Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER PO-4003

Appeal PA17-424

Ministry of Natural Resources and Forestry

October 29, 2019

Summary: The appellant sought access to information relating to a specified gravel pit licence. After considering the objections of the pit operator, the ministry issued an access decision granting the appellant partial access to the records. The ministry claimed that the withheld information qualified for exemption under the third party information exemption under section 17(1). The appellant appealed the ministry's access decision and narrowed the scope of the request to production tonnage information contained in the records. In this order, the adjudicator finds that the information remaining at issue does not qualify for exemption under section 17(1) and orders the ministry to disclose this information to the appellant.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, as amended, s. 17(1).

Orders and Investigation Reports Considered: Orders PO-2594, PO-2838 and PO-2839.

OVERVIEW:

[1] The appellant made a request to the Ministry of Natural Resources and Forestry (the ministry) under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to a specified gravel pit licence. The period of time specified in the request dates to when the licensee (the third party) started operating the pit.

[2] The ministry located responsive records and notified the third party under section 28 of the *Act*. The third party objected to the release of information which related to it and provided submissions to the ministry. After considering the third party's objections, the ministry issued an access decision granting the appellant partial access

to responsive records. The ministry claimed that the withheld portions of the records qualified for exemption under section 17(1)(third party information exemption) and section 21(1)(personal privacy).

[3] The appellant appealed the ministry's decision to this office and a mediator was assigned to explore settlement with the parties. At the end of mediation, the appellant confirmed that it was no longer seeking access to the portions of the records withheld under the personal privacy provisions under section 21(1).[1] However, she continued to seek access to the portions of the records the ministry claimed qualify for the third party information exemption under section 17(1).

[4] The file was transferred to the adjudication stage of the appeals process. During the inquiry, I sent a Notice of Inquiry to the parties and invited their representations. The ministry and the appellant submitted representations in response, which were exchanged between the parties in accordance with this office's confidentiality criteria found in Practice Direction 7. The third party did not submit representations in response to the notice. However, as mentioned above, the third party provided submissions to the ministry during the request stage.[2]

[5] In this order, I find that the third party exemption under section 17(1) does not apply to the withheld tonnage information and order the ministry to disclose it to the appellant.

RECORDS:

[6] The records at issue consist of the following two type of documents:

- annual licence production reports[3]; and
- licence fee invoices[4].

[7] The ministry submits that the licence production reports contain information relating to the amount of aggregate (in tonnes) that has been extracted from a site.

[8] The ministry submits that the same tonnage information can be extracted by

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[1] Accordingly, Records A0294613_00009, A0294680_00040 to A0294680_00041, A0294693_00054, and A0294699_00063 were removed from the scope of this appeal.
[2] During mediation, the ministry provided this office with a copy of an email, dated August 14, 2017 the third party sent to it. In this email, the third party submits that the third party information exemption under section 17(1) applies to the records the ministry identified as responsive to the appellant's request.
[3] The licence production reports are found at pages A0299741_000121 to A0299741_000136, A0299742_000137 to A0299742_000148, and A0299749_000152.
[4] The licence fee invoices are found at A02999742_000137 to A0299742_000148.

"calculating backwards" from the licence fees reported in the licence fee invoices.

[9] The appellant submits that she only seeks access to "tonnage information" found in the annual production reports and licence fee invoices. However, these records also contain information identifying how much land requires rehabilitation along with information regarding the expiry dates of extraction and lease agreements. The appellant confirmed that she is not interested in pursuing access to this information. Accordingly, the portions of the production reports which contain this type of information have been removed from the scope of this appeal and are highlighted in the copy of the records sent with the ministry's copy of this order.

DISCUSSION:

[10] The sole issue in this appeal is whether the records contain information the third party reported directly or indirectly to the ministry about tonnage amounts for a specified aggregate pit qualifies for exemption under sections 17(1)(a) or (c). These sections state:

> 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,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; [or]
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[11] Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

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

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[5] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[13] The appellant does not dispute that the withheld information constitutes commercial information. The ministry submits that information that relates to the amount of aggregate that has been extracted from a pit site for the purpose of use or sale qualifies as commercial information.

[14] In support of its position, the ministry refers to Orders PO-2838 and PO-2839 which adopted the finding in Order PO-2594 that a gravel pit's tonnage information relates to the buying, selling or exchange of merchandise or services and meets the definition of "commercial information" as contemplated in part 1 of the section 17(1) test.

[15] Having regard to the type of information at issue in this appeal, I adopt the reasoning in Orders PO-2594, PO-2838 and PO-2839. I find that the tonnage information at issue relates to the third party's buying, selling or exchange of merchandise or services and this meets the definition of "commercial information"[7] thus satisfying the first part of the section 17(1) test.

Part 2: supplied in confidence

Supplied

[16] The requirement that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties.[8]

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[7] *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. [Order P-1621]

[8] Order MO-1706.

In confidence

[17] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[9]

[18] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[10]

Representations of the parties

[19] The third party takes the position that it supplied the information at issue in confidence to the ministry. In his submissions, the third party submits that he has always treated production tonnage information in a manner that indicates a concern for confidentiality and states:

> [i]t is recognized in the industry and other Access to Information Orders that annual tonnage production figures supplied by [pit operators] such as myself to [the ministry is] supplied implicitly "in confidence" and that this expectation of confidence is reasonably held.

[20] The third party submits that the information he provided the ministry about disturbed areas and rehabilitation was also supplied in confidence.

[21] The ministry also submits that the tonnage information at issue in this appeal was supplied in confidence to it by the third party. In its representations, the ministry states:

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[9] Order PO-2020.
[10] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

> [The third party] asserts that it always treats its tonnage information as confidential and supplied this information to the Ministry with an expectation of confidentiality. Although [the third party] did not identify specific orders of the IPC, it relied on the common understanding within the aggregate industry and on previous rulings by the IPC to demonstrate that an expectation of confidentiality was reasonable in the circumstances.
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> …
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> The Ministry confirms that the [*Aggregate Resources Act* (*ARA*)] requires all licensees to supply tonnage production information to the Ministry through the Aggregate Resources Trust Corporation, the trustee appointed under section 6.1 of the *ARA*, and that the trustee provides this information to the Ministry.

[22] In further support of its position, the ministry refers to Order PO-2594 which, after considering prior orders[11] from this office addressing tonnage production information and requirements of the *ARA*, found that the tonnage information at issue in that appeal was supplied in confidence to the ministry with an implicit expectation of confidentiality.

[23] In its submissions, the appellant provided evidence suggesting that the third party did not consistently treat the information at issue in this appeal in a manner that indicates a concern for confidentiality. The appellant submits that the third party provided her with tonnage information representing the sand and gravel removed from her property for a specified period of time in 2011 during his first year of operating the pit. The appellant provided this office with a copy of the invoice and related worksheet the third party sent to her. I note that the receipt is entitled "Pit Materials Extracted". In addition, the related worksheet contains information relating to two other properties. However, these documents do not appear to contain information representing the third party's annual production tonnage.

[24] Having regard to the submissions of the parties and this office's past treatment of tonnage production information, I am satisfied that the third party "supplied" it to the ministry with an implicit expectation of confidentiality and that this expectation was reasonably held.

[25] Despite the appellant's evidence that the third party did not treat the information at issue in a confidential manner for a period of time during his first year of operating the business, I am satisfied that by the time the appellant made her request under the *Act,* the third party had a history of treating the information at issue in a confidential

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[11] Orders P-725 and P-925.

manner.

[26] Accordingly, I find that the second part of the test in section 17(1) has been met.

Part 3: harms

[27] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[12]

[28] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[13] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 17(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[14]

[29] In this case, the ministry and third party submit that the harms contemplated in sections 17(1)(a) and (c) apply.

Representations of the parties

[30] In his submissions to the ministry at the request stage, the third party takes the position that disclosure of the tonnage production information contained in the records would significantly affect his competitive position and interfere significantly with future negotiations. As noted above, the third party did not respond to the Notice of Inquiry inviting his representations or my invitation to make reply representations. The following non-confidential portions of the third party's submissions summarized in the ministry's representations were shared with the appellant:

> [D]isclosure of the actual tonnage of aggregate removed in a given year, and of information on lease and extraction agreements and their expiry dates, and on disturbed areas requiring rehabilitation can reasonably be expected with my negotiations for the purchase or lease of additional properties in the area.
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> …

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[12] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[13] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[14] Order PO-2435.

> [D]isclosure would also significantly prejudice my competitive position with regards to my competitors. With this [c]ommercial information they will have information which they can use to outbid me for contracts with customers. This [c]ommercial information will also give them additional competitive advantage by allowing them to negotiate for the purchase or lease of the same properties I am interested in purchasing or leasing, which could either result in a higher price for me to buy or lease such properties, or deprive me of the opportunity to purchase or [l]ease such properties, which in my area are very limited in number.

[31] In its representations, the ministry submits:

> The Ministry submits that the [third party] has identified potential harms associated with the release of tonnage information that have been accepted by the IPC in previous orders.[15] These harms were described in previous orders as unfair advantage when bidding on a future contract and interference with an operator's negotiations for the purchase or lease of additional properties in the area.

[32] The appellant takes the position that the disclosure of tonnage information at issue could not be reasonably be expected to give rise to the harms contemplated in sections 17(1)(a) and (c) as the third party is no longer in business. In support of this position, the appellant submits that:

- the third party has not applied for a pit licence since 2015 and is not actively looking for another licence;
- the specified pit licence has been surrendered; and
- the third party no longer operated a business in the community, is retired and spends his winters away.[16]

[33] The appellant also submits that the fact that the third party had previously provided her with tonnage information for 2011 demonstrates that the third party's claims of harm are unfounded. The appellant argues that the third party himself disclosed tonnage information to property owners and thereafter, continued to operate the pit with "no loss of economic monies to his business or breach of confidentiality, [or negative effect to] his competitive position".

[34] There appears to be no dispute that the third party's licence has been surrendered. In its representations, the ministry states:

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[15] See for example, Orders PO-2838 and PO-2839.
[16] The appellant provided a copy of a website page in support of this argument.

> In this case, information regarding surrender of the [third party's] licence has already been disclosed to the requester, as have the extraction and lease agreements themselves.

[35] The appellant's argument that the third party is retired and no longer operates a business was shared with the ministry and the third party along with an invitation to provide representations in reply. Though the third party's submissions suggest that he may be interested in negotiating a future purchase or lease of a site, neither the ministry nor the third party provided a response to my invitation for reply representations.

Analysis and Decision

[36] Past orders from this office have been consistent in finding that tonnage production information is commercial information and that licensees have a reasonable expectation of confidentiality when they provide this type of information to the ministry. However, whether or not tonnage production information qualifies for exemption under the third party information exemption will depend on whether the party resisting disclosure provides sufficiently detailed evidence of the harms contemplated in the third part of the test in section 17(1).[17]

[37] In Order PO-2594, the then Assistant Commissioner Brian Beamish ordered the ministry to disclose the requested tonnage information because he found that the evidence presented to him failed to satisfy the requirements of the third part of the test in section 17(1). In making his decision, he took into consideration the availability of public information relating to maximum tonnage amounts set out in licence applications and concluded that the availability of such information requires "very specific evidence of the harm that could result from the disclosure of the *actual amount* even greater"[18] in these types of cases. The Assistant Commissioner concluded that the requisite evidence was lacking in the case before him in Order PO-2594 as the third party failed to explain how knowledge of a specific tonnage amount removed from a site could reasonably be expected to give rise to the harms contemplated in section 17(1)(a).

[38] The adjudicator in Orders PO-2838 and PO-2939 came to a different conclusion regarding the production tonnage information before her and found that the parties resisting disclosure provided sufficient evidence demonstrating that disclosure could reasonably be expected to give rise to the harms in sections 17(1)(a) or (c). In these orders, Adjudicator Catherine Corban stated:

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[17] See for example Orders P-725 and P-925.
[18] Page 5, Order PO-2594.

> First, in my view, the Ministry and the affected parties have explained how disclosure of the actual tonnage of aggregate removed from a specific pit in a given year can reasonably be expected to interfere with the operator's negotiations for the purchase or lease of additional properties in the area. I accept the operator's argument that the disclosure of the actual tonnage production information, together with the maximum tonnage information, which is publicly available, will reveal a pit's reserves and life expectancy. I also accept that knowledge of reserve amounts and life expectancies of an operator's pits will place vendors and lessors of suitable properties in the area at a competitive advantage in that they will know to charge a higher price based on the need of the operator. I also accept that disclosure of this information would impact leases on a royalty per tonne payment scheme as the landowner could require an unreasonably high minimum tonnage to be extracted from its land based on the tonnage information of the producer. Accordingly, I accept that the operator's competitive position in negotiations with landowners would be significantly prejudiced within the meaning of section 17(1)(a).
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> Second, based on the detailed submissions provided, I find that the Ministry and the affected parties have provided me with sufficiently detailed evidence to indicate that knowledge of the affected party's tonnage would provide a competitor with an unfair advantage when bidding on a future contract. In particular, I accept that if an operator is fairly close to its maximum limit, a competitor will know that it is unable to bid on a large contract allowing a competitor to bid at a higher price. I also accept that if a competitor knows an operator who is bidding on a particular contract is close to its limit it will know whether the operator is likely to seek municipal approval for a temporary licence limit increase and prepare in advance to lobby against that increase to ensure the operator cannot bid on the contract. Accordingly, I accept that disclosure of the actual tonnage information would reveal information that could reasonably be expected to significantly prejudice its 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).

[39] In this appeal, the third party submits that disclosure of actual tonnage removed in a given year would interfere with negotiations for the purchase or lease of additional properties in the area (section 17(1)(a)). The third party also submits that disclosure of the information at issue would also significantly prejudice his competitive position as it would enable his competitors to outbid him (section 17(1)(a)). Finally, the third party submits that his competitor's ability to outbid is an "unfair advantage" that would result in an undue loss to him (section 17(1)(c)).

[40] I have considered the representations submitted by the ministry in addition to

the third party's submissions and note that their evidence mostly relies on this office's past treatment of similar information in Orders PO-2838 and PO-2839 and industry standards.

[41] In my view, the evidence presented to me by the parties resisting disclosure fails to highlight the specific circumstances of the case before me. I compare this with the type of evidence presented to the adjudicator in Orders PO-2838 and PO-2839. I note that in those orders, Adjudicator Corban had evidence before her that at least one of the pit owners was presently negotiating a lease agreement for lands in the area of the quarry. In addition, the evidence presented to Adjudicator Corban suggests that the pit operators resisting disclosure were actively engaged in the buying and selling of aggregate.

[42] This contrasts sharply with the circumstances of this appeal. Here, there is no dispute that the third party no longer operates a business.

[43] In addition, when asked to respond to the appellant's evidence that the third party no longer operates a business and has not done so for some time, neither the ministry nor the third party provided a response. As a result, I was not provided with an explanation as to how disclosure of the production tonnage information at issue could reasonably be expected to compromise the negotiating or competitive position of what appears to be an inactive business or result in undue harm under sections 17(1)(a) and (c).

[44] Instead, the ministry and third party appear to take the position that the harms alleged are self-evident and almost exclusively rely on the arguments presented in Orders PO-2838 and PO-2839. However, I was not provided with sufficient evidence connecting the findings in Orders PO-2838 and PO-2839 with the actual facts and circumstances of this appeal. As a result, the necessary evidentiary link between disclosure and the harm alleged in sections 17(1)(a) and (c) is not established.

[45] Having regard to the above, I find that the ministry and the third party have failed to provide sufficient evidence to satisfy the requirements of the third part of the test in sections 17(1)(a) and (c).

[46] As all three parts of the test in section 17(1) must be met for the exemption to apply, I find that the tonnage information at issue does not qualify for exemption under sections 17(1)(a) or (c) and order the ministry to disclose this information to the appellant.

ORDER:

1. I order the ministry to disclose the tonnage production information contained in the records to the appellant by **December 4, 2019** but not before **November 29, 2019**. For the sake of clarity, in the copy of the records enclosed with the

ministry's copy of order, I have highlighted the portions of the records that were removed from the scope of the appeal and **are not** to be disclosed to the appellant.

2. In order to verify compliance with order provision 1, I reserve the right to require a copy of the records disclosed by the ministry to the appellant to be sent to me.

Original Signed By: October 29, 2019

Jennifer James
Adjudicator