ALBERTA

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

ORDER F2007-032

January 16, 2008

ALBERTA SUSTAINABLE RESOURCE DEVELOPMENT

Case File Number 3690

Office URL: www.oipc.ab.ca

Summary: Alberta Sustainable Resource Development (the Public Body) decided to release information regarding surface materials lease applications made by Wapiti Gravel Suppliers (the Third Party) to an applicant who had requested them. The Public Body notified the Third Party of its decision to release the information, as the records contained its commercial, financial and technical information. The Third Party objected to release of the records and requested review by this office.

The Adjudicator confirmed the decision of the Public Body to release the records at issue and ordered the Public Body to give access to the records to the Applicant.

Statutes Cited: AB: *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16, 59, 69, 71, 74

Authorities Cited: AB: Orders 97-013, 98-006, 99-018, 2000-017, F2004-013**,** F2005-011 **BC:** *Inquiry re: Ministry of Water, Land and Air Protection* [2001] B.C.I.P.C.D. No. 37 Order No. 01-36; **ON:** MO-2070; P-1095;

Cases Cited: *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner)*, 2006 ABQB 515

I. BACKGROUND

[para 1] The Public Body is responsible for issuing "surface material leases" (SMLs). SMLs are leases of public land issued to individuals and businesses for the purpose of producing materials such as sand, gravel, clay, peat, marl, and topsoil.

[para 2] As part of the SML application process, applicants receive licenses to conduct surface material explorations (SMEs) to determine the volumes of resources. Following testing, the applicant decides whether to continue with the SML application process. If the applicant continues the SML application process, the applicant will be required to provide, among other requirements, a Conservation and Reclamation Business Plan (CRBP). The Public Body may require changes to the CRBP prior to approroval. A successful applicant will receive an SML, which gives the applicant the right to produce surface materials from public lands and includes terms and conditions of use.

[para 3] On July 29, 2005, the Applicant made an access request to the Public Body. The Applicant requested copies of all records relating to the allocation of gravel leases in the Grande Prairie region in 2004, and specified that allocation of gravel leases to the Third Party were included in the request. On October 11, 2005, the Applicant clarified that the scope of the request included:

1. Copies of all records related to the allocation of S & L 020023, being a 705.05 acre site south of Wapiti river near the City of Grande Prairie. Our request includes, but not limited to applications, approvals and internal files relating to the said plans and allocations (*sic*).
2. Copies of all records related to the allocation of S & L 020022 being a 145.40 acre site north of Wapiti river near the City of Grande Prairie Our request includes, but not limited to applications, approvals and internal files relating to the lands and the said allocations (*sic*).

[para 4] On January 6, 2006, the Public Body provided notice to the Third Party under section 30 of the Act that it intended to release to the Applicant the requested records. The Third Party objected to the release of the information on the basis of section 16 of the Act. On May 8, 2006, the Third Party was advised that the Public Body had decided to release the records.

[para 5] On May 8, 2006, the Third Party requested review by this office of the Public Body's decision to release the records.

[para 6] As mediation did not resolve the issue, this matter was scheduled for a written inquiry. Both the Third Party and the Public Body provided written submissions. The Applicant did not participate in the inquiry.

II. RECORDS AT ISSUE

[para 7] Four packages of records relating to the allocation of S& L 020022 and S & L 020023, including applications, approvals, and internal files are at issue.

[para 8] The Third Party has conceded that Records 1-56, 1-61, 1-72, 1-86, 1-103, 1-110, 1-117, 1-132, 1-139, 1-142, 1-175, 1-176, 1-241, 1-242, 1-250, 1-253, 1-254, 1-

280, 1-282, 1-297, 1-298, 1-369, 1-370, 1-394, 1-435, 1-438, 1-439, 2-4,2-5, 2-48, 2-164, 2-165, 2-215, 2-216, 2-226, 2-231, 2-232, 3-6, 3-7, 3-13, 3-14, 3-17, 3-21, 3-29, 3-84, 3-94, 3-95, 3-105, 3-106, 3-107, 3-112, 3-113, 3-116, 3-126, 3-139, 3-149, 3-248, 3-291, 3-293, 3-367, 3-372, 3-373, 3-374-3-375, 3-376, 3-378, 3-379, 3-455, 3-456, 3-457, 3-458, 3-482, 3-484, 3-490, 3-491, 3-492, 3-493, 3-500, 3-503, 3-504, 3-505, 3-508, 3-509, 3-510, 3-516, 3-517, 3-518, 3-519, 3-520, 3-521, 3-522, 3-523, 3-525, 3-526, 3-536, 3-537, 3-543, 3-585, 3-594, 3-595, 3-596, 3-597, 3-601, 3-602, 3-611, 3-613, 3-615, 3-616, 3-617, 3-620, 3-621, 3-622, 3-626, 3-627, 3-628, 3-629, 3-631, 3-632, 3-633, 3-636, 3-637, 3-638, 3-642, 3-644-3-645, 3-661, 3-662, 3-663, 3-699, 3-701, 3-702, 3-704, 3-795, 5-9, 5-10, 5-11, 5-12, 5-13, 5-14, 5-16, 5-19, 5-42 and 5-43, may be released.

III. ISSUES

Issue A: Does section 16 of the Act (business interests) apply to the records / information?

IV. DISCUSSION OF ISSUES

In Camera Submissions

[para 9] The Third Party provided *in camera* submissions and evidence regarding its reasons for opposing release of the records, both generally and in relation to specific documents. It did not provide submissions other than *in camera* submissions.

[para 10] The Public Body provided in camera submissions in addition to submissions that could be shared with the parties. However, it provided more detailed and extensive arguments *in camera*, while the submissions to be shared provide a general overview only.

[para 11] The Applicant did not provide submissions, *in camera* or otherwise.

[para 12] FOIP Practice Note 8 explains when *in camera* submissions may be accepted. It states in part:

> Sometimes a party asks to provide part or all of its written submission "in camera" meaning that part or all of the submission is provided for the Commissioner only and is not to be exchanged among the other parties. A party should provide reasons as to why part or all of a written submission should not be exchanged among the other parties.
>
> The Commissioner decides whether to accept some or all of a written submission "in camera". Generally, the commissioner will accept "in camera" the records or information a public body withholds under the FOIP Act. The Commissioner will also accept "in camera" the personal information or confidential business information of other parties. If the Commissioner refuses an "in camera" request, he will return the submission to the party, so that the party can decide what can be exchanged among the other parties.

[para 13] Section 59(3) prohibits the Commissioner and anyone acting for or under the direction of the Commissioner during an inquiry from disclosing types of information. It states:

> *59(3) In conducting an investigation or inquiry under this Act and in a report under this Act, the Commissioner and anyone acting for or under the direction of the Commissioner must take every reasonable precaution to avoid disclosing and must not disclose*
>
> *(a) any information the head of a public body would be required or authorized to refuse to disclose if it were contained in a record requested under section 7(1), or*
>
> *(b) whether information exists, if the head of a public body in refusing to provide access does not indicate whether the information exists.*

This provision ensures that the investigation and inquiry processes do not reveal information that the Act requires to be withheld.

[para 14] The ability to make in camera submissions arises from section 69(3) of the Act, which states:

> *69(3) The person who asked for the review, the head of the public body concerned and any other person given a copy of the request for the review must be given an opportunity to make representations to the Commissioner during the inquiry, but no one is entitled to be present during, to have access to or to comment on representations made to the Commissioner by another person.*

This provision recognizes that disclosure of information contained in the records at issue in the body of an argument would have the same effect as ordering disclosure whether or not disclosure is warranted.

[para 15] In addition, section 74(2) prohibits a Public Body from disclosing records until the judicial review period has ended, so that a party's right to request review of a decision to disclose information does not become moot.

[para 16] Sections 59, 69 and 74 display a clear legislative intent that the information that is the subject of an inquiry is to be protected. However, this legislative protection does not extend to arguments made by parties that do not reveal the nature of information at issue.

[para 17] In the present case, the parties' *in camera* submissions were apparently accepted by this office. However, the *in camera* submissions do not contain an explanation as to why they were not to be shared with the other parties, contrary to FOIP Practice Note 8. More importantly, for the most part, neither party provided *in camera* arguments that would reveal the information that the Third Party seeks withheld, but presented arguments and evidence in general terms only.

[para 18] If I do not refer to the *in camera* arguments and evidence in this Order, the parties will be left in doubt as to whether I considered their arguments and evidence. There would also be uncertainty as to the basis for the decision. I have therefore decided, in keeping with the purpose of the Act, as evidenced by sections 59(3), 69(3) and 74, to refer to the *in camera* arguments and evidence where doing so would not reveal the information at issue.

Issue A: Does section 16 of the Act (business interests) apply to the records / information?

Section 16

[para 19] The Public Body argues that section 16 does not apply to the records and information because it is not apparent on the face of the records in issue that there was any intention to submit them in confidence, express or implied and because the Third Party provided no evidence of direct harm that would flow from disclosure.

[para 20] The Third Party argues that the records at issue contain its commercial, financial and technical information, which would not otherwise be available to the public. It disputes the Public Body's determination that the information was not supplied in confidence, and argues that its competitive and negotiating ability would be significantly affected and that it will most likely suffer undue financial loss if the records are disclosed.

[para 21] Section 16 is a mandatory exception to disclosure. It states:

> *16(1) The head of a public body must refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
>
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party,*
>
> *(b) that is supplied, explicitly or implicitly, in confidence, and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person or organization, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

(2) The head of a public body must refuse to disclose to an applicant information about a third party that was collected on a tax return or collected for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply if

(a) the third party consents to the disclosure,

(b) an enactment of Alberta or Canada authorizes or requires the information to be disclosed,

(c) the information relates to a non-arm's length transaction between a public body and another party, or

(d) the information is in a record that is in the custody or under the control of the Provincial Archives of Alberta or the archives of a public body and has been in existence for 50 years or more.

[para 22] In Order F2005-011, the Commissioner adopted the following approach to section 16 analysis, which is also used in other jurisdictions:

> According to section 71(3)(b) of the Act, the Third Party has the burden to show that the information should not be disclosed under section 16. This burden is to be discharged on a balance of probabilities. (See Order 2001-019.)
>
> Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:
>
> Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?
> Part 2: Was the information supplied, explicitly or implicitly, in confidence?
> Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

I will therefore consider whether the records at issue meet each requirement of the test.

Trade Secrets or Commercial, Financial, Labour Relations, Scientific or Technical Information of a Third Party

[para 23] In Order 96-013, the former Commissioner noted:

> The Ontario Commissioner has also made some specific additions to the ordinary dictionary definition of "commercial information", which I wish to adopt. The category of "commercial information" includes "contract price" and information, "...which relates to the buying, selling, or exchange of merchandise or services..." (Order P-489 [1993] O.I.P.C. No. 191).

[para 24] The Third Party submits that all information dealing with the application, testing, approvals, operations and marketing plans of surface material lease (SML) 020022 and SML 020023 is commercial information within the meaning of the Act. It submits that financial information for the purposes of section 16 is information relating to the monetary resources or financial capabilities of an organization and is not limited to financial transactions. The Third Party also submits that some of the information

contained in records is technical information, which is defined in Order 2001-026 as "information relating to a particular subject, craft or technique".

[para 25] The Public Body concedes that the records at issue contain commercial, financial or technical information within the meaning of section 16(1)(a)(ii), but disputes that this information was supplied in confidence or that disclosure of the information would result in harm for the purposes of the second and third parts of the test.

[para 26] I agree with the Third Party and the Public Body that the records at issue contain information that may be classified as the commercial, financial, or technical information of the Third Party.

Supplied in Confidence

[para 27] The Public Body argues that none of the information contained in records created by the Public Body could have been supplied by the Third Party in confidence. It also argues that there is nothing to indicate that the records created by the Third Party were submitted in confidence.

[para 28] The Third Party argues that all records were supplied in confidence. It submits that those records it did not mark as confidential were supplied implicitly in confidence. It provided statutory declarations to the effect that all records were supplied in confidence.

[para 29] I disagree with the Public Body that because information is contained in records that are generated by a public body it cannot have been supplied in confidence by a third party. Section 16 clearly applies to information, as opposed to records. It is quite possible that a third party may supply information in confidence and that a public body may create a record containing that information. Creating such a record does not change the fact that the information it contains was supplied in confidence.

[para 30] Section 71(3) explains the burden of proof in applications of this nature. It states:

> *(3) If the inquiry relates to a decision to give an applicant access to all or part of a record containing information about a third party,*
>
> *(a) in the case of personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy, and*
> *(b) in any other case, it is up to the third party to prove that the applicant has no right of access to the record or part of the record.*

The Third Party therefore bears the burden of proof to establish that section 16 applies to the information it seeks to withhold. Consequently, it bears the burden of establishing that the information contained in the records at issue was supplied in confidence.

[para 31] In *Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner),* 2006 ABQB 515 the Court clarified evidentiary requirements for discharging the burden of proof. The Court said:

> In my view, the Privacy Commissioner's requirement for an evidentiary foundation withstands a somewhat probing examination. As discussed, the scope and intention of FOIPP presumes access to information, subject only to limited exceptions, and the responsibility for establishing an exception rests with the party resisting access to the information.
>
> The requirement of some cogent evidence permits the Privacy Commissioner to discharge his duty of balancing competing interests and policy considerations by rationally assessing the likelihood of reasonable expectations of harm. To suggest that requiring some evidence is unreasonable means that access to information could be denied based solely on hypothetical possibilities, and that only the most preposterous theoretical risks could be rejected by the Commissioner.

[para 32] The Third Party therefore bears the burden of submitting cogent evidence to establish that its expectation that the information at issue was supplied in confidence is reasonable. It must also establish through evidence, that disclosure of information supplied in confidence will result in harm within the meaning of section 16(1)(c).

[para 33] The Third Party contends that all the records it seeks withheld contain information that it intended to be kept confidential, either explicitly or implicitly. It also argues that information provided during negotiations is considered to be supplied in confidence when the information remains unchanged in the final contract and where the disclosure of the information would permit an applicant to make accurate inferences about sensitive third party business information. It cites Order 96-013 as support for this interpretation.

[para 34] In Order 96-013, the former Commissioner considered the meaning of "supplied in confidence" and the evidence required to establish that information has in fact been "supplied in confidence":

> I now turn to the specific wording of the section 15(1)(b). The section uses the phrase "is supplied...in confidence". The use of the word "is" as opposed to "was" indicates that not only must I consider the status of the information when it was originally supplied, but also the current status of the information.
>
> The third party presented substantial evidence to show that the information was originally "supplied in confidence". Reference was made to a proposal submitted by the third party to the public body. The covering letter that accompanied the proposal included a paragraph indicating that the information contained in the proposal was supplied in confidence.
>
> An Affidavit and a Statutory Declaration regarding the information contained within the agreements were provided. The Statutory Declaration was sworn by the Executive Director of the public body who stated that he believed the severed information was supplied in confidence. The Affidavit was sworn by the General Manager of the third party who deposed that he had understood that all the terms of the proposal and the terms of the agreements were confidential.
>
> Furthermore, both agreements contain confidentiality clauses. These clauses indicate that the information is confidential, which allows me to conclude that not only was the information

> originally supplied in confidence, but also that the third party considers the information to be presently supplied in confidence.

[para 35] In Order 96-013, the affidavits and statutory declarations were supported by evidence that the third party and the public body had taken precautions to protect the confidentiality of information and had included confidentiality clauses in their agreement. In the present case, four employees of the Third Party submitted statutory declarations stating that they believe all information submitted by the Third Party to the Public Body was submitted in confidence. However, none of the records in issue, with the exception of the SML application, contain instructions requiring information to be kept confidential or clauses requiring confidentiality. In other words, the actions of the parties at the time the records were created may be inconsistent with their declarations that the information at issue was supplied in confidence. Consequently, I must consider whether the assertions of the authors of the statutory declarations are supported by the evidence.

[para 36] I note that the CRBPs are the only records marked "confidential" by the Third Party. I find that this designation indicates an explicit intention of the Third Party to protect the confidentiality of the information contained in this record when it supplied it to the Public Body. By inference, those records it did not mark as confidential may not have been intended to be kept confidential at the time they were created.

[para 37] In Order No. 01-36, the Privacy Commissioner of British Columbia considered the following factors in determining whether a third party had supplied information to a public body in confidence:

> To establish confidentiality of supply, a party must show that information was supplied under an objectively reasonable expectation of confidentiality, by the supplier of the information, at the time the information was provided… The cases in which confidentiality of supply is alleged to be implicit are more difficult. This is because there is, in such instances, no express promise of, or agreement to, confidentiality or any explicit rejection of confidentiality. All of the circumstances must be considered in such cases in determining if there was a reasonable expectation of confidentiality. The circumstances to be considered include whether the information was:
>
> 1. communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
> 2. treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the public body;
> 3. not otherwise disclosed or available from sources to which the public has access;
> 4. prepared for a purpose which would not entail disclosure.

This test is the same as that adopted by the previous Commission in Order 99-018, cited by the Third Party. In determining that the information in that case had not been supplied in confidence, the Commissioner of British Columbia said:

> It has not elaborated on the bare assertion that it has always treated the list as confidential. It has not provided me with any evidence as to how it has handled the list internally or in any dealings with others. There is no evidence before me of security measures to ensure confidentiality or other circumstances suggesting that Western Rubber was concerned to keep the list confidential before it was supplied to PWC. Certainly, the copy of the list provided to me for the purposes of this inquiry is not marked as being confidential.

[para 38] In PO-2594, an order of the Ontario Office of the Information and Privacy Commissioner, evidence of a Public Body's policies and procedures regarding confidentiality was considered relevant in determining whether a third party's belief that information is being kept confidential is objectively reasonable.

[para 39] Consequently, I will consider whether the evidence establishes that the Third Party's commercial, financial or technical information was supplied in confidence, which includes considering whether it was communicated on a confidential basis, was treated consistently by the Third Party as confidential, was not otherwise disclosed, and was prepared for a purpose that would not entail disclosure. In doing so, I will consider whether records are marked confidential, and whether the Public Body had a clear policy, known to the Third Party, of keeping information supplied to it confidential.

[para 40] The affidavit evidence of the employee of the Third Party who submitted records to the Public Body explains his understanding of the Public Body's confidentiality policies in relation to SML applications. The affidavit of the Third Party employee states:

> In all my dealings with (the Public Body) relating to SMEs and SMLs, I have always been under the impression and understanding that all information provided to ASRD was confidential and that the only information relating to gravel pits on Crown land that would become publicly available was the information that is available by utilizing the Land Stat Automated System (LSAS)...
>
> Based on (the Third Party's) past experiences with ASRD, information related to testing of pit sites for SMLs could not be released. For example, (the Third Party) in the past requested information from ASRD relating to testing data of a SML that was expired and which (the Third Party) was interested in taking over. ASRD responded that this information would not be made available and that (the Third Party) must incur the cost of retesting and providing the information again.

[para 41] The Third Party points to a specific instance when it was denied access to a record containing testing data, but only speculates as to the reason for the refusal. While the refusal may be consistent with a policy of keeping these records confidential, the refusal is also consistent with a decision to require retesting to be done and may not relate to confidentiality at all. I am not satisfied that the Third Party has established that it has a reasonable basis for its view that the Public Body has a policy of keeping all information relating to SME/SML applications confidential, or that its reliance on such a policy was reasonable. In addition, the Public Body, on whose policy the Third Party seeks to rely, argues that the information was not supplied in confidence.

[para 42] In effect, the Third Party relies on an impression that SML applications were kept confidential as rationale for assuming that all information it submitted to the Public Body, regardless of whether it related to the SML application, would be held in confidence. While the Third Party took steps to protect the information contained in the CRBPs, by marking these records as confidential, it took no steps to mark the SME test data or any of its other correspondence to government as confidential.

[para 43] The employee who provided the affidavit also provided a statutory declaration stating:

> …regarding the Access Request, all information referred to as "Documents in Dispute" in the June 18, 2007 letter from (the Third Party) to the Office of the information and Privacy Commissioner, that was provided to and exchanged between (the Public Body) and (the Third Party) regardless of the format was provided or exchanged in confidence.

The affidavit of this employee suggests that the foundation for the belief expressed in the statutory declaration is an instance where he was denied access to SML information without reasons. Consequently, I cannot give any weight to the statutory declaration. As the other statutory declarations submitted by the Third Party have identical wording and do not explain how the authors came to hold their beliefs in the confidentiality of records, or explain the steps taken by the Third Party to protect confidentiality of information, I am unable to give those declarations any evidentiary weight.

[para 44] Had the Third Party had concerns regarding confidentiality of records, it would have been advisable to confirm with the Public Body that the information it supplied would be kept confidential. As indicated by the confidentiality warning on the CRBPs, the Third Party has a practice of marking records "confidential" when it wishes to indicate that it considers information to be confidential. However, it did not do so in relation to records other than the CRBPs. I find that the Third Party has not established that information contained in records other than the CRBPs was communicated to the Public Body on a confidential basis.

[para 45] As the Third Party made specific arguments in relation to its bank account and credit information, I will address these records. The Third Party argues that cheques or banking and bonding information is "absolutely private in nature". However, it is important to consider how the Act applies to the information. I note that the Act treats the bank account information of an individual differently than that of a third party organization. While disclosure of bank account or credit card information of an individual is deemed to be an unreasonable invasion of personal privacy under section 17(4)(e.1) of the Act, a third party that is not an individual must establish that banking information is supplied in confidence and that disclosure may reasonably be expected to result in harm within the meaning of section 16(1)(c) before this information may be withheld. As noted above, a third party must provide evidence to establish that bank account information has been supplied in confidence and that disclosure will result in harm. The Third Party has provided no evidence that it supplied bank account information and letters of credit in confidence, other than the statutory declarations created after the fact and on which, for the reasons above, I do not place any weight.

[para 46] I find that the Third Party has not established that it supplied information to the Public Body in confidence, other than the information contained in the CRBPs. I find that the CRBPs were supplied in confidence. The Third Party marked these records as "confidential" where it was able. In my view, it is reasonable for a third party to rely on the fact that information falling under section 16(1)(a) contained in records it supplies to a public body and which are marked "confidential" are supplied in confidence within

the meaning of section 16(1)(b) of the Act, absent the presence of factors such as those in section 16(3).

Harm

[para 47] I am satisfied that the Third Party supplied financial, technical and commercial information to the Public Body within the meaning of section 16(1)(a) of the Act. However, as noted above, I found that only the CRBPs were supplied in confidence within the meaning of section 16(1)(b). I will therefore consider whether disclosure of the technical and commercial information contained in the CRBPs will result in the harm the Third Party foresees.

[para 48] The Third Party argues that disclosure of the information contained in the CRBPs could reasonably be expected to cause significant harm to its competitive position or interfere with its negotiating position; as well as to cause it "undue financial loss and / or gain to its competitors". More specifically, the Third Party argues that competitors will be able to gain information about its clientele, market, expected volume and operations, which would result in direct damage in the form of significant harm to its competitive and negotiating position in the aggregate supply industry if the information is disclosed.

[para 49] A consultant for the Third Party provided an affidavit stating his opinion that disclosure of the information contained in the records could harm the Third Party's economic interests by allowing competitors to estimate the Third Party's costs and to adjust their own prices accordingly.

[para 50] The Third Party also submitted a letter from a member of the concrete industry providing the opinion that if the disputed documents were released it would harm the business interests of the Third Party. This letter states:

> I have been advised of the nature and degree of detail in the documents that are in dispute. It is my expert opinion that release of documents such as those that are in dispute would be detrimental to the business interests of any company in the aggregate supply business.

[para 51] While I accept that the author of the letter is in a position to comment on the concrete and aggregate supply industry with authority, the letter indicates that the author does not have personal knowledge of the contents of the records. Instead, he knows only what others have told him. Consequently, I am unable to accept his opinion as to the consequences of releasing the information contained in the records, as I do not know what he was told, or what information he believes is going to be disclosed.

[para 52] The affidavit evidence of the employee of the Third Party states that if a competitor were to obtain the type of information contained in SME and SML applications, the competitor would have an advantage, as the competitor could become aware of "certain market factors". He commented that knowing the amount of a security deposit could enable a competitor to determine the scope of the work being planned for a specific pit and the amount of product that will be hauled to market. In relation to SML applications 020022 and 020023, the employee projects that the Third Party will lose

profits if a competitor is able to determine the scope of the project and then chooses to undercut prices based on the projected supply. He also speculates that competitors could use the information contained in the applications to lobby potential customers and suppliers of the Third Party identified in the SML documents, which would result in harm to the negotiating and competitive position of the Third Party.

[para 53] I find that the Third Party has not established that release of the commercial and technical information contained in the CRBPs will result in undue financial loss or gain to any person or organization within the meaning of section 16(1)(c)(iv) of the Act for the following reasons:

[para 54] The projected harm relates to a decision of a potential competitor or competitors to calculate accurately the Third Party's aggregate supply based on the information in the CRBP, to have sufficient supplies of aggregate and the means to supply the aggregate to the Third Party's clients, and to lower their own prices to undercut the Third Party. However, it is not clear from the Third Party's evidence that the Third Party has competitors, that these competitors are in a position to supply aggregate, that they will be in a position to lobby potential clients of the Third Party, and if they are, that they will have the financial capacity to lower prices. Consequently, I find that the evidence does not establish that there is a reasonable likelihood that the financial harm the Third Party projects will result from the disclosure of the the CRBPs. In addition, the Third Party does not explain what it is about the information that would lead competitors to take the action it speculates they may take.

[para 55] I do not find that the evidence establishes that disclosure of the CRBPs is likely to harm the Third Party's competitive position or interfere with its negotiating position significantly. While the Third Party has argued that disclosure of much of the information would harm its competitive and negotiating positions, it has provided little evidence to that effect. As noted above, it has not provided any evidence relating to its competitors and their resources, or its present bargaining and negotiating position. Consequently, it is difficult to ascertain whether disclosure of information will significantly affect its bargaining and negotiating position.

[para 56] In relation to the bank account and credit information of the Third Party, had I found that the bank account and credit information of the Third Party had been supplied in confidence, I would not find that the Third Party had established that harm within the meaning of section 16(1)(c) would result if this information is disclosed. The Third Party argues that disclosure of bank account information would compromise the Third Party's position with bonding and banking institutions. The Third Party does not explain how its position would be compromised, or provide evidence, such as an affidavit from a representative of the Third Party's bank, to establish that the projected harm is reasonable. Finally, this projected harm does not fall under any of the categories in section 16(1)(c). Consequently, I conclude that the Third Party has not established that harm will result if its financial information contained on cheques and letters of credit is disclosed. In arriving at this conclusion, I follow the reasoning of the Office of the Ontario Information and Privacy Commissioner in orders MO-2070 and P-1095. In those

decisions, the adjudicators concluded that bank account information of third parties is financial information and must meet the requirements of confidentiality and harm before it may be withheld, as with other financial information of third parties.

V. ORDER

[para 57] I make this Order under section 72 of the Act.

[para 58] I confirm the Public Body's decision and require the head of the Public Body to give the applicant access to the records at issue.

[para 59] I further order that the Public Body notify me in writing within 50 days of being given a copy of this Order, that the Public Body has complied with this Order.

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Teresa Cunningham
Adjudicator