



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER PO-2399**

**Appeal PA-030420-2**

**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 *Act* for access to a geological report on a proposed quarry at a named harbour in northern Ontario. The requester specifically asked for access to the following:

- Geological report received by district geologist for [the named] District, [a named employee], subsequent to August 2003
- Report is on the geology of the proposed quarry at [the named harbour], being undertaken by [a named company] under the consultant, [a named consulting company].
- Request is for entire report including any attached or accompanying correspondence and is required as part of a lands-use clarification process at the Municipal and Provincial level.

The requester is an incorporated ratepayers' organization whose corporate objectives include the conservation, protection and wise management of the natural resources in and around a bay in Lake Superior. The organization is concerned about the possibility of adverse environmental impacts of the proposed quarry. The organization includes individuals who live, work and own property in the vicinity of the proposed quarry.

In representations to this office, the requester explained its reasons for seeking access to this report:

From an early stage in the planning process, [the appellant] has raised concerns about the potential environmental impacts of the proposed mining operations. One of the most significant issues raised [by the appellant] relates to the potential acid mine drainage from the proposed quarry into the adjacent Lake Superior. This potential impact is a direct result of the geological characteristics of the material to be mined. ... [I]ron ore in the area of the subject lands are typically associated with arsenic and sulphur which gives rise to potentially significant health and environmental concerns. ...Blasting and mining operations have the potential to create both surface water, groundwater and air quality impacts relating to the chemical composition of the rock to be mined.

...

The geological information contained in the report is likely to shed light on whether or not these potential impacts are significant in the circumstances.

....

[I]t is the requesters' intention in this case to review the geological data and analysis contained in the record in the context of potential air and water quality impact issues and to retain independent experts to assist in this review.

Initially, the Ministry issued a decision stating that it was unable to provide a decision on access because the report was not in the custody or under the control of the Ministry. The requester appealed that decision to this office (Appeal PA-030420-1). During the mediation stage of that appeal, the Ministry revisited its decision that the record was not in its custody or control and agreed to provide a decision on the access request. Appeal PA-030420-1 was then closed.

Before making a decision on the access request the Ministry notified the company for which the report was prepared (the company, also referred to in representations from the Ministry and the appellant as the third party) and asked for submissions as to whether the report should be disclosed. The company provided submissions in a letter dated April 28, 2004 stating it did not consent to releasing a copy of the report.

The Ministry subsequently issued a decision on the access request that denied access to the requested report. The Ministry's access decision stated:

Following third party notice and after careful consideration of representations provided, I have decided to deny access to the report applying the exemptions under sections 17 (1)(a), (b) and (c).

The report contains technical information supplied to the Ministry of Northern Development and Mines (the Ministry) in confidence by the party. The release of the technical information could significantly prejudice the third party's competitive position and if used cause considerable unnecessary cost to the third party. Further, the information was provided to the Ministry voluntarily and the third party has stated that if released would result in no further information being volunteered to the Ministry.

The requester, now the appellant, appealed the decision to deny access and this office opened Appeal PA-030420-2.

During the mediation stage of this appeal, the mediator contacted the both the appellant and the Ministry to discuss the appeal. In discussions with the Ministry, the mediator noted that seven attachments to the report referred to in the report as Figures 1-7 (which appear to be maps and drill logs) were not sent to our office. The Ministry explained that it provided our office with the report as it was received in its office. The Ministry stated that it never received a copy of accompanying documentation, namely Figs. 1-7. These are therefore not in the Ministry's custody or control and are not at issue in this appeal.

No other issues were resolved through mediation. Accordingly, appeal entered the inquiry stage.

Initially, I sought the representations of the Ministry and the affected party. The Ministry provided representations. The company advised that it did not intend to provide representations but that it continued to object to the disclosure of the record. I then provided the appellant with a

copy of the Ministry's representations and obtained representations from the appellant (through its counsel) in response. As those representations appeared to claim that there is a strong public interest in disclosing the record, I asked the appellant whether it intended to rely on section 23 of the *Act* (the public interest override). The appellant stated that its position is that the record is not subject to an exemption from disclosure; however, in the alternative, it took the position that the record should be disclosed under section 23. The appellant provided representations in support of the application of section 23. As the representations of the appellant contained facts to which the Ministry should have an opportunity to reply, and addressed the new issue of the application of section 23, I invited and received a reply from the Ministry to the two sets of representations received from the appellant.

## **RECORDS:**

The record at issue is a draft geological report on "Grid Geology" of the site of the proposed quarry, dated August 16, 2003, prepared for the company by a geologist. It consists of an eighteen-page geological report with a four-page appendix.

It should be noted that there is also a final report dated April 3, 2004. The appellant has received a copy of the final report from the Ministry of the Environment pursuant to a request under the *Act*. As a result, the only record at issue in this appeal is the draft report.

## **DISCUSSION:**

### **ISSUES:**

#### **THIRD PARTY INFORMATION**

##### **Does the mandatory exemption at section 17 apply to the records?**

As indicated earlier, the Ministry refused to disclose the draft report on the basis of the exemption in section 17(1)(a), (b) and (c) of the *Act*.

Section 17(1) states, in part:

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;

- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; [or]
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions. 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

### **Part 1: type of information**

In its decision letter, the Ministry described the information in this report as “technical”. In its representations, however, the Ministry changed its position and stated that the information was “scientific” in nature. In its letter to the Ministry objecting to disclosure of the record, the company claimed that the information in it was “technical information”.

The report contains information relating to the science of geology and in particular the geology of specific land where the proposed quarry is to be constructed. The information includes descriptions of the lithology (rock type) and mineralization found in the area of the proposed quarry. The descriptions are the product of the observation of a professional geologist who is a member of the Association of Professional Geoscientists of Ontario, made while mapping and logging drill cores at the site. The report also describes the number and type of rock samples collected and elements for which they would be analyzed.

The meaning of “scientific information” and “technical information” in section 17(1) has been discussed in prior orders:

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

The Ministry explained that it abandoned its position that the information is “technical” because the information does not describe the construction, operation or maintenance of a structure, process, equipment or thing – a component of the definition of “technical information” adopted in past orders of this office.

Instead, the Ministry argued the information is “scientific information” under a broader definition of “scientific” than the one adopted by this office. The Ministry argued that the definition of “scientific information” developed by this office, which says that the information must relate to the testing of a specific hypothesis, is unreasonably narrow. The Ministry argued that the testing of a hypothesis is not determinative of whether information is scientific:

The requirement of a specific hypothesis being tested appears instead to be a part of the scientific method, which only tests a specific hypothesis as a final step in the process. One must first identify a problem, then gather observations and experiment to come up with a hypothesis, which is then tested by further experimentation and observation. ... The description of a method of investigation should not be used to restrict the meaning of what is “scientific information”. Surely experimentation, observation, testing and analysis by a scientist for scientific purposes is “scientific information”.

The Ministry argues that there are dictionary definitions of the word “scientific” which do not contain a requirement that a specific hypothesis be tested for something to be “scientific”.

The appellant argues that the information is neither scientific nor technical. It is not scientific because it does not relate to observation and testing of a specific hypothesis or conclusion, and it is not technical because it does describe the construction, operation or maintenance of a structure, process, equipment or thing.

## **Analysis and Findings**

In my view, the information that I have described above is technical, and it is therefore not necessary to consider whether it is also scientific. The technical information is found in the first and second (unnumbered) pages, all but the last paragraph of page 5, pages 7 and 8, all but the first paragraph of page 11, pages 12 to 16, the first three lines of page 17, and the last three unnumbered pages (pages 20 to 22).

The information is technical because it belongs to an organized field of knowledge, geology, which is an applied science, and has been prepared by a professional in the field. While this office has said that technical information will *usually* describe the construction, operation or maintenance of a structure, process, equipment or thing, technical information is not limited to such information.

In addition to this technical information, the record contains other information that does not relate to the science of geology, such as directions to the proposed quarry site, descriptions of vegetation, and a history of development of the area. Although the Ministry opposes disclosure of the entire report under section 17(1), the Ministry makes no claim that this is technical or scientific information. The information that is not technical or scientific is found on the cover page, pages 3 and 4, the last paragraph of page 5, page 6, pages 9 and 10, the first paragraph of page 11, all but the first three lines of page 17, and pages 18 and 19. This information does not meet the first part of the test for exemption under section 17(1).

I find that the following information is “technical information” and therefore meets the first part of the test for exemption under section 17(1): The first and second (unnumbered) pages, all but the last paragraph of page 5, pages 7 and 8, all but the first paragraph of page 11, pages 12 to 16, the first three lines of page 17, and the last three unnumbered pages (pages 20 to 22).

## **Part 2: supplied in confidence**

### **Supplied**

The requirement that it be shown that the information was “supplied” to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The appellant does not dispute that the information was supplied directly to the Ministry by the company. Based on my review of the record and representations, I find that the information was “supplied” to the Ministry.

### **In confidence**

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

### **Representations, analysis and findings**

The Ministry acknowledges that any expectation of confidentiality was implicit rather than explicit. The onus is on the Ministry and the company to establish that there was an implicit expectation of confidentiality.

In its letter to the Ministry objecting to disclosure, the company stated, “The information was supplied for the Government’s use only”. As stated earlier, the company provided no representations in this appeal.

The Ministry’s representations in support of its position on this issue describe a regime in which District Geologists employed by the Ministry are responsible for building up the province’s database of geological resources. In certain situations, they have legal authority to enter land for this purpose, and in other circumstances, operators or their consultants have a duty to provide geological reports. However, in some circumstances, such as the present one, the Ministry must rely upon voluntary cooperation from the private sector to carry out this function. In return for this voluntary cooperation, the Ministry’s longstanding practice is to keep this information confidential.



The Ministry describes this system as follows:

The role of a District Geologist is to provide professional geological information services to the public, the mineral industry and the ministry itself, in support of the Resident Geologist Program. The geologist collects, reviews and interprets geological data for the maintenance of geoscience databases, and for the preparation of geoscience maps and reports for in-office use and for ministry publications. The information is acquired through the compilation of information from various public sources; field observations acquired from visits to active and inactive mining properties and field observations acquired from visits to other greenstone belts in the province.

The information is used by the ministry to extrapolate onto adjacent or similar properties that may not have outcrops (where rock is at or above the surface of the ground) from which direct observations can be made. This is the fashion in which the provincial geological knowledge is built.

The Ministry states that third parties provide geological data in order to obtain advice on their properties, because they know that the provincial geologists are interested in the results of work conducted on various properties, and because they know that the information will be held in confidence.

Even under these circumstances, the expectation of confidence is modified by the Ministry's duty to notify the relevant authorities if there is a risk to the public related to a development, a duty acknowledged on page 5 of the Ministry's December 8, 2004 representations.

The Ministry submits that it received the draft report as part of this general information-gathering regime rather than in relation to any function of commenting on the company's quarry proposal or in relation to any approval process, and therefore, the confidentiality expectations within the regime described above apply to the supply of this report.

It may or may not be the case that information supplied to District Geologists in the context of the regime described above is subject to a reasonable expectation of confidentiality. However, I do not accept the Ministry's characterization of the circumstances in which this information was provided.

In this case, the company supplied information to the Ministry to further a specific process requiring government approval, in which the Ministry played a formal role, and involving public consultations. According to the Ministry's representations, the information was provided to the Ministry in response to a recommendation made by the District Geologist in a letter to the company dated March 13, 2003. The District geologist recommended that the company obtain this information and provide it to the public. The company had sent an information package relating to its quarry proposal to the Township where the proposed quarry would be located and

to several government agencies in January of 2003, identifying that it would need an approval under the *Planning Act*, and, it appears from the representations, under the *Municipal Act* as well (although I have been provided with no information about how the *Municipal Act* applies). The Ministry acknowledges that its functions include making comments to the Ministry of Municipal Affairs and Housing regarding *Planning Act* approvals.

The Ministry states,

The stated purpose of the information package was to *move forward* the third party's surface mining operations project (quarry) for [the named] Harbour. The information package was prepared as part of the process for a Class "A" Licence for a Quarry Operation Above Groundwater (these licences are issued by MNR [Ministry of Natural Resources]). The third party came to the conclusion that the only overarching legislation that applied to its proposed development was the *Planning Act* and the *Municipal Act* (both administered by the Ministry of Municipal Affairs and Housing. [Emphasis added].

...

In this case, the geologist noted [in her letter of March 13, 2003] that the information package did not deal at all with the geology of the proposed quarry, and since the *whole proposal depended on the mineral resources*, in her opinion it was critical that a basic geological report be done. It would also assist the company *when it came time to answer questions from the public* and various government agencies. As a result of comments the geologist had heard at a couple of public information sessions, and questions the geologist had answered in an informal one-on-one fashion with members of the public, it was apparent *that the public did not even have a basic understanding of what material would be quarried*. [Emphasis added]

The Ministry also states:

The [Ministry] geologist anticipated opposition to the quarry development and while she did not anticipate any significant acid mine drainage problems from the site, she felt it was important that the company investigate this possibility.

It is clear that the Ministry required this information to permit it to carry out its functions during the approval process under the *Planning Act*. It is also clear that one reason the Ministry recommended that the company provide the information in the draft report was to determine whether the proposed quarry would endanger public health or the environment. In its representations, the Ministry stated:

[T]he ministry's District Geologist ('the geologist') made a recommendation to the third party to obtain background geological data on the proposed quarry site.

...

The material could have been acid generating, mercury generating or unsuitable for the end purpose. By thoroughly investigating its resource, the proponent would have a much better idea of the size of its potential resource *and any possible detrimental environmental effects that might arise from the operation.* (Emphasis added).

Thus, it is clear that the information was provided to the Ministry as a result of the Ministry's response to an invitation from the company to comment on a proposal to establish a quarry under the *Planning Act*, which mandates public consultation. It is clear that the Ministry invited the company to supply this particular information not only to satisfy its own information needs, but also the information needs of the public during this regulatory process. It is also clear that the Ministry communicated to the company its expectation that the information would be communicated to the public in its letter dated March 13, 2003. Although the Ministry did not have a direct regulatory role in this process, it is clear from other submissions of the Ministry that its role included making comments on this proposal to the Ministry of Municipal Affairs and Housing in relation to the *Planning Act* process, and making comments to the Ministry of the Environment in relation to another regulatory process, namely, deciding whether to designate the proposal under the *Environmental Assessment Act*.

In fact, the company itself used the information in the draft report for the purpose of public consultation, as envisioned by the Ministry and the company. The draft report was prepared on August 16, 2003. On October 1, 2003, the company held a public meeting to discuss its proposal. At a public meeting mandated by the *Planning Act*, held by the Township on October 7, 2003, according to the following representations of the appellant, which are uncontradicted, the appellant "first became aware of the existence of the [draft] geological report":

The geological report was referenced by the representatives of the third party in oral submissions at a public meeting held at the community centre with respect to the third party's application for rezoning of the site to permit the proposed quarry.

...

During the public meeting, the representatives of the third party company referred to the report and provided findings of the report to the Township of Michipicoten. The information provided orally by representatives of the third party at the public meeting included assurances that, based on the geological investigations conducted, the rock was "acid consuming". Based on this, the third party company submitted that there was no potential for acid mine drainage, a previously stated concern of our client group.

The fact that a draft of a report is prepared in the course of a public consultation process does not necessarily mean that there is an expectation that the draft will be available to the public, although the public nature of the process may be a relevant consideration in determining whether there is an expectation of confidentiality.

I have taken into account the fact that similar geological information is often provided to the District Geologists at the Ministry in the context of an implicit understanding that it will be kept confidential. This is a factor that favours a finding of a reasonable expectation of confidentiality.

However, this must be balanced against other evidence that does not support such a finding. First, I agree with the appellant that, "The information contained in the report describes environmental conditions that may have relevance to matters of environmental and public safety." This is a factor that weighs against confidentiality, because in the circumstances the company and the Ministry were both aware (as acknowledged in the representations and correspondence reproduced above) that there was a public expectation to receive any information the company generated about possible acid and mercury generation during the land use planning process.

Not only were the Ministry and the company aware of a public expectation to have this information during the planning process, but the circumstances in which this report was prepared suggest that both the Ministry and the company *intended* that the information in it would be conveyed to the public. At page 19 of its May 26, 2005 representations, the Ministry states that, "The geologist's intention in recommending the completion of a geological assessment was that the company could use the information in its various public information sessions and during the course of its quarry development".

The Ministry states that it "did not anticipate that the *draft* report would become public as part of any approvals process; rather the final version of the report would be relied upon if the report were to be used in any such process" [Emphasis in original]. However, the company had informed the Ministry as early as January 2003 that its proposal was subject to the *Planning Act* and crucial meetings regarding decisions under that Act which were prerequisites to approval of the project were taking place in October of 2003. Therefore, it is not likely that the Ministry or the company expected that the information in the draft would be released only when the final report was ready in April of 2004. By that time the zoning and official plan amendment decisions required under the *Planning Act* would be made by the Township.

Most importantly, the appellant's description of the information disclosed at the October 7, 2003 public meeting by the company is consistent with the kind of information found in the draft report and the company acknowledged that it came from the draft report. The company's conduct in disclosing this information at a public meeting is inconsistent with an expectation of confidentiality.

Accordingly, I find that the Ministry and the company have not met their onus of establishing an expectation of confidentiality through detailed and convincing evidence, and I find that this part of the test for exemption under section 17(1) has not been met.

In conclusion, the technical information in the report does not satisfy part 2 of the test for exemption under section 17(1). Therefore, it is not exempt from disclosure. Nevertheless, I will consider part 3 of the test.

### **Part 3: harms**

#### **General principles**

To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

#### **Section 17(1)(a): prejudice to competitive position/Section 17(1)(c): undue loss or gain**

In its letter to the Ministry, the company stated that disclosure “could significantly prejudice our competitive position, result in misuse by the appellant and thereby cause unnecessary cost to the company”. The only specific harm from disclosure identified by the company in its letter to the Ministry is the possibility that the citizens’ group may take information from the report and use it in their “campaign to have this project designated under the Environmental Assessment Act” or their efforts to “stop the project”. In my view, the possibility that information in the draft report could be taken out of context is not a serious concern, as the company, which has the whole report, can always provide the context, and as the final report, which is very similar, is already accessible. Moreover, as I stated in Order MO-1914, informed discussion and debate in a democratic country is not in itself a harm covered by section 17(1).

In its representations, the Ministry very fairly acknowledges that, “with respect to the third party’s competitive position and undue loss, the third party is in a better position to provide information on these issues”. As indicated earlier, the company chose not to provide representations.

As the Ministry makes the same representations in regard to both subsection (a) and subsection (c), I will address them together. The Ministry's representations on this issue include the following:

The record contains information specific to the mineral resources on the property that are not disclosed elsewhere or available in the public domain.

I disagree. I have carefully reviewed the contents of the draft and final reports. Virtually all the information in the draft report about the nature of the mineral resource on the property is also in the final report, which has been disclosed under the *Act* by the Ministry of the Environment.

The Ministry goes on to elaborate on ways in which knowledge of the exact type of mineralogy in the rock could give competitors an advantage. I find two weaknesses in these arguments. First, as noted above, the information about mineralogy in the draft report is also in the final report, which has previously been disclosed under the *Act*. The Ministry does not identify any mineralogical information in the draft report that is not also in the final report. Indeed, the Ministry stated in its March 26, 2005 representations that, "the draft report would not provide the appellant any more information than it already has". Therefore, there is insufficient evidence that disclosing the draft report will disclose any information that is not already available to potential competitors.

Secondly, the Ministry acknowledges that although prior to the analysis done for the draft and final reports there was little information available about the specific geology of the company's property, there is a substantial amount of geological information available to the public about the geology of surrounding properties. In its representations, the Ministry submitted that the geological information that it obtains about one property allows it to extrapolate onto adjacent or similar properties that may not have outcrops (where rock is at or above the surface of the ground) from which direct observations can be made. Thus, the Ministry, having geological information about both the subject property and surrounding areas, would be in a position to advise me if there is something special about the geology of the proposed quarry which should not be revealed to potential competitors. The Ministry's arguments may be valid if the geology of the company's property is substantially different from the geology of the surrounding areas that is already available to competitors. However, the Ministry has not provided any evidence of this.

The Ministry repeatedly makes the point that the geological information in the draft report is "proprietary". However, the Ministry also states that one of its own geologists was present on the site and made geological observations that have been entered into the Ministry's publicly available database. The Ministry does not suggest that this information is different from the information in the draft report which it claims is proprietary. I am unable to accept the bald statement that the geological information in the draft report is proprietary in the absence of any specific evidence to support it. Moreover, even if the information were proprietary, this relates to the first part of the section 17(1) test and does alone support a finding that its disclosure could reasonably be expected to result in the harms addressed in sections 17(a) and (c).

I find that these harms have not been established and sections 17(1)(a) and (c) do not apply.

**Section 17(1)(b): similar information no longer supplied**

In its response to the Ministry, the company stated, “The information that was supplied was not required to be submitted by legislation and if released will result in no further information being volunteered by this company”. Other than this rather self-serving bald statement, the company has not addressed this issue.

The Ministry states:

Confidential information is frequently made available to employees of the Ministry. The information is propriety and constitutes an “informational asset” of the third party supplier, yet it is freely given with either explicit or implicit understanding that the material is to be kept confidential, based on the ministry’s long-standing practice. The public release of this information would send a clear message to entire industry that the ministry cannot be trusted to keep the information confidential. This would destroy the 50-year relationship with respect to information exchanges between the ministry and its industry stakeholders and there is a reasonable expectation that such geological information would no longer be supplied to the ministry.

Without further information, explanation or authority, I cannot accept the Ministry’s claim that the information about rocks and soil that it receives from a variety of sources is necessarily “proprietary”. From its representations, it appears that the Ministry collects a wide variety of geological data, and while some of it may be proprietary, I suspect a great deal of it is not. Moreover, even if this data is proprietary, this relates to part 1 of the section 17(1) test and does not in itself establish that disclosure could reasonably be expected to result in similar information no longer being supplied.

I accept that there is a public interest in the Ministry continuing to receive the kind of information that it received in this case.

However, I am not persuaded by the Ministry’s representations that disclosure of this particular information would undermine the relationship between the Ministry and its industry stakeholders. As I have stated above, this situation is not similar to the regime in which this understanding of confidentiality in return for information generally operates. Rather, this is a case where, in the face of substantial public concern about its proposal, the proponent of a quarry sought the Ministry’s support. The Ministry pointed out what it considered to be major deficiencies in the information provided and was not prepared to support the proposal without being provided with this information. Even though the company had no statutory duty to provide information, the circumstances gave it a strong incentive to do so.

I am not satisfied that in similar circumstances proponents will not provide similar information in future. As the appellant pointed out, the Ministry has outlined a number of substantial benefits to aggregate companies in submitting geological information, including:

- an opportunity for claim holders to obtain expert advice on their properties; and
- to obtain comments from MNDM that may assist them in various statutory approvals processes.

I find that the Ministry and the company have not provided detailed and convincing evidence that any of the harms in part 3 of the test could reasonably be expected as a result of disclosure of the geological information in the draft report.

I find, therefore, that none of the information in the draft report is exempt under section 17(1).

Although I am ordering disclosure of the record on the basis that section 17(1) does not apply, I feel, as did Senior Adjudicator David Goodis in Order PO-1688, that it would be useful in the circumstances to make a finding on the public interest override in section 23 of the *Act*, below.

## **PUBLIC INTEREST OVERRIDE**

**Issue B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption?**

As indicated above, the draft report describes the nature of the geology on the site of the proposed quarry and observations and analysis of that quarry designed to determine whether quarrying of the rock could result in contamination of Lake Superior. The report also contains recommendations for further work to determine this.

In its initial representations, the appellant submitted that to meet the public interest objectives of the *Planning Act* and *Aggregate Resources Act*, the geological information and analysis in the draft report should be made available for public review. The appellant stated that there is a “public interest in disclosure of [this] scientific information”.

In my view, this raises a question of whether there is a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption and brings the draft report within section 23 of the *Act*.

Section 23 states:

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



For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

### **Compelling public interest**

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]
- the integrity of the criminal justice system has been called into question [Order P-1779]
- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]
- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

### **Purpose of the exemption**

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

### **Representations, Analysis and Findings**

I will first consider whether there is a public interest in disclosure of the draft report, and, if so, whether it is compelling.

The appellant's representations state,

A public interest can be demonstrated if the record adds to the information available to the public to participate in democratic processes.

In this case, it is submitted, the fundamental elements of the record driving the public interest to disclose relate to the potential environmental impacts of the proposed mining project. The record contains geological and geochemical information about the potential existence of contaminants such as arsenic and

sulphur in the material that is to be mined through blasting and stored on the subject property.

One of [the appellant's] longstanding concerns with the project has been the potentially significant impacts of sulphide bearing rocks, both to air quality and surface and groundwater quality in the vicinity of the proposed quarry. The Ontario Ministry of the Environment (MOE), in a letter dated February 2, 2005...identified significant environmentally (sic) concerns with the project.

In fact, I note that in providing comments to the MMAH on the official plan and zoning amendments needed for the proposed quarry to proceed in this February 2, 2005 letter, the Ministry of the Environment stated that it did not support the official plan amendment. Specifically in regard to the concerns raised by the appellant, the MOE stated that the [final] geology report and investigations are representative of a small portion of the total proposed quarry development and with much of the proposed quarry not having been investigated in detail, there remains a possibility that more significant quantities of sulphide bearing rocks could be found.

The appellant stated:

The [appellant] is seeking an opportunity to review all available information on the extent and chemical composition of sulphide bearing rocks on the proposed site and, through professional environmental review, to assess the potential impacts of mining this rock on a large scale, and the adequacy of proposed mitigation measures.

The appellant states that the Ministry has not made the draft report available to other government agencies that are required to provide comment on or make a decision on the approval of the proposed quarry. Relevant agencies that have not received the draft report include the MOE, the MMAH, the MNR, and the Township. "This raises a fundamental public interest concern about the adequacy of the government review process in the absence of access to the record by all relevant agencies".

The appellant submits that disclosure is in the public interest for the following reasons:

- It appears that two and possibly more government agencies could be influenced by the references by MNDR and the third party company to the data which is the subject of the record;
- Disclosure of the record will shed light on the operations of government by providing an opportunity for the public to assess the adequacy of reviews by MOE, MNDR, and other government agencies with respect to the potential environmental concerns of the proposed mining project;

- Disclosure of the record serves the purpose of informing the public about the adequacy of the review process and the sharing of information between government agencies with respect to a matter of potential environmental concern;
- Disclosure of the record provides the only available means for members of the public to assess the government decision-making process on this issue and adds, in an essential way, to the information available to the public to express its concerns about decisions to be made with respect to the proposed quarry application.

I agree with the representations of the appellant set out above. I find that they are amply supported by the evidence in this case, including the contents of the draft and final reports and by this office's past interpretations of the term "public interest".

As noted above, the proposal was originally subject to requirements under the *Planning Act*, but not the *Aggregate Resources Act (ARA)*, which regulates the establishment and operation of rock quarries in Ontario. The reason for this is that the *ARA* does not apply in Northern Ontario. In the summer of 2004, the proposal was designated under the *ARA*, despite this. The Ministry states, "This designation was unprecedented; the first time privately-held land in northern Ontario had been designated". Although the Ministry does not state the reason for this departure from the usual regulatory regime, it is clear that there was strong and widespread public interest in this proposal. The unprecedented designation under the *ARA*, despite a government policy against making private property in northern Ontario subject to this statute, is strong evidence of public interest in information about the proposed quarry. The purposes of the *ARA* are:

- To provide for the management of the aggregate resources of Ontario
- To control and regulate aggregate operations on Crown and private lands
- To require the rehabilitation of land from which aggregate has been excavated; and
- To minimize adverse impact on the environment in respect of aggregate operations.

Section 12 of the *ARA* provides that in considering whether to issue a quarrying licence, the Minister of Natural Resources and the Ontario Municipal Board must consider, among other things, the effect of the operation on the environment and on nearby communities, effects on ground and surface water resources, and planning and land use considerations.

The Ministry states that the Ministry of the Environment received 5734 public comments on a proposal to designate the proposed quarry for review under the *Environmental Assessment Act*. To put this in perspective, the 2001 population of the Township in which the property is located was 3,668. This is also strong evidence of a public interest.

In its representations, the Ministry alleges there is no public interest in the disclosure of the records for reasons that may be summarized as follows:

- The draft report relates to a proposed quarrying operation, not to a mining operation as claimed by the appellant throughout its representations;
- The Ministry's input and the October 7, 2003 public meeting were for "land use planning purposes and therefore did not discuss site-specific geology or any potential for acid drainage". The environmental issues of concern to the appellant and addressed in the draft report are dealt with in different processes – those under the *ARA* and the *Environmental Assessment Act*;
- The draft report was not provided to the Ministry or used by the Ministry in relation to government licensing, regulatory or approval process. The Ministry has no regulatory responsibility for quarries;
- The interest in disclosure is that of the appellant alone, which is not a "public interest";
- The draft report "would not provide the appellant any more information than it already has", since there is already significant publicly available information on the nature of the bedrock resources in the area and since the information in the draft report is all found in the final report, which the appellant already has;
- The appellant has received or will receive all the information it requires to participate in public discussion of the proposed quarry through other public information sessions and regulatory processes referred to earlier in this order.

I do not agree with the Ministry's representations on this issue for the following reasons:

The fact that the appellant refers to the proposed process as "mining" rather than "quarrying" does not affect the credibility of the appellant or reduce the importance of its concerns. Acid drainage, a concern of the appellant, is a potential result of both mining and quarrying. The *Mining Act* defines "mining lands" and "mining rights" in terms that include "quarry and pit material" and the purpose of the Act is to regulate "mineral resources", a term which includes quarry and pit materials. Operators of pits and quarries regulated by the Ministry of Natural Resources under the *Aggregate Resources Act* are required to provide geological information to the Minister of Northern Development and Mines under the *Mining Act*. Similarly, the *Aggregate Resources Act* refers to underground extraction of aggregate (i.e., rock) as "mining". Although "mining" and "quarrying" are not identical, the terms are somewhat interchangeable. The Ministry's submission trivializes the importance of the issues raised by the appellant.

I disagree with the Ministry's position that there is no public interest in disclosure of the information in the draft report about potential impact on the environment because the

information was generated in the course of a land use planning process rather than in the process of approving the quarry under the *Aggregate Resources Act* or the *Environmental Assessment Act*.

This proposition is based on an artificial distinction between land use planning and environmental protection that is not consistent with Ontario government policy or jurisprudence. Environmental protection is recognized in the *Planning Act* as an integral component of the land use planning process: *Planning Act*, s. 1.1(a), s. 16; *Re Westminster (Township) and London (City)* (1975), 5 O.R. (2d) 401 (Div. Ct.).

I disagree with the Ministry's assertion that the draft report was not provided to or used by the Ministry in relation to government licensing, regulatory or approval processes. As discussed above, in my view when the company provided the draft report to the Ministry it was in the context of a legislated planning approval process in which the Ministry has a formal commenting role intended to influence the outcome of that approval process. The fact that the Ministry has no regulatory responsibility for quarries does not mean that there is no public interest in the manner in which it carries out this commenting function.

I do not agree that the interest in disclosure is that of the appellant alone, and is therefore not a "public interest". This issue was addressed by Senior Adjudicator David Goodis in Order PO-1688, the facts of which are similar to this case:

In my view, there is a public interest in the disclosure of the record at issue in this case. The requester and the requester's engineer have stated, and I accept, that release of this record is required in order to conduct a technical review of the material submitted ...in support of the proposal which, in turn, is required in order to make meaningful submissions to the Ministry on whether or not it should grant the appellant's application for a certificate of approval. Although the requester clearly has a personal, private interest in making submissions on the appellant's proposal, the appellant's interest also coincides with a greater public interest of the community surrounding the appellant's plant and the general public as a whole. ...

The public has an interest, from the perspective of protecting the natural environment and protecting public health and safety, in seeing that the Ministry conducts a full and fair assessment before deciding whether or not to grant the appellant a certificate of approval to discharge air emissions into the natural environment. This necessarily entails disclosure of the relevant data contained in the record. In addition, the public has an interest in knowing the extent to which the appellant's proposal...will impact the environment.

In my view, the public interest in this case is the interest in ensuring the integrity of the various legislated planning and approval processes and public consultation processes in relation to a serious public concern – the protection of the environment and public health.

Having compared the contents of the draft report with the final report, which the appellant already has, I disagree with the Ministry's assertion that the draft report "would not provide the appellant any more information than it already has". The Ministry gives two reasons for this. First, there is already significant publicly available information on the nature of the bedrock resources in the area; second, the information in the draft report is all found in the final report, which the appellant already has.

The Ministry's statement that the publicly available information about the geology of surrounding areas is adequate to describe the geology of the proposed quarry is incompatible with its position that the information in the draft report deserves special protection because it is "proprietary". As stated earlier, this implies that there are important differences between the publicly available information and the information in the draft report and contradicts the proposition that the appellant can rely on the available information about other properties. Given these apparently conflicting positions, I am not in a position to find that all the geological information in the draft report is also available from other public sources.

Of greater importance is the fact that there appear to be some differences between the information in the draft and final reports, and at least one of them appears to me to be potentially significant. I do agree with the Ministry that almost all the information in the draft report is also in the final report. However, there are a few areas where the information in the draft report differs from the final report. I have noted differences between the wording of page 13 of the draft report and similar text in page 8 of the final report; between page 15 of the draft report and page 11 of the final one; and between page 16 of the draft report and pages 11 to 12 of the final report. Although these differences in wording may not be significant, in my view it is in the public interest to provide the appellant with an opportunity to retain an expert, as I accept that it intends to do, to evaluate whether these differences are important.

Apart from the differences in wording mentioned above, a recommendation on page 16 of the draft report that appears to directly relate to the environmental concerns raised by the appellant and by the Ministry of the Environment appears to be absent from the final report. This would be understandable if that recommendation had been implemented before the final report was drafted and therefore became redundant, but I find no evidence in the final report that this recommendation had been implemented.

In my view, there is a public interest in disclosure of this recommendation to permit assessment of its significance by an expert. The public interest here relates to the desirability of public scrutiny of government decision-making processes.

I do not agree that the appellant has received or will receive all the information it requires to participate in public discussion of the proposed quarry through other public information sessions and regulatory processes referred to earlier in this order. The submissions and evidence before me indicate that none of the regulatory processes and public consultation processes to date have resulted in the disclosure of the draft report or of the existence of the recommendation referred to

above, which, as I have stated, appears to me to be potentially important in analysing the environmental issues arising out of the quarry proposal.

Although there is a possibility that differences between the draft and final reports will ultimately be revealed through hearings of the Ontario Municipal Board, in my view it is in the public interest not to leave the question of disclosure to the uncertainties of future proceedings in the circumstances of this case.

Having found that there is a public interest in the disclosure of the record, I turn to the question of whether this public interest is compelling.

In my view, the public interest is compelling. As stated earlier, the word “compelling” has been defined in previous orders as “rousing strong interest or attention”.

As McEachern C.J.S.C. said in *Delgamuuk v. British Columbia* (1988), 55 D.L.R. (4<sup>th</sup>) 73 (BCSC):

[E]xperience has demonstrated that some experts have been shown to be advocates rather than independent, impartial, objective professionals. ...It is no longer possible to assume that all expert witnesses, including many professionals, are impartial and independent. Some still qualify for that description, but others are fully participating members in the litigation team of a party to litigation and still others, as I have said, are advocates for the side which employs them.

Since *Delgamuuk*, a number of courts have expressed similar concerns. See for example, *Perricone v. Baldassarra*, [1994] O.J. 2199 (OCGD).

While Chief Justice McEachern’s comments refer to expert witnesses, they are also true of consultants who prepare reports for use in influencing government approval authorities. One of the ways some consultants put the interests of their clients above their professional integrity is by changing draft reports that contain their true professional views, so that the final version is more acceptable to the client.

I want to make it clear that I am not implying that the **company or its consultant have** done anything improper or inappropriate in this case. However, the fact that such behaviour does occur, together with the particular nature of the changes between the draft report and the final report, the nature of the environmental concerns to which these changes relate, and the importance of safeguarding the integrity of the public consultation and regulatory processes, make the public interest in disclosure of the draft report so that an expert independent of both government and the proponent can provide independent analysis, a compelling one.

It remains to consider whether there is also a compelling public interest in non-disclosure of the draft report and whether the public interest in disclosure clearly outweighs the purpose of the section 17(1) exemption. As recognized by Senior Adjudicator Goodis in Order PO-1688, the



public interest in protecting business interests is an important one; however, this interest may be outweighed by the public interest in disclosing records for the purposes of advancing fairness and comprehensiveness of environmental approval processes, informing the public about the potential effects should approvals be granted, and ultimately enhancing environmental protection and public health and safety. The importance of these public interests is articulated in a number of decisions of the Supreme Court of Canada cited in Order PO-1688. More recently, that Court reiterated in the *Spraytech* case that “collectively we are responsible for preserving the natural environment” and that “environmental protection has emerged as a fundamental value of Canadian society”: *114957 Canada Ltée (Spraytech, société d’arrossage) v. Hudson (Town)*, [2001] 2 SCR 241 at paragraph 1. For reasons I have given throughout this order, I do not find the interest in non-disclosure to be compelling. In my view, the interest in disclosure clearly outweighs any interest in non-disclosure and outweighs the purpose of the section 17(1) exemption.

I therefore find that, if the information were exempt under section 17(1), the exemption would not apply because section 23 overrides it.

**ORDER:**

1. I order the Ministry to disclose the record to the appellant no later than **July 14, 2005**, but not earlier than **July 11, 2005**.
2. To verify compliance with this order, I reserve the right to require the Ministry to provide me with a copy of the material disclosed to the appellant.

Original Signed By:

\_\_\_\_\_  
John Swaigen  
Adjudicator

\_\_\_\_\_  
June 9, 2004