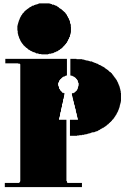

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER PO-2839

Appeal PA07-375

Ministry of Natural Resources

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 the following information for the years 2004, 2005, and 2006:

1. The limestone (bedrock quarried) tonnage vs. gravel tonnage in Zorra Township.
2. The limestone tonnage for each quarry operated by [three named companies].
3. The tonnage of all other products such as clay, gypsum, dolomite extracted from each of these quarries.
4. The tonnage of the 10 largest producing aggregate pits of sand, gravel, clay and topsoil in Zorra along with their operator's names.
5. Any other industrial activity occurring within any of the quarries or pits of Zorra Township other than blasting, crushing, and sorting of aggregate for haulage – for example asphalt blending and processing, concrete mixing.
6. Water taking (including amounts of water) for purposes other than for dewatering and washing aggregate.

The Ministry located records responsive to the request and pursuant to section 28 of the *Act,* notified eleven individuals and/or companies named in the records (the affected parties) who are the operators of aggregate pits in the identified region and who may have an interest in the disclosure of the information contained in the records. Eight affected parties did not reply to the Ministry's notice. The remaining three affected parties responded to the notice and advised the Ministry that they objected to the release of their information, either in full or in part.

Subsequently, the Ministry granted the requester partial access to the responsive records, denying portions of them pursuant to the mandatory exemptions at sections 17(1) (third party information) and 21(1) (personal privacy) of the *Act*. The Ministry clarified that the responsive records contain information for 2004 and 2005 but that no data was available for the year 2006. The Ministry also advised that it does not have records relating to two of the named companies referred to in part 2 of the request, nor for other products such as clay, gypsum and dolomite under part 3 of the request. The Ministry referred the requester to the Ontario Ministry of the Environment for the information sought under part 6 of the request.

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

During mediation, the appellant clarified that he no longer seeks access to information which is responsive to parts 5 and 6 of the request.

The appellant advised that he wishes to pursue access to all of the information that has been withheld under sections 17(1) and 21(1) of the *Act*. The appellant also advised that he is of the view that additional records exist in relation to parts 2 and 3 of the request, as well as data for 2006. Accordingly, reasonableness of search was added as an issue in this appeal.

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

After mediation concluded but before I issued a Notice of Inquiry, the Ministry sent a letter to this office advising that it had located a copy of the 2006 data which was not available at the time of the request for information, but was now available. A copy of the record was provided to me. However, the Ministry advised that the requester was not provided with a copy of the record, severed or otherwise.

I began my inquiry by sending a Notice of Inquiry setting out the facts and issues on appeal to the Ministry, initially. In that Notice of Inquiry, I advised the Ministry to issue a supplementary decision letter to the appellant (pursuant to the access provisions of the *Act*) in relation to the record containing responsive information for the year 2006, enclosing a copy of the record with its letter. Subsequently, the Ministry issued a decision letter to the appellant, enclosing a copy of the record containing the responsive information for the year 2006, advising that the record had been severed pursuant to the exemptions at sections 17(1) and 21(1) of the *Act*, consistent with the severances made for the responsive information for the years 2004 and 2005.

I also sent a Notice of Inquiry to thirteen affected parties who might have an interest in the disclosure of the records at issue. In addition to the eleven affected parties that had previously been notified of the appeal by the Ministry, I also notified one affected party named in the record but not notified by the Ministry and an association which represents producers of sand, gravel and crushed stone in Ontario (the association) who had advised that it may have an interest in the disclosure of the records. The affected parties were advised that they were not required to make representations on the issue of reasonable search.

Of the thirteen affected parties notified, four responded with representations.

The Ministry responded with representations enclosing a copy of a second supplementary decision letter issued to the appellant. In that supplementary decision letter, the Ministry advised that it had conducted an additional search for responsive records using the key words "Municipality of Zorra Township" rather than just "Zorra Township" and had located additional records responsive to his request. The Ministry granted partial access to these records, denying access to portions pursuant to sections 17(1) and 21(1) of the *Act*. A copy of the newly located responsive records was provided to me and I identified twelve new affected parties who might have an interest in the additional information that is now included in the current appeal.

I then sent a copy of the Notice of Inquiry to the twelve new affected parties who might have an interest in the information found in the additional records located by the Ministry. The affected parties were advised that they were not required to make representations on the issue of reasonable search. Three of the twelve new affected parties responded with representations.

To summarize, of twenty-five affected parties that were notified, seven responded with representations. One of the parties submitted a duplicate copy of the representations submitted by another affected party, the association, and advised that it was adopting the association's representations as its own. Another affected party did not consent to the disclosure of their representations to the appellant.

I then sent a copy of the Notice of Inquiry to the appellant enclosing a copy of the Ministry's representations in their entirety and copies of the non-confidential representations of five affected parties. As the sixth affected party's representations are simply a duplicate of those of another, I provided the appellant with one copy of those representations. The seventh affected party did not consent to the disclosure of their representations. However, as they are substantially similar to those of other affected parties, I did not share those representations with the appellant.

The appellant responded to the Notice of Inquiry with representations in which he raised the possible application of the public interest override provision at section 23 of the *Act*. Accordingly, I sought reply representations on the possible application of section 23 from the Ministry and the seven affected parties who responded to the original Notice of Inquiry. The Ministry and two of the 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:

There are three records at issue in this appeal. The first record consists of five pages of a printout for Zorra Township (the Township) from a database located in the Ministry's Lands and Water Branch. The record contains tonnage production information for all aggregate pits in the Township for the years 2004 and 2005. The second record consists of four pages of a similar printout that contains tonnage production information for all aggregate pits in the Township for the year 2006. The third record is the additional record located by the Ministry and consists of five pages of tonnage production information resulting from a search that was done with the key words "Municipality of Zorra Township" rather than for "Zorra Township."

The information that remains at issue in the records are the names, lot and concession numbers of individual aggregate pit operators and the actual annual tonnage production information for the years 2004 and 2006.

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2(3) and 2(4). These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2(3) modifies the definition of the term "personal information" by excluding an individual's name, title, contact information or designation which identifies that individual in a "business, professional or official capacity." Section 2(4) further clarifies that contact information about an individual who carries out business, professional or official responsibilities

from their dwelling does not qualify as "personal information" for the purposes of the definition in section 2(1).

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The Ministry has severed the names of five individual aggregate pit operators contained in the records, as well as the lot and concession numbers of their pits. The Ministry takes the position that such information qualifies as personal information within the meaning of that term as defined in the *Act*.

The Ministry submits "[i]n this instance, the name is linked with the source of the individual's income. Based on communications with the affected party, the Ministry came to the conclusion that the name was personal information."

All five individual operators whose names appear on the records were notified of the appeal as affected parties and invited to submit representations. None of the individuals to whom the information at issue relates responded to the Notice of Inquiry.

The appellant submits:

> Most individuals did not object to the enclosure of their names in the information that the Ministry did provide. The holders of all licensed pits are available from the Ministry offices. Such information does not provide information about an individual in a personal capacity or in a professional, official or business capacity as defined in section 2(4). Practically all licensed pits are operated under an incorporated name. It is no different from obtaining the ownership of any other registered property owned by a company or individual. It reveals nothing of a personal nature that may further identify individuals in a company or a single individual.

I have carefully reviewed the information that the Ministry submits amounts to "personal information" within the meaning of the definition of that term in section 2(1) of the *Act* and find that it qualifies as business information, rather than personal information. The information at issue amounts to the names of five licenced operators of aggregate pits and the lot and concession numbers of the pits.

In determining whether information relating to an individual is "personal information," the appropriate approach is to look at the *capacity* in which the individual is acting and the *context* in which their names appear. This was enunciated in Order PO-2225, in which former Assistant Commissioner Tom Mitchinson considered the definition of "personal information" and the distinction between information about an individual acting in a business capacity as opposed to a personal capacity. Former Assistant Commissioner Mitchinson posed two questions that help to illuminate this distinction.

> … the first question to ask in a case such as this is: *"in what context do the names of the individuals appear*"? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?
>
> ....
>
> The analysis does not end here. I must go on to ask: *"is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual*"? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

Former Assistant Commissioner Mitchinson asked himself the same two questions in Order PO-2295, for the purpose of assessing whether the information in a Nutrient Management Plan (NMP) relating to the property owners of a farm constituted business or personal information. With respect to the first question *("In what context do the names of the individuals appear?")*, he found that the names of the farm owners appeared in a business context:

> The property owners are clearly engaged in business activity. The building they are seeking approval to construct is a 3000-hog finishing barn, which would appear to me to represent a significant commercial undertaking. There is nothing inherently personal about the context in which the NMP was prepared or used …
>
> I acknowledge that the property owners may be engaged in what they characterize as a "family farm" operation, but this does not alter my finding. Fundamentally, both large and small farming operations can be said to be operating in the same "business arena", albeit on a different scale …

With respect to the second question posed in Order PO-2225 *("Is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual?")*, former Assistant Commissioner Mitchinson found that there was nothing present in the circumstances of that case that would allow the information in the NMP to "cross over" into the personal realm. As a result, he concluded that the NMP contained business information rather than personal information relating to the farm owners:

> The fact that the property owners operate a large hog finishing farm speaks to a business not a personal arrangement and, in my view, there is nothing in the NMP or the circumstances of this appeal to bring what is essentially a business activity into the personal realm.
>
> Accordingly, I find that the NMP does not contain the "personal information" of the property owners. Because only "personal information" can qualify for exemption under section 21 of the *Act*, I find that this exemption has no application in the circumstances of this appeal.

I agree with former Assistant Commissioner Mitchinson's reasoning and will apply it in the circumstances of the appeal before me. In my view, the information in the records at issue, namely the name of the operators of a specific aggregate pit and the lot and concession number of that pit, appears in a business, rather than a personal context. The individuals whose names appear in the records are deriving income from a business operation. There is nothing in this information that is inherently personal in nature, or that would allow it to "cross over" into the personal realm. I find therefore, that the information relating to the five named lot owners is business information relating to them, not personal information.

The Ministry submits that disclosure of the names of the five individual operators and the lots and concession number of the pits that they own would constitute an unjustified invasion of their personal privacy under section 21(1) of the *Act*. However, the personal privacy exemption in section 21(1) only applies to information that qualifies as "personal information." Given that I have found that the information for which the exemption has been claimed qualifies as business information rather than personal information, section 21(1) of the *Act* cannot apply in the circumstances of this appeal and I will order that it be disclosed.

THIRD PARTY INFORMATION

The Ministry and all of 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 affected parties 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 records at issue reveal commercial information because they relate 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].

Similarly, 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 six other affected parties who submitted representations also take the position that the information at issue qualifies as "commercial information" as it relates to the buying and selling of aggregate.

The appellant submits:

> Aggregate haulage from an aggregate pit cannot be considered a trade secret, to be scientific, or to be related to labour relations. It is the simple act of weighing shipped resource material, thus not very technical.
>
> Commercial information? The requirement by law of simply weighing a resource as it is being removed from a licensed site is not commercial information. It just represents the mass of material hauled to another location. It need not be sold. It may involve material being transported to another pit for further processing by the same operator. Or, it may be as simple as a few tones of gravel or a few dimensional stones being donated for a worthy cause. The tonnage figures requested would only be the cumulative weight of a resource that was removed, possibly for a great number of reasons. This in itself cannot provide any substantial commercial information. And indeed, its primary purpose is not to specify commercial information. Measured tonnage is simply a prescribed requirement of an aggregate license.
>
> …
>
> Resource tonnage production is really "resource information" which is of interest to those concerned about land planning, the health of the province, and the effect it is having on our limited resources such as water, wetlands and agriculture land both locally and regionally.
>
> Tonnage data would only become commercial information if it were to be accompanied by data revealing prices, end products, purchasers, etc. Pit or quarry licence holders can follow several options concerning their production which are difficult, if not impossible to discern from production tonnage figures. Only the licence holders themselves could reveal this additional information.

In reply, the association submits:

> The requester asserts that information about the amount of aggregate that an operator extracts for sale "would only become commercial information if it were to be accompanied by data revealing prices, end products, purchasers, etc." This is not the relevant test. As discussed in the [association's] original submissions, the definition of commercial information is much broader and has previously been held to extend to tonnage figures. Moreover, as discussed below, depending upon the pit, disclosure of the information at issue may reveal the end product for which it has been ordered, the type of purchaser(s) and potentially even the specific purchaser(s). However, this is not the test – the amount of a product sold by a private commercial entity would constitute commercial information within the meaning of section 17(1) of [the *Act*] even if it did not also reveal additional commercial information, such as type of customer.

Also in reply, one of the affected parties reiterates that, in its view, the amount of production achieved by a business is clearly commercial information.

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 from 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 also 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 relies on Orders P-725 and P-925 where Adjudicator Laurel Cropley found that tonnage information was "supplied" within the meaning of part 2 of the section 17(1) test.

All of the operators who submitted representations take the position generally that their annual tonnage production figures for specific pits were supplied to the Ministry within the meaning of that term in the section 17(1) test.

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 trustee) of the Aggregate Resources Trust, a trust created under the authority of the *Aggregate Resources Act*. 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 explains that the information at issue was supplied to the Ministry through the trustee pursuant to an indenture signed with the Ministry. The association submits that as a result of this indenture, the information was supplied to the trustee acting as agent for the Ministry.

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 operators 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 operators 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 operators 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 2 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 part[ies], are aware that it is the Ministry 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.

With respect to the "in confidence" component of part 2 of the test, the association points to Order PO-2594 in which 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 both the Ministry, and the aggregate producers (the operators) 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. It submits that although the Ministry collects tonnage information to oversee management of the aggregate resources in Ontario, it does not disclose this information.

The submissions of the other affected parties who made representations, the operators, are substantially similar to those of the Ministry and the association. All of the operators take the position that the information at issue is identical to information that they supplied, in confidence, to the Ministry and should not be made available to the public. They submit that their expectation is reasonably and consistently held within their industry. One operator in particular submits that disclosure of this information would be "absolutely contrary to the established understanding of the industry that information pertaining to license holders' business and in particular sales levels and available reserves, would be kept confidential by … the Ministry" because it has "been collecting this information for at least 30 years and has always treated it as being confidential commercial 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.

- 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.

- Financial data is readily available from government tenders which support much of the usage of aggregate in Ontario. Operators submit bids on tenders which are then made available to the public when the decision is made.

The association and one of the operators provided reply representations and responded to the appellant's three examples of why he takes the position that the information at issue is not supplied "in confidence." As their representations are substantially similar, I have summarized their responses below:

- The association submits that article 5.03 of the Indenture between the trustee and the Ministry specifically requires the trustee to treat the type of information at issue in this appeal as "confidential and competitively sensitive." The association submits that this article confirms the reasonableness of the operators' expectations that the type of information at issue will be kept confidential. The operator states that it relies on and repeats the representations of the association on this point.

- Both the association and the operator submit that while membership fees for the association are based on members' overall annual tonnage figures, the figure is from the total for all of each operator's pits. This is different from the information at issue which relates to individual pits. Additionally, the association has a strict policy in keeping its members' tonnage information confidential and all employees sign a confidentiality agreement that specifically addresses tonnage information. The association submits that it also restricts access to tonnage information to those who require it in the course of their work.

  The operator reiterates that it has always been its understanding that information reported to the trustee for the purposes of reporting extraction levels under the *Aggregate Resources Act* to the Ministry is kept confidential. The operator submits that this understanding is based on assurances provided by the trustee and the Ministry.

- The association submits that although *Aggregates and Roadbuilding Magazine* published what it purports to be tonnage figures for the top aggregate operations in Ontario, the accuracy of the figures cannot be verified given that such information is confidential. Additionally, the association states that none of the information that appears in the magazine is for the aggregate pits at issue in the current appeal.

  The operator submits that the information as it appears in *Aggregates & Roadbuilding Magazine* was not the precise information at issue but estimates.

- The association agrees that some tenders are publicly accessible but states that an operator who decides to bid in such circumstances has chosen to accept the competitive effects of doing so. The association submits that this is very different from disclosing information under the *Act* that a third party has been assured and reasonably expects will be held in confidence. The association states that "the requester specifically acknowledges that the information at issue in this appeal is not found in the public domain.

  The operator submits that the fact that the bid price for the supply of aggregate is made public does not mean that the amount of aggregate extracted from a site should be disclosed. It submits that this is a different type of information that is made available to the public for another purpose and is not relevant to determining whether the information at issue is exempt from disclosure under the *Act*.

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. The affected parties, the operators 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 licencees, the operators, 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 operators supplied their 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 all of the 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 association 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. All of the operators who submitted representations either refer to the Ministry's or the association's representations, and state that they either adopt and rely upon those

representations or agree with them as they share the same concerns with respect to competitive harm.

Specifically addressing the harm outlined in section 17(1)(a), the Ministry and the association submit:

> Disclosure would prejudice significantly the affected parties' 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 records contain commercially sensitive information which, if disclosed, would provide affected parties' competitors with details regarding its current reserves, market share and market size, putting the affected parties' at a competitive disadvantage. It would also enable vendors or lessors of new sites to know how much the affected parties' need more supply in that area, resulting in higher costs for the affected party.

One of the operators also submits that disclosure of the records would prejudice significantly its competitive position for the following reason:

> The information is tonnes sold from our quarry and our competitors are not aware of the volumes we ship. Knowing our volumes would alert them to the size of our markets and could enable them to focus efforts on taking some of that market share from us. Further, we are negotiating [a] lease arrangement for material extraction from lands in the area of the quarry. It would be disadvantageous to have our competitors learn the tonnage being shipped from the quarry.
>
> …This data reflects operational information that could be used to calculate production levels and/or other process information that is confidential and should not be subject to disclosure to the public.

With respect to the harm outlined in section 17(1)(c), the Ministry and the association submit:

> [D]isclosure of the record would cause undue loss to the affected parties and undue gains to their competitors (s. 17(1)(c) of [the *Act*]). In particular, the affected parties' competitors could use the information to target [their] customers, enter [their] market[s] and engage in non-competitive bidding.
>
> 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.

The Ministry and the association add:

> 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.
>
> 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.
>
> 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 the association continue:

> 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 company 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 company 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.
>
> 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.
>
> If the record at issue is disclosed, the affected parties would be at a distinct disadvantage as [their] competitors would know [their] tonnage but [they] would not have reciprocal information about [their competitors]. [Their] competitors could determine [the affected parties'] reserves, market share and profitability; whereas [they] would not be able to do so with respect to [their] competition.

The appellant takes the position that none of the harms outlined in sections 17(1)(a) and (c) could reasonably be expected to occur. 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 type of information about their competitors. He argues that the result would be a level playing field for all operators.

The appellant also submits that other publicly available information is more helpful in assisting an operator to determine the amount of reserves of another pit. He submits, for example, that helpful information is found in the Aggregate Resources Inventory Papers publications which provide analysis of the reserves all across the province, in 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."

The appellant argues that aggregates are not a single commodity as there are many kinds of aggregates which have different qualities and values. He submits that because tonnage figures do not differentiate between the distinct kinds of aggregate a competitor does not know from the figures what type of aggregate is being shipped, nor does it know its value. He submits this information cannot be deduced from the tonnage figure so it is information of "modest competitive value."

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 submits that locally competing companies will already know each other's competitive position. He also submits that the argument that if a competitor is aware that a producer has reached his maximum tonnage and is not able to compete for a client he would be able to charge higher prices suggests that the aggregate industry is not competitive; otherwise, other competitors would be able to provide lower prices to keep the market prices in check.

The appellant also disputes that the combined knowledge of the maximum tonnage limit and actual tonnage production causes market inequality. He submits that by the time tonnage figures are submitted they are already out of date with regard to market conditions. Additionally, he submits that if an operator comes to a competitor to purchase additional aggregate to fulfill a contract, it is reasonable to believe that the competitor would automatically believe that the producer has fulfilled his licensed limit and charge a higher price. The appellant also submits that there are other, easier means of getting "inside" knowledge about a producer reaching a licence allowance than from past production figures.

The appellant also disputes that operators would lobby competitors from obtaining a temporary annual tonnage increase. He submits that most small producers are not members of the association and probably cannot afford a professional lobbyist to lobby the Ministry against a temporary increase in limit. However, he does agree that a larger producer who is a member of the association could effectively lobby against a temporary tonnage increase sought by a small competitor who is not a member of the association.

Finally, the appellant disputes the argument that tonnage information can significantly interfere in producers' negotiations with landowners for the purpose or leases of additional land. He submits that in Southern Ontario most of the "choice" aggregate properties have been bought up by large aggregate producers. He submits that whatever market that exists is now mainly aggregate producers selling and trading licensed pits with one another rather than negotiating

with landowners and that any new land with quality aggregate will sell at a premium over other agricultural land. He further submits:

> Any tonnage production information to possibly indicate that a pit's reserves are running low, will be of little interest to a land vendor and he will assume that the aggregate producer has other choices of land. If the licensed pit next door is running low in aggregate reserves, the potential vendor will automatically know this from observations without needing to know production tonnage. Otherwise, someone else will observe the situation and pass on the word. It would be rare for revealed production figures of nearby pits to be a significant factor when producers are negotiating land deals. An astute producer would already be anticipating needing other aggregate properties long before he nears critical depletion and would be watching for opportunities to expand his business.

The association and one operator provided reply representations in response to the appellant's submissions. I have summarized their reply representations as follows:

- Level playing field

  The association submits that whether or not the disclosure of tonnage information would result in a level playing field between competitors is not at issue in this appeal. It submits that the question is whether disclosure of the confidential information of the operators, in circumstances in which its competitors' comparable information is not public, would prejudice it. For the reasons submitted in its original submissions, the association submits that it would.

  The operator submits that the appellant's assumption that disclosure of the information at issue will level the playing field is mere speculation. Additionally, the operator submits that the appellant's assumption that disclosure will result in similar information being disclosed in every other instance is flawed as each appeal related to information exempt pursuant to section 17(1) of the *Act* is considered on its merits and with regard to the evidence presented. It submits that there is no guarantee that similar information belonging to competitors will be disclosed.

- Determining amount of reserves

  The association submits that its original submissions may have used the term "reserves" too generally. It submits that if a competitor knows the maximum tonnage that an operator is permitted to extract from a pit (which is public information), plus the amount actually extracted (the information at issue), it can deduce how close an operator is to its maximum. Therefore, the association submits, it may recognize that the particular operator cannot bid on a large contract which would facilitate the competitor quoting a higher price than it would if it expected competition from the operator that is unable to fulfil the request for supply.

The operator submits that the appellant's claim that the information would only be of modest use in determining reserves is baseless because there is no alternative source for extraction information. It submits that the Compliance Assessment Reports referred to by the appellant do not provide any indication of reserves as the reports are a self-assessment by an operator indicating that the site is being operated in compliance with the site license and site plan. It further submits that the Aggregate Resources Inventory Papers do not show the current inventory of aggregate that is available to be extracted from a given site but it does show the deposits of the various types of aggregate in the region.

- Aggregates not a single commodity

The association submits that because a particular pit may be used for different types of aggregate this increases the competitive value of the tonnage production figures. It submits that operators only extract aggregate when they have an order for it. It explains, if it is disclosed that a particular amount of sand and gravel were extracted from a specific pit, a competitor could deduce from the physical properties of the reserves in the pit, the type of aggregate in demand, the type of customers and potentially even the precise customers to whom the aggregate was sold. The association submits that this is competitively sensitive information that enables a competitor to go after those customers and seek to underbid a current supplier.

- Competitive industry

The association submits that the appellant makes "a bald assertion" that the aggregate industry is not particularly competitive which is inaccurate and contrary to the evidence submitted by industry stakeholders. The association reiterates its position that disclosure of the fact that an operator may be unable to meet a particular request for supply as it is close to its license maximum would enable competitors to identify opportunities, adjust their bids or make bids they would not otherwise make, or try to attract customers who would not otherwise have been likely to change suppliers.

The operator submits that the aggregate business is a competitive business.

- Combined knowledge

The association reiterates its position taken in its original submissions on how an operator could use the information at issue in a manner that causes significant prejudice and loss to the operator whose figures were disclosed. The association submits that the appellant assumes a perfect market which only exists in theory. The association argues that the 3rd and 4th competitors reference by the appellant would not have the information that the competitor who obtained the disclosure and therefore would not know that the operator whose information has been disclosed is unable to compete.

- Lobbying

  The association submits that the requester's allegations relating to lobbying are made without foundation.

- Negotiations with landowners

  The association submits that contrary to the appellant's assertions, a landowner will not necessarily assume that an aggregate producer has other equivalent choices of land. Without the information at issue, a landowner will not know how close the operator is to its maximum. The association submits that, as the appellant notes, an operator will look for land before depleting reserves which makes the tonnage figures at issue particularly valuable to potential land vendors.

Analysis and findings

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 tonnage production information were to be disclosed, there is a reasonable expectation that the affected parties 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 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 specific tonnage of aggregate removed from a specific pit can reasonably be expected to interfere with an 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 find that, were the tonnage production figures disclosed, the operator's competitive position in negotiations with landowners could reasonably be expected to 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 the 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 find 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 information is exempt from disclosure pursuant to the mandatory exemptions at sections 17(1)(a) and (c) of the *Act*.

PUBLIC INTEREST OVERRIDE

As noted above, in his representations, the appellant raised the possibility that the public interest override provision in section 23 of the *Act* applies in the circumstances of this appeal. Section 23 reads:

> 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 [Order P-1396, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner),* [1999] O.J. No. 488 (C.A.)].

Public Interest

In considering whether there is a "public interest" in the 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].

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

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, P-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].

Purpose of exemption

If a compelling public interest is established, it must then 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 valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balancing exercise is the extent to which denying access to the information is consistent with the purpose of the exemption [Order P-1398].

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 during the licensing process. 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 the 'licensing' trust and an endangerment of the environment due to greater than expected production of dust, noise and wear along local roads. 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 accurately assess the levy imposed on pit owners, based on the amount of aggregate extraction. This levy is collected and then split by [the trustee] among various parties including [the trustee] as well as government agencies 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 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 [and] Nature Ontario and Gravel Watch Ontario, need tonnage information to make informed projections 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…This information is also in the public interest in that mines are potentially damaging to the environment and society. Also mining is generally a non-sustainable activity, essentially consuming the resources of the earth, and so the public and the government are interested in this information. 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 no 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 aggregates branch) is a partner with 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 old 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 no life – we all know that water needs to be protected for the greater good and source water quality is closely related to aggregate deposits. 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 publications (created by the Ontario government) document the aggregate reserves in Ontario. Pit licenses 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 at the regional [Ministry] office. 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 assist the [Ministry] in monitoring the environmental impacts of pits, it follows that tonnage figures are in the public interest and should be made accessible.

In its reply representations, the Ministry takes the position that there is no compelling public interest in the disclosure of the information because tonnage information is primarily private information related to the companies at issue and its disclosure would not shed light on the activities of government. Specifically, 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 (ie: the *Aggregate Resources Act*) serving that very purpose, with opportunities for public comment with respect to application for aggregate permits and licenses.
>
> 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 studies prepared 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.

Only one of the operators provided reply representations. In those representations, the operator takes the position that the appellant has not met the high burden of demonstrating that there exists a compelling public interest in the disclosure of the information relating to the amount of aggregate that it extracted from its sites in Zorra Township. It submits:

> As stated by [the association] in its reply submissions, the information in question relates to commercial activities of [named operator] and others. It does not relate to any specific government activity, policy or position.
>
> Furthermore, if the goal of the appellant is to monitor the aggregate industry and its regulation in Ontario, the appellant has identified a number of other sources of information which are publicly available that will allow the appellant to accomplish that task. Also, the process for the granting of aggregate licenses, which is mandated by the *Aggregate Resources Act*, the regulations and the Provincial Standards implemented by the Ministry of Natural Resources, is one that involves significant and extensive public consultations.

The operator included an attachment that provided an overview of the process by which the maximum tonnage that can be extracted from a site pursuant to a license is set.

The operator submits:

> The availability of this information and the public process used to issue licenses (which set the maximum extraction levels) undermines the appellant's claim that the public interest requires the disclosure of the actual production levels achieved by [named operator] at its sites in Zorra Township.
>
> The appellant's submission under the headings (C1) and (C2) that access to the production levels is necessary to determine whether [named operator], or any other license holder, has adhered to the terms of its license and is paying the required levy are without merit. The appellant's submissions in that regard are based on an assumption that [named operator] has exceeded its limit or has not paid its levy. There is no basis for such allegations and [named company] hereby confirms that it is operating with[in] the bounds of, and according to, the terms of its licenses, the *Regulations* and the *Aggregate Resources Act*. [Named operator] also confirms that it has paid all levies as they become due.
>
> Pursuant to section 3 of the *Aggregate Resources Act* the Minister of Natural Resources is responsible for the administration of that *Act* and the licenses issued under it. There is no allegation that the Ministry is not carrying out its mandate in this regard.

Also, [named operator] notes that tonnage information is published on a regional basis allowing municipalities to determine whether or not the levies to which they are entitled to are being properly distributed. The regional reporting of extraction information does not harm individual license holders commercial interests as the information is sufficiently generalized so as not to be associated with any given license holder or site and, therefore, avoids the prejudices and harms that are associated with public disclosure of tonnage information on a site basis.

With respect to the appellant's submissions under the heading (C3) that disclosure is necessary for environmental considerations, [named operator] notes that the granting of a license under the *Aggregate Resources Act* and the setting of the terms of license, including maximum extraction levels, are the subject of public consultation and an environmental review. The maximum extraction level is set pursuant to that process and the maximum extraction level is publicly known. Presumably, if the maximum tonnage level was acceptable, then the actual extraction level (which would be no more than the maximum) has also been predetermined as being acceptable.

Also, in the third paragraph under the heading (C3), the appellant admits a point that is central to [named operator's] submission, namely, that tonnage information is useful for determining "demand for and uses of aggregate."

With respect to the appellant's submissions under the heading (C4), [named operator] repeats its submission that the appellant is, in effect, seeking an amendment to the *Aggregate Resources Act* or *Regulations* to require the automatic disclosure of extraction levels by way of this [access] request. The Legislature and the government of Ontario have clearly considered what information ought to be made public and what ought to be confidential in an effort to balance the interests of stakeholders. [Named operator] also repeats its submission that there is no evidence that the information provided on the InfoMine website was disclosed by the Government of Ontario pursuant to the *Mining Act*. Finally, [named operator] repeats its submission that the appellant is simply wrong about the manner in which information provided to [the trustee] and [the association] is handled.

With respect to the appellant's submissions under the heading (C5), [named operator] submits that the information that it claims is exempt has nothing to do with water usage. The information at issue relates to the amount of aggregate that [named company] extracted from its Zorra sites. The appellant's submissions under (C5) appear to be irrelevant to the issue at hand. Furthermore, [named operator] notes that environmental issues and water usage are generally addressed in the license application process.

With respect to the appellant's submission under the heading (C6), [named operator] repeats its previous submission that the availability of information relating to the aggregate industry in Ontario undermines the appellant's argument

> that the disclosure of [named operator's] extraction levels from its sites in Zorra is necessary in order to meet a compelling public interest (See Order P-532).

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 demonstrated 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 each of 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 [appellant] are comparable.

C6 – Information Already Made Public regarding Aggregates

As the [appellant] 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 scrutinize 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 requested tonnage information would "shed light on the activities of government" by providing information on the actual management of aggregate resources on an annual basis. The appellant submits:

The request concerning actual pit and quarry tonnage was raised because the only public information made available to Zorra Council was a single figure giving the total tonnage for the entire township. That figure was derived from royalties collected per tonne for a given year. Once a pit or quarry within the township is licensed, its actual production becomes hidden behind this global figure. There is no geographic information provided with this single annual tonnage figure provided to the municipality. This figure is the sum of all production from scattered clusters of pits within its boundaries. This prevents municipal councils from effectively carrying out their responsibilities with respect to aggregate pits such as measuring health and safety risks associated with extraction and haulage from pits and quarries. Aggregate licensed operations tend to be geographically clustered and the status of licenses can range from dormant to highly active. No

risk assessments can be made nor judgement on cumulative impacts as to health risk (dust, noise, and traffic) and other environmental impacts can be ascertained and minimized. Contrary to [the Ministry's] position, knowing the maximum tonnage for a site is not a reliable measure of the level of aggregate extraction and transport.

[The Ministry's] representations claims that a significant amount of information regarding aggregate operations is already made available to the public. However, access to this information is limited to viewing in distance [Ministry] offices during office times by appointment and does not provide annual past production figures. Only during the application procedures for obtaining an aggregate license are the specifications for a proposed pit or quarry brought before the public for comment. After licensing, exemptions and modifications are frequently requested and made to the site plans including increasing the maximum tonnage limits. Since these requested amendments are not published in the local press, rural neighbours may not be aware of them. Also, increases to the allowable tonnage maximums can be temporary or permanent which is even more confusing.

According to information re: offences on the [Ministry] website, convictions under the [*Aggregate Resources Act*] for exceeding maximum tonnage are rare and are largely at the discretion of the Aggregate Inspector. Tonnage increases can be verbally approved and subsequently inserted into the site plans or license without public consultation, much of this being at the discretion of the Aggregate Inspector as per directives from the [Ministry] stated in its Polices and Procedures Manual for Aggregate Inspectors (Miscellaneous Section)…Actual annual production figures would shed considerable "light on the operations of government." …

The problem with getting only one tonnage figure in a jurisdiction such as Zorra Township is that it includes quarried limestone, mainly on site for cement production. If there is an increase in aggregate production, Zorra Township Council has no idea whether this is a result of increased quarried limestone processed on site or increased sand and gravel production requiring haulage for long distances along its concession roads. In fact, Zorra Township Council has no idea what proportion of Zorra's aggregate production is from gravel pits and what is from limestone quarries. Nor does it know from where, in what proportions sand and gravel production comes from within its boundaries. Thus, it has little ability to accordingly understand trends and requirements with regard to aggregate operations in various parts of the township.

Making tonnage figures publically available for all aggregate sites would enable members of the public whose health, safety and local environment are being directly affected to better assist their local governments in taking measures to minimize impacts through by setting planning priorities such as for strategic road upgrades etc.

In his sur-reply representations, the appellant also responds to the association's reply representations on the application of the public interest override. The appellant submits:

> There is a compelling public interest to know how the [Ministry] is managing our aggregate resources for the public benefit and to involve public comment where detriment is recognized (Environmental Commissioner Ontario Annual Report, p. 44 to 50, 2006-2007) as set out in C1 to C6 of my …representation. Actual tonnage produced, instead of maximum tonnage is key information needed to facilitate sustainable management of our non-renewable aggregate resources. Local impacts, cumulative impacts and Province-wide impacts can thus be ascertained and more effective policies developed for future land use planning, for the benefit of the Aggregate Industry as well as the public.

Regarding the issues in (C1), Determining Compliance, and (C2) Determining Appropriate Receipt of Funds to Government Units, the appellant submits that the annual compliance assessment reports do not include tonnage produced and asks how the public can raise concerns about tonnage when they are kept unaware of the actual tonnage produced. The appellant also submits:

> The Aggregate inspectors "aim to physically inspect 20% of the licensed operations in their jurisdiction but are lucky to have the time to inspect 10% per year. A pit, on average, is only inspected once every 10 years. If the public notices an unusual aggregate was hauled from a pit in a given year, they have no facts with which to raise concerns.

Responding to the association's comments with respect to (C3), the Need for Environmental Projections, the appellant submits that environmental concerns have been recognized in the Environmental Commissioner's Annual Reports in recent years, as well as in a Special Report to the Legislative Assembly and that such concern relates back to the individual pits and the cumulative effects they have. The appellant submits that maximum tonnage figures appear to be flexible and questions whether there are environmental problems related to issuing exemptions to the maximum tonnages at the discretion of the [Ministry] Aggregate Inspectors. The appellant submits that environmental concerns need not be restricted to the natural environment; they include the social impact of dust, noise, traffic safety, wear and tear on roads and bridges which very much depend on the amount of aggregate extracted, the degree to which it is processed and the distance that it is hauled.

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 maximum annual tonnage production figures. 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 an extensive process that has already taken into account environmental concerns and provided an opportunity for public consultation. 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, it is the maximum tonnage production figure (the amount that an operator can legally extract from its aggregate pit), upon which any impact should be assessed or upon which projections should be based, 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 at issue, the actual tonnage production figures for individual aggregate pits in Zorra Township. As I have found that there is no compelling public interest in disclosure of the information at issue, I find that section 23 of the *Act* does not apply and pursuant to section 17(1), the information is exempt from disclosure.

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 24 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

In its original decision letter, the Ministry advised that no data is available for the year 2006. The Ministry also advised that it does not have records in relation to two of the named operators under part 2 of the request nor for other products such as clay, gypsum and dolomite under part 3 of the request. During mediation, the appellant advised that he is of the view that additional records should exist in relation to parts 2 and 3 of his request, as well as data for 2006.

As noted above, during my inquiry into this appeal, the Ministry advised that it had located a copy of the 2006 data which was not available at the time the request for information was received. A severed copy of this information was provided to the appellant along with a supplementary decision letter.

Also as noted above, with its representations the Ministry enclosed a copy of a second supplementary decision letter issued to the appellant. In that supplementary decision letter, the Ministry advised that it had conducted an additional search for responsive records and had located additional records responsive to his request. In those responsive records, twelve new operators were identified, including the two operators the appellant specifically mentioned in part 2 of his request and whose information had previously not been located.

Representations

The Ministry takes the position that it conducted a reasonable search to locate records responsive to the appellant's request. It submits that it has now located responsive records for the year 2006 and for part 2 of the appellant's request and that records responsive to part 3 of the request do not exist.

The Ministry submits that the search was conducted by a Policy Analyst for the Aggregate Resources Section of the Ministry of Natural Resources and together with its representations enclosed an affidavit sworn by that individual. In his affidavit, the Policy Analyst explains that he conducted the search himself and no other staff member was involved as he is the only one in the Ministry that has access to the requested information, as it is sent to him by the trustee. The Policy Analyst attests to the fact that he personally conducted a search for responsive records on the understanding that the scope of the request was narrowed to Zorra Township. He states that based on the wording of the request it was determined that the responsive records would be located in the following database:

- ALPS (Aggregate Licencing and Permitting System) database
- 2004 [The trustee's] Production Database
- 2005 [The trustee's] Production Database
- 2006 [The trustee's] Production Database

The Policy Analyst describes the databases as follows:

> The ALPS database contains descriptive data such as the client name, physical location and operation type for all Aggregate Licences or Permits within the Province of Ontario. The ALPS database is used by the [Ministry] to monitor, track and issue Aggregate Licences and Permits.
>
> [The trustee], on behalf of [the Ministry], collects production information from Licence and Permit holders for the purpose of invoicing for money owed to the province and/or municipalities. Every licensee and every permit holder must file an annual production report setting out the quantity of aggregate removed from a site in each month of the previous year. Production reports must be received in [the trustee's] office by January 31st or the individual/corporation is in contravention of Section 1 of Ontario Regulation 244/97 under the *Aggregate Resources Act*. [The trustee] sends [the Ministry] a copy of their database annually. The [trustee's] Production databases contains the production (tonnage extracted) statistics.

The Policy Analyst then describes the specifics of his search for responsive information:

> On July 31, 2007, I combined a local copy of the ALPS database with both the 2004 and 2005 [trustee] production information to give the total tonnage for each Authority number (which is the Licence or Permit number) using a Visual Basic script. The production values came from the [trustee's] database and the rest of

the information came from the ALPS. I did a query to link them by Authority ID number (which is the Licence or Permit number). Using this method I created a table. I then did another query to reduce my list to only include Zorra Township. This returned 18 Licences.

On January 17, 2008, I took the newly received 2006 data from [the trustee], and added it to my previous query linking the additional 2006 data (I did not have to combine commodities as [the trustee] provided the data in the required format). This returned 19 licences.

The information located as a result of my searches of the ALPS database and [the trustee] production database were input into two spreadsheets: one for 2004 and 2005 information and another for the 2006 information.

Part 2 of the request was for: "The limestone tonnage for each quarry operated by [three named affected parties]." My queries returned 19 Licences for Zorra Township. There was only one Quarry returned and this was owned by [one of the three affected parties named in part 2 of the request]. No information was found relating to [the other two affected parties named in part 2 of the request].

On March 18th, 2008 while confirming my values for this affidavit, I discovered that while the request was for "Zorra Township" I only searched the Geographical Township of Zorra, Oxford on Thames, and Nissouri Townships. Upon running the same search for the Municipality, I located 24 total Licences which included Licences owned by [the other two affected parties named in part 2 of the request].

Part 3 of the request was for: "The tonnage of all other products such as clay, gypsum, dolomite, extracted from each of these quarries." As stated earlier in my affidavit, every licensee and every permit holder must file an annual production report setting out the quantity of aggregate removed from a site in each month of the previous year**.** The Production Reports provides that pit operators only report on the following commodities: sand & gravel, clay/shale, topsoil (only if removed with [Ministry] permission) and Quarries operators only report on the following commodities: crushed stone, clay/shale, dimensional stone, industrial, topsoil (only if removed with [Ministry] permission).

[The trustee] collects this information on individual Licences and Permits when Production Reports are submitted annually. The information recorded in the [trustee's] databases is how much is produced by commodity type. We have no information regarding gypsum, dolomite, or just clay. Below is a list of the commodity types which are tracked:

- Sand and Gravel
- Crushed stone
- Industrial
- Shale/Clay

- Topsoil
- Dimensional stone

The appellant submits that the Ministry did not conduct a reasonable search for responsive records "as it did not indicate that it plans to correct two discovered flaws in their database and have this information potentially available." The appellant submits:

> Access to limestone tonnage for quarries operated by [named operator] were partly denied under section 17 of the *Act* and partly because figures would be impossible to provide as a result of the Ministry's (and thus [the trustee's]) not having any figures for [named operator]. This may be possible in the case of [named operator] as they could be purchasing their raw materials from [named operator] and/or [named operator] rather than operating in one of the latter's quarries. However, that the [Ministry] database has no data for [named operator] is shocking. How does [the trustee] collect the royalties due to the province from the 4 licensed pits operated by [named operator] when this is to be based on annual production data? Does the [Ministry] not ever inspect these pits for compliance? There appears to be considerable negligence on the part of [the Ministry] and [the trustee] and hence the [association] in conjunction with managing the aggregate industry's data for [the Ministry].
>
> The [Ministry] has no records concerning other valuable resources, in particular gypsum. Gypsum is an important ingredient in wall board production and the manufacture of cement to name only two of its many uses. It has been known to be a resource in Zorra Township. Dolomite is also found in the same area and is specifically quarried in some parts of Ontario for particular uses. Clay is also an important ingredient for cement and brick manufacturing as well as for more general uses such as roadbeds etc. I would have expected that [the trustee] and [the Ministry] would required license holders such as [named operators] to provide records of the extraction of these three resources and to collect royalties according to their tonnages as is done for other resources extracted from pits and quarries.
>
> The request for separate tonnages for bedrock (limestone, gypsum and dolomite) and for other aggregate (sand, gravel etc.) was because the tonnages of the two are presently combined into one lump sum for Zorra Township. The two types of resources are handled differently. In Zorra Township bedrock resources are extracted near their uses in the manufacturing of industrial products and thus require little or no distant haulage. In contrast, loose aggregate may be transported over concession and country roads for considerable distances.

Analysis and finding

I have considered the submissions of the Ministry and the appellant on this issue and have also reviewed the information responsive to the request. I am satisfied that the Ministry has performed a reasonable search for the records responsive to the request.

With respect to the information related to 2006, the Ministry subsequently located a copy of responsive information and has provided the appellant with a severed copy. In his submissions, the appellant did not comment on whether, despite this additional disclosure of information, he continues to take the position that additional information for 2006 (other than that addressed in part 2 and 3 of his request which I will discuss below) might exist.

Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. In light of the Ministry's representations on its search for responsive records, the fact that it located responsive information for 2006, and the fact that the appellant did not make any submissions on whether additional responsive information for 2006 might exist, I am satisfied that the Ministry's search for responsive records for the year 2006 was reasonable.

I will now address the appellant's position that the Ministry did not locate any responsive records in relation to two of the named operators under part 2 of his request. From my review of the records and the Ministry's representations I understand that as a result of a subsequent broadened search using the search term "Municipality of Zorra," rather than "Zorra Township," the Ministry located 24 total operator licences rather than 19 and that the 24 included the two operators specifically named in part 2 of the request whose information did not come up in the original search. Having reviewed the representations of the Ministry as well as having reviewed the information at issue in this appeal, I not only accept that the information relating to the two named operators in part 2 of the appellant's request appears in the responsive information but that the Ministry's search for this information was reasonable.

Finally, the appellant takes the position that specific information regarding amounts of clay, gypsum and dolomite as outlined in part 3 of his request should exist. While I understand that the appellant believes that these three commodities should be tracked separately, based on the Ministry's representations I accept that these three commodities are not specifically tracked at this time. Accordingly, based on the Ministry's representations I find that its search for this information was reasonable.

In sum, I find that the Ministry has provided sufficient evidence to demonstrate that it has expended a reasonable effort to identify and locate responsive records as required by section 24 of the *Act*. In my view, it is clear that a number of searches were conducted by an experienced employee who is responsible for managing these records. I accept that this individual expended reasonable efforts to locate any additional records that are responsive to the appellant's request. Accordingly, I uphold the Ministry's search.

ORDER:

1. I order the Ministry to disclose to the appellant the names and lot and concession numbers of the individual operators that have been severed from the records by **December 3, 2009** but not before **November 27, 2009**.

2. I uphold the Ministry's decision to deny access to the actual tonnage production figures pursuant to section 17(1) of the *Act*.

3. I uphold the Ministry's search for responsive records.

4. 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