

# GILBERTI STINZIANO HEINTZ & SMITH, P.C.

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May 31, 2017



Karen Ansong  
NYS Office of General Services  
Office of Legal Services  
Mayor Erastus Corning 2<sup>nd</sup> Tower  
Empire State Plaza  
Albany, New York 12242

Re: FOIL #6088  
Requester/Subject: Dennis/REF #LUW00163 Lease of Salt/Mineral Rights Cayuga Lake  
Claim of Confidentiality and Disclosure through FOIL

Dear Ms. Ansong:

By letter of May 12, 2017 to Shawn Wilczynski, Mine Manager, Cargill Deicing Technology, you advised that documents submitted to the State by my client, Cargill, Incorporated, in connection with the referenced matter, fall within the scope of a pending request for disclosure under the State's Freedom of Information Law (FOIL). This Freedom of Information Law request includes documents authorizing Cargill to mine under Cayuga Lake, as well as associated royalty schedules and payments made to the State of New York.

Cargill has asserted claims of confidentiality with respect to pages related to Lansing Mine State of New York Royalty calculations, and other (Copyrighted) information. This letter confirms Cargill's continued claim of confidentiality and request for exception from disclosure with regard to this information. This letter also provides justification for such claim and request based on the Freedom of Information Law (Public Officers Law § 87), OGS implementing regulations (9 NYCRR Part 330), and relevant case law.

Access to and disclosure of the subject information may be properly denied because they are trade secrets and because they are submitted to OGS by a commercial enterprise or are derived from information obtained from a commercial enterprise and which if disclosed would cause substantial injury to the competitive position of Cargill. See Public Officers Law §87.2(d). See also 9 NYCRR § 330-1.6(d).

Under OGS regulations implementing the FOIL, a trade secret includes any proprietary data concerning past, present or planned future distribution, customer lists, sales volumes, costs, or prices; cost records; compilations of information and other confidential or proprietary information which is not generally published or divulged, the disclosure of which would cause substantial injury to the competitive position of the commercial enterprise, or if openly disclosed would permit an unfair advantage to competitors of the subject enterprise.

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The requested information includes tons of halite hoisted (produced) and annual produced bulk salt sales. These are sales volume and cost records defined by regulation to be trade secrets. 9 NYCRR § 330-1.7(a)(1). They are therefore not available for public inspection or copying. 9 NYCRR § 330-1.6(d).

Likewise, the royalty rate, royalty calculation, average price received, royalty due the State and annual bulk sales price per ton of rock salt product are trade secrets, 9 NYCRR § 330-1.7(a)(1), and are therefore not available for public inspection or copying. 9 NYCRR § 330-1.6(d).

While the exception from disclosure is commonly referred to as the "trade secret" exception, it is not limited to trade secrets. It extends to records that are submitted to an agency by a commercial enterprise and which, if disclosed, would cause substantial injury to the competitive position of the subject enterprise. Public Officers Law § 87.2(d).

This statutory basis for exception from disclosure is reflected in OGS regulation as part of the trade secret exception. The exception from disclosure applies to confidential or proprietary information which is not generally published or divulged, the disclosure of which would cause substantial injury to the competitive position of the commercial enterprise, or if openly disclosed would permit an unfair advantage to competitors of the subject enterprise. 9 NYCRR § 330-1.7(a)(1). See also, Matter of Encore College Bookstores, Inc. v. Auxiliary Service Corp., 87 NY 2d 410 (1995).

The subject information is comprised of sales volumes, product types and annual sales volumes for each product type, cost/price (royalty) per year and per ton of specific product and the royalty rate used to calculate amounts due the State in royalty payments. This confidential or proprietary information is cost, cost record, sales volume and price information as those terms are used in the regulation, which is not generally published or divulged, the disclosure of which would cause substantial injury to the competitive position of Cargill, a commercial enterprise, or if openly disclosed would permit an unfair advantage to competitors of Cargill.

None of this information is published or divulged outside the Company or even within the Company, except to employees whose function requires such information. Since this information describes the details of Cargill's commercial dealings with the State, this information represents Cargill's advantage over competitors who do not know, use or have access to such information.

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Cargill's sales volumes, production schedules, products sold, prices, detailed cost calculations, and royalty payments, if disclosed to Cargill competitors, would allow such competitors to use them to analyze the economics of their own mine sites relative to Cargill's, and to gain a windfall of valuable confidential information regarding Cargill's sales volumes, prices, costs and royalty obligations over a number of years.

The value of the requested information to Cargill is great, representing more than 10 years of commercial sales/volume and price data.

Since this information describes sales volumes, costs and price information, this is commercial information which, if disclosed, would likely cause substantial injury to Cargill's competitive position in the New York, regional, national and international salt markets, in which there are dozens of competitors including American Rock Salt Co. in upstate New York, Morton Salt in Ohio and Canada and mines in Mexico and Chile.

The rock salt produced by Cargill at the Cayuga mine is primarily used for road deicing and is primarily sold to State and local governments through a competitive bidding process. The difference between the successful bidder and the second lowest bidder is often a few pennies per ton. Public disclosure of the information sought in the FOIL request would enable Cargill's competitors to know or estimate Cargill's costs and volumes, anticipate its bids and undercut those bids creating an unfair advantage to competitors and substantial injury to Cargill.

Cargill has historically gone to great lengths to secure such information against disclosure to anyone other than those employees who require such information to do their work. The rare exception has been with respect to mineral rights lessors in the context of negotiation for those rights under legally enforceable confidentiality agreements and with respect to submissions to OGS, under claim of exception from disclosure.

Disclosure under FOIL is the only way a competitor could properly obtain the information. Where that is the case, disclosure is not permitted. Passino v. Jefferson-Lewis, 277 A.D. 2d 1028 (4<sup>th</sup> Dept. 2000) leave to appeal denied 96 N.Y. 2d 701. [Where disclosure of information under the Freedom of Information Law (FOIL) is the sole means by which competitors can obtain the requested information, the inquiry ends there, and disclosure is not permitted]. Citing Encore.

In consideration of the foregoing, the information sought under the pending FOIL request constitutes trade secrets and confidential commercial information submitted by a commercial enterprise which, if disclosed, would cause substantial injury to Cargill's competitive position. Consequently, the information is excepted from disclosure under Public Officers Law §87.2(d) and under the OGS FOIL regulations of 9 NYCRR Part 330 which provide that it "shall not be

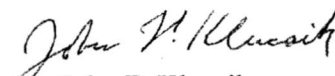
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available for public inspection or copying". Therefore, Cargill respectfully requests its continued treatment as records excepted from disclosure under the FOIL.

Very truly yours,

GILBERTI STINZIANO HEINTZ & SMITH, P.C.

  
John F. Klucsik

JFK/djs

cc: Mr. William Gracon  
Mr. Russ Givens  
Mr. Shawn Wilczynski  
Mr. David Plumeau  
Mr. Robert C. LaFleur  
Michael Skoglund, Esq.