ALBERTA

INFORMATION AND PRIVACY COMMISSIONER

ORDER 97-005

June 12, 1997

ALBERTA TRANSPORTATION AND UTILITIES

Review Number 1150

BACKGROUND:

[1.] On April 22, 1996 the Applicant applied under the *Freedom of Information and Protection of Privacy Act* (the "Act") to Alberta Transportation and Utilities (the "Public Body") for any reports, maps, pit logs or other information regarding gravel or aggregate (including location or grades of gravel and aggregate) located on the Applicant's lands lying in the vicinity of the Milk River.

[2.] The Public Body originally performed tests on the aggregate found on the Applicant's land in 1982. At that time, the Applicant was not the landowner. It is my understanding that the pit on the Applicant's land has been inactive since 1984.

[3.] On June 26, 1996, the Public Body disclosed (with a disclaimer) the development and reclamation approval, the pit plans and the aggregate testing plan.

[4.] The Public Body did not disclose the lab test results, prospector's field log notes, testing plans and calculation sheet (the "records"). It claimed that this information falls within the exceptions set forth in sections 24(1)(c) ("financial loss to the public body") and 24(2)(b) of the Act.

[5.] Mediation between the Applicant and the Public Body was authorized under section 65 of the Act but was unsuccessful. Under section 66(4) of the Act, both parties' written submissions were considered at the written inquiry held on March 17, 1997.

RECORDS AT ISSUE:

[6.] The 23 pages of records withheld are both scientific and technical in nature. The data was gathered by the Public Body's technologists who specialize in prospecting and field testing. The lab test results, testing plan and calculation sheet, and the prospector's field log notes are considered aggregate testing data.

[7.] The Public Body further described the records as follows:

> *The Testing Plan is based on observations of field conditions that describe the nature (type) and depth of material, as specified in the department's Prospecting and Materials Testing Manuals. The lab results are based on samples of aggregate tested, for use in road construction using procedures as set out in the department's Standard Specifications for Highway Construction…The Calculation Sheet is used to quantify the volume of aggregate within the area tested. This sheet is filled out once the lab results and testing plan has (sic) been analyzed to determine the quantity of material that would meet department specifications for certain types of road construction. The calculations are performed using mathematical principals (sic), in accordance with an internal, technical document entitled Aggregates Bulletin #5.*

ISSUES:

[8.] There are two issues in this inquiry.

> I: Could disclosure of the information in the records reasonably be expected to harm the economic interest of the Public Body under section 24(1)(c)?
>
> II: Did the Public Body correctly apply section 24(2)(b) to the records?

DISCUSSION:

[9.] Before discussing the issues in this inquiry it is important to understand how section 24 works.

[10.] Section 24(1)(c) reads:

> *The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to harm the economic interest of a public body or the Government of Alberta or the*

ability of the Government to manage the economy, including the following information:

> *(c) information the disclosure of which could reasonably be expected to*
>
> *(i) result in financial loss to,*
> *(ii) prejudice the competitive position of, or*
> *(iii) interfere with contractual or other negotiations of,*
>
> *the Government of Alberta or a public body;*

[11.] Section 24(2) reads:

> *The head of a public body must not refuse to disclose under subsection (1) the results of product or environmental testing carried out by or for a public body, unless the testing was done*
>
> *(b) for the purpose of developing methods of testing or testing products for possible purchase.*

[12.] Section 24 is a discretionary exception. In Order 96-013, I applied section 24(1) which is the general rule. The information must fall at least within section 24(1) to be severed. Evidence may be presented to show that the evidence also meets one of the tests in section 24(1)(c). It is possible that the severable information does not fall within section 24(1)(c), but still satisfies the general rule in section 24(1). In other words, if disclosure harms you economically, you may not disclose, even if your situation does not fall in one of the specific cases set out in section 24(1).

[13.] Section 24(2) is part of section 24. It is not an exception to disclosure in and of itself. Nonetheless, section 24(2) is an exception to the exception in the sense that even if the information could reasonably be expected to harm the economic interest of a public body, if the information is the result of product or environmental testing, the public body must not refuse to disclose the information under section 24(1). In other words, if disclosure harms you economically, you still must disclose environmental or product testing.

[14.] However, section 24(2)(a) and (b) provide a further exception: if the testing was done for a fee or for the purpose of developing methods of testing or testing products for possible purchase, the information can still be withheld under section 24(1). Therefore, if disclosure harms you economically and it is disclosable because it is environmental or product testing, you do not need to disclose if the testing was done for a fee or it was done for purchase.

[15.] Consequently, in determining whether section 24(2) applies, one still must examine if disclosure could reasonably be expected to harm the economic interest. Section 24(2) does not stand by itself. Had the Legislature wanted to allow an exception to disclosure for test results for possible purchase, it would have simply said a public body may withhold such test results. Economic harm would be irrelevant. However, the way section 24 reads, section 24(2)(b) is dependent on the information falling first under section 24(1).

[16.] Accordingly, I must examine first, whether the records fall within section 24(1)(c); second, whether the general test in section 24(1) has been satisfied; and then apply the exceptions to the exceptions in section 24(2)(b).

Issue I: Could disclosure of the information in the records reasonably be expected to harm the economic interest of the Public Body under section 24(1)(c)?

[17.] Since the Public Body refused to release the records under section 24(1), the Public Body has the burden of proof: section 67(1).

(a) Does the information meet any of the tests in section 24(1)(c)?

[18.] While the Public Body has cited section 24(1)(c) as an exception to disclosure, it has not explained in its submissions specifically how the disclosure would be related to sections 24(1)(c)(i), (ii), or (iii). I have reviewed the evidence to make this determination.

i) Financial loss (section 24(1)(c)(i))

[19.] The Public Body stated that the lab results, plans and quantity calculations information contained in the records cost $8,200. Consequently, providing the tests at no cost to the Applicant could represent a financial loss to the Public Body as set out in section 24(1)(c)(i). This argument assumes that the Public Body could sell the information for that amount.

[20.] The Public Body also submitted that by disclosing the records, the Public Body loses a source of gravel close to the project. For this particular site, the pit has a haul advantage of eight kilometres over other pits in the area to projects further north of the site. With this haul distance reduction, a cost savings of $25,000 could be realized on a typical project. According to the Public Body, if the pit was tied up by a private supplier, it could raise the amount charged by the estimated savings in haul distance plus the value of the testing, and still have the least expensive source to the project. As a result, the

direct cost of giving out this information could be $32,000. This assumes that the test results would induce a private supplier to tie up the pit.

[21.] According to the Public Body, if the pit was exploited by an industry that does not supply gravel for highway construction, the cost would be even higher. By losing the availability of this source, the Public Body would have to again search out materials to replace this deposit, costing the Public Body at least another $10,000. Again this assumes that the test results would induce a private supplier to tie up the pit.

[22.] I have determined that these figures could be related to a financial loss according to section 24(1)(c)(i). However, the Public Body has procured the records and presumably paid for the tests over ten years ago. Also, the Public Body has not provided evidence to show that it has been interested in this particular pit. It is notable that the pit has not been worked for ten years and no evidence has been provided to show that there is construction in the area. Although the Public Body anticipates that work in the area may commence in the year 2000, I am not persuaded by the Public Body's evidence that it will use the tests again in the foreseeable future.

[23.] Even if the Public Body did provide the records of the tests to the Applicant, sharing the information will not preclude the Public Body from relying on it in the future. Nor am I persuaded by the Public Body's argument that the disclosure of the records could reasonably be expected to result in a monopoly or third party's use of the record, causing thereby a financial loss. Since the pit is already privately owned, the Public Body has no proprietary right to the gravel. Moreover, the information in the records does not disclose the economic advantage of this pit over any other pit in the area. All it does is analyze the aggregate in this particular pit. Therefore, I find that the Public Body has not proven on a balance of probabilities that the disclosure of the record could reasonably be expected to result in financial loss pursuant to section 24(1)(c)(i).

(ii) Prejudice to competitive position (section 24(1)(c)(ii))

[24.] Section 24(1)(c)(ii) deals with prejudice to the competitive position. According to the Government of Alberta, Freedom of Information and Protection of Privacy Policy Manual at page 98, "Prejudice to competitive position" means:

> *...that a public body must have a reasonable expectation that disclosure of the information is capable of being used by an existing or potential competitor to reduce the public body's or the government's share of a market...The exception may be claimed whether or not there is a competitor in the marketplace.*

[25.] The Public Body argued that disclosure of the records would facilitate other industries or contractors in exploiting the gravel. It is not clear from the Public Body's submissions if it is arguing that disclosure would specifically harm the Public Body as a competitor as set out in section 24(1)(c)(ii). In any event, there must be a direct link between disclosure of the particular records and prejudice to the Public Body's or Government of Alberta's competitive position.

[26.] Relating the Public Body's evidence to section 24(1)(c)(ii), the evidence shows that the Public Body is not currently purchasing the gravel or negotiating its purchase and is unable to provide a specific date for its purchase. It anticipates that work would begin on a nearby highway in year 2000. The Public Body has not provided evidence to show that some other party is specifically interested in the gravel on the Applicant's property. I am not persuaded there is competition for this gravel; therefore, there cannot be prejudice to the Public Body's competitive position. I find that there is no reasonable expectation that disclosure of the records is capable of being used by an existing or potential competitor to buy this particular gravel, if the Public Body is indeed making such argument under section 24(1)(c)(ii).

(iii) Interference with contractual or other negotiations (section 24(1)(c)(iii))

[27.] The Public Body has not presented argument with reference to section 24(1)(c)(iii). Since the Public Body has no contractual or other negotiations going on with the Applicant or other party regarding this pit, there is no evidence to meet the test under this section.

(iv) Conclusion

[28.]The evidence does not support any of the tests under section 24(1)(c).

(b) Does the information nevertheless meet the test under section 24(1)?

[29.] As I stated in previous orders, even if the withheld information does not fall under sections 24(1)(c)(i), (ii), or (iii), it might still meet the harm test under section 24(1). Section 24(1) is considered to be the general rule and information must at least fall within that general rule to be severed. The reasoning for this is set out in Order 96-012 where I stated:

> *I have interpreted section 24(1) in this way because the section reads information,....including the following information (my emphasis). I believe that the word "including" is meant to provide specific examples of the category of "information", in order to remove any ambiguity about the kind*

of information to be included in the category. (Arguably, there could be categories of information other than those specifically set out in (a)-(d) under section 24(1), but such additional categories would have to contain information that meets the general rule of section 24(1)). The fact that some of these categories contain their own restrictions or test does not change the general rule under section 24(1). Therefore, in applying section 24(1), the public body must present evidence to show the information falls within the general rule (section 24(1)), although the public body may also present evidence to show that the information is included in and meets the requirements of one of the categories (section (1)(b), for example).

[30.] What is the test for "reasonable expectation of harm"? As discussed in Order 96-003, the courts have in interpreting "reasonable expectation of harm" applied a threshold test by considering three main factors. They are: 1) there must be a clear cause and effect relationship between the disclosure and harm; 2) the disclosure must cause harm and not simply interference or inconvenience; and 3) the likelihood of harm must be genuine and conceivable.

[31.] The burden of establishing this threshold has been placed on the Public Body pursuant to section 67 of the Act. To discharge the burden, evidence must be presented to show a "reasonable expectation of harm."

[32.] In Order 96-003 I referred to the decision *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054, which held that the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.

[33.] The thrust of the Public Body's submissions is that the disclosure of these records will harm its economic interest. It states that maintaining a large supply of gravel is essential for highway construction projects. It states that for example last year a total of 1.5 million tonnes of aggregate were consumed. To ensure this supply is maintained the Public Body undertakes testing at substantial costs to identify and determine gravel sources.

[34.] In summary, the Public Body stated in its written submissions that disclosure of the records to the Applicant could reasonably expect to harm its economic interest in the following ways:

1. With this information the Applicant will be able to induce other industries to use the gravel for other projects than road construction or rehabilitation, thus reducing the amount of material available for area roadway projects.
2. Alternatively, the Applicant could use the information as the basis for selling the material to a road construction company which could gain a monopoly

over the gravel supply in the area. Having a monopoly would allow the supplier to charge higher than average rates for the gravel.

3. If the testing data is disclosed, there will be a precedent set and an overwhelming demand from landowners and the construction industry for this information. Consequently, there would be a cumulative effect of paying higher rates and also a shortage of material available for road construction across the province.
4. Once the testing is done, the Public Body is in a position to make decisions on the aggregate source's preferred usage, market and expected life span. Sampling and testing are carried out according to technical standards established by the Public Body and suited to its needs. As such, the results are not necessarily adequate or applicable to other users or owners. By having access to the Public Body's test data, the third party could gain a competitive advantage in making decisions regarding the purchase and use of an aggregate source that they would not ordinarily be able to do. This would also allow them to pay a small sum, compared to the value of the testing, to exclusively control the resource and would allow them to demand higher than average royalty rates when selling to road construction companies, because of their savings in time and money to locate, test and evaluate the material's usefulness.
5. Offering an optional source allows all contractors to bid the contract, knowing that access to the quality and quantity of material is available in the area, without having to spend excessive time and money to locate their own source. This also serves to prevent monopolies from being established where the price paid for the gravel would be substantially higher than what the Public Body pays for gravel.
6. Sampling and testing are carried out according to technical standards established by the Public Body and suited to its needs. As such, the results are not necessarily adequate or applicable to other users or owners. If a pit has been mined, then the test results will not accurately reflect the status or condition of the aggregate at the time the test data was obtained. Inappropriate use of the information could harm the reputation of the department as a good business partner and the willingness of landowners and contractors to enter into an agreement with the department.
7. If the Public Body discloses aggregate testing data through FOIP at the fees established, it could be seen as competing with the private sector who have established their livelihood in aggregate testing.

[35.] In general, it is the Applicant's position that the Public Body has failed to show a "causal connection" or direct link between disclosing this information and a potential increase for its cost of gravel.

[36.] Finally, both parties spoke about the Applicant's intentions for requesting the records. Since the onus on the Public Body is to prove economic harm under section 24(1) of the Act, the Applicant's reasons for requesting the

records are irrelevant. Accordingly, my concern is only with the application of section 24(1) to the Applicant's request for access to the records.

[37.] My understanding from the Public Body's written submission is that the Public Body is concerned about a precedent being set resulting in an overwhelming demand for test data from landowners and the construction industry. The Public Body's evidence centres on harm "in general" rather than on harm directly resulting from the disclosure of the records in this particular inquiry.

[38.] However, to prove on a balance of probabilities that there is a reasonable expectation of economic harm from the release of the records in question, the Public Body must show "direct harm". In Order 96-016, the issue of "direct harm" was discussed. I stated:

> *In Canada (Information Commissioner) v. Canada (Prime Minister) [1992] F.C.J. No. 1054 (Fed T.D.), the court considered this same issue about "direct" harm. In that case, which dealt with a similar section in the federal access legislation, the court stated that (i) there must be a clear and direct linkage between the disclosure of the specific information and the harm alleged, and (ii) the court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. "This requires evidence linking the harm described and the disclosure of specific pages of the record and an explanation of why, in all the circumstances, the disclosure of the contents of the record would cause such harm." Consequently, the court determined that the public body must do a page-by-page analysis of the record to determine the harm from releasing specific pages and whether specific pages could be released.*

[39.] In making my decision, I have considered all of the Public Body's arguments.

[40.] I accept the Public Body's evidence that it paid to have the testing done for the sole purpose of future road building and that landowners have been and continue to be advised that the testing information will not be divulged. I also accept the Public Body's evidence that the testing is not performed unless the landowner signs an agreement stipulating that the Public Body can purchase gravel, should it be found, at established rates.

[41.] Moreover, I do not believe that the Public Body should be providing testing for the sole benefit of the landowner, at the public's expense. Nevertheless, the Public Body is relying upon section 24(1)(c) of the Act, so I must therefore examine the application of section 24(1)(c) to the records and specifically whether disclosure would cause economic harm to the Public Body or the Government of Alberta. Given the way section 24 works, I have some

misgivings about the less than desirable results that the application of section 24 to the records in this inquiry produces.

[42.] The Public Body has not provided evidence that disclosure could reasonably be expected to harm the economic interests of the Public Body or the Government of Alberta or the ability of the Government to manage the economy, for five reasons:

[43.] Firstly, it is significant that the Public Body permitted its non-exclusive royalty agreement with the landowner to expire in 1993. Although the Public Body states that it has maintained its interest in these lands by registering a caveat on the title and by holding the Environmental Approval, allowing the agreement to lapse is a strong indication of the lack of reasonable expectation of economic harm. To put it another way, if the site was so valuable why did the Public Body give up its right to it?

[44.] Secondly, this gravel is located in a remote, rural area of the province far from urban or industrial development. I am not convinced that sharing this information would, on a balance of probabilities, result in a monopoly situation rendering the gravel inaccessible to the Public Body. Moreover, the Applicant has provided evidence which shows the presence and accessibility of gravel in numerous other sites in the area. It appears from the evidence, that the only purchaser in this area would be the Public Body or someone working for the Public Body.

[45.] Thirdly, the Public Body has not provided a timeline whereby the gravel might be needed. The Public Body has not shown any direct interest in this pit for the last ten years. While it anticipates work in the area may commence in 2000, I find that too speculative. Even if the Public Body were to commence the work, there is no specific evidence that this particular gravel would be needed.

[46.] Fourthly, providing access to the records will not remove the information from the Public Body's use. Should the Public Body need the gravel, it could still rely on the records since it is unlikely the pit would be mined by another party. Consequently, the testing data will still be accurate and useful.

[47.] Fifthly, in *Canada (Information Commissioner) v. Canada (Prime Minister*), Mr. Justice Rothstein stated at page 43:

> *...allegations of harm from disclosure must be considered in light of all relevant circumstances. In particular, this includes the extent to which the same or similar information that is sought to be kept confidential is already in the public realm. While the fact that the same or similar information is public is not necessarily conclusive of the question of whether or not there*

is a reasonable expectation of harm from disclosure of the information sought to be kept confidential, the burden of justifying confidentiality would, in such circumstances, be more difficult to satisfy.

[48.] In this case, it is publicly known that the pit exists. In addition, the information contained in the records may be purchased on the market from a private company specializing in aggregate analysis. Therefore the information can be available in the public realm. I am not comfortable with the thought of giving out test results which cost the government $8,200. However, based on the evidence before me, I am unable to agree with the Public Body's argument of economic harm under section 24(1).

[49.] Because such information can be accessible to the public through purchase, I find that there is not a reasonable expectation of economic harm to the Public Body resulting from disclosure.

[50.] On balance, I find the Public Body's evidence to be too speculative to be determinative in relation to the legal standard of the reasonable expectation of economic harm. The evidence does not support a direct link between the alleged harm and the disclosure of the records. As stated above, according to the decision, *Canada (Information Commissioner) v. Canada (Prime Minister)* [1992] F.C.J. No. 1054, the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the ripple effects which may arise from the Applicant's use of the information.

[51.] My decision in this case should not be read as requiring disclosure of the information of all the Public Body's gravel testing documentation. There will be certain testing documentation which falls within section 24(1) because there is a clear and direct link between disclosure of the specific information and the harm resulting from that disclosure. The test for disclosure of records under section 24(1) of the Act is not a class test. Each record must be judged on its own.

Issue B: Did the Public Body correctly apply section 24(2)(b) to the records?

[52.] As stated above, section 24(2) is only applicable to information which falls under section 24(1). Because I found that the information did not fall under section 24(1), section 24(2) is not applicable. Therefore, the Public Body did not correctly apply section 24(2), and I do not need to consider its application.

ORDER:

[53.] I find that the Public Body did not correctly apply sections 24(1)(c) and 24(2)(b) to the information contained in the record. Therefore, the Public Body is not authorized to refuse access. Consequently, pursuant to section 68(2)(a) of the Act, I require that the head of the Public Body give the Applicant access to the record.

[54.] I ask that the Public Body notify me in writing, not later than 30 days after being given a copy of this Order, that this Order has been complied with.

Robert Clark
Information and Privacy Commissioner