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August 16, 2009

To Whom it May Concern

RE: Information and Privacy Commissioner Order MO-2416: County of Simcoe

AND RE: Moratorium on use of Dump Site 41.

It is our opinion that the County of Simcoe's recent responses to the Privacy Commissioner with respect to Order MO-2416 have been inappropriate, and that continued failure to respond appropriately would create a serious risk of liability. It is our further opinion that, partially as a result of those responses, the County of Simcoe should impose a moratorium on construction of "Dump Site 41" that remains in effect unless and until further investigations of possible environmental impacts have been completed. The basis for our opinion is outlined below.

The Order at issue relates to a report of a hydrogeological investigation that was required by the Minister of the Environment's Provisional Certificate of Approval for the construction of a landfill site known as "Site 41". The report was prepared by Jagger Hims Limited (henceforth, "JH"). Some of the information provided in the report was obtained by using a "calibrated hydrogeological model" (henceforth, "model") of Site 41 that JH developed. This model was then used to assess some of the environmental impacts that could result from the development of Site 41.

The Community Monitoring Committee (henceforth, "CMC") was created pursuant to the Provisional Certificate of Approval to provide community review of the development, operation, ongoing monitoring, closure and post-closure care related to the landfill site. The CMC requested that the County of Simcoe provide a copy of the model so that an expert that they had retained could use it to evaluate the conclusions that JH had reached. On July 4, 2007, Simcoe County officials refused to provide a copy on the basis of their alleged "concern" that "someone not familiar with the integral details of the model may inadvertently alter some aspect which would cause erroneous results. To address any results varying from those already reported by Jagger Hims would therefore require the County to potentially expend significant costs on addressing any data output."

Steve Ogden, a member of the CMC, requested that the Information and Privacy Commissioner of Ontario issue an order requiring the County of Simcoe to obtain a copy of the model from JH and produce it to him.

On May 13, 2009, the Privacy Commissioner adjudicator issued Order MO-2416. This Order included ordering the County to issue a written direction to JH to provide the County with the model and the accompanying input data (henceforth, the

“records”) and to then issue an “access decision” to Mr. Ogden. The Adjudicator specified that he remained seized of any compliance issues that may arise from this order.

The County did request that JH provide the records. However, JH wrote to the County on June 26 asserting that it “will not honour the request formulated by the Information and Privacy Commissioner.” The County informed the Adjudicator of the response by JH.

On July 28, 2009, the Adjudicator wrote to the County that he was continuing his inquiry as a result of JH’s refusal to comply with the direction to provide the records, and that the purpose of the continuation of the inquiry was to determine whether he should “issue a further order to address the County’s failure to comply with Order Provision 2.” He invited the County to provide representations to him on three issues:

1. What the County’s position is with respect to JH’s refusal;
2. Whether the County is able to take additional actions, including legal proceedings if necessary, to encourage and/or compel JH to provide the records;
3. If the County is able to take additional actions, what actions would the County be willing to take voluntarily or if ordered by the office of the Privacy Commissioner?

The Adjudicator asked that the County submit its representations no later than August 12, 2009.

On August 5, 2009, a lawyer for Simcoe County wrote to the Adjudicator on behalf of the County. The lawyer wrote, in part, “We need to put this matter before Council. It would already be too late for us to get a proper report to Council for its meeting of August 25th. The next meeting of Council following that will be September 22nd. We would accordingly ask you to delay the completion time for your request to 10 days following that meeting, or October 2.”

It is our opinion that this response by the County’s lawyer was entirely inappropriate, for several reasons. First of all, it appears that the County officials hoped that construction of the dump site would be completed and use of the dump site would begin by some time this Fall. If the request to delay the response to October 2 had been granted, it is almost certain that operation of the dump site would have begun before the CMC’s expert could use the model to evaluate the conclusions reached by JH. For after JH provides the model to the County, the County still has the right to consider whether any exemptions apply to any part of the records. If the County claims an exemption and withholds any part of the records, Mr. Ogden would have to appeal that withholding. Once the model is actually given to the CMC, their expert must have time to use it to check JH’s conclusions. The expert must then write a report. If the expert’s conclusions differ significantly from those obtained by JH, JH needs to be given the opportunity to respond. Then the approval of the project must be re-evaluated. Surely, months are required to complete this process.

Special meetings of the County of Simcoe Council can be called on less than a week’s notice. If this matter had to be put before Council, why wasn’t a meeting of Council convened by August 5, rather than applying for an extension of time to respond to the Adjudicator? The letter of August 5 could well be interpreted as a “stalling tactic”; it is our opinion that it should be strongly repudiated by the Council.

Moreover, on August 14, 2009 it was affirmed by counsel representing the County (on the record in the Superior Court of Justice in Barrie) that the question of the response to the Privacy Commissioner *will* be before Council at its meeting of

August 25. Why was the Adjudicator told on August 5 that it was “already too late to get a proper report before Council for its meeting of August 25th”?

On August 6, 2009, an adjudicator informed the County that its request for an extension of time to reply was denied.

Counsel to the County of Simcoe wrote to the Adjudicator on August 10. He explained that he was informing the Adjudicator “only what would be the advice or recommendation of staff and legal counsel”, since the request for an extension of time had been denied. We wonder why no special meeting of Council was convened.

It is our opinion that much of the “advice or recommendation of staff and legal counsel” proffered in the letter of August 10 is inappropriate and thus should be rejected by Council at its meeting of August 25.

The letter states “We have no particular ‘position’ with respect to Jagger Hims refusal to answer our request for their computer model.” It is our view that it would be irresponsible for Council to accept the advice to make such a response. It is our opinion that an appropriate response on this issue would be along the following lines: “Although we argued before you that the records should not be produced, we understand and respect your ruling to the contrary and we therefore take the position that Jagger Hims should produce the model. We note that the arguments that Jagger Hims has put forward in its letter of June 26, 2009 as its reasons for refusing to provide the records are quite different from the arguments that it put forward in its letter of June 28, 2007.”

The August 10 letter by counsel for the County of Simcoe asserts “We are unaware of any basis upon which the County could take legal action against the engineering firm in order to obtain the records.” We would suggest that a more appropriate response would be something like: “We see much merit in your view that the fact that Jagger Hims used public funds to create the model gives the County the right to obtain it and the input data. Moreover, Jagger Hims’ inconsistent positions with respect to providing us with a copy of the model would appear to limit their possible defences. Should the additional actions that we detail below not lead to production of the records, we shall initiate legal action.”

The letter of August 10 states “We are somewhat mystified by the ‘additional actions’ that you feel we might be able to take to ‘encourage or compel’ the engineer to provide the computer model.” It is our opinion that there are many actions that are not at all mysterious. You could write to the Adjudicator “There are several additional actions that we are prepared to take. First of all, we will inform the engineers that, should they fail to provide the records forthwith, the County of Simcoe will not engage them or any company owned by their parent company for any work beyond what we have presently contracted for. If that does not sway them, we will ask them to specify the value of the calibrated model to them, indicating that we will pay them a reasonable price for it. We will enter into negotiations with the company forthwith, indicating that we intend to get the model, and will pursue legal action if necessary. If a copy of the model is not provided to us by September 3, 2009 we shall commence urgent legal action against Jagger Hims.”

The County of Simcoe lawyer’s letter of August 10, 2009 contains information that is, in our opinion, very misleading. It states “we would like to point out an important fact which does not appear to have been made known to your Office”. It goes on to describe a meeting at which an expert chosen by the CMC spent several days with representatives of Jagger Hims and others reviewing aspects of the environmental assessments.

The letter of August 10 then continues as follows:

“On September 28th, 2008, Mr. Rowe wrote a letter to the Ministry in which he stated:
‘In summary, the MODFLOW model appears to have been well constructed and, for the cases examined in the Supplemental Hydrogeological Report and the additional scenarios run at my request, the predicted average water levels in the confined aquifer beneath the area of the site approved for landfilling are high enough to provide inward gradients with an operating leachate collection system’”

It is our opinion that, in the context, this paragraph conveyed the impression that the model was no longer required since the concerns had been adequately addressed. However, that impression would not be conveyed if the rest of the letter of September 28th, 2008 of Mr. Rowe had been included. In particular, Mr. Rowe also wrote the following (it appeared in the September 28th letter, on the previous page before that containing the paragraph that Simcoe County counsel chose to send to the privacy Commissioner):

“It should be noted that while I did my best to compare the hydrogeology with the model-idealization adopted in the MODFLOW modeling, a real-time comparison between what is shown on a screen on the wall and the information in a 5cm thick report was challenging and I may well have missed things that would be identified had a hard-copy or soft-copy of the modeling information presented on the screen been provided. With that caveat, my conclusions based on the information presented to me to review...”

Your counsel also choose to fail to inform the Adjudicator of another limitation’s of Mr. Rowe’s review.

It is our opinion that the County of Simcoe Council should write to the Adjudicator to the following effect: “The County of Simcoe Council regrets that the letter of August 10, 2009 was sent to you and respectfully requests that you ignore it.”

The above outlines our opinion as to the appropriate responses to the Privacy Commission. Below we discuss our concerns about liability of the County of Simcoe Council and its individual members and staff.

The Adjudicator’s letter of July 28, 2009 to Warden Tony Guergis refers to sections of the *Municipal Freedom of Information and Privacy Act* that create offences of willfully failing to comply with an order of the Privacy Commissioner and of willfully obstructing the Commissioner in the performance of his office. That letter also indicates that aiding, abetting counseling or procuring a person to commit these offences are also offences, pursuant to provisions of the *Provincial Offences Act*. We do not have enough information to assess the likelihood that any County of Simcoe staff or members of Council could be found guilty of any such offences on the basis of actions taken to date. We do feel, however, that now responding to the Adjudicator in the spirit of what we have suggested above would substantially lessen the possibility of any such charges. Conversely, it is our opinion that the possibility of such charges will be greatly increased if the Council adopts the advice and recommendations contained in its counsel’s letter of August 10, 2009.

There is, in our view, also danger of much more serious liability. The fact that constructing a calibrated model can be described as a combination of “art and science” suggests that even a perfectly well-intentioned and well-trained expert might make mistakes in constructing such a model. If the conclusions reached by JH are invalid in any significant respect, use of Dump Site 41 might seriously harm the environment. If some such harm occurred, and if evidence suggests that an independent assessment conducted with the assistance of the calibrated model would have detected the problem that led to the harm, there would appear to be little doubt that Simcoe County would be found to be at least partially liable for the harm. If such

a situation arose and it was determined that Simcoe County improperly withheld access to the model, it is likely that both aggravated and punitive damages would be assessed against Simcoe County, in addition to compensatory damages for the harm caused to the environment. We would need to obtain much more information and do much more legal research for us to be able to estimate the likelihood that any individual County of Simcoe staff or member of Council would be found liable for any such damages.

An assessment of the environmental impact by an expert chosen by the CMC who is given access to all materials used by and created by Jagger Hims for its investigation would have a dual benefit for Simcoe County: it would lessen the possibility that serious environmental harm would result from the use of Site 41 and, should such harm occur in spite of the second assessment, it would lessen the liability of the County for damages.

It is our opinion that it is incumbent upon the Council to impose a moratorium on construction of "Dump Site 41" that remains in effect unless and until further investigation of possible environmental impacts have been completed by at least one expert with no connection to JH who is provided with the model and any other information the expert reasonably requests. Such a further investigation might confirm the essential conclusions of JH, in which case it would probably lessen public concern about Site 41. On the other hand, another investigation might reveal flaws in the conclusions reached by JH, in which case the planned construction might be modified or abandoned, depending upon evaluation of the new findings. If the construction continued after such an investigation and harm did eventuate, the liability of the County of Simcoe would be lessened by the fact that they had taken reasonable steps to try to avert the harm.

It has been estimated that presently-existing land fill sites are adequate for the next ten to twenty years. Thus there is no great urgency to completing the construction of Site 41. It is our opinion that a moratorium on construction is required.

We have prepared this opinion on our own behalf; it reflects our personal legal opinions and is not presented on behalf of any former or present client. This opinion can be used in any appropriate way and quoted by anyone who finds it useful to do so.

We would be pleased to answer questions from County of Simcoe Council Members or staff about this letter or any related matters.

Sincerely,

Peter Rosenthal
Barrister and Solicitor

Chris Reid
Barrister and Solicitor