministry] and of [Company A].

Company A describes the manner in which information such as that at issue is maintained by it and the security precautions it takes in maintaining confidentiality, and asserts that "this confidential commercial information about [Company A's] mining properties is not available from public sources.

On a related note, Company A points out that although the requester has had access to and reviewed some of the information at issue through its litigation with Company A, such access was subject to both an implied undertaking as to confidentiality and the Mining and Lands Commissioner's Orders with respect to confidentiality

The requester takes the position that the information at issue was not supplied by Company A because the records were generated by the Ministry:

> For instance, the date on which the payments were received is not information that was ever in [Company A's] possession. [Company A] can't know when mail arrived at [the Ministry] and therefore can't know dates of receipt. Those dates are determined and recorded by the government. Whether or not the payments met the requirement of the property is also a determination of the government, therefore a record of the government not [Company A]. That information does not exist until the government creates and records it.

The requester submits that the information at issue relates to "simple administrative function" by either Company A's or the land management office's accounts payable. The requester argues further that the records do not pertain to Company A's "commercial activities" on the properties but rather, only to the payment of rent, and contends that "there is nothing confidential about that". Responding to Company A's arguments, the requester states:

> [Company A's] commercial activity is mining. Cheques and receipts contain no references to what mining or other activities were taking place on the property. There is no evidence presented to suggest otherwise.
>
> …
>
> …[Company A] sent these documents (cheques) to make a statement to the public that they were retaining the rights under the MLO's …
>
> Records were not confidential nor intended to be kept confidential by [Company A]; they were provided to prevent the MLO from becoming void, pursuant to its terms. Even now the Mining Act requires that non payment of taxes or rental be

> published in newspapers. Clearly it is public information. (See subsection 197(2), the Mining Act …
>
> In making payments, [Company A's] payment information was then transferred to other public documents, like claim maps including valid MLO's kept by the Mining Recorder for public review; [Company A's] making payments under the MLO's was a very public act, to signal that the MLO's it purported to hold remained valid in part as a result of [Company A's] timely payment.
>
> [Company A's] alleged "confidential business relationship" with [the Ministry] does not exist, and [Company A] offered no evidence to demonstrate this supposed relationship. Indeed, [the Ministry's] ordering disclosure of these records demonstrates that [the Ministry] does not acknowledge any such "confidential business relationship".
>
> …
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> [T]he Mining and Lands Commissioner for Ontario does not bind the FOI process, as the consideration made by the Mining and Lands Commission did not address [Freedom of Information] considerations.

In responding to the issues relating to the application of section 63(2) of the *Act*, the Ministry discusses the type of mining related information that is available to the public, noting that a large amount of this type of information is so available under the *Mining Act* (with specific reference to section 8). Section 8 of the *Mining* Act states that "every document filed and recorded in the Provincial Recording Office may be inspected during office hours on payment of the required fee". The Ministry notes, however, that the records at issue are neither filed nor recorded in the Provincial Recording Office, and that they are therefore not part of the public records held at that office (either prior to the *Act*'s introduction or after).

Referring to Mining Lands Section policies and guidelines relating to access requests under the *Act*, the Ministry comments on information relating to taxes and rent:

> Information on taxes and rent are personal in nature and therefore are not automatically available, even if they were available before [the *Act*] came into being.
>
> **TAXES/RENT** – Any third party enquiries on taxes and rent will be refused unless the enquirer has written permission of the person/company about whom they are enquiring. If a company is giving permission then the letter must be on company letterhead.
>
> If the enquirer insists on an answer, then that person/company can make a formal request under [the *Act*].

With respect to MLOs, the Ministry's policy states:

> However, any financial questions will be refused unless the licensee gives written permission.

The Ministry indicates that it was unable to locate any policies, procedures or guidelines relating to the treatment of this type of information prior to the *Act* coming into force.

In response to the requester's submissions, Company A reiterates that the information contained in the records was "supplied" by it to the Ministry, stating:

> [I]t has indeed supplied the information to the Ministry, to enable the [Ministry] officials to record the same. Based on the decision in Order PO-1912 at pages 7 and 9, [Company A] agrees that the [Ministry] officials created these documents in response to their express or implied statutory responsibility to maintain records of payment. Nonetheless, [Company A] submits that it does not matter who actually creates the piece of paper; the issue is whether the information in that piece of paper in confidential information "supplied" by the third party…
>
> Company A also takes issue with certain statements made by the requester relating to the public availability of the information contained in the records, by virtue of section 197 of the *Mining Act* or by reference to the claims maps.

With respect to the reasonableness of its expectation of confidentiality, Company A states that the Ministry maintains "confidential business relationships" with all of its "clients", including Company A and the requester. Referring to the "Wigmore" test for confidentiality (cited and applied in Order P-561 above), Company A states:

> [Company A] and everyone else in the mining industry who is required to deal with the [Ministry] concerning their most critical business information, being information concerning its mining properties, communicates information to the {ministry] in confidence, they *reasonably expect* such information to be maintained in confidence, the element of confidentiality is essential to the full and satisfactory maintenance of the relationship between the [Ministry] and [Company A] … and, for over 100 years, this confidential relationship has been promoted and fostered by the mining community, for the benefit of the citizens of Ontario.

Company A recognizes that:

> … the *Act* has established the right of the public to disclosure of certain information as outlined in the *Act*, and that the [*Act*] would, in some circumstances, override the equitable duty of confidence. But that does not change the fact that [Company A] has a *reasonable* expectation that its payment information and the Records at issue would be kept in confidence.

Some of the records at issue were clearly sent by Company A and/or B to the Ministry (for example, cheques, vouchers and some correspondence). The remaining records were created by the Ministry. To a large extent, these records reflect the very information that is contained in the records that were sent to the Ministry by Company A and/or B. As previous orders (cited above) indicate, even though a record is created by Ministry staff, where its disclosure would "reveal" the information that was supplied by a third party, that information also qualifies as "supplied" within the meaning of this section.

Previous orders have also considered whether information obtained by institutions pursuant to statutory requirements is supplied within the meaning of the *Act*. These orders have distinguished between those cases where information is independently gathered/ calculated/observed by government staff in the performance of their on-site inspections (for example, Orders P-373, P-1392 and P-1614) and those where the third party has actively participated in providing the information to the government body (Orders P-345 and P-1614, for example). In general, these orders stand for the proposition that it is the factual circumstances relating to how the information came into the government's hands that determines this issue; not merely that it was required to be provided by statute. I agree with this line of orders and find that the requester's arguments in this regard do not support a conclusion that the records or information were not supplied.

That being said, the factual circumstances of this case are somewhat different from those just referred to. In this case, the amounts owing are established by the Ministry in accordance with set legislated rates. Company A is effectively returning the amounts as set by the Ministry, and the question is, whose information is this? In considering this question, I have taken into account the purpose of section 17(1) of the *Act* as it was articulated in *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):

> . . . The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

I am also mindful of the Legislature's reasons for including the section 17 protections to information belonging to third parties, as noted by Senior Adjudicator Goodis in Order PO-1805:

> In order to understand the significance of the Hydro/WANO arrangement for the application of the section 17(1), it is useful to understand the purpose of the exemption and the mischief it is intended to address within the context of access to information legislation. Section 17 of the *Act* is designed to protect the "informational assets" of businesses or other organizations which provide information to government institutions. This exemption does not protect

"informational assets" of government institutions. Information of that nature is covered by section 18, which I will consider later in this order when dealing with Hydro's submissions. As stated in *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):

> In the course of discharging their responsibilities to the public, governmental institutions collect substantial amounts of information about the activities of business firms. Some of this information, such as trade secrets, constitutes a valuable asset, and disclosure would impair a firm's ability to compete effectively in the marketplace.
>
> . . . . .
>
> . . . disclosure should not extend to what might be referred to as the informational assets of a business firm -- its trade secrets and similar confidential information which, if disclosed, could be exploited by a competitor to the disadvantage of the firm . . .
>
> . . . [W]e believe that the exemption should refer broadly to commercial information submitted by a business to the government . . .
>
> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added].

As I found above, some of this information qualifies as technical information. However, the originating source of the technical information in the records is Hydro: specifically, Hydro's staff, documents and the nuclear facilities themselves. While WANO, in one sense, may be said to have supplied information relating to "issues and problems" identified by WANO in the course of its reviews, to the extent that this information constitutes technical information,

> it is derived from, and relates to, Hydro's nuclear facilities, and not the operations or undertaking of WANO or any other party.
>
> None of the information contained in the report, including the identification of issues and problems, can properly be characterized as the informational assets of WANO… [emphasis in the original]

I find that the vast majority of the information at issue actually originated with the Ministry in the first place and disclosing it could not be said to reveal information originally supplied by Company A (see, for example Orders MO-1199-F and MO-1364). The rationale for finding that information in a contract is typically not supplied, as discussed in Order MO-1553, for example, is also, in my view, relevant to my conclusion with respect to the rental amounts. As a result, I find that the information pertaining to the rents owing/paid in the records (either those sent to the Ministry or created by it) was not supplied.

Moreover, based on the nature of the records and, as the Ministry notes, the fact that these amounts can be readily calculated from publicly available information, I find that any expectation Company A (and/or B) has with respect to their confidentiality is not reasonable.

I also agree with the requester that the receipt dates were not supplied, nor would their disclosure reveal information supplied by Company A. Even if it could be argued that disclosure of this information would reveal the due dates for receipt of payments, these dates are reasonably ascertainable in publicly available records (the MLOs themselves) and there could be no reasonable expectation of confidentiality with respect to them.

In coming to this conclusion, I recognize that the Ministry's policy with respect to disclosure is to withhold from a requester where the request is made outside of the *Act* and the licencee objects, and to require that the request be made under the *Act*. In my view, this policy simply reflects the Ministry's recognition that the *Act* applies to such information and that the disclosure of records must be considered in accordance with it.

Based on the above discussion, I am not persuaded that the information at issue was supplied to the Ministry with a reasonable expectation of confidentiality. Accordingly, I find that Company A has failed to satisfy the second part of the section 17(1) test.

Harms

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 17(1) would occur if the information was disclosed (Order P-373).

The words "could reasonably be expected to" appear in the preamble of section 17(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of

probable harm" [see Order P-373, two court decisions on judicial review of that order *in Ontario (Workers'Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)]. [Orders PO-1745 and PO-1747]

In explaining why it decided to disclose the records at issue, the Ministry takes the position that there is no direct connection between the release of the information and a reasonable expectation of harm.

Company A asserts that disclosure of the records at issue could reasonably be expected to result in the harms under sections 17(1)(a) and/or (c). These sections provide:

> 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.

The primary bases for Company A's position are its present "relationship" with the requester and the requester's "publicly disclosed intention of using the Information to stake [Company A's] mining lands". Company A provides extensive representations on these two points. Essentially, it has been, and appears to continue to be involved in a number of disputes with the requester, which have led to hearings before the Mining and Lands Commissioner. Of particular concern, as stated in the requester's Notice of Application, issued in the Ontario Superior Court of Justice, is the requester's intention to:

> …obtain copies of the rental records for the three MLO's listed … to confirm and obtain evidence that they had been in default for one month at several times .. [the requester] intends to record these mineral rights and requires this evidence to place it before the Mining Recorder. If the Mining Recorder disagrees, [the requester] intends to appeal to the Mining Commissioner under Part VI of the *Mining Act* … [emphasis in Company A's submissions]

With respect to the application of section 17(1)(a), Company A states:

> As the [Ministry] and everyone in the mining industry knows, the staking and mining business in Ontario is highly competitive. One of the purposes of the *Mining Act* is to "encourage prospecting, staking and exploration for the development of mineral resources". At the same time, the perceived confidentiality of information provided by a participant in this business to the

> [Ministry] is a cornerstone of the regulatory scheme that benefits all the participants, and which contributes to the success of the mining industry in Ontario.
>
> The disclosure of the Information in these Records to the public is reasonably expected to prejudice [Company A's] competitive position. [Company A] is the main, if not sole, target of [the requester]. Other mining companies and recorded holders of mining licenses of occupation have not been subjected to similar illegal staking and to the expensive and protracted litigation that inevitably follows when the Mining Recorder refuses to accept [the requester's] applications to record statutorily prohibited staking, on the basis that the staking of lands was prohibited by section 30 of the *Mining Act* and that the land is not "Crown land" that is "open" for staking under Sections 1 and 27 of the *Mining Act*… [Company A's] competitive position is therefore affected by reason of these unmeritorious attacks by [the requester]…

Company A submits that the requester's intention and actions to date and anticipated in the future require an "inordinate amount of time" and have the effect of diverting staff and management from their business, in contrast to its competitors which "are not subjected to similar distracting activities". In addition, Company A indicates that it has incurred legal costs to date of over $300,000 as a result of its dealings with the requester, which it notes may not be recoverable.

In regards to section 17(1)(c), Company A submits that the "unrecoverable legal costs" that will result if the requester proceeds to stake the lands included with two of the MLOs and the "unrecoverable costs" of employee and management time dealing with this could reasonably be expected to result in undue loss to it:

> Even though [Company A] maintains that the staking of the lands described in [one of the MLOs] and the intended staking of the [other MLO] lands is illegal and cannot be justified or excused by any reliance on the confidential Information that [the requester] hopes to obtain on this appeal, the fact remains that [Company A] will spend hundreds of thousands of dollars in legal costs in responding to the inevitable appeals to the Mining and Lands Commissioner when [the requester] pursues its publicly stated intention of staking more lands upon its anticipated receipt of the Information. The costs incurred in the prior legal proceedings initiated by [the requester], which have either been dismissed by the Mining and Lands Commissioner or discontinued by [the requester], are good evidence of the extent of the financial loss and undue harm that may be incurred by [Company A] if the Records are released.

In the reply Notice of Inquiry that I sent to Company A, I included the following comments:

> In its representations, the Ministry takes the position that the "harms" described by the appellant do not relate to the disclosure of the information itself, but rather, would depend on the end result of litigation concerning the mining properties at issue. The Ministry submits that there is no direct connection between the release

of the information and a reasonable expectation of harm as required by section 17(1).

The appellant is invited to comment on the basis for the Ministry's conclusions regarding harm. For your reference, I have enclosed copies of Orders MO-1481, PO-1912 and PO-2003, which address claims of "harm" in relation to the pursuit of a legal action. You are invited to comment on the principles enunciated in these orders in responding to this issue on reply.

In response, Company A states:

> The principles in the Orders provided with the Notice of Inquiry do not support [Company A's] prior submissions on the "harm" it reasonably anticipates it will suffer. [Company A] therefore respectfully submits that in the special circumstances of this case, the general principle that "no harm" results from anticipated future litigation ought not to be applied. The frivolous and vexatious litigation commenced by [the requester] and its wholly owned subsidiary seeking to stake a Summer Resort Location and then all the lands within [one of the MLOs] makes this [access] Application distinguishable from the cases cited by the Adjudicator.
>
> In the Court materials referred to in [Company A's] original submissions, [the requester] made an unequivocal statement, based on the sworn affidavit of [the Land Manager on behalf of the requester], of its intention to use the Records being requested in this [access] Application as the basis for staking lands within [two of the MLOs]. Thus, there is not merely an apprehension of future litigation, which makes this case distinguishable from the facts underlying Orders MO-1481, PO-1921 and PO-2003.
>
> [The requester] have now lost both appeals before the Mining & Lands Commissioner ("MLC"). It has lost both appeals to the Divisional Court. It has paid the costs ordered by the Divisional Court on the first unsuccessful appeal, but costs in the amount of $13,400.98 have not yet been paid, as ordered by the Divisional Court on April 9, 2002, when dismissing the second appeal.
>
> …
>
> The much more substantial costs requested by [Company A] from the MLC in respect of proceedings before that Tribunal have not yet been dealt with, since the decision on costs in the first hearing is reserved, and the costs hearing related to the direct attach on [one of the MLO] lands based on the alleged non-payment of rent (which was in fact paid) was sabotaged by [the requester] launching an appeal to the Divisional Court in the midst of the costs hearing, despite the clear prohibition against interlocutory appeals in section 117 of the Mining Act (copy enclosed). That expensive and unmeritorious appeal is further evidence of the actual harm that [Company A] will suffer if the Records are released and if [the requester] proceeds with the threatened illegal staking.

> There are numerous cases of the highest authority – being the Privy council and later the Supreme Court of Canada – which support the principle that there would be no automatic voiding or forfeiture of any MLO in any event. [The requester's] reiteration of the contrary position, almost a year after the relevant legal authorities were given to its counsel and almost 9 months after it abandoned its second appeal to the MLC because of the evidence and that case-law, is further evidence supporting [Company A's] reasonable expectation of the actual harm that will result from the release of the Records. [The requester] brazenly intends to proceed with more illegal staking, and appeal the required refusal to record the staking to the MLC, even though it cost [Company A] more than $300,000.00 to respond to the appeal from the prior illegal staking before that appeal was abandoned by [the requester] because it was hopeless.

In Order PO-1912, Assistant Commissioner Mitchinson considered whether disclosure of certain records which may be relevant to a particular civil action would result in unfair exposure to pecuniary or other harm, pursuant to section 21(2)(e) of the *Act*. He concluded that any determination of personal liability would be based on a finding to that effect by a court and, therefore, could not accurately be described as being "unfair".

Referring to these conclusions, former Adjudicator Irena Pascoe found that they were similarly applicable to a claim under section 10(1)(c) of the municipal *Act* (the equivalent to section 17(1)(c) of the *Act*) (Order MO-1481). In that case, the records at issue consisted of child care wage subsidy utilization statements. She commented:

> Further, I note that the appellant's concern that the requested information could be used to "either establish or strengthen an anticipated claim for damages" relates to the day care centre whose child care wage subsidy utilization statements the appellant had consented to disclose during mediation. Even if it could be argued that the remaining two statements relating to the second day care centre could also be used for the same purpose, I am not persuaded that this would amount to *undue* loss or gain, as contemplated by section 10(1)(c).
>
> …
>
> In my view, since any damages that may be awarded as a result of the potential legal proceedings in this case would be based on a finding by a court, in my view, this cannot be characterized as an "undue" loss…

In Order PO-2003, I rejected the argument that legal action brought against the appellant constituted "harassment" for the purposes of the exemptions in sections 17(1) and 20 (danger to safety or health). With respect to the section 17(1) argument, I stated:

> Further, the only evidence of "harassment" provided by the third party relates to a small claims court action. I am not persuaded that the pursuit of a legal action against the third party constitutes "harassment" (see, for example: Orders PO-

> 1912 and MO-1481, which discuss this issue generally) or that the pursuit of information under the *Act* is evidence of a continuation of such harassment.

Commenting on the appellant's arguments in this regard again under the section 20 discussion, I concluded:

> The third party has alleged "harassment" on a number of occasions, yet the only written evidence it has provided in support of the allegation pertains to a legal action. As I found above, the pursuit of legal remedies in a court of law does not substantiate a claim of harassment. The fact that the plaintiffs lost is not, in itself, evidence of harassment. The third party does not indicate, for example, that the claim was dismissed as being frivolous or vexatious. Similarly, the fact that there was a dispute between the former students and staff and the school, which ultimately led to the small claims court action is not, in and of itself, evidence of harassment. I stress here that the only evidence presented by the third party of harassment appears to relate to the court action.

The issue to determine in this part of the section 17(1) test is whether disclosure of the information at issue could reasonably be expected to result in one of the harms outlined in sections 17(1)(a) and/or (c). In my view, in order to establish this part of the test, there must be some causal connection between disclosure of this information and the contemplated harm.

In this case, Company A claims that the requester has, and intends in the future, to illegally stake its lands. Company A also asserts that the requester's behaviour in pursuing its legal issues is unmeritorious and amounts to a frivolous and vexatious use of the processes established under and in respect of the *Mining Act*. Company A provides considerable (documented) detail regarding the various legal proceedings that have arisen between them and I have some sympathy for its position. However, Company A's arguments in this regard are more appropriately made to the Mining and Lands Commissioner or the appropriate court in connection with proceedings before them. I am not persuaded that the history between the parties is sufficient to discharge the burden on Company A in establishing a reasonable connection between disclosure of the information at issue and the contemplated harms.

Although it appears that the requester is seeking the information at issue to bolster its position with respect to staking, I am convinced by all of the evidence before me that the requester would take whatever actions it intends to take (based primarily on past actions) regardless of whether it has this information or not. The harms described by Company A that it has experienced, is currently experiencing and anticipates experiencing are all derived from the requester's attitude with respect to this issue and its interpretation and use of the provisions of the *Mining Act*, particularly in its use of the appeals process before the Mining and Lands Commissioner and related legal proceedings. I am not persuaded that disclosure of the information at issue pursuant to an access request could reasonably be expected to result in the harms envisioned by Company A. This is simply another piece of information available to the requester as it pursues its previously established course of action against Company A's interests.

As I noted above, the purpose of the section 17(1) exemption is to "protect the commercially valuable information" of third parties who do business with government. In my view, the harms contemplated under sections 17(1)(a) and (c) must be considered in this light.

Consequently, I find that Company A has failed to provide detailed and convincing evidence to establish a reasonable expectation of probable harm under sections 17(1)(a) or (c) resulting from the disclosure of the information at issue.

In summary, although the majority of the information at issue qualifies as either financial or commercial information, I found above that it was neither supplied in confidence nor could its disclosure reasonably be expected to result in the harms under sections 17(1)(a) or (c). Accordingly, the information at issue should be disclosed to the requester in accordance with the form as severed by the Ministry (following its review of the records in response to Company A's concerns regarding the severances originally made to them and with additional severances made with respect to the portions of the records containing internal invoice numbers and voucher numbers).

ORDER:

1. I uphold the Ministry's decision.

2. I order the Ministry to disclose the information at issue to the requester by providing it with a copy of the severed records by **October 18, 2002**.

3. In order to verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the requester in accordance with provision 2 of this order.

Original signed by: September 13, 2002
Laurel Cropley
Adjudicator