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

ORDER PO-2838

Appeal PA07-366

Ministry of Natural Resources

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NATURE OF THE APPEAL:

The Ministry of Natural Resources (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information in relation to five identified aggregate pits. Specifically, the requester sought access to the following:

> I am requesting a copy of any report giving the amount of aggregate hauled from the following pits all managed by [named operator] during the years of 1999 to the present…

The Ministry located the record responsive to the request and pursuant to section 28 of the *Act* notified the operator named in the request who operates the aggregate pits (the operator), as it might have an interest in the disclosure of the record. The operator advised that the requested information consisted of its business information and requested that the Ministry keep it in confidence.

The Ministry issued a decision letter to the requester denying access to the responsive record, in its entirety, pursuant to the mandatory exemption at section 17(1) (third party information) of the *Act*.

The requester, now the appellant, appealed the Ministry's decision.

During mediation, the Ministry clarified that it is relying on sections 17(1)(a) and (c) of the *Act* to withhold the responsive records.

As further mediation was not possible, the file was transferred to the adjudication stage of the appeal process where an Adjudicator conducts an inquiry.

I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the Ministry, initially. The Ministry responded with representations. I also sent a copy of the Notice of Inquiry to the operator named in the request and to an association which represents producers of sand, gravel and crusted stone in Ontario and that might have an interest in the disclosure of the type of the information at issue (the association). Both affected parties provided representations in response.

I then send a Notice of Inquiry to the appellant, inviting representations. Along with the Notice of Inquiry, I enclosed a complete copy of the Ministry's representations, and copies of the non-confidential portions of the representations of both affected parties. The appellant responded with representations.

As the appellant's representations raised issues to which I believed the Ministry and the affected parties should have an opportunity to reply, I sought reply representations from these parties. The Ministry and both affected parties provided reply representations in response.

As the reply representations of the Ministry and the two affected parties raised issues to which I believed the appellant should have an opportunity to reply, I sought sur-reply representations from the appellant. The appellant provided representations by way of sur-reply.

RECORDS:

The record at issue in this appeal consists of five pages of spreadsheet data for five specific aggregate pits. The information includes the actual tonnage production figures for each pit, for the years 1999 to 2005. The Ministry has denied access to the record in its entirety.

DISCUSSION:

THIRD PARTY INFORMATION

The Ministry and the affected parties claim that the information at issue is exempt under the mandatory exemption in section 17(1)(a) and (c). Those sections read:

> 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; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: Type of Information

The types of information listed in section 17(1) have been discussed in prior orders. Those that may be relevant to the current appeal have been defined in past orders of this office as follows:

> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

The Ministry submits that the record at issue reveals sensitive commercial information because it relates to the buying, selling, or exchange of merchandise. It submits:

> Your office has previously held that "commercial information" includes the tonnage portion of the Production Reports [Orders P-725, and P-925]. It has also held that product information showing the amount of stone as part of mining activities is commercial information under the *Act* [Order P-1071].

The operator submits that part 1 of the test has been satisfied because the information at issue is "commercial and/or financial information." The operator submits:

> The requested information is tonnage production from a specific gravel pit. Licence fees are paid on this amount at a per tonne rate determined by Regulation. This then constitutes both commercial and financial information. We received a copy of Order PO-2594 along with the Notice of Inquiry. We agree with the comment in that order that tonnage information "relate[s] to the buying, selling, or exchange of merchandise or services," and thus it is "commercial information" for purposes of [the *Act*].

The association submits:

> The [Information and Privacy Commissioner/Ontario] has previously, correctly held that tonnage production information is "commercial information" for purposes of [the *Act*] [see Orders P-246, P-269, P-725, and P-925. See also Order 1071]. As Assistant Commissioner Beamish noted in Order PO-2594, licence fees in the aggregate industry are paid at a per tonne rate determined by the *Aggregate Resources Act*. Tonnage information "relate[s] to the buying, selling or

> exchange of merchandise or services" [see Order PO-2594], and thus qualifies as "commercial information."

The appellant takes the position that the information at issue is not any of the types of information contemplated by part 1 of the section 17(1) test. In particular, the appellant submits that the information is not commercial information because "tonnage dose not directly indicate commercial value." He submits the information is better described as "resource information" because "it is a measure of the mass of removed earthen matter and does not give a good measure of commercial value."

As noted by the Ministry and both affected parties, in Order PO-2594, Assistant Commissioner Brian Beamish found that a gravel pit's tonnage information related to the buying, selling or exchange or merchandise or services and therefore amounted to "commercial information" as contemplated in part 1 of the section 17(1) test. As the information at issue in this appeal is the same type of information as was at issue in that order, I find Assistant Commissioner Beamish's reasoning relevant to my determination.

Having reviewed the specific information at issue in this appeal, I accept that it amounts to the statistical tonnage production of aggregate pits operated by the named operator. I accept that disclosure of this information would reveal the amount of aggregate produced from each pit and then subsequently sold. In my view, this information relates to the buying and selling of merchandise.

Accordingly, considering the information at issue and in keeping with Assistant Commissioner Beamish's reasoning, I find that the aggregate pits' tonnage information relates to the buying, selling or exchange or merchandise or services within the meaning of the term "commercial information" as defined in previous orders by this office, including Order PO-2594.

Accordingly, I find that the first part of the section 17(1) test has been satisfied.

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].

In its representations on the supplied component of part 2 of the section 17(1) test, the Ministry submits:

> It is the Ministry's position that the record was supplied by the affected party in strict confidence. As noted above, the information is required to be submitted by section 14.1 of the *Aggregate Resources Act* and by clause 1 of the Regulation made pursuant to that Act.
>
> In submitting the information, the affected party is supplying the information as contemplated by [the *Act*]. The issue has been canvassed by the Commission in Orders P-725 and P-925. In both instances, the Commission found that the information had been supplied.

The association's representations on the "supplied" component of part 2 of the section 17(1) test are similar to those of the Ministry. The association explains that tonnage production information for each site is required to be supplied to the Ministry pursuant to section 14.1 of the *Aggregate Resources Act* and clause 1 of Regulation 244/97 made pursuant to that Act. The association also cites Order P-725 and P-925 in which Adjudicator Laurel Cropley found that tonnage information was "supplied" within the meaning of part 2 of the section 17(1) test.

The operator takes the position that their annual tonnage production figures for specific aggregate pits was "supplied" to the Ministry within the meaning of that term in the section 17(1) test. Specifically, the operator submits:

> Information is supplied as required by Ontario Regulation 244/97. This is supplied to [a corporation that acts as a trustee (the trustee) of the Aggregate Resources Trust, a trust created under the authority of the *Aggregate Resources Act*] in the form of a Production Report annually.

The appellant submits that he accepts that the requested information is supplied to the Ministry but takes the position that it is not directly supplied by the affected parties but through another party, a corporation that acts as a trustee. The appellant submits that all licensed aggregate pit owners are required to submit tonnage production figures to the trustee, which in turn provides copies of this information to the Ministry and the association. He submits that the trustee administers and collects detailed data about aggregate extraction in Ontario on behalf of the Ministry and the association.

In reply, the association acknowledges that tonnage production figures are supplied to the Ministry through the trustee, which acts pursuant to its indenture with the Ministry. It submits, however, that as a result of the indenture, the trustee acts as the Ministry's agent. The association points to *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, where the Court of Appeal accepted that information supplied through an agent of an institution would still be "supplied in confidence" within the meaning of section 17(1) of the *Act*.

I have reviewed the parties' representations and have considered the information that is before me. In my view, the information at issue was "supplied" to the Ministry by the operator within the meaning of that term in part 2 of the section 17(1) test.

In Order MO-2261 Adjudicator Colin Bhattacharjee found that a contract administrator hired by a City to oversee a project was acting as the City's agent. As a result, he found that information provided to the contract administrator by a third party was "procedurally speaking, directly 'supplied to' the City for the purpose of section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, the municipal equivalent of section 17(1) of the *Act*." I agree with Adjudicator Bhattacharjee's reasoning and adopt it for the purposes of the current appeal.

In the circumstances of this appeal, I accept that the information at issue, the annual tonnage production figures for specific aggregate sites, is supplied to the trustee who, pursuant to the indenture, acts as the Ministry's agent in the collection of information required to be supplied by the operator pursuant to section 14.1 of the *Aggregate Resources Act* and its regulations. I also accept that this information is supplied, unaltered, to the Ministry by the trustee. In keeping with the reasoning expressed in Order MO-2261, I am satisfied that the annual tonnage production figures were "supplied" to the Ministry by the operator as contemplated by part 2 of the section 17(1) test. I find, therefore, that the supplied component of part 2 has been met, although it must still be determined whether this information was supplied "in confidence."

In confidence

In order to satisfy the "in confidence" component of part two of the section 17(1) test, 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; or
- prepared for a purpose that would not entail disclosure [Order PO-2043].

Addressing the "in confidence" portion of part 2, the Ministry submits:

> Ministry staff has always treated this information as confidential. In the User Guide for the Aggregate License and Permit System (ALPS) which is the computer system by which the aggregate information is stored and accessed by the Ministry, it clearly provides on page 2 that some information is confidential and that production data for individual licensees should not be released/divulged to anyone outside of the Ministry.
>
> Most aggregate producers, like the affected party, are aware that it is the Ministry's policy and practice to treat tonnage information as confidential. They are generally aware that in previous appeals under [the *Act*] that tonnage information has been found to have been supplied in confidence. Accordingly, there is an assumption that such information will be treated in strict confidence. Therefore, it is the position of the Ministry that the [operator] had a reasonable expectation that the Ministry would indeed hold the record in confidence; thus it was implicitly supplied in confidence.

The operator submits that part 2 of the test is satisfied because it supplied the information to the Ministry "in confidence":

> The Memorandum of Understanding between [the Ministry] and [the trustee] which on page 5 under Memorandum 2.0, Production Reports, states '[the trustee] must ensure the confidentiality of production reports ..." [The Ministry] has in the past considered the tonnage information a Mandatory Information Exemption. According to [Ministry] Policy No. AR.9.02.00 issued 1991.09.01, page 4 of 6, the tonnage portion of the Production Report is confidential. It is not subject to interpretation of section 17(1) of the [*Act*]. According to this Policy, the reply to this request for information should have been to refuse access to the records. We relied on this [Ministry] opinion and policy in providing the information…[P]olicy A.R. 5.00.22 issued March 15, 2006, which continues to state that Production Reports will be withheld. In addition we are now printing "CONFIDENTIAL" in black magic marker on the Production Reports we submit to underscore our understanding of the confidential nature of the information.

The operator enclosed a copy of the Memorandum of Understanding and a copy of the identified Ministry policies with its representations.

With respect to the "in confidence" portion of the test, the association points to Order PO-2594 and states that in that order Assistant Commissioner Beamish found that "aggregate producers have an objectively reasonable expectation of confidentiality when they provide tonnage information to the Ministry." It submits that, as was the case in Order PO-2594, the information at issue in this appeal, which is the same type of information, was communicated to the Ministry in strict confidence. As submitted by the Ministry, the association submits that producers are

generally aware that in previous appeals, tonnage information has been found to have been supplied in confidence. Accordingly, it submits that there is an expectation within the industry that such information will be treated in confidence. The association also submits that the aggregate producers consistently treat tonnage information as confidential, proprietary information.

Additionally, the association submits that although the maximum tonnage permitted for each quarry is public information because it forms part of the license, the actual tonnage produced at a particular time is not publicly available. Finally, the association submits that although the Ministry collects tonnage information to oversee management of the aggregate resources in Ontario, it does not disclose this information.

The appellant submits that there is a lack of confidentiality with respect to the information at issue as the parties who have access to it are the association, the trustee, as well as the Ministry. The appellant provides several examples of why, in his view, this information cannot be said to have been provided in confidence. I have summarized those examples as follows:

- Annual dues for members of the association are based on tonnage figures. This implies that as a matter of course, operators are required to provide their tonnage figures to the association.

- The tonnage information is not actually collected by the Ministry but by the trustee.

- Each year, the website for the Canadian aggregate industry magazine (*Aggregates & Roadbuilding Magazine*) publishes the top aggregate operations in Canada along with the actual tonnage of each operation.

In its reply, the operator states that the annual membership fees to be part of the association are indeed based on tonnage information but that it amounts to the total tonnage information for the member (operator) and is not broken down into the tonnage production of each individual licensed pit.

The association also submits that the membership fees are based on members' overall annual tonnage figures for all of each operator's pits rather than individual pits. It submits that those overall annual tonnage figures are kept confidential and each of its employees must sign a confidentiality agreement to that effect. Even with the confidentiality agreement, the association explains that access to this total tonnage information is restricted to only those who require it in the course of their work.

With respect to *Aggregates and Roadbuilding Magazine*'s annual list of the top aggregate operations, the association submits "the accuracy of these figures cannot be verified, given that such information is confidential. None purports to be for the pits at issue here."

I have reviewed the parties' representations and, in my view, the information at issue was supplied "in confidence" to the Ministry by the operators within the meaning of that term in part 2 of the section 17(1) test.

The Ministry has provided detailed and convincing evidence to demonstrate that its staff treats tonnage production information as confidential. The Ministry also states that, as a result of both its treatment of the information and previous appeals under the *Act*, there is a general assumption among pit and quarry licencees that such information will be treated in strict confidence. Both affected parties, the operator and the association, support the Ministry's submissions and take the position that, in the industry, it is commonly expected that tonnage information supplied to the Ministry is to be kept in confidence because it amounts to sensitive commercial information. Based on these representations, I am satisfied that aggregate pit and quarry licensees, such as the operator, have an objectively reasonable expectation that the information regarding their tonnage production that they supply to the Ministry (by way of the trustee) under the *Aggregate Resources Act* is supplied, implicitly, "in confidence."

In sum, having reviewed the representations of the parties, the information at issue and the approach adopted in the three prior orders issued by this office that addressed tonnage production information (Orders P-725, P-925 and PO-2594) I am satisfied that the operator supplied its tonnage production information to the Ministry (by way of the trustee) implicitly "in confidence," and that this expectation of confidence was reasonably held.

Accordingly, I find that part 2 of the section 17(1) test has been established.

Part 3: Harms

To meet this part of the test, the institution and/or the affected parties 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].

Representations

The Ministry and both affected parties submit that section 17(1)(a) (prejudice to competitive position) and (c) (undue loss or gain) are relevant in the current appeal. The Ministry and the affected parties make substantially similar representations on the reasonable expectation of the occurrence of the harms outlined in section 17(1)(a) and (c) if the information in the record were to be disclosed.

Specifically addressing the harm outlined in section 17(1)(a), the parties submit:

> Disclosure would prejudice significantly [the operator's] competitive position and interfere significantly with its contractual negotiations with landowners of potential new quarry sites as contemplated by section 17(1)(a) of the *Act*. The record contains commercially sensitive information which, if disclosed, would provide [the operator's] competitors with details regarding its current reserves, market share and market size, putting [the operator] at a competitive disadvantage. It would also enable vendors or lessors of new sites to know how much [the operator] needs more supply in that area, resulting in higher costs for the affected party.

With respect to the harm outlined in section 17(1)(c), they submit;

> [D]isclosure of the record would cause undue loss to [the operator] and undue gains to its competitors (s. 17(1)(c) of [the *Act*]). In particular, [the operator's] competitors could use the information to target [its] customers, enter [its] market and engage in non-competitive bidding.
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> The aggregate industry is a very competitive industry. Aggregate is essentially a commodity with little differentiation in product quality between producers. Consequently, producers can only differentiate themselves by using other measures such as price, credit terms, product mix and ability to service. Often the lowest price bid on a project will receive the contract and as little as five cents per tonne can make the difference. Producers may be competing against as many as nine or ten producers in an area, each one capable of supplying much more of the market share. Given the competitiveness of the market, it is crucial to keep tonnage information confidential. Tonnage information can be used to determine the amount of the reserves of other pit owners. Consequently, it can be used to determine the life expectancy of a particular pit which is highly valuable competitive information.
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> In Order PO-2594, Assistant Commissioner Beamish relied heavily on the fact that the maximum tonnage limit found on an aggregate producer's license is available to the public. However, there is a crucial difference between the maximum and actual production, and the competitive effects of both numbers becoming publicly known.
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> The maximums are often set at the highest shipment rate during the life of the reserve plus an additional safety limit. This ensures the producer has capacity to accept a large project should one be offered. However, actual production (the information at issue) is often well below the limit and can fluctuate based on the projects undertaken.

The Ministry adds:

> Simply put, maximum tonnage limit in no way reflects actual tonnage. It is only a limit. Unlimited tonnage does not mean that an infinite amount of aggregate may be extracted. In many cases the actual limit does not even represent the potential size of the operation. An operation may not extract aggregate for years, or may only extract a small portion of their limit in a year. In certain cases the limit imposed was originally to be extracted over a limited period of time, and has since changed to an annual limit, which significantly changes the context and meaning of that value (5000 tonnes over 5 years vs. 5000 tonnes per year). Generally speaking, on an estimate average it has been seen that a group taken as a whole might only produce a third of what their actual maximum tonnage is.

The Ministry and both affected parties submit:

> The combined knowledge of the maximum tonnage limit and the actual tonnage production can cause severe market inequality. For example, if a producer is fairly close to its maximum limit, a competitor can determine that the producer would be unable to bid on a large contract, allowing the competitor to bid at a higher price. Alternatively, since licence limit increase requests typically need municipal approval before [the Ministry] will consider, the competitor could prepare in advance to lobby against a temporary increase in the producer's license limit to ensure the producer would not be able to bid on the project. If the producer has already obtained a contract that may exceed its annual tonnage limit, and must look for a nearby alternate source of supply, the competitor may request a high premium from the producer to supply the project. The competitor can also be more certain that the producer is unable to compete for its clients which, again could result in the customer receiving non-competitive pricing. Consequently, it is extremely important to aggregate producers that the difference between the maximum tonnage permitted and the actual tonnage produced at their pits remain confidential.
>
> Tonnage information can also significantly interfere in producers' negotiations with landowners for purchases or leases of additional land. If a producer is quickly running out of existing reserves, the landowner is likely to increase the price. Consistently high production over the past few years can also create unrealistic expectations of vendors in terms of volume of production and price per tonne, particularly if there is an economic downturn. Similarly, if the new land is being leased on a royalty per tonne payment scheme, the landowner may require an unreasonably high minimum tonnage to be extracted from its land based on the tonnage information of the producer. Consequently, the producers are at a distinct disadvantage in these negotiations if their tonnage information is publicly available.

> Tonnage information can also be used to determine the market share of competitors. The operator with the largest market share is likely to be targeted by others who seek to take its customers or use it to gauge the effectiveness of sales and marketing techniques. Companies would also be able to determine to whom they are losing market share and target that operator as a result.
>
> In some circumstances, trading tonnage information would enable competitors to determine the amounts that the pit owner is supplying to particular customers.
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> Finally, tonnage information can be used to determine areas for further expansion and markets upon which to focus. If the actual tonnages in a market area are known, a new competitor can determine if sufficient sales volume exists to offset the significant costs of entering that market. Such an entry would obviously impact the profitability of existing producers in the area who have recognized its value through their own work, rather than through disclosure of a competitor's confidential information. It would also increase the competition for raw aggregate reserves.

The appellant takes the position that neither of the harms identified in sections 17(1)(a) or (c) could reasonably be expected to occur if the information was disclosed. He submits that operators cannot be said to be at a competitive disadvantage if this information was disclosed because everyone would have access to the same information about its competitors.

The appellant submits that there are many kinds of aggregate and tonnage figures alone will not allow a competitor to know what type of product is being shipped or its value. He also submits that because from the tonnage figure, a competitor cannot, in general, reasonably deduce how much of a particular kind of aggregate remains in reserve, knowing tonnage figures is only of "modest competitive value."

The appellant also submits that other publicly available information is more helpful in determining the amount of reserves of other pit owners. He submits for examples, helpful information is found in Aggregate Resources Inventory Papers publications which provide analysis of the reserves all across the province, yearly Conformance Assessment Reports (CARs) for each pit, site plans for pits, and records of visits to sites by Ministry officials. He submits that disclosing the tonnage of pits would "be of only modest use by the competition compared with other available information." He also submits that information in tenders and bids is more useful to a competitor than the annual tonnage figures:

> [The] tonnage figures that I have requested do not contain particularly important information to competitors compared with other available information arising such as that from tenders.

The appellant disputes that the aggregate industry is particularly competitive. He takes the position because aggregates are extremely heavy, and because their price per tonne is low the

primary cost of aggregates is the cost of transportation which leads to the result that a local pit may hold a near monopolistic position with respect to nearby uses of aggregates.

He also disputes the following positions put forward by the Ministry and the affected parties:

- that tonnage figures are "informational assets" because, the appellant submits, the operator does not create or fabricate this information,

- that tonnage information is "commercially sensitive" because, the appellant submits, they do not provide details about reserves or market share size.

In sum, the appellant submits:

> [T]here will not be significant harm, and no undue loss or gain, to the [operator] or other aggregate operators by releasing tonnage figures. Indeed, such information is already available for non-aggregate mining and those operations presumably are not suffering from harm as a result. Tonnage figures are too rough a predictor of value or of reserve to provide much advantage to competitors. Besides, there would be a level playing ground [amongst] all operators once these figures were generally made accessible.

In its reply, the association responds to the appellant's arguments. First, the association concedes that there are many different types of aggregate but argues that this increases the competitive value of the type of information at issue. It argues that a competitor can deduce, from the physical properties of the reserve in a particular pit, the type of aggregate in demand, and the annual tonnage information would then reveal the type of customers and potentially even the precise customers to whom the aggregate was sold. This type of information, the association submits, is competitively sensitive as it would enable a competitor to go after those customers and seek to underbid the current supplier.

The association also submits that if a competitor knows the maximum tonnage that an operator is permitted to extract from a pit (which is public information) with the amount actually extracted (the information at issue in this appeal), it can deduce how close the operator is to its maximum. As a result, it may recognize that the operator cannot bid on a large contract because it is too close to its limits and quote a higher price than it would if the information about the operator's reserves is not known.

The association agrees that some tenders are publicly accessible but submits that an operator who decides to bid in such circumstances has chosen to accept the competitive effects of doing so. It submits that this is different from disclosing information that an operator reasonably expects to be held in confidence.

Analysis and finding

The Ministry has denied access to the responsive record in its entirety; however, its representations (and those of the association and the operator) appear to focus on the harm that could reasonably be expected to result if the information on the final page was disclosed, the actual annual tonnage production figures for the years 1999 to 2005. Having reviewed the other information contained in the record (which includes the district name, the name of the operator, the lot and concession number where each aggregate pit is located, the township's name, the names of municipalities, the type of license held by the operator and the maximum allowable production tonnage for each specific aggregate pit), and the representations of the parties, I am not satisfied that the parties have established that this information meets the harms component of the section 17(1) test. With respect to the maximum allowable production tonnage on page 4, all parties submit that this information is already publicly available. For all of the other information on pages 1 through 4, not only have the parties not provided me with sufficiently detailed and convincing evidence to support a claim that any of the harms in section 17(1) could reasonably be expected to occur were this information disclosed, from my review of the information I am also not satisfied that disclosure would result in any of those harms. Accordingly, I find that the mandatory exemption at section 17(1) of the *Act* does not apply to the information on pages 1 through 4 and I will order it disclosed to the appellant.

I will now determine whether section 17(1) applies to the information remaining at issue, the actual annual tonnage production figures for each of the five identified pits operated by the named operator for the years 1999 to 2005. This information is found on page 5 of the record.

In Order PO-2594, Assistant Commissioner Beamish found that he had been presented with insufficient evidence to find a reasonable expectation that the harms in either section 17(1)(a) or (c) would occur if the information was disclosed. He stated that the concerns raised by the parties were too general in nature and lacked specifics of the kinds of harms or interference expected as a result of disclosure. Specifically, he stated:

> The affected party and the Ministry have made general statements regarding the harms that could result from the disclosure of the requested record. However, specific questions remain unanswered:
>
> - The affected party claims that disclosure of these amounts will alert competitors to the size of their market and cause them to focus efforts on taking market share away. However, the affected party does not connect the size of its market to the effort expended by other companies to gain a competitive advantage. Presumably companies are always attempting to take business away from competitors even in the absence of specific knowledge of the size of the competitors' operations.

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

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

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

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

Finally, reference has been made to Orders P-725 and P-925 by the Ministry. Those orders are cited above to support the position that information in the record at issue in this case was supplied to the Ministry by the affected party in confidence. I note, however, that the orders came to different conclusions when determining whether the third part of the section 17 test had been met. In Order P-725, Inquiry Officer [Mumtaz] Jiwan found that the third party company had provided detailed representations on the negative impact that disclosure of the information in the records would have on its competitive position and upheld the Ministry's decision to deny access to the record. However, in Order P-925, Inquiry Officer Jiwan came to the opposite conclusion, based on the lack of

> evidence before her. These cases, cited by the Ministry, clearly point out the need for detailed and convincing evidence of the harm that could result from disclosure.

However, in the circumstances of the current appeal, I find that the Ministry and the affected parties have provided the requisite detailed and convincing evidence to demonstrate that if the actual tonnage production information were to be disclosed, there is a reasonable expectation that the operator would experience the harms identified in either section 17(1)(a) or (c). In Order PO-2594, Assistant Commissioner Beamish found that he had not been provided with specifics of the kinds of harms or interference expected as a result of disclosure. In my view, in the circumstances of this appeal, I find that I have been provided with the kind of specific detail required to uphold the application of the section 17(1) exemption. In particular, I find that in their representations, the Ministry and the affected parties effectively responded to the kind of issues identified by Assistant Commissioner Beamish in Order PO-2594.

First, in my view, the Ministry and the affected parties have explained how disclosure of the actual tonnage of aggregate removed from a specific pit in a given year can reasonably be expected to interfere with the operator's negotiations for the purchase or lease of additional properties in the area. I accept the operator's argument that the disclosure of the actual tonnage production information, together with the maximum tonnage information, which is publicly available, will reveal a pit's reserves and life expectancy. I also accept that knowledge of reserve amounts and life expectancies of an operator's pits will place vendors and lessors of suitable properties in the area at a competitive advantage in that they will know to charge a higher price based on the need of the operator. I also accept that disclosure of this information would impact leases on a royalty per tonne payment scheme as the landowner could require an unreasonably high minimum tonnage to be extracted from its land based on the tonnage information of the producer. Accordingly, I accept that the operator's competitive position in negotiations with landowners would be significantly prejudiced within the meaning of section 17(1)(a).

Second, based on the detailed submissions provided, I find that the Ministry and the affected parties have provided me with sufficiently detailed evidence to indicate that knowledge of the affected party's tonnage would provide a competitor with an unfair advantage when bidding on a future contract. In particular, I accept that if an operator is fairly close to its maximum limit, a competitor will know that it is unable to bid on a large contract allowing a competitor to bid at a higher price. I also accept that if a competitor knows an operator who is bidding on a particular contract is close to its limit it will know whether the operator is likely to seek municipal approval for a temporary licence limit increase and prepare in advance to lobby against that increase to ensure the operator cannot bid on the contract. Accordingly, I accept that disclosure of the actual tonnage information would reveal information that could reasonably be expected to significantly prejudice it's competitive position within the meaning of section 17(1)(a), as well as result in an undue loss for the operator and a correlative undue gain to its competitors within the meaning of section 17(1)(c).

Therefore, subject to my discussion below of the possible application of the public interest override at section 23, I find that the actual tonnage production figures on page 5 of the record are exempt from disclosure pursuant to the mandatory exemptions at sections 17(1)(a) and (c) of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant takes the position that the public interest override at section 23 applies to allow disclosure of the actual tonnage production information despite my finding that the exemption at section 17(1) of the *Act* applies.

Section 23 reads:

> An exemption from disclosure of a record under section 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 the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

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 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].

Purpose of the exemption

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. If a compelling public interest is established, it must be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect a valid interest, must yield on occasion to the public interest in access to information. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Representations

The appellant takes the position that there is a compelling public interest in the disclosure of the tonnage figures as their disclosure would help the public to understand, monitor and control the environmental impact of aggregate mining. He submits that his argument is supported by the fact that comparable information is accessible about non-aggregate mines. He also submits that since there is similar information available about non-aggregate mines, pit and quarry tonnage should also be publicly accessible. Specifically, he submits that the requested information should be available to the public for the following six reasons:

> **(C1) Determining compliance.** A key purpose of the collection of tonnage figures is to determine if a pit had obeyed its legally binding limits on shipped aggregates. These limits are commonly determined by means of rather strenuous negotiations involving the public. Hence it is the public's interest to know if the actual hauled tonnage is reasonable and within legal bounds. Excess haulage would be considered by these people to be a violation of trust and an endangerment of the environment. As such, these figures should be considered to be "state of the province" or "state of the resource" information, which is in the public interest.
>
> **(C2) Determining appropriate receipts of funds to governmental units.** A second key purpose of collection of tonnage figures is so the Province can lay a levy on the amounts of aggregate extraction. This levy is collected and then split by [the trustee] among various parties including [the trustee] itself as well as government units such as municipalities. As long as this tonnage information is hidden from the public and municipalities, there is no way to determine if the correct amount of fees is collected and distributed. Hence, [the disclosure of] this information is in the public interest.
>
> **(C3) Need for environmental projections.** It is commonly considered that the accessible information about pits is lacking and that this lack negatively impacts planning and environmental protection. For example, Winfield's widely regarded study on conservation in Ontario pits states:

> *The study finds that the province lacks basic information on current demand for and uses of aggregate. Further, the province does not have up-to-date projections regarding future demand. The lack of current, comprehensive, publicly available information makes it impossible to properly assess claims of a supply "crisis" in the southern part of the province, or, more generally, to manage the resource in a sustainable manner.*
>
> From: "Rebalancing the Load: The Need for an Aggregate Conservation Strategy for Ontario" by Mark S. Winfield, Amy Taylor, Pembina, Jan 1, 2005, available in https://pubs.pembina.org/reports/Aggregatesfinal-web2pdfn.

Hence, [the disclosure of] the requested information is in the public interest.

Environmental groups such as Pembina, Nature Ontario and Gravel Watch Ontario need tonnage information to make informed projection about whether particular pits are a danger to the environment, as too great a removal of earth from a site can affect environmentally critical functions such as flow of ground water. Tonnage information is useful for determining "demand for and uses of aggregate" and to determine if aggregates are being exploited in a "sustainable manner", using Winfield's phrases. Hence, [the disclosure of] this tonnage information is in the public interest.

(C4) Mining information is in the public interest. In Ontario, information about mining is publicly available. For example, for a given mine in Ontario the public can access the tonnage and the kind of material mined…There is only one mining segment, aggregate mining, that hides this information from the public. This exception seems to have arisen by historical accident, in that in Ontario (but not in other jurisdictions such as the USA), the law (*Aggregate Resources Act*) regulating mining of aggregates is distinct from other mining laws, such as the law for coal mining or nickel mining. Thus it seems that politics and history may be the explanation of why aggregate tonnage information (but not information about other mined resources) is hidden. The fact is, [the Ministry] (its aggregate branch) is a partner within the industry group and lobbyist [the association]. Much information about aggregate mining is available from the [Ministry]. However, the information about tonnage, which is collected by [the association's] subsidiary, [the trustee], is hidden from the public. This in effect provides political leverage to the [association] in keeping the public in the dark about certain mining information – which would not be possible if aggregate mining was not accidentally separated from mining in general in Ontario. By analogy with mining information, tonnage information for aggregates is in the public interest and should be accessible.

> **(C5) Water information is in the public interest.** Water exploitation is comparable to aggregate extraction in that typically the resource is sold and trucked away from the site. For water exploitation including use of water in aggregate pits, the operator must report to the government the amount of water used. The information is available to the public as it is in the public interest. After all, without water there is not life – we all know that water needs to be protected for the greater good. Similarly, comparable information, tonnage information for aggregates is in the public interest.
>
> **(C6) Other information analogous to tonnage is publicly accessible.** The Aggregate Resources Inventory Papers (created by the Ontario government) document the aggregate reserves in Ontario. Pit licences show the boundaries and depths where aggregate can be legally exploited. The annual CARs (Compliance Assessment Reports) that are completed for each pit (or quarry) each year in Ontario are available to the public. These list the areas in a pit that have been opened for mining as well as those parts that have been rehabilitated. The CARs also list violations of the site plan and this too is in the public interest and is accessible. All of this information is in the public interest and is publicly accessible so the public can keep an eye on these potentially dangerous and potentially polluting impacts of aggregate pits. Given the precedent of this other information about pits being available, and given the public's need to monitor the environmental impacts of pits, it follows that tonnage figures are in the public interest and should be made accessible.
>
> I have argued that tonnage figures are in the public interest in helping the public to understand, monitor, and control the environmental impact of aggregate mining. This argument is backed up by observing that comparable information is accessible about non-aggregate mines. Also there is similar information available about aggregate mines which indicates that tonnage should also be publicly accessible.

In its reply representations, the Ministry takes the position that there is no compelling interest in the disclosure of the record. It submits that the tonnage information reflects primarily private information related to the companies at issue and its disclosure would not shed light on the activities of government. The Ministry submits:

> The appellant lists a number of grounds in support of its assertion of a compelling public interest, including: general public oversight of the Ministry's enforcement role with respect to the *Aggregate Resources Act* and the collection of revenues from the disposition of Crown resources; and information parity with other natural resource sectors (notably metallic mining). The appellant summarizes these grounds as follows: "I have argued that tonnage figures are in the public interest in helping the public to understand, monitor and control the environmental impact of aggregate mining." While the appellant may have a

> keen interest in understanding and monitoring the environmental impact of the aggregate industry, the public interest, if any, in disclosure fails to meet the compelling threshold. A general assertion of the public's right-to-know in the abstract and without a concrete set of factual circumstances that rouse strong public interest should not be equated with "compelling public interest" for the purposes of section 23 of the *Act*. With respect to the assertion of public interest in "controlling the environmental impact of aggregate mining", a regulatory regime exists in Ontario (i.e. the [*Aggregate Resources Act*]) serving that very purpose, with opportunities for public comment with respect to applications for aggregate permits and licences.
>
> Moreover, as conceded by the appellant, a significant amount of information regarding aggregate operations is already made available to the public, including licences and permits, site plans (which include specifics regarding the limitations for the site, such as maximum tonnage and boundaries and depths for aggregate extraction), and environmental and/or archaeological boundaries in relation to the site. Moreover, details regarding convictions under the [*Aggregate Resources Act*] for exceeding maximum tonnage are generally a matter of public record.

In responding to the appellant's representations, the operator submits that there is no compelling public interest in the disclosure of the information. Regarding the appellant's submission in C1 that the information is required to determine compliance, the operator explains that [the trustee] determines if the tonnage reported is over the licence limit and sends a report to the Ministry to follow up on any compliance issues. It also submits that the provision of the requested information would not further the reasons the appellant describes under C2. It submits:

> Under C2 it is suggested that the public needs the information to determine if the correct amount of fees is collected and distributed. [The trustee] submits an annual audited report of the fees collected by the lower tier municipality. Note that the current request is only for an operator's pit tonnage in the municipality. In order to check [the trustee's] math the request would have to have been for tonnage information for all the licences in the municipality, which it was not.

The operator also submits that it disagrees with the appellant's arguments with respect to C3, C4 and C5.

The operator concludes its arguments on the application of section 23 by stating:

> [T]here is non-confidential, non-harmful, information available on aggregate operations. It does not follow that tonnage information from individual pits should be released.

The association also submitted reply representations. The association states that for section 23 to apply, a requester must demonstrate a compelling public interest in the activities "of government." It submits:

> The activities at issue here are commercial activities of a private company. Disclosure of information about the affected party's business operations might be of private interest to the requester, but it does not advance the purpose of [the *Act*] which is to make the government accountable to citizens. Accordingly, even the most basic requirements of section 23 are not met here.
>
> Moreover, section 23 only applies where the public interest in disclosure "clearly outweighs the purpose of the exemption." The requester's submission is essentially a policy position that commercial information of private companies that operate in resource sectors should not be confidential. Section 17 of [the *Act*] represents a legislative determination that commercially sensitive information submitted to government in confidence shall remain confidential. The requester has not demonstrate[d] that the purpose of this exemption has clearly been outweighed.
>
> As noted in the requester's submissions, the legislature has made specific types of aggregate information public, but not the information at issue here. The legislature has thus turned its mind to the proper balance between statistical information, information about specific pits (including maximum tonnage permitted to be extracted) and compliance information that is public and, on the other hand, producer specific competitive information that is confidential. Accordingly, even if a public interest were at stake (which has not been established), it is already satisfied by the information already made public.
>
> Moreover, with respect for the requester's desire for more public debate about aggregate resource planning as [former] Commissioner [Sidney] Linden pointed out in Order P-128:
>
> > Clearly, one of the consequences, if not the purposes, of the *Freedom of Information and Protection of Privacy Act, 1987* is to foster public awareness and discussion of issues by providing access to government held records. It is also true that the existence of exemptions in the *Act* serve to deny the public some of the tools available to participate in these discussions, and it is for this reason that the *Act* contains the provision that "necessary exemptions from the right of access should be limited and specific." However, in passing this *Act*, the Legislature acknowledged that certain types of records could or should be withheld from disclosure in order to protect legitimate interests of government [and private companies], and certain exemptions were formulated and included in the *Act*.

> Having found that the records in this case do fall within the scope of one of these exemptions, subsection 13(1), I am not persuaded that the need for public debate, in and of itself, is sufficient to outweigh the purpose of this exemption. In my view, public debate may be restricted when access to government records is denied, but as long as the reasons for denying access fall within the scope of one of the *Act*'s exemptions, such restrictions are not inconsistent with the principles of the legislation. [emphasis added]

The association goes on to refute the appellant's arguments that there is a compelling public interest in the disclosure of the information at issue. Specifically, it submits:

> **C1 –Determining compliance.**
>
> [The appellant] claims that disclosure of tonnage figures would enable the public to know whether pit operators are in compliance with their statutory obligations. However, as the requester points out (at p.7 of his submissions), the annual compliance assessment reports completed for each quarry are already available to the public (see sections 15.1(4) and 40.1(4) of the *Aggregate Resources Act*, R.S.O. 1990, c. A.8). These reports are adequate to meet any public interest concern regarding compliance. The situation is comparable to Order P-561, in which the requester alleged a public interest in safety in the absence of any evidence of an actual safety concern, and in circumstances in which reporting and testing of quality concerns was already conducted.
>
> There is no public interest in operators who stay within their maximum tonnage limit having their commercial sensitive actual tonnage figures disclosed, particularly where non-compliance is already made public.
>
> **C2 – Determining Appropriate Receipt of Funds to Governmental Units**
>
> [The appellant] suggests that disclosure of the information at issue here could reveal an error in the amount of levies paid to the Province. This is a completely baseless speculation. There is no evidence that the public has raised any concern (much less a credible concern) that any error has been made. Sections 4 and 6 of the [*Aggregate Resources Act*] and the [trustee]/[Ministry] Indenture of 17 June 1997, as amended and restated 6 December 2001 referenced at page 3 of the requester's submissions (the "[trustee] Indenture") provide inspectors with broad statutory powers of compulsion to verify information provided by licensees. The Trustee Indenture also requires regular statements from the Trustee, including annual financial statements prepared in accordance with generally accepted accounting principles and audited by a person or firm licensed under the *Public Accountancy Act*, R.S.O. 1990, c. P.37. There are thus numerous checks and

> balances to ensure that proper amounts are paid. There is no more "compelling public interest" in the confidential business information at issue here being made public so that the requester can double-check payments that there is no reason to believe are inaccurate than there is for individual's tax information to be made public so that other members of the public can check whether Revenue Canada made a mistake.
>
> **C4 and C5 – Information about Other Industries is Publicly Available**
>
> Sections C4 and C5 of the [appellant's] submissions are attempts to argue that because other industries make certain information public, disclosure of the information at issue here is in the public interest. There is no evidence on the record of this proceeding that the competitive circumstances relating to mines or water is comparable to that of the aggregate industry. Here, even if there were a public interest at stake (which has not been established) public disclosure of the maximum amount that can be extracted from a pit, which already occurs, is sufficient to satisfy that interest. There is no evidence that the circumstances of the other industries cited by the requester are comparable.
>
> **C6 – Information Already Made Public regarding Aggregates**
>
> As the [appellant's] points out, information about compliance with regulatory requirements and about the boundaries and depths of pits are already made public. The [appellant] acknowledges that this information enables the public to scrutinized any environmental impact of the pits. The [appellant] provides absolutely no explanation as to why, when the maximum amount that can be extracted from a pit is known, knowing how much less the operator actually extracted would advance the public interest. As in Orders P-532 and 568, the information that is already public addresses any public interest considerations, without interfering unduly in competition among private companies.

In his sur-reply representations, the appellant submits that disclosure of the records should assist in shedding light on government. He submits:

> A central purpose of the *Aggregate Resources Act* is "shedding light on the operations of government." The public needs and wants to know if the government (the Ministry of Natural Resources) is actually enforcing the requirement that pit operators should not exceed their allowed annual maximum shipping tonnages. Access to the requested shipping tonnage information would allow the public to check if an exceedance [sic] has occurred. Without this tonnage information, the public is frustrated by depending upon enforcement by (1) [the association/the trustee], which is industry owned, and (2) [the Ministry's] enforcement procedures. On average, only about 10% of pits are audited per year

> by [the Ministry], so it is not likely that [Ministry] procedures will detect violations of shipping limits…
>
> The enforcement of shipping limits is important to the public as exceedances [sic] indicate risk to groundwater, indicate possible environmental damage such as excess dust, noise and trucks and indicate violation of operational rules agreed to by the pit operators in negotiating with the public for constraints on the pit's license.
>
> …
>
> In summary, making the requested shipping tonnage available to the public will "shed light" on the operations of government.

The appellant also submits that disclosure would "inform the citizenry about government":

> The business of gravel is highly political in that the lobbying efforts of the industry and the involvement of the public effectively determine the regulations and laws that in turn determine where pits are located, how they do their business, and how the environment is protected. Without access to shipping information, the public is deprived of the prime, most credible source of information about whether pits are operating within the law with respect to shipped tonnage. The organization, Gravel Watch Ontario … uses information such as is being requested here, to inform our elected representatives such as MPPs and municipal Councillors about how the gravel industry is or is not acting responsibly. It follows that this interest in shipping information is public and not merely private in nature.

Finally, the appellant submits that the subject matter at issue rouses strong interest:

> The local newspapers repeatedly carry articles about gravel pits. In Elora, where I live, there have been letters to the Editor in the local paper week after week. There have been protest marches here about pits. There is a common distrust in how pits are operated, and there is little understanding of how operational constraints such as tonnage shipping limits are or are not enforced. These questions and this need for the requested information rouses strong interest and attention…

Analysis and finding

Based on my review of the records and the representations submitted by the parties, I find that the appellant has not established that there is a compelling public interest in the disclosure of the actual annual tonnage production figures.

First, the appellant submits that disclosure of the actual tonnage production figures is necessary to determine whether operators are complying with their legally binding maximum tonnage limits established during the licensing process. Based on the representations of all parties, including the appellant, I understand that pursuant to the *Aggregate Resources Act* every aggregate licence holder is required to submit an annual Compliance Assessment Report to the Ministry for the purpose of assessing their compliance with that *Act*, the regulations, and the conditions of their licence. These reports are publicly available under the *Aggregate Resources Act*. Accordingly, in my view, there is a regulatory regime in place with checks and balances to address any public interest that might exist in ensuring that licensed operators are complying with the terms of their licenses.

The appellant's representations suggest, however, that there is a general public interest in overseeing the Ministry's enforcement role under the *Aggregate Resources Act*, to ensure that it is properly monitoring the aggregate pit licensees. In the absence of any evidence of an actual concern that the Ministry is not carrying out its mandate under the *Aggregate Resources Act*, I do not accept that the public interest in the disclosure of the specific information for the purpose of monitoring the Ministry's enforcement role is an interest that rouses strong interest or attention. Therefore, I find that it is not compelling in nature.

Second, the appellant submits that the disclosure of the tonnage figures is necessary to determine whether the Ministry is properly collecting and distributing the appropriate levies received from operators which, pursuant to the *Aggregate Resources Act*, are based on an aggregate pit's actual tonnage production. Again, as the appellant has not provided sufficient evidence to suggest that the Ministry is inappropriately collecting and/or distributing the fees received from aggregate pit operators pursuant to the *Aggregate Resources Act*, I am not satisfied that this is an interest that rouses strong public interest or attention. Accordingly, in my view, any public interest in the disclosure of the information at issue for that purpose has not been demonstrated to be compelling in nature.

Third, the appellant submits that the actual tonnage production figures should be disclosed to permit the public to assist the Ministry in monitoring the environmental impacts of aggregate pits. He submits that the actual tonnage production figures are required to assess the environmental impacts on a pit's neighbouring area as well as to make environmental projections about the future impact it might cause. While I acknowledge that there may be a public interest in monitoring the environmental impact of aggregate pits, I do not accept that to address that interest it is necessary that the actual tonnage production figures for individual pits be disclosed publicly.

The process for granting aggregate licenses is mandated by the *Aggregate Resources Act*, the regulations made under that *Act*, and Provincial Standards implemented by the Ministry. I accept that this process is one that involves significant and extensive public consultation as well as an environmental review prior to the granting of the license and the setting of its terms, including the maximum allowable annual tonnage production. I further understand that the maximum tonnage production allowed by each individual pit is a figure that is publicly available.

In my view, provided that an operator is within the limits prescribed by their license, it stands to reason that their actual tonnage production amount will either be equal to or lower than the maximum established through a detailed process that has already taken into account environmental concerns and given the public an opportunity to comment. Therefore, if it is in the public interest to assess the environmental impacts of a particular aggregate pit or make environmental projections about future impacts, in my view, the number upon which any impact should be assessed or upon which projections should be based is the maximum tonnage production figure, the amount that an operator can legally extract from his licensed aggregate pit, not the actual tonnage production figure. Even if, as the appellant submits, after licensing, exemptions and modifications including increases to tonnage are approved, given that the maximum tonnage figures are publicly available, disclosure of actual tonnage production figures are not required to establish that an increase has been granted. Accordingly, I do not accept that there is a public interest in the disclosure of the actual annual tonnage production figures at issue in this appeal, compelling or otherwise, for the purpose of making environmental projections.

Fourth, the appellant submits that tonnage information about mining is publicly available, as is information about water exploitation and, by analogy, disclosure of "comparable information," tonnage information for aggregates, is in the public interest. In my view, the appellant has not provided sufficient evidence to demonstrate how disclosure of information about other natural resources, neither of which are regulated by the *Aggregate Resources Act*, supports an argument that there is a compelling public interest in the disclosure of the actual tonnage production figures of individual aggregate pits.

Finally, the appellant submits that given that other information about aggregate pits is publicly available this demonstrates that disclosure of all information relating to aggregate pits, including actual tonnage information, is in the public interest. Based on the representations of the parties, including the appellant, I note that the information about aggregates that is publicly available includes:

- Aggregate Resources Inventory Papers and Maps, which document aggregate reserves in Ontario;
- Aggregate Pit Licenses, which stipulate the terms including maximum tonnage production figures and boundaries and depths for aggregate extraction;
- Compliance Assessment Reports, which are annual reports completed for each pit identifying areas in a pit that are open as well as those that have been rehabilitated and any violations of the terms of an operator's licence;
- environmental studies, and;
- regional tonnage information.

In my view, a compelling public interest in the disclosure of actual tonnage production figures cannot be established simply based on the fact that other types of information relating to aggregate pits are available to the public. Moreover, I am not satisfied that, when the maximum allowable tonnage production figures established by the licensing process are known, knowing how much less an operator extracts in a given year, would serve to advance the public interest by shedding further

light on the operations of the Ministry. In my view, the information relating to aggregate pits (including the maximum tonnage production figure), that is already available to the public is adequate to address any public interest considerations [Orders P-532, P-568]. I therefore find that the appellant has not provided me with sufficient evidence to demonstrate that because other information about aggregates is publicly available, there is a compelling public interest in the disclosure of the specific information at issue in this appeal, the actual annual tonnage production figures of individual pits.

Accordingly, in my view, I have not been provided with sufficient evidence to demonstrate that there is a compelling public interest in the disclosure of the specific information remaining at issue, the actual tonnage production figures for specific aggregate pits operated by the operator. As I have found that there is no compelling public interest in disclosure of this information, I find that section 23 of the *Act* does not apply and pursuant to section 17(1), the tonnage production figures on page 5 of the record are exempt from disclosure.

ORDER:

1. I order the Ministry to disclose pages 1 through 4 of the responsive record to the appellant, by **December 3, 2009**, but not before **November 27, 2009**.

2. I uphold the Ministry's decision to withhold the actual annual tonnage production figures, for the years 1999 to 2005, found on page 5 of the responsive record.

3. In order to verify compliance with provision 1 of this order, I reserve the right to require the Ministry to provide me with a copy of the records disclosed to the appellant.

Original signed by: October 29, 2009
Catherine Corban
Adjudicator