



Office of General Services

ANDREW M. CUOMO
Governor

ROANN M. DESTITO
Commissioner

October 3, 2017

John V. Dennis, Ph.D.
893 Cayuga Heights Road
Ithaca, New York 14850

Re: Freedom of Information Law (FOIL) Appeal of Response
FOIL Request No. 6088
Appellant: John V. Dennis
Subject Matter: Records Related to Cargill's Mining Operations Under Cayuga Lake

Dear Dr. Dennis:

The Commissioner of General Services received the above-referenced appeal on September 5, 2017, made pursuant to the New York Freedom of Information Law ("FOIL"), and has referred it to me as the designated Records Access Appeals Officer for the Office of General Services ("OGS"). The findings and determinations set forth below are made pursuant to the authority of the Commissioner and therefore constitute the final determination of OGS in this matter.

Your FOIL request was received on March 31, 2017 seeking "[a]ny documents pertaining to the lease of the salt/mineral rights under Cayuga Lake to Cargill, Inc." Records responsive to your request include (i) contractual agreements between OGS and Cargill, Incorporated ("Cargill") setting forth the terms of the consent orders for Cargill's mining operations under Cayuga Lake, (ii) Cargill's calculations of tonnage of salt mined and royalties due, and (iii) correspondence between OGS and Cargill related to the tonnage of salt mined and Cargill's royalty payments to OGS. Certain of these documents were provided to you in redacted form so as to prevent the disclosure of the royalty rates, tonnage mined, and total royalty payments made to OGS. Other documents, reflecting Cargill's calculations of royalty payments due to OGS, and marked as confidential and copyrighted when submitted to OGS, were determined to be wholly exempt from disclosure.

Your appeal contends that the information redacted and withheld, including tonnage of salt and royalty amounts, should be disclosed under FOIL as it was not properly exempt from disclosure as a trade secret under Public Officers Law § 87(2)(d). As explained herein, your appeal is granted in part and denied in part.

The first category of records responsive to your request are the contractual agreements between OGS and Cargill. Four of these were provided to you in redacted form to shield the royalty rates in those agreements. I have reviewed OGS's original redactions and determined that these records, along with their attachments, should be released in their entirety because disclosure of the royalty rates, without more information, is unlikely to cause substantial injury to the competitive position of Cargill. Accordingly, three of the agreements are enclosed herewith in unredacted form. These are:

1. 1986 Consent Order
2. 1995 Consent Order (which you attached in unredacted form to your appeal)
3. 2009 Mining Consent Order Modification Agreement

The fourth agreement, a 2014 Solution Mining Permit, will not be released in unredacted form because it pertains to Cargill's operations at Seneca Lake and is therefore not responsive to your original request.

Turning to the next set of records previously found exempt from disclosure, Cargill's calculations of tonnages of salt mined and royalties due OGS, I have determined that these records were properly withheld. Public Officers Law § 87(2)(d) contains two provisions for exception from disclosure under FOIL. See *Verizon New York, Inc. v. NYS Pub. Serv. Comm.*, 137 A.D.3d 66 (3d Dep't 2016). The first exemption allows agencies to exempt trade secrets from disclosure. The second provision for exemption applies to "records or portions thereof 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." In order for this exception to apply, "[a]ctual competition and the likelihood of substantial competitive injury is all that need be shown." *Matter of Encore Coll. Bookstores, Inc. v. Auxiliary Service Corp.*, 87 N.Y.2d 410, 421 (1995) (citing *Gulf & W. Indus. v. United States*, 615 F.2d 527, 530 (D.C. Cir. 1979)).

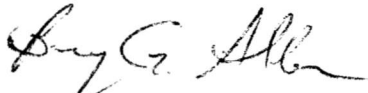
Cargill's attorneys provided a letter dated May 31, 2017 to OGS asserting that disclosure of sales volumes and royalty payments would cause substantial injury to Cargill's competitive position. A copy of the letter is enclosed for your reference. The letter states that Cargill has many competitors in the regional, national, and international salt markets and that Cargill sells the vast majority of the rock salt produced at the Cayuga mine to State and local governments through competitive bidding processes. The price difference between the successful bidder and the second-place bidder is often pennies per ton. In a competitive environment such as this, disclosure of information regarding Cargill's costs and volumes could give Cargill's competitors an advantage that would cause Cargill to lose sales and suffer substantial competitive injury.

Your appeal letter casts doubt on whether the disclosure of the tonnage of salt mined would cause competitive harm to Cargill and notes that Cargill's own website states that the Cayuga salt mine "annually produces approximately 2 million tons of road salt." I have reviewed Cargill's website and find that the statement in question is an approximation for public relations purposes and not a disclosure of the mine's precise production, particularly in light of the fact that the actual tonnage mined varies significantly from year to year.

Applying the rule outlined in *Encore Coll Bookstores*, I find that Cargill has met its burden of identifying actual competition and showing how disclosure of the exact tonnage of salt mined from under Cayuga Lake and the royalties paid to the State could substantially injure its position relative to its competitors. Accordingly, I find that records showing Cargill's calculations of tonnages of salt mined and royalties paid to OGS were properly withheld from disclosure pursuant to Public Officers Law § 87(2)(d).

A third category of records was also provided to you with redactions. These documents are correspondence between Cargill and OGS regarding Cargill's calculations of royalties and internal OGS financial routing instructions. The redacted portions of these documents were derived from the amount of salt mined by Cargill and contain the royalties Cargill has paid to the State. Such information could give an advantage to Cargill's competitors thereby causing Cargill to suffer substantial competitive injury. It should be noted that the exception from disclosure pursuant to Public Officers Law § 87(2)(d) applies not only to records submitted directly by a commercial enterprise, but also to records "derived from information obtained from a commercial enterprise." I therefore find that the redacted portions of these records were properly withheld from disclosure pursuant to Public Officers Law § 87(2)(d).

Sincerely,



Bradley G. Allen
Deputy Commissioner and Counsel
Records Access Appeals Officer

Enclosures

cc: Committee on Open Government (via email)