

This is Exhibit "13"
Referred to in the Affidavit
of Robert McCullough
Sworn before me this 11
day of August, 2009

Susan O'Ryan

A Commissioner, etc.



Information and Privacy
Commissioner of Ontario
Commissaire à l'information
et à la protection de la vie privée de l'Ontario



July 28, 2009

VIA COURIER

Mr. Tony Guergis
Warden
c/o Mr. Glen R. Knox
FOI Co-ordinator
County of Simcoe
Administration Centre
1110 Highway 26
Midhurst, ON L0L 1X0

Dear Mr. Knox:

**RE: Continuation of Inquiry
Order MO-2416
Appeal MA07-365
Your File A17-5520-07**

I am writing to advise you that I have decided to continue my inquiry into Appeal MA07-365 as a result of Jagger Hims' refusal to comply with the County of Simcoe's written direction that Jagger Hims provide the County with the records responsive to the appellant's request. The continuation of this inquiry relates solely to the issue of compliance with Order MO-2416.

The records at issue are the calibrated hydrogeological model and accompanying input data that were prepared by Jagger Hims Limited, an external engineering consultant. To comply with the requirements of the Ministry of the Environment's Provisional Certificate of Approval for Site 41, particularly conditions 9, 10.1(c) and 10.1(d), the County retained Jagger Hims to conduct a "geotechnical evaluation" and "supplemental hydrogeological investigation" of the proposed landfill site. Jagger Hims used a software program called "Modflow" to construct and run a hydrogeological model. The output from this model formed a basis of the supplemental report that the firm submitted to the County.

In Order MO-2416, I found that the calibrated hydrogeological model and accompanying input data were under the County's "control" for the purposes of section 4(1) of the *Municipal Freedom of Information and Protection of Privacy Act (MFIPPA)*. Consequently, I issued the following order provisions:



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1. I order the County to issue a written direction to Jagger Hims to provide the County with the records responsive to the appellant's request. The County's written direction should be issued no later than **June 17, 2009** but no earlier than **June 12, 2009**. It should require that the records be delivered to the County no later than **June 26, 2009**.
2. I order the County to issue an access decision to the appellant upon receipt of the records in accordance with Part I of the *Act*, treating the date of receipt of the records as the date of the request.
3. I remain seized of any compliance issues that may arise from this order and any new appeal that the appellant may file with respect to the access decision that the County is required to issue under Order Provision 2.

The County issued a written direction to Jagger Hims, dated June 15, 2009 that instructed the firm to provide the County with the records at issue no later than June 26, 2009. In response, Jagger Hims sent a letter to the County, dated June 26, 2009, in which it refuses to provide the County with the records.

As noted above, Order Provision 3 of Order MO-2416 states that, "I remain seized of any compliance issues that may arise from this order" Jagger Hims' refusal to provide the County with the records has created a significant compliance issue. In particular, it prevents the County from complying with Order Provision 2, which requires the County to issue an access decision to the appellant upon receipt of the records in accordance with Part I of the *Act*.

Although I am not alleging that an offence has been committed, nor is this an investigation into whether an offence has been committed, it is important to note that wilfully failing to comply with an order of this office and wilfully obstructing the Commissioner in the performance of his or her functions are offences under section 48(1) of *MFIPPA*. Aiding, abetting, counselling or procuring a person to commit these offences are also offences under sections 77 and 78 of the *Provincial Offences Act*.

Section 43(3) of *MFIPPA* provides:

Subject to this Act, the Commissioner's order may contain any conditions the Commissioner considers appropriate.

Consequently, I have decided to continue my inquiry into Appeal MA07-365 for the purpose of determining whether I should issue a further order to address the County's failure to comply with Order Provision 2. The only way that the County can comply with this order provision is if Jagger Hims first provides the County with the records at issue. Consequently, I am inviting the County to provide representations to me on the following three issues:

1. What is the County's position with respect to Jagger Hims' refusal to comply with the County's written direction that the firm provide the County with the calibrated hydrogeological model and accompanying input data?

2. Is the County able to take additional actions, including legal proceedings if necessary, to encourage and/or compel Jagger Hims to provide the County with these records?

In responding to this question, please consider commenting on the application of the reasoning in Order MO-1251 to this appeal, and in particular, the following passage from B.M. McLachlin et al., *The Canadian Law of Architecture and Engineering*, cited in that order:

... a client who decides to proceed with a project for which an architect or engineer has prepared designs, expressly or by implication appoints the architect or engineer as his or her agent for various purposes... The documents the architect or engineer receives or creates in his or her role as agent for the client are owned by the client.

3. If the County is able to take additional actions to encourage or compel Jagger Hims to provide the County with these records, please specify what actions the County would be willing to take voluntarily or if ordered by this office.

I would ask that you submit your representations to this office no later than **August 12, 2009**. Please note that I may share your representations with both the appellant and Jagger Hims, subject to the confidentiality criteria on the sharing of representations set out in *IPC Practice Direction Number 7*. I have provided both of those parties with a copy of this letter.

If you have any questions, please contact Renee Barrette, Adjudication Review Officer at (416) 326-3461 or our toll free number 1-800-387-0073.

Yours truly,



Colin Bhattacharjee
Adjudicator

cc: Appellant
Jagger Hims Limited