

August 13th, 2009

MARK ANDREW AITKEN: (SWORN)

CROSS-EXAMINATION BY MR. ROSENTHAL:

Q. Good afternoon, sir. My name is Peter Rosenthal, I'm examining you on behalf of Vicki Monague. And I'm going to apologize at the beginning I'm going to be much quicker and more rushed than perhaps I would be under certain circumstances. We're under time constraints. Now sir, you swore two affidavits that were submitted in this matter.

A. That is correct.

Q. It's been marked as C-9. You may not be aware of that fact. That was an affidavit that was sworn on the 10th of August 2009 and then there was a supplementary affidavit marked C-10 that was sworn on August 11th, 2009, is that correct?

A. That's correct.

Q. According to the first affidavit, you're the chief administrative officer of the County of Simcoe.

A. That is correct.

Q. Does Mr. Knox report to you then, sir?

A. Yes he does.

Q. Does Mr. McCullough report to you?

A. Not directly but he does.

Q. But you're higher up in the command than he?

A. That is correct.

Q. And you've been in this position for many years, is that correct, sir?

A. I have been the chief administrative officer in an acting role since November – in an acting role from November to April I was passed by by-laws as the chief administrative officer in May of 2005.

Q. So you became chief administrative officer in May 2005 --

A. That's correct.

Q. And for several months prior to that you were acting -

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A. That is correct.

Q. -- in that capacity. Thank you. Now, as you know Simcoe County has initiated a lawsuit against two persons, two named persons, is that correct, with respect to this dumpsite business?

A. With respect to the injunction, yes.

Q. Was that your decision to issue that lawsuit sir?

A. Myself as the chief administrative officer consulted with legal counsel and senior -- key senior staff and we came to that conclusion. We took that conclusion to -- as a solution to regain access into our property, sir, and we took that solution to the head of council who as I understand it, confirmed that with his chairs, the chairs of each of the standing committees and we -- we went from there.

Q. Okay. You have to back up for me. I want to know the names of those persons, sir.

A. Okay.

Q. So you -- who actually made the decision, was it you or --

A. Myself as the chief administrative officer in consultation with the warden who is Tony Guergis is his name.

Q. Okay. So you made the decision, but you consulted with the warden.

A. Yes.

Q. Mr. Guergis.

A. As the head of council, yes.

Q. And he agreed with that decision?

A. Yes.

Q. And who else did you consult with sir?

A. Senior staff, key senior staff being Mr. McCullough, I believe Mr. Newlove who reports to Mr. McCullough and legal counsel.

Q. Did you discuss it with Mr. Knox?

A. I don't believe we had discussed the injunction directly with Mr. Knox.

Q. Now, I'm not just talking about the injunction, I'm talking about suing for damages as well. You're aware of that, right?

A. Yes, yes.

Q. You're the one who authorized that.

A. That's correct.

Q. You're claiming --

A. We were made aware of that by our counsel, sir.

Q. Yes, you're claiming thousands of dollars in damages against two persons.

A. Losses, that's correct, sir.

Q. And so you authorized that and also the applying for an injunction.

A. That is correct, sir.

Q. Has that matter been brought before the Simcoe County council?

A. Not as yet sir. Simcoe County council is meeting on August 25th and that matter will be discussed.

Q. It will be discussed.

A. That's correct, sir.

Q. You're quite certain it will be on the agenda for that day?

A. I will ensure that, sir.

Q. Now, we've heard from Mr. Knox the agenda has not been prepared yet.

A. That's correct.

Q. But you know that will be on the agenda.

A. As I stated, I will ensure that as the chief administrative officer.

Q. Yes. Now, your supplementary affidavit, I won't turn to it, I'm trying to save time, presents a letter from Chief Rodney Monague of the Beausoleil First Nation, right?

A. An email sir, yes.

Q. An email that was received by you.

A. That is correct.

Q. And you haven't yet responded to that email, it's just a couple of days ago?

A. Yes, it was c.c.'ed to council and it was actually placed on agenda and I will likely respond to it once county council has considered it.

Q. Thank you. Now sir, to your knowledge was the question of whether or not the CMC as it's been called should be provided with the calibrated model ever brought before Simcoe County council?

A. Yes.

Q. And when was that to your memory, sir?

A. I don't recall the date in which it was taken to Simcoe County council.

Q. And was that, do you recall was it before or after there were formal requests made through the Privacy Commissioner for production of that document?

A. I believe it was before but I don't recall, sir.

Q. Before. And then as you know there were proceedings over a period of a couple of years with respect to the production of that calibrated model, is that correct?

A. The Freedom of Information Act, sir?

Q. Yes.

A. Yes.

Q. And before the Information and Privacy Commissioner.

A. That's correct.

Q. Were you the person making decisions on behalf of Simcoe County with respect to how to proceed during those proceedings?

A. With respect to Freedom of Information requests, that is actually a process that's handled by the clerk's office although the clerk's office does keep me apprised of letters that come from the head of council on those matters.

Q. So who made the decision, for example, to resist the production of that document on the basis that it's not a record that you have control of?

A. That would have been coordinated in the clerk's office. It would have been the clerk's office in consultation with key staff.

Q. The clerk meaning Mr. Knox?

A. That's correct.

Q. And you had no part in that discussion?

A. Not in the decision, sir, but the clerk's office is very efficient in making sure I'm aware of letters under the warden's signature.

Q. So you were aware that Simcoe County was taking the position that the model should not be produced?

A. I'm aware that Simcoe County took the position that the model was not in their – not in our possession.

Q. Yes. Clearly it was not in your possession, right?

A. That's correct.

Q. That wasn't the question. The question was rather Simcoe County should try and get it and try to produce it, right?

A. We were given an order from the F.O.I. individuals and to your question directly, sir, I was aware of that.

Q. That's within the last month or two, right?

A. Yes.

Q. I'm talking about a two-year process, sir, during which Simcoe County resisted the production of that model.

A. Yes.

Q. And you had no participation in making the decisions along the way whether or not to continue resisting the production of that model?

A. Not in the decision, sir, but I was definitely aware of that.

Q. And who would have had the authority to make those decisions?

A. The FOI requests sir, are coordinated by the clerk's office.

Q. Now Mr. Knox had the full authority on that, that's your evidence?

A. Yes.

Q. I see.

A. The letter, if I could clarify, Your Honour, the letter certainly comes from the warden. The clerk's office prepares the letters and I believe all letters go under the signature of the warden.

Q. Yes. Did you give any advice during that period as to whether or not Simcoe County should continue to resist production of this calibrated model?

A. I don't recall but since the – again, since we were not in possession of that model, I didn't see any advice to be given sir.

Q. Sir, I would put it to you, you could have advised that we should try to get that model and we should ask the consultants, if they would please give it to us.

A. I could have advised.

Q. You could have done that, right?

A. Yes.

Q. Did you do that?

A. No I did not.

Q. Did anyone do that in Simcoe County among the staff or councilors or wardens, as far as you know?

A. As far as I know, no, not until recently.

Q. Yes. And was there a discussion during that two-year period as to whether or not you should do that, should try to provide this calibrated model?

A. Not with myself. That was again, where decisions made within the clerk's office.

Q. I see. Wasn't there any concern that it might be desirable to get an independent assessment of the environmental concerns independent of Jagger Hims, given the fact of their continuing involvement and their obvious pecuniary interest in continuing the involvement? Was that question ever discussed among any Simcoe County people that you're aware of sir?

A. Could you clarify exactly the question? Are you asking was there ever a question with respect to a peer review?

Q. I'm sorry, I'm trying to go more quickly than perhaps I can effectively go, I'm sorry. I'm talking about during the two-year period before the ruling of the Privacy Commissioner however, that you must request that model from Jagger Hims, okay, prior to that period.

A. All right.

Q. There were a number of steps in the procedure, a number of opportunities for mediation, right?

A. Yes.

Q. And so on. During that period, did you hear anyone from your staff or connected with the Simcoe County council make a proposition, perhaps we should try and get that calibrated model so we can have an independent assessment of any possible environmental problems.

A. No sir, But if I could clarify.

Q. Yes you may.

A. The – the model itself the data that went into the calibration of the model as I understand it as well as the inputs and outputs of that model have been independently peer reviewed.

Q. Yes.

A. Prior to that request that you're talking about, the most recent F.O.I. information at the request of the Ministry of Environment I understand that Mr. McCullough and our technical advisors from Jagger Hims actually sat with individuals representing the CMC and some of their technical expertise to go through that undertaking.

Q. Now sir, you understood, however, that at least one expert had requested the calibrated model itself in order to evaluate the conclusions made by the Jagger Hims report, right?

A. I'm aware that an individual had made that request – that request through F.O.I.

Q. An individual had made the request for F.O.I. but it was based on the fact that there was an expert who indicated that he wanted that model in order to do an independent evaluation, right?

A. I'll take your word for that, sir.

Q. You're not aware of that, sir?

A. I was not aware of that. If that was in the F.O.I. request, I'm certain the clerk's office and our technical staff are aware of that.

Q. I see. Okay. I would like to show you a document that's at Tab C of the affidavit of Stephen Ogden. It's been marked as M-3 to this proceeding. This is an email on July 4th, 2007 from Rob McCullough addressed to Ray Millar, you're aware that Ray Millar was a member of the CMC?

A. At that time, yes I believe he was.

Q. On again, off again. He's been chair of it.

A. He has been the chair of the CMC, yes that's correct.

Q. And Mr. McCullough acknowledged that this was an accurate reproduction of this email okay.

A. Okay.

Q. Okay. This is on July 4th, 2007. It begins, after fully discussing the CMC's request for the MODFLOW model with senior county staff and the consultant. Now Mr. McCullough testified that senior county staff meant you.

A. Okay.

Q. Were you consulted?

A. I don't recall being consulted but I may have been.

Q. Did you have the authority to direct the response to that request?

A. I would have had the authority, but again, the F.O.I. requests are done in the clerk's office.

Q. Do you recall anything about this, sir? Perhaps you can take a moment to read that email.

A. With respect to the email I'm certainly aware of the explanation that Mr. McCullough has put there, sir, but I – you know, although the email is there and it talks about senior county staff, I don't recall the conversation.

Q. You're aware of the concern that was expressed and the reason for denying the request.

A. I'm aware of the fact that there was a request to obtain the MODFLOW model from an individual through an F.O.I. undertaking.

Q. Yes. And did you or did you not, sir, personally make a decision to deny that request?

A. I don't recall personally making the decision. Again, I believe those decisions was made in the clerk's office.

Q. By Mr. Knox?

A. Yes. He is the coordinator with F.O.I.

Q. I see.

A. Again, if I could clarify, those letters are all under the – as the I understand it the signature of the warden as well.

Q. This is under the signature of Mr. McCullough.

A. That is not a formal response through the F.O.I. That looks to be an email, sir.

Q. Yes. This is previous to the F.O.I. request.

A. Yes.

Q. And he told us that senior county staff meant you.

A. Okay.

Q. Was it you or was it not you?

A. You're telling me what he said and I'm saying I hear what you're saying, but I don't recall that.

Q. So did you or did you not have the authority to make that decision?

A. I had the authority to make that decision.

Q. And did you make that decision sir?

A. I don't recall making that decision, sir.

Q. If Mr. McCullough testified that you did, would you accept responsibility.

A. Yes.

Q. And did you not, in fact, continue to make decisions with respect to the denial of this request as it went through the Information and Privacy Commissioners procedure, sir?

A. As I said, the clerk's office was responding and I was aware that they were responding that that was not a record of the county and we could not release it.

Q. And you were aware that the county was resisting every step of the way the production of this calibrated model, isn't that correct?

A. I was aware that with the explanation that it wasn't a record of the County of Simcoe.

Q. I see. Yes. That was the argument that was being put forward. It wasn't a record, right?

A. That's right of the corporation.

Q. And there was never any consideration that you're aware of, of asking Jagger Hims would you please produce it prior to the decision of the Information and Privacy Commissioner requiring you to make that request.

A. Again, I don't recall that, but I'm aware of that more recently as you suggested.

Q. Now sir, going to more recent times, I'm now Your Honour looking at Exhibit C-8(a) the affidavit of Robert McCullough volume one of two.

THE COURT: Yes.

MR. ROSENTHAL: Q. And Tab 14 thereof.

THE COURT: Thank you.

MR. ROSENTHAL: Q. This is a letter August 5th, 2009 on the letterhead Graham, Wilson and Green. This is approximately a week ago.

THE COURT: What tab are you at?

MR. ROSENTHAL: I'm sorry?

THE COURT: What tab are you at?

MR. ROSENTHAL: I'm at Tab 14.

THE COURT: Thank you. I didn't catch that. Thanks. I'm there.

MR. ROSENTHAL: Q. Are you familiar with this letter, sir?

A. Yes I am.

Q. This was a week ago.

A. Yes.

Q. Did you direct the issuance of this letter?

A. I didn't direct the issuance but again I was aware of it.

Q. You were aware of it. Mr. Knox made the decision to do this?

A. It's as of – as part of the F.O.I. duties under his realm, yes, I believe he did.

Q. I see. Mr. Knox reports to you.

A. Yes he does.

Q. You were aware of that.

A. I was aware of that, yes.

Q. And you were aware of the details of it, were you sir?

A. Yes.

Q. Now, you understood, did you not, that Mr. Ogden the person who applied for this calibrated model had been trying for a couple of years to get it, right?

A. That's correct.

Q. And you understood that work was going on on dumpsite 41.

A. Yes.

Q. And the CMC was anxious to get this model so they could see whether or not that work should go ahead, right, that's what your understanding was, sir?

MR. WAYLAND: Your Honour, Your Honour – sorry...

OBJECTION MADE

MR. ROSENTHAL: Q. Now sir, we're talking about August 5th, a week ago, right?

A. Yes.

Q. And I'm suggesting to you sir, that at this time you were aware that the CMC had been anxious to obtain this model for a couple of years.

A. Yes.

Q. And you were aware that work had begun and was except for possible delays proceeding with respect to the actual construction of dumpsite 41, right?

A. Yes.

Q. And you were aware that they wanted this model in order to have a different analysis of the possible environmental dangers of that construction, right?

A. Yes. They believed they – if I could clarify, they believed they needed the model. I know all of the data with respect to the MODFLOW was available in the supplemental documents.

Q. And they had an expert, you were aware, were you not --

A. That's correct.

Q. – who said he wanted the calibrated model in order to review what had happened, correct? You were aware of all of that on August 5th, 2009. Now you say Mr. Knox is the one who actually decided the content of this letter and you just approved it or what are you saying about the responsibility there sir?

A. Mr. Knox and – under his role as the clerk of the County of Simcoe coordinates all of the F.O.I. materials.

Q. We understand that sir.

A. I was aware of that document. I did not approve it, I was aware of that document.

Q. You didn't approve it?

A. No.

Q. Do you disapprove of something in this document, sir?

A. No I don't. I – I mean, what I'm saying is, you asked me if I actually approved the release of that letter. I agree with what's in the letter. I didn't approve it per se.

Q. Did Mr. Knox show it to you?

A. I don't know if it was Mr. Knox or the author of the letter Mr. Green.

Q. But you are not the person who said go ahead with this letter.

A. No, but I was aware of that and I agree with what's in the letter.

Q. Well, okay. Mr. Knox was the person who authorized it, is your understanding.

A. Mr. Knox is the one that coordinated sir, I was aware of the letter and I didn't object to it going out.

Q. Now, it says here, it would already be too late for us to get a proper report to council for its meeting of August 25th. You see that part sir?

A. Yes I do sir.

Q. In fact, this is going to be on the agenda of August 25th, is it not?

A. This?

Q. The question of producing this model.

A. I'm uncertain of that at this point.

Q. It could be on the agenda --

A. It could be --

Q. -- could it not?

A. It could well be but I think -- I think with respect to what was being put before the council was advising us to what we could do to try and obtain that document.

Q. All I'm suggesting --

A. In terms of taking legal proceedings against Jagger Hims.

Q. Yes. Now, you had never gone before council before with respect to legal proceedings and with respect to production of this

model over the two-year period it went before the Privacy Commissioner had you?

A. Not to my knowledge.

Q. No. You would know that, if you had, wouldn't you?

A. There are a lot of things that go to council sir, but – but I don't recall it going to council per se.

Q. It might have gone to council.

A. It may have gone as an information report at some point.

Q. And council may have authorized the various steps taken to try to resist the production of this model over the two period, is that what you're telling us?

A. I don't recall them doing that, sir.

Q. You may have done it sir?

A. I don't recall them doing it sir.

Q. Sir, I'm put it to you, you're not being very forthright.

A. They may have, but I don't recall them doing it.

Q. I see. Okay. But it is going to be on the agenda of August 25th probably, right?

A. Again, I don't know if it will or not. I think as this letter indicates sir, it was with respect to a response to the individuals from the Freedom of Information and it specifically as you say, as you can see says that with respect to taking legal proceedings against Jagger Hims we would need to get some direction from county council on this.

Q. Is that true, you would need to get direction from council before that?

A. In an undertaking like that where we have some time, yes.

Q. Why sir, would you not need to get authorization from council to sue my client?

A. It's an urgency matter, sir. We had a piece of county property where we had no access to a piece of county property to undertake a project that we had the direction of the council to undertake. This particular suggested legal action has no urgency or rush to it. Obviously we would try and get that to council in that regard.

Q. That's no urgency or rush in your view, sir?

A. In terms of – of making a call on that prior to getting to the next meeting of council.

Q. Were you aware of the order of the Privacy Commissioner that you respond appropriately by August 12.

A. Is that the order, sir, where we were asked to send a letter to Jagger Hims to request the document?

Q. Well, let's look at some of the documents sir. I didn't expect to go over this.

MR. GREEN: It's at Tab 13.

MR. ROSENTHAL: Yes. Q. Now sir, at Tab 13 of the affidavit of Mr. McCullough submitted by Simcoe County to this proceeding it – there is a letter addressed to Warden Tony Guergis and it concludes and I'm trying to be expeditious here.

A. Okay.

Q. On page three, "I would ask you that your representations to this office" and this is about getting the calibrated model "no later than August 12, 2009." Do you see that sir?

A. Yes I do.

Q. Would that not create an urgency if you were ordered by a Privacy Commissioner to respond by August 12, 2009?

A. I believe – I believe they were intending on responding sir, but August 25th was the next scheduled council meeting.

Q. Yes. But the letter – we didn't finish looking at it, but the letter that you didn't formally approve but you acquiesced to said can't be done by August 25th, so we have to do it September 22nd, meeting and

then give us ten more days so October 2nd. That's what the letter says. Okay.

A. That's what the letter says, sir.

Q. The letter you felt it was an appropriate letter.

A. Yes.

Q. Mr. Knox is the person who has to take responsibility but you thought it was appropriate, right?

A. Yes.

Q. Now, here it says no later than August 12th, and I ask you sir, why this had to go in front of council. Let me go back now to the question I had asked you.

A. Okay.

Q. You said to institute a lawsuit like that, it should go in front of council. And I said why not then to institute a lawsuit against my client, and you said well that was urgent.

A. There was – yes, there was urgency to it with respect to access to county property sir.

Q. Yes. But we were told that the current disposal that would be taken care of by this dumpsite would become not useable in ten to 20 years. So there's a bit of a window there as far as urgency, right?

A. Yes.

Q. Now, here it says August 12th, 2009. That's pretty urgent when you're talking August 5th, right?

A. And that is a request to submit representations to that office by August 12th.

Q. Yes. As to how you're going to respond to the request to try to get this model from Jagger Hims, right?

A. Yeah.

Q. And in the letter that we just looked at on August 5th, a week before the deadline of August 12 says it has to go in front of council and it's too late to get it really ready for August 25th so the next one is

September 22nd, how about you give us to October 2nd. Is that responding appropriately to the order of the Privacy Commissioner that you do it by August 12th?

A. I would say not, and that as I understand it, that's likely why the August – the Privacy Commissioner I think denied the request for --

Q. Yes.

A. – that expectation.

Q. Indeed. At the next tab, Exhibit 15. There's a letter of August 6th the next day. Your request for an extension is denied. And then at Tab 16 of this affidavit, is another letter from solicitors on behalf of Simcoe County.

A. Okay.

Q. August 10th, 2009.

A. Yes.

Q. Now, we're getting into very recent history.

A. Yes.

Q. Did you instruct the writing of this letter sir?

A. I was aware of this letter, yeah.

Q. It was Mr. Knox's responsibility, is that what you're tell us again?

A. Mr. Knox in consultation with our solicitor.

Q. And did you approve of it?

A. And again sir, and I apologize for my lack of familiarity with the F.O.I. request. I am familiar with it but I don't recall necessarily approving that letter.

Q. Well, sir, this was three days ago --

A. Yes.

Q. – August 10th, 2009 sir. When did you see this letter?

A. I probably would have seen it August 9th or 10th.

Q. August 9th of 10th. Okay. Before it was sent?

A. Yes, I believe so, yeah.

Q. And who showed it to you?

A. I think it was either the author of the letter Mr. Green or Mr. Knox.

Q. You can't remember? We're talking three days ago, sir. We're talking about this important letter it's been controversial for a couple of years about you producing this document, this calibrated model and three days ago, somebody gave you this draft letter and asked you what you think of it, and you can't recall if it was Mr. Knox or Mr. Green?

A. They were both in the room, sir. I would suggest it was Mr. Green since he was the author of the letter.

Q. I see. So you met with both of them.

A. They were in the room.

Q. You read this carefully?

A. No I haven't read it carefully, but I'm aware – but I'm aware of the position.

Q. Sir, this letter went out three days ago and you were given a copy and you didn't read it carefully?

A. I said I read it sir. In terms of the details of what's in the letter I could certainly read it now. I'm aware of what the letter indicates in terms of the three points that were asked by the Freedom of Information officer.

Q. Well sir, your answer you hadn't read it carefully. Did you read it carefully or not?

A. I read it sir.

Q. Not carefully.

A. Enough to understand the position that we were taking.

Q. Is there any subsequent correspondence that you're aware of in either direction with respect to this issue with the Privacy Commissioner?

A. I am not aware of any subsequent --

Q. Now sir, I asked Mr. McCullough with respect to the letter of August 5th that said well, the next council meeting is August 25th and we can't get ready for that, how about September and then give us ten more days, October 2nd, I suggested to Mr. McCullough that in the context of this proceeding, the whole proceeding for two years of trying to get this document, this calibrated model, it might well be read as suggesting that Simcoe County was trying to delay the matter of getting this calibrated model produced. Isn't that a fair reading of the August 5th letter in the context that we've been discussing sir?

A. I don't believe that to be true, but I can see to your point sir, where one might see it that way.

Q. Thank you. You didn't read the August 10th letter, the most recent one carefully you say, but I would suggest to you it is not responsive to the concerns of the Privacy Commissioner and the demands with respect to August 12th. Is it your position that it is responsive, sir?

A. I would suggest that I know one of the points that -- the third point in particular places a question back to that individual as to how we could be responsive.

Q. And you read the previous correspondence and they suggested ways you could be responsive, right?

A. But again, you know how -- how can we take legal action against the consultant or what should we do to try and get that consultant out. We were asking the F.O.I. Commissioner what he thought 'cause he was suggesting we should do something --

Q. Sir --

A. -- to try and undertake that --that record and so I think in point three the question back was what do you suggest, sir, that we can do to try and acquire this record.

Q. Did not the previous correspondence suggest that there was at least a possibility of suing Jagger Hims for production of that

calibrated model as your work that you had paid for if they continued to refuse to produce it. That was one of the possibilities.

A. I believe it suggested it as a possibility sir.

Q. And your position was, it would have to go before council before such a decision could be made. Is that your position?

A. That's correct.

Q. And that's still your position?

A. Yes, where – where possible.

Q. Where possible.

A. Where there isn't a sense of urgency you would – we obviously like to get to council first.

Q. Where there's no sense of urgency.

A. Where – don't – if I may clarify that, Your Honour.

There is a sense – there is a sense of urgency in respect that there's a date with respect to the response in that -- that document.

Q. Are you concerned about Simcoe Count appearing perhaps to some persons as contravening an order of the Privacy Commissioner? Isn't that a concern that you and your colleagues would have discussed?

A. It would be a concern if we appeared that way, but I don't believe we're in contravention.

Q. I see. Now sir, we understand that there's now a Genivar Consulting Company that owns Jagger Hims and other companies, is that correct?

A. As I understand it, that company had bought out Jagger Hims.

Q. Yes. And they're continuing to be paid for continuing work with respect to the construction at dumpsite 41, right?

A. I'm not aware of what work Mr. McCullough has had them done recently, but I would believe that would be in the intent.

Q. And it's anticipated they'll be paid for the continuation of the project.

A. Yes.

Q. Now sir, do you recognize a possible concern that they would – might be worried about producing this calibrated model because if it's produced and someone else gets different results, that might stop the project and might – may I finish the question?

A. Yes.

Q. Thank you. That might stop the project and might therefore end their consulting fees for the future. Are you –

MR. WAYLAND: Your Honour...

OBJECTION MADE

THE COURT: Carry on.

MR. ROSENTHAL: Q. Did you identify that concern, sir?

A. No I did not.

Q. Well, I'm identifying it for you right now, don't you see that as a serious concern?

A. Repeat the question if you would for clarification as to what you see the concern as.

Q. My question is this --

A. The one you're identifying for me.

Q. Let me put the context to you, sir. I'm suggesting we have the following context. There is something called the calibrated model that forms an important basis for a hydrogeological report, and assesses the possible environmental dangers of this project.

A. Yes.

Q. Okay. That's one. Number two, that was prepared under the employ of Simcoe County by a firm called Jagger Hims, right?

A. That's correct.

Q. Number three, a member of the Community Monitoring Committee requested on behalf of the committee that model

based on his being informed by an expert that he would like to start with that model as far as investigating the situation, okay.

A. Yes.

Q. And then I'm suggesting to you, you have a situation where the people who are now refusing to produce that model on the basis it's their work product and it's not yours even though you paid for them to make it, stand to lose a great deal if some expert does a computation with that model that shows that their predictions are inaccurate, right? You understand what I'm saying sir, do you?

A. Rephrase it sir, if you could. What do you mean understand or stand to lose a great deal.

Q. I'm sorry?

A. What do you mean by stand to lose a great deal? If you could rephrase that --

Q. I'm talking about the fact that would you not agree that if some other expert examining the calibrated model and doing his extrapolations from it came to conclusions that there was serious environmental dangers, right, that would be a possibility, right?

A. I don't believe there's a danger in it, but --

Q. You don't believe it's likely but that's a possibility --

A. It is a possibility.

Q. -- is it not?

A. It's a possibility.

Q. I'm suggesting to you if that possibility eventuated and Jagger Hims and its parent company would lose the millions of dollars they anticipated in the next several months from continuing to be consultants on this project because the project would surely be stopped, right?

A. I -- I don't -- sorry sir, I don't draw the -- the link.

Q. You don't follow that logic, sir?

A. I mean, in terms of what you're stating at the end there, I'm not following your link there. You're saying that could they possibly use – lose the work of the county and therefore lose revenue?

Q. Well sir, would you agree with the following; if an expert used the calibrated model and made reasonable conclusions that there was serious environmental danger from continuing with this dumpsite project.

A. Yes.

Q. You would want to stop the project, would you not?

A. Yes. If that were the case.

Q. Yes. And you recognize that the Community Monitoring Committee had at least one expert who said he wanted this model to be able to investigate that, right?

A. Yes. With an explanation if I could.

Q. What explanation sir?

A. I'm certainly aware that again all of the calibration and the data that went in and out of that model that was utilized to get approval of the site was peer reviewed by several individuals. So to your question about fear of something being different, I believe if all of the data and calibration and everything were used correctly in the model, the results would be the same.

Q. You believe that.

A. I believe – I believe that in that the peer reviews were done of the model and they came to the --

Q. And sir --

A. – conclusion—

MR. WAYLAND: I'm sorry, the witness hasn't finished answering.

MR. ROSENTHAL: I'm sorry. I'm sorry sir, I didn't mean to cut you off.

THE COURT: He finished. Carry on.

MR. ROSENTHAL: Q. But sir, would you not acknowledge that it's conceivable at least that Jagger Hims made a mistake in applying that model?

A. I don't believe it's likely, but it may be conceivable but I don't believe it's likely sir.

Q. Wouldn't you want it checked by an independent expert who volunteers to check it before you go ahead with this project?

A. Again sir, in terms of – I'm not an expert in this field. In terms of the model, as I understand it, it is a tool and all of the data that was used to calibrate that tool and all of the inputs and outputs to that tool were utilized and they were peer reviewed. So I have a very high level of confidence that that's correct.

Q. We're told that the calibrated model can be done differently by different people. It's an art and a science combination. Now sir, --

A. I would suggest, sir, if I could, if they utilize the same calibration it should be the same.

Q. Should be and properly done.

A. Yes.

Q. And don't you want someone else to check whether the Jagger Hims did it properly?

A. I don't think it's necessary sir, and I don't believe it's the – it's the – it's the standard. I believe that all approvals don't necessarily have the model. They review in their technical reviews the calibrations, the inputs and the outputs of the model.

Q. Whether or not you think it's necessary, can you give us an explanation as to why for more than two years Simcoe County resisted the production of that calibrated model?

A. Primarily through the F.O.I. because the model is not our record.

Q. Was there any discussion amongst staff of anybody from Simcoe County that you're aware of, of the question should we maybe have an independent assessment here given the fact that Jagger Hims who is still retaining the model of still getting money from this project.

A. I'm not aware of that particular discussion. I think technical staff were satisfied that the review was done and the peer reviews were accurate.

Q. Now, evidently on June 22nd, 2007 which appears to be during the time period when there were early requests by Mr. Ogden for this calibrated model, there was a letter written to him by your solicitors that suggested there are a possibility of defamation and libel and slander laws and so on. Were you involved in the writing of that letter?

A. Could I see the letter sir?

Q. Sure.

A. Sir, I'm familiar with the letter.

Q. You are familiar with the letter.

A. Yes.

Q. Yes. And were you involved in directing that that letter be written?

A. Yes I was.

Q. You were? Are you the person who directed that that letter be written?

A. Yes I was.

Q. I see. And did you direct that that letter be copied to the people to whom it is indicated as copied on the second page?

A. No I did not. That was – that was not directed by me.

Q. I see. And so you did direct that this letter be written warning Mr. Ogden of possible libel suits, right?

A. Yeah, it wasn't – it wasn't to be initially directed just to Mr. Ogden, it was to be initially directed to other folks as well.

Q. Yes. Addressed to Mr. Ogden and it was designed to be addressed to public media as well, right?

A. Not the public media, it was designed to be addressed to the individuals, the first four individuals that it was c.c.'ed to.

Q. I see. And why were those four individuals chosen?

A. Those four individuals at – at the time, sir, were known to be opponents of the undertaking.

Q. I see.

A. We had some concerns that things perhaps may escalate to over the line of what's considered responsible.

Q. And then the last four carbon copies are indicated to media, you're saying it was not among your instruction to direct it to media?

A. I don't recall directing it to media to be under my instruction.

MR. ROSENTHAL: May I suggest this be made an exhibit, Your Honour.

THE COURT: Yes.

REGISTRAR: Exhibit Number Six.

EXHIBIT NUMBER SIX – Letter as described

-- Produced and marked

MR. ROSENTHAL: Q. I put it to you, sir, that the purpose of this letter was to try to intimidate Mr. Ogden from voicing opposition to dumpsite 41.

A. No. It was not intimidation sir.

Q. What was the purpose?

A. The purpose of the letter was to indicate to opponents to the site as the letter states that while we certainly encourage all opinions on the project, we were made aware of some events and

information that we were concerned that there may be personal attacks on employees or off -- officers and we were concerned that somebody may step over the line. It was intended sir, to be some free legal advice if you will.

Q. I see. Free legal advice. And you didn't recognize that someone receiving a letter like that might well be intimidated?

A. I didn't see it as an intimidating letter sir.

Q. I see. Now, there's a document that I would like to put to you. By the way, with respect to the previous exhibit, the letter to Mr. Ogden, sir, excuse me, before you look at the document, sorry. One more question on the previous exhibit. Did you seek instruction from Simcoe County council before having that letter written?

A. No I did not.

Q. Did you seek instruction from anyone else before having that letter written?

A. I had had a conversation with -- with the head of council.

Q. That's Mr. Guergis?

A. Yes.

Q. And did he agree with you that that letter should be written?

A. He didn't take a position on it at that time.

Q. He said, 'I have no position on whether or not you should do this'?

A. He was -- he was while he did -- well, let me rephrase that. Let me clarify that. He didn't have a position on this letter as it is written. He suggested that something should be done to ensure that people do not get themselves into some legal issues.

Q. I see. And the concern was saving people from legal issues, that's your evidence sir?

A. It was not meant to be intimidating sir. It was – it was to make people that were in opposition to this site aware that their – their opposition is fine, but there is a line.

Q. And you said it was free legal advice. That's the way you characterized it before?

A. Perhaps I used a bad term of impression but it was -- it was meant to make them aware that personal attacks or slander or anything like that, defamation is – is illegal. It would be – it would be a crossing a legal line.

Q. And you don't think that Mr. Ogden would have been aware that defamation is crossing a legal line?

A. But again, it was made – meant to be sent to a number of people. I believe Mr. Ogden and I – I hope – I would hope that Mr. Ogden would be aware that defamation was crossing a legal line, but because we were hearing things about that – that were perhaps not as – as positive as they had been prior to this, we were concerned that something was going to happen and we said, please be aware.

Q. Sir, now I'm getting the impression from you, you're saying Mr. Ogden would have been aware but some of the people getting the carbon copies might not have been aware and that was the purpose of this letter?

A. No sir. Sir, you're – you're – the purpose of the letter was to inform those in opposition that – that we – we would not tolerate any defamation, slander or libel. If that was to happen they would cross a legal line and we would – we did not want to see anybody do that sir.

Q. I put to you, it's no coincidence that this happened at just about the time that Mr. Ogden was pushing for the production of this calibrated model.

A. Based on the date, it would be around there, yes.

Q. I've handed you another document. It has confidential written on the top. I always enjoy seeing a document that

says confidential Your Honour. And it's called appendix F. Do you recognize this document, sir?

A. If I could take a moment to familiarize myself, sir?

Q. Certainly.

A. I'm familiar with the document, sir.

Q. You recognize the document.

A. Yes I do.

Q. Are you the author of this document?

A. I was the author of the covering report, sir.

Q. I'm sorry?

A. I was the author of the covering report, the first page.

Q. The covering report to which this was appendix F?

A. Yes.

Q. And who, do you know who the author of appendix F was then?

A. I think it originated from the Township of Tiny.

THE COURT: You're talking about the pages in behind the first page. He says he authored the first page.

What's in behind came from Tiny.

MR. ROSENTHAL: I'm sorry, I misunderstood Your Honour. I misheard.

THE COURT: He authored the first page he said and the stuff in behind came from Tiny.

MR. ROSENTHAL: I'm sorry, I misunderstood.

Q. You did author the first page as His Honour corrected me.

A. Yes I did yeah.

Q. And in fact it says prepared by Mark Aitken, right and submitted by you.

A. Yes it does.

Q. And then on the second page, there's a document Tiny Township discussion group, ground rules.

A. Yeah.

Q. Now, I gather from looking at this document, this was to discuss something called the integrated waste facility, right?

A. Yes.

Q. And the idea was that that facility which is something different from the ongoing construction at dump site 41 itself was anticipated to be on the site adjacent to dump site 41, is that correct?

A. This – this if I may clarify. This stemmed from a series of discussions wherein the county was looking to construct an integrated waste management facility. And through that obviously we went through an exercise to determine where a suitable site would be and a site of possibility at the time was the property adjacent to the landfill as you suggest.

THE COURT: What is an integrated waste management facility?

A. Your Honour, an integrated waste management facility is a recycling and composting facility.

THE COURT: Sorting facility.

A. Sorting of dry recyclables papers and containers as well as a composting facility for household organic waste.

THE COURT: It doesn't replace a dumpsite per se.

A. No. It's a reduction strategy.

THE COURT: Thank you.

MR. ROSENTHAL: Q. And it was anticipated that it would be adjacent to dump site 41, right?

A. That was a potential location through a siting exercise.

Q. Now, it's still being considered that there be an integrated waste facility adjacent to dump site 41?

A. It is not being actively considered because we have external markets to deal with our – those types of materials but it is – it's not a non possibility that county council may want to review and build their own facility at one point.

Q. This is a report of a meeting of September 5th 2001. Have there been subsequent meetings dealing with the possibility of an integrated waste facility at that site?

A. At this particular location actually the report suggests that we pull together a group. I don't believe the committee has suggested in this report ever did meet to discuss this location, sir.

Q. Well sir, if you look in the middle of the second page, it says purpose to draft a set of provisions whereby Simcoe County administers the building and operation of I.W.M.F. adjacent to the North Simcoe landfill site 41. The intent being to arrive at a win-win agreement between the county and the township. That was the purpose, was it not?

A. This as I said the schedule to this report was a – from – if I recall from the Township of Tiny and they were hoping to – to meet and sit and have a discussion based on these – these ground rules, if you will, sir, but as the report and the recommendations indicate the committee was to name a number of representatives from the county to attend with Tiny Township and I don't recall that meeting ever taking place.

Q. Now, if you look at the next page of this, the –
THE COURT: What does this have to do with Site 41 and the issues that you're pursuing? This isn't an open ended public inquiry. This has to get at something specific and relevant, can you please tell me what it is before I shut you down on this?

MR. ROSENTHAL: Thank you, sir. I believe I was going to by turning to the next page.

Q. There are a number of occurrences of the word 'site 41' on the next page, is that correct, sir?

A. Yes I see a number.

MR. ROSENTHAL: Your Honour, I'll just leave it at that hoping to have assuaged your concern in that respect and I'll go onto other matters and refer to this document in argument.

THE COURT: Thank you. We better make this exhibit since it was referred to.

REGISTRAR: Exhibit Number seven.

EXHIBIT NUMBER SEVEN – Report of a meeting

-- Produced and marked

MR. ROSENTHAL: Q. Now sir -

A. Yes.

Q. – at the August 25th upcoming meeting of council --

A. Yes.

Q. – will there be a motion on the agenda to either approve or not approve the continuation of construction at dump site 41 and/or to call an interim halt to that?

A. There will be a – I would expect a confidential report. It will be in front of county council on August 25th.

Q. A confidential report will be about the work on dumpsite 41?

A. Your question sir, I believe was with respect to the injunction and the continuation of that.

Q. No sorry. Perhaps I misspoke myself.

THE COURT: Witness, please listen to the question. You got to answer the question he asked, not the one you want him to ask.

MR. ROSENTHAL: Thank you, Your Honour.

A. Sorry, Your Honour.

Q. The question I did ask, sir, was will there at the August 25th upcoming meeting of Simcoe County council be a motion before the council concerning whether or not the construction at dump site 41 should continue or there should be a moratorium on it or something to that effect?

A. That was – I believe that is the case sir. There was a resolution with respect to that document. I don't know for sure whether that will be before them but I expect it will be sir. I believe a councilor will bring it forward.

Q. Sorry, with respect to which document, sir?

A. Not a document, sir, the resolution that you suggest that – that there be a one year moratorium.

Q. A one year – so it's anticipated that at the meeting of August 25th of Simcoe County council there will be a motion debated and voted upon as to whether or not there should be a one year moratorium on construction at dump site 41, is that correct?

A. I can't say for sure, sir, because the corporate services committee did not make that recommendation to county council but rather deferred that discussion. But given the media and all of the un – un – information I've heard on that, that is a possibility.

Q. Now, who will make the determination as to whether or not that motion is on the agenda of August 25th?

A. As I said, the corporate services committee didn't make that specific recommendation.

Q. Yes.

A. So it may not be on the agenda, but it maybe heard, sir.

Q. Well, how might it get on the agenda sir?

A. At this point, based on the fact that the standing committees are completed, it perhaps won't be formally on the agenda. How might it be on the agenda, a councilor may bring it forward as a motion.

Q. A councilor can bring forward something as a motion that's not on the agenda prior to the meeting, is that correct?

A. I would – again, that falls within the guise of the clerk in terms of procedure. But it's my understanding that a councilor could make a direct motion in that regard.

Q. But unless that happens, it's not going to be at the meeting of August 25th, is that what you're telling us?

A. Not based on what happened at the corporate services committee correct.

Q. The way agenda items normally get on is by some sub committee proposing that they be on the agenda, is that correct?

A. Agendas get on county council by the minutes of the standing committees and any other corporate – county officers reports that might come forward.

Q. And there may have been no such minutes that have so far propose such a motion, is that correct?

A. That's my understanding, yes.

Q. And it's your understanding there will be no committees meeting between now and August 25th that could propose such a motion.

A. No. Although there was a motion that discussion on that matter be deferred to county council. So county council is planning on having a wholesome discussion about whether they get to the actual request of a one-year moratorium, I can't say for sure.

Q. I see.

THE COURT: Hold on a sec. So you have a motion sitting in front of the corporate services committee that

they deferred, in other words they tabled it for discussion at county council, right. Is that what you're saying happened?

A. What happened, Your Honour, is I understand it was I don't believe that the motion was actually made, but the discussion had started and a deferral of discussion was made to county council. So I'm not having not reviewed the agenda for county council, I'm not certain that there will be a formal motion on that or if it will be brought.

THE COURT: Because the motion wasn't moved at the committee.

A. That's correct.

THE COURT: If you were to get on the agenda as a councilor, you have in your by-laws a provision for a notice of motion but it doesn't say how much in advance of the meeting that a notice of motion must be tabled and all of that. How does that work?

A. Notice of motion and again, I would defer to that procedure –

THE COURT: Don't keep saying that, get on with the question –

A. As I understand it, a notice of motion –

THE COURT: -- he's not – Don't talk over me.

A. Sorry sir?

THE COURT: Don't talk over me.

A. I apologize sir.

THE COURT: Carry on.

A. As I understand it, a notice of motion would require it to be heard at the next council meeting but a direct motion would allow it to be heard at that council meeting.

THE COURT: So in other words, if a councilor comes forward at this month's council meeting with a motion, it won't be considered until September.

A. On a notice of motion, sir.

THE COURT: Right. That's not an avenue that's available to get something in front of council for August, right?

A. Not a notice of motion, no sir.

THE COURT: So how do you get – so you're saying that the discussion issue has been deferred from corporate services. It's going to get on the agenda. Are you saying that a councilor has an opportunity at that particular time to move a motion?

A. I believe so, sir.

THE COURT: Okay.

MR. ROSENTHAL: Your Honour, may I clarify a little further? Q. In response to His Honour's question, you said I believe so. You believe that what? What did you mean by I believe so. You believe what can happen sir between now and August 25th?

A. No His Honour indicated that could a councilor bring – as I understand it, sir, could a councilor bring a direct motion on the 25th to that effect and I believe a councilor could.

Q. So you mean a councilor without any prior notice can just say at the meeting of the 25th, I move that construction be deferred for a year? Is that within the bylaws to your understanding for a councilor to do that and to have it voted upon at that meeting?

A. I believe through a direct motion I believe that's possible.

Q. What do you mean by a direct motion?

A. Just coming right out and saying it as you stated, sir.

Q. You believe that's possible?

A. Yes.

Q. Has there ever been such a motion in your time with the township – with the council, sorry?

A. Not to my knowledge, sir.

Q. Now, there is a possibility of a special meeting of council, is that correct?

A. That is correct. The warden has the authority as I understand it to call it.

Q. Yes. You are one of the prime advisors to the warden, are you not sir?

A. That's correct.

Q. Have you advised the warden at any point that there should be a special meeting with respect to any of the concerns that have been raised about dumpsite 41?

A. At any point?

Q. Yes.

A. Yes.

Q. And at what point was that sir?

A. When we were discussing a site 41, we and waste management – and management issues in general we actually did have a series – a workshop to discuss these matters.

Q. A workshop.

A. Yes.

Q. That's not a special meeting of council, is it?

A. It was a special meeting of counsel to discuss in committee of the whole. It was called as not a normally scheduled meeting.

Q. A special meeting could be called on a day or two's notice, right?

A. I believe so.

THE COURT: Excuse me, what was the meeting you were just referring to? When was that called?

A. It was in 2007, Your Honour.

THE COURT: You're calling it a workshop?

A. It was a – it was a meeting of council and they broke into committee of the whole to have a wholesome discussion on waste management.

THE COURT: Was it private or public?

A. It was public.

MR. ROSENTHAL: Q. Was there any discussion about holding a special meeting to deal with any of the issues – I'm trying to save time – any of the issues that we've raised response to private commissioner, suing my client, getting an injunction, any of those aspects?

A. Not a special meeting sir. It's intended that they will be dealt with at the August 25th, council meeting.

Q. All of those issues will be dealt with at the August 25th, council meeting?

A. The ones you mentioned the --

Q. The ones I just mentioned.

A. Yes.

Q. As a result of coming out of what committee sir? You told us how the motions get on the agenda coming out from a committee.

A. They come from a committee but I also sir indicated that they can come through a county officer's report which is a report directly to council and they will be coming through that venue.

Q. And what report is that, report of whom sir?

A. The county officers' reports that are prepared by staff that goes directly to county council.

Q. And that report will include the question of the injunction --

A. Yes.

Q. – is that correct?

A. It will be one. There may be just for clarification sir, there may be – it might not just be one report but there will be a report on the injunction.

Q. There will be report that will result – there will a report or several reports that will result on the agenda on August 25th including motions with respect to at least the following issues. Okay.

A. Yes.

Q. The injunction --

A. Yes.

Q. – right? The lawsuit?

A. Yes.

Q. The private –the response to the privacy commissioner.

A. Not certain on that one, sir.

Q. Not certain on that one.

A. I would – I would expect so.

Q. Well, you know about this report that's going to generate those motion items. Does it talk about the privacy commissioner issue or not?

A. That's why I would expect so, sir.

Q. It does do that. Sorry sir, I don't understand your evidence.

A. You asked me the question will there be one, a report on the agenda specific to the privacy commission information. I'm suggesting there will be an information report.

Q. That information report is such as to make it an agenda item that people can vote on, final determination of on August 25th rather than saying I'm giving you notice for the next meeting.

A. I believe so, yes sir, that's correct.

THE COURT: Just to be clear on this, when staff walk in a report that hasn't gone through committee they walk it

in directly to municipal council meetings, once that report is tabled, then the subject matter of the report is open for movement of a motion by a councilor arising out of what is in the report?

A. That is correct, Your Honour.

THE COURT: Now do you walk in stuff to municipal council fairly routinely?

A. Perhaps based on timing, two or three items a meeting.

THE COURT: And the debate and the motion arising out of that is common practice?

A. Correct.

THE COURT: Thank you.

MR. ROSENTHAL: Thank you, Your Honour.

THE COURT: Re-examination.

ROBERT PAUL MCCULLOUGH: (AFFIRMED)

CROSS-EXAMINATION BY MR. ROSENTHAL:

Q. Good morning, sir. My name is Peter Rosenthal. I'm examining you on behalf of Ms. Monague.

A. Yes.

Q. I should apologize at the outset I'm going to be a little bit quicker, sir, than I might otherwise be. We're under some time constraints that might not be so in more leisurely proceedings. The court has received affidavits sworn by you on July 21, 27, 28, 29 and August 11th, you did swear all those affidavits, right?

A. I did.

Q. And you do stand by the content of those affidavits today?

A. I do. I understand there is one minor date issue in referring to a date in one of the county clerk's affidavits where I made a

reference to it and I understand there's a date issue. I'm not sure what that is.

Q. Sir, there's a mistake in one of the dates, do you happen to know where that is?

A. It was – it was just brought to my attention by the clerk last night that in my affidavit referred to, an affidavit of his. I referred to the wrong affidavit date. It's not the subject of the affidavit.

Q. Thank you. With that exception you stand by what you swore?

A. Yes I do.

Q. Now, there are many issues here, and I'm going to just try and deal with issues that are relevant to this application. But we need a little bit of general context. And I gather it's proposed that dump site 41 will receive waste from four communities once it's completed, is that correct?

A. That's correct.

Q. And it's estimated that the present site used by those communities will be full beyond use within say ten to 20 years, is that fair?

A. Correct, the – the other county facilities, that's right.

Q. So you need some dumpsite available sometime between ten and 20 years from today?

A. Yes.

Q. Now, dumpsite 41 construction has begun as we know. When do you anticipate that construction being completed?

A. I originally -- before the disruption in the construction, it's estimated would have been ready to receive waste by the middle of the fall.

Q. Middle of this fall?

A. Yes.

Q. I see. Okay.

THE COURT: Is that changed, that schedule changed in some way?

A. Yes. We've lost five weeks of construction so we're doing what we can to catch up but that will have a significant impact on us by not having that five weeks of construction. So we're hopeful to have good weather that will allow us to still open it but it will be likely pushed out later into the fall.

MR. ROSENTHAL: Q. If worse comes to worse it would be finished in the spring if it's not stopped by council before that?

A. Correct. Spring construction is difficult for us at times because it's wetter weather so the construction season we really need the dry time when we're working with clay.

Q. So certainly by the end of 2010.

A. Yes.

Q. However, as you know, there is some controversy and it is stated that Simcoe County council might revisit this issue on its August 25th meeting, is that correct?

A. I understand there will be discussion about the site at the August 25th meeting, right.

Q. Sir, do you have a copy of your affidavit sworn on August 11 the big fat one?

A. Not in front of me. I may have one --

Q. Is there a copy that the witness could refer to just so he can read along? I'm not going to use it very extensively but I do want to refer to one or two paragraphs.

THE COURT: This is the large one?

MR. ROSENTHAL: Yes sir, a large white bound one entitled Affidavit of Robert McCullough sworn August 11th, 2009.

THE COURT: Right. C-8(a).

A. Yes I have it in front of me, Mr. Rosenthal.

MR. ROSENTHAL: Q. Thank you sir. Could you please turn to page four of your affidavit paragraph 15?

A. Yes.

Q. You wrote, "As a requirement to obtain its certificate of approval, the County hired two engineering firms – Jagger Jims to conduct hydrogeological investigations, and Henderson Padon to undertake a Design and Operations Report." These reports were completed and distributed and submitted and so on. That's correct, is it?

A. It is.

Q. So you as a person concerned about the environment and apparently many other people would be concerned when a dump site like this is built that it not pollute the waters --

A. Correct.

Q. – is that fair?

A. Yes.

Q. That's the prime environmental concern at least in respect to this particular dumpsite.

A. Correct.

Q. And in order to investigate whether any such dangers are being properly taken into account there must be a hydrogeological investigation and report, right?

A. Correct.

Q. That was done by Jagger Hims.

A. Correct.

Q. Now, we don't want to go into the science in any detail but I think we have to have a vague idea at least as to what this is. So please correct me if I'm wrong. My understanding and I'm sorry, yours is much deeper, sir, is that there is a canned program called MODFLOW right, that one can buy, right?

A. Yes. There's even free versions, I understand.

Q. Sorry, please a little louder.

A. Yes, there's even free versions I understand.

Q. Three different versions of MODFLOW.

A. Free, F-R-E-E, sorry.

Q. Free. There's some open source --

A. Yeah.

Q. --possibilities and there are canned versions that one can buy.

A. Correct.

Q. And a consulting firm that is doing an investigation such as Jagger Hims did for you in this case, might buy or freely get a MODFLOW program, right?

A. Yes.

Q. And then they would input certain data from the site itself into that program, right, certain measurements about the water and all sorts of other aspects of that site, right?

A. Yes.

Q. And then they run the model somewhat and get some output of various kinds of measurements, right?

A. Uh huh, yes.

Q. And then they take those output measurements and compare them to actual things that they measure on the site, right?

A. Yes, that's my understanding as well.

Q. And then they go back and put some more information into the model to try and make it more closely mirror the site, right?

A. Okay. I'll pre-qualify my statements. I'm not a modeler or a hydrogeologist, but that --

Q. That's the --

A. -- loosely my understanding of it as well, yes.

Q. And then they again take – they have the computer program generate some measurements and then they check those against the actual site again, right?

A. Yes.

Q. And there's a back of forth that goes on for some period of time like that, right?

A. Right.

Q. At the end of which when they're satisfied that the model is a good model of the situation, they call that the calibrated model, right?

A. That's my understanding as well, yes.

Q. So that is the general program calibrated or modified so as to deal with that particular site, right?

A. Correct.

Q. And the doing of that, that process is generally described by hydrogeologists as a combination of art and science, right?

A. I've heard it described that way, I'm not sure it was a hydrogeologist that may have that --

Q. It's your understanding isn't it that when one does the feeding back and so on, there's some judgment calls there. It's not just a rope procedure if you put this in and pull this out.

A. That maybe. Again, I've never done that work.

Q. Okay. In any event, hopefully a good consulting firm gets a good calibrated model, right?

NO VERBAL RESPONSE

Q. Right. You can't just shake your head sir you have to answer.

A. Oh sorry, yes, yes.

Q. Thank you. And then when they have that calibrated model, they can then add various hypothetical situations to it to see what the affect would be on the environment of those hypotheticals, right?

A. Yes.

Q. And for example, once you have a model of what's going on now on the site, then you can add, suppose you put 200 tons of garbage on top in this area, what affect would that have on the waters and so on, right?

A. I don't believe that that's what the model is used for.

Q. Okay. How is it used once it's calibrated? Isn't it used to put in hypothetical situations and see what the outcome would be?

A. Yes. That is my understanding but putting waste onto it wouldn't change the hydrogeological context of the model. Things – different things like amount of rainfall are what – what are used.

Q. Okay. But the reason you want a calibrated model is so that you can add to that the possibility of a landfill there and see what the new situation would be as far as water flow and so on, right?

A. Yes.

Q. Okay. Thank you. If the calibrated model is done poorly, and any report based on it would be something you would not want to rely on, right?

A. Well, that is certainly something that is checked through the calibration of the model and again, I've mentioned to you my understanding of it is it's just another tool that's used for assessing a site.

Q. Yes. But a very crucial tool, correct?

A. An important tool, not a tool that approved the site, but yes a tool that's been used since the site has been approved.

Q. But what leads to the approval of the site is the report that the consulting firm makes based on using that tool, isn't that fair?

A. I'm not sure that that's fair because the report, the MODFLOW report itself is a tool that's used in supplement to other actual observations but yes, it's part of the report.

Q. A very important component of the report, is it not?

A. I'm not sure I'm the one to judge how important it is compared to the actual readings but it is important – it is important, I don't know if it's the most important part of the report.

Q. Let me ask you this question then sir, in your present position, if it came to your attention hypothetically that the calibrated model used by Jagger Hims was seriously flawed, would you not want another calibrated model to be made and have the report evaluated in terms of the new calibrated model?

A. If – if any part of any report showed that there was a concern with the site, I would want more science to be done to ensure that the site would be safe.

Q. Thank you. And given as you say you've heard as well the notion that this is a combination of art and science, you would acknowledge that even a well meaning and quite qualified engineering firm could make a mistake in producing the calibrated model, isn't that fair?

A. Yes, it's possible that any human can make a mistake that's why it's not the only thing that's relied upon as well as actual observations are relied on.

Q. Now, the calibrated model is the modified software, modified so as to fit the site, right?

A. Yes.

Q. So one can make as many copies as one wants of that software?

A. Potentially. I would assume that's the case, perhaps not the software, but the program that's in it itself, I'm sure the software program is what is proprietary.

Q. Sorry, thank you. You described it more accurately than I. The result in the calibrated model is -- well, the model that is digitally stored in some computer and can be reproduced so as to be digitally stored in any other computer that you want, right?

A. I understand that to be the case, yes.

Q. Thank you. Now, you are the main person who deal with Jagger Hims on behalf of Simcoe County, is that correct?

A. That's correct since my employment in 2002, yes.

Q. Since 2002.

A. Yes.

Q. Jagger Hims was involved prior to your employment?

A. Absolutely.

Q. But since 2002 you've been the main person dealing with them on behalf of the county.

A. Yes.

Q. And it's your understanding that Simcoe County paid Jagger Hims to make this calibrated model as part of its preparing the report, right?

A. Yes.

Q. Now, your indulgence, Your Honour. I should like to show you, sir, a paragraph of the supplementary affidavit of Stephen Ogden which has been entered in these proceedings. I don't know if you've had a chance to look at it. You did according to your August 11 affidavit, you did review --

A. Some of it, yes I did. I don't have it in front of me though.

MR. ROSENTHAL: So Your Honour with your indulgence may I approach him and point to a paragraph?

THE COURT: Yes. That's M-4 for purposes of the record.

MR. ROSENTHAL: Thank you, Your Honour.

Q. I'm going to be showing Mr. McCullough paragraph three of this affidavit of Stephen Ogden and perhaps I'll read aloud as he and I look at it. At the June 14 2007 CMC meeting, CMC stands for community monitoring committee?

A. Correct.

Q. I asked Mr. McCullough if he had the authority to release the calibrated MODFLOW to us immediately so we can get it to Mr. Charlesworth the independent hydrogeologist retained by the CMC. Mr. McCullough advised the committee that quote that sounds reasonable close quote. He further advised that he would have to find out if there was a quote work product issue with Mr. Jagger although he doubted that there was. He said that he believed it was likely owned by the county although it is in Mr. Jagger's possession.

Now, sir, is that an accurate record of that meeting in that respect?

A. Yes I believe it is.

Q. Thank you. Was the question of whether or not to provide the calibrated model to the CMC ever brought before the Simcoe County council to your knowledge?

A. Yes it was.

Q. I see. And was that voted on by the council?

A. It was.

Q. And when was that, sir?

A. I don't recall, but it was shortly after that exchange.

Q. Shortly after --

A. Within --

Q. -- June 14th 2007.

A. Within four to six months after that, I believe yes.

Q. Within four to six months of that time.

A. I don't recall the exact date.

Q. There was a motion at Simcoe County council with respect to this, sir?

A. No -- yes, there was -- there was a discussion at Simcoe County council because the Community Monitoring Committee, I had responded to after that and with Mr. Jagger's response to the county which I subsequently come to agree with that it shouldn't be provided that was

reflected back to the CMC in a letter from me and the CMC then formalized a request as a recommendation to county council to provide that – that MODFLOW model to the CMC.

Q. The calibrate --

A. That was – that was a discussion.

Q. We're talking about the calibrated model.

A. Absolutely, you're right.

Q. So perhaps let's use that term consistently if we could because the MODFLOW could mean the abstract program. And you say there was a resolution at Simcoe County council to deny that to the CMC?

A. That's correct.

Q. And that was duly passed.

A. That's correct.

Q. I see.

THE COURT: Just to be clear, the resolution to deny was passed, is that what you're saying?

A. By county council that's -- that --that's correct.

THE COURT: Okay. Thank you.

MR. ROSENTHAL: Q. Now, I believe sir, you referred to a communication by you to the CMC. I should like to show you if I may Exhibit C of the original affidavit of Stephen Ogden.

THE COURT: That's M-3.

MR. ROSENTHAL: Thank you. Q. Exhibit C. Now sir, this appears to be a copy of an email that you sent to Ray Millar of the CMC on July 4th, 2007. Is this the document that you're referring to, sir?

A. Yes it is.

Q. And that is an accurate reproduction of the email?

A. I believe it to be, sure.

Q. And it says in the next to last paragraph, it says that you're not going to provide the CMC right, with this document?

A. Correct.

Q. That was before there was any resolution of Simcoe County council about this, right?

A. That's correct.

Q. So who made the decision not to provide it to CMC at that point?

A. It was – it was my recommendation to senior county staff so it had been discussed with staff senior to me but it was my recommendation not to that was agreed to.

Q. And who were the senior staff to whom you made that recommendation?

A. I believe it would have been the CAO and my boss the general manager of corporate services would have likely been involved in that discussion but I certainly remember the CAO was involved in that.

Q. And the CAO is Mr. Aitken.

A. That's correct.

Q. And he's still the CAO.

A. That's correct.

Q. And so who would have made the actual decision, you would have made a recommendation to him and would he have made the decision then not to provide it?

A. Certainly he was involved in the discussion. It was my recommendation. I can't remember if he formalized it and said I agree to that, or no, do it this way, but it was my recommendation that it was certainly agreed with by the CAO.

Q. Okay. And you explained to the committee in this email why you made that recommendation I presume and in the third paragraph you wrote the following. The concern resulting in our denial of the CMC's request is that the model is a complex and complicated tool constructed from an interpreted hydrogeological setting based on actual bore hole data then calibrated to several conditions as outlined in supporting reports. The output of the model is sensitive to the calibration

conditions and even minor changes in the settings could vary the results. We are concerned 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.

That's what you wrote at the time, sir?

A. That is.

Q. And is that correct, is that the concern that you had at the time?

A. That is the concern that we had at the time to which was based on the letter from Jagger Hims on that, yeah.

Q. Yes. But you accepted that as a reason, you personally?

A. Yes.

Q. Now, you were aware that the Community Monitoring Committee had a responsibility to monitor this project for the community, right?

A. Absolutely.

Q. And you were aware of the importance of the calibrated model to assessing this key report of Jagger Hims, right?

A. Right. And I was already aware that it had been essentially accepted by the MOE and other peer reviewers who had looked at.

Q. Without having the opportunity to look at the calibrated model, right?

A. I – you're right. They didn't have the calibrated model in their hand, they had the inputs, outputs, and the balancing of it which I believe was sufficient for them to make a judgment on it.

Q. But you were aware that the CMC had retained another hydrogeologist who wanted to look at the calibrated model, right?

A. At some point I became aware of that. I can't recall.

Q. Well, it was before July 4th, 2007, wasn't it?

A. Could well have been. I know it was Doctor Charlesworth who had been involved.

Q. Yes.

A. I can't recall the date that that came about.

Q. Yes, well in fact at Tab B of this same affidavit of Stephen Ogden, there is a letter and you may recall Your Honour unfortunately it's my mistake not Mr. Ogden's the second page of that letter was left out of the original affidavit but then it was provided last day in court. But the crucial information is on this page.

This is the letter that you're referring to from Jagger Hims, right?

A. Yes it is.

Q. And it's a letter addressed to you, right?

A. It is.

Q. And it indicates there on June 28th, 2007 before your July 4th email. It is understood the CMC want to retain the services of Charlesworth and Associates to model climatic effects, right?

A. Yeah.

Q. So you knew that then, right?

A. Yes, I did. I knew I knew it at some point, I didn't know when without reviewing that when – when it was.

Q. And the next paragraph says, MODFLOW is a complicated and complex model which requires an experienced professional to operate. We suggest that the county obtain verification that Charlesworth and Associates has the capability to operate the model. Did you ever follow through on that suggestion, sir?

A. I don't recall that I did, but I believe members of the CMC came back and informed me that they – that Charlesworth was able to do it.

Q. And you accepted that.

A. I continue to accept that.

Q. You continue to accept this.

A. Yeah.

Q. So this concern of Jagger Hims as far as you are concerned was not something that had to be considered. In other words, this concern had been met. They do – did have the capability, right?

A. I – it's my understanding that they did have someone who that was capable to do it.

Q. So when you spoke to Mr. Aitken, did you give him a copy of this letter from Jagger Hims?

A. I can't recall one way or the other, yeah.

Q. Well, did you inform him that one of the concerns that Jagger Hims was whether or not Charlesworth and Associates had the capability and that concern didn't have any content to it.

A. I – I don't recall the exact conversation that I had with Mr. Aitken at the time.

Q. Okay. Now, going then to the last paragraph on this page, of this letter of June 28th from Jagger Hims. Our models are constructed from the interpreted hydrogeological setting and calibrated to several conditions as outlined in the supplemental hydrogeological and geotechnical investigation report. That's sort of a summary of what we were discussing a few minutes ago as to whether the model is obtained, right?

A. How it was reported, yes.

Q. And it's calibrated from several conditions and so we explored that --

A. Yes.

Q. – in a little more detail.

A. Yeah.

Q. The output is sensitive to the calibration conditions such that even some minor changes in the setting will affect the results. That's one of the things you pointed out in your email, right?

A. Right.

Q. We are concerned that someone not familiar with the integral details may inadvertently alter some aspect which would result in erroneous answers. Any answers which differ from those prepared by us would have to be addressed.

Now sir, you are the person responsible from the county's perspective --

A. Yes.

Q. – overseeing the environmental aspects of this, right?

A. Yes.

Q. Now, when you read that, and you learned that indeed Charlesworth and Associates did have appropriate expertise --

A. Yes.

Q. – didn't that make you want to have Charlesworth and Associates evaluate this calibrated model to make sure that there were no errors introduced by Jagger Hims?

A. No.

Q. Why was that your position sir?

A. Because the model had already been independently reviewed through the Ministry of the Environment in two separate peer reviews and it was – it was not brought up as an issue of concern.

Q. But sir, the calibrated model was not made available to anyone else except for Jagger Hims, is that correct?

A. That's correct. And it's my understanding that it's not necessary to review the models standing to have the touch and feel ability to it because there is the calibration report that goes with it to determine whether it's accurate.

Q. But sir, someone who you recognize as having the appropriate expertise, Charlesworth and Associates --

A. Yes.

Q. -- said for them to evaluate the situation, they wanted that calibrated model.

A. Right.

Q. You were being asked for it by the Community Monitoring Committee that has the responsibility of monitoring these things.

A. Right.

Q. There's the possibility of a different result that would have to be investigated. Why would you not make a recommendation that that model be provided in order to give further assurance hopefully or perhaps put some brakes on it that this project should go ahead.

THE COURT: Somebody is talking in the courtroom and it's distracting me. Please stop talking. If you want to talk you can leave and talk outside and come back. I'm having problems following this because of the low rumbling that's happening.

MR. ROSENTHAL: Thank you. I especially endorse that request. I should inform Your Honour, I'm very hard of hearing. I would personally appreciate quiet and I appreciate volume from you.

A. Okay. If you can remind me of the question.

Q. I shall indeed. I would put it to you sir, that this is a very important question.

A. Okay.

Q. We know your responsibilities.

A. Yes.

Q. You on or about June 28th, 2007 two years ago, were aware that an expert wished to see the calibrated model in order to try to make their assessment of the dangers that building this site might create.

Jagger Hims said first question, check if they are really accurate. So you found out that's okay. And then they said somebody might get different results.

Wasn't it your responsibility, sir, to say please do this test. If you do get different results we want to investigate this, we don't have to have a catastrophe here. Please do that the test. Wasn't that your responsibility?

A. It continues to be my concern about the site to ensure it's safe. However, what you're specifically talking about had been asked and answered on a number of previous occasions through the independent peer reviews and through the Ministry of the Environment and add to that the MODFLOW is again only one of a multiple tools that ensure that the site will be safe.

Q. I have your answer thank you. I think these are your counsel's copy and these are my copies. In any event, the concern was that somehow there might be different answers that what you told the committee and that's what Jagger Hims told you, right?

A. No. The concern was that the model maybe tweaked in a way that would make it work and we would had to figure out what was wrong with the model that the outside peer reviewer had done to it to make it not work and that was chasing our tails really because the process had already gone to the point where they're already been independently reviewed a number of times.

Q. Sir, if the model had been provided, if the calibrated model had been provided Jagger Hims and you would have kept a copy of the original model, right?

A. Right.

Q. So there wouldn't be a problem of them messing up your model.

A. No, no.

Q. There would be a problem that maybe a different expert might look at it differently, might be more or less artistic than Jagger Hims and might come to different conclusions, right?

A. There maybe – what we felt was a concern, there may be an erroneous result that we would have had to answer and address at great expense --

Q. Yes.

A. – when no need because previous peer reviewers had already asked and answered that question.

Q. Yes. But didn't it occur to you, sir, that perhaps Jagger Hims had reached an erroneous result and perhaps this independent expert might point to the truth.

A. It's my understanding that if that would have been the case, that the other peer reviewers or the Ministry of the Environment themselves would have found that.

Q. Except sir, they did not go so deeply as to look at the calibrated model, right?

A. And again, it's my understanding that that's not necessary. They look at the inputs, the results and the calibration report to determine if it's accurate.

Q. It's your understanding that's not necessary but you received the understanding that an expert namely the organization retained by CMC did consider this thing, right?

A. Sorry? I'm not sure I follow you on that.

Q. You received the understanding that, I'm just forgetting now the name we just looked at, Charlesworth, your understanding was that Charlesworth did consider it necessary and that's why they requested of the CMC that they try and obtain it from you, right?

A. They may have considered it necessary, I'm not certain. I know that the CMC hired them to look at that.

Q. So the email that you sent on July 4th, 2007 was discussed with Mark Aitken you said?

A. You're getting me confused.

Q. I'm sorry.

A. Which is the email of the July 4th then?

Q. I'm sorry, the one informing the CMC of the reason --

A. Yes.

Q. That was Mark Aitken.

A. It was discussed with Mark Aitken, yes.

Q. And in a discussion like that between you and him, you would have been making recommendations and he would made decisions, is that correct?

A. That's my -- yes, I would make recommendations, if he had a concern with that, he'd -- he'd let me know.

Q. And then you say at some point after that it was brought before Simcoe County council to question whether or not to provide this, right?

A. That's correct, sir.

Q. And your estimate and I appreciate it's awhile ago, you may not recall, but it's several months after July 4th, 2007.

A. Yes. I believe it would have been within probably three or four months after that if my memory serves the CMC then addressed it at their next meeting and passed either that meeting or the subsequent one a motion requesting that county council provide it. And that's when I did a report to county council on that subject.

Q. I understand that there's a Warden Tony Guergis would he have been consulted about this issue whether or not to provide the calibrated model to the CMC?

A. He may have been but I have no recollection of that.

Q. Thank you. And what about Glen Knox, would he have been involved in any such discussions?

A. I don't recall him being involved in any such discussions.

Q. Now, you turn again to your most recent and thickest of your numerous affidavits, the August 11 one.

THE COURT: C-8.

MR. ROSENTHAL: Q. C-8 and I should like to look at volume a, C-8(a) as it's now called volume 1 of 2. If you look at paragraph 23 and I should just for context indicate that this is in the part of your affidavit when you're talking about the whole episode over a period of a couple of years of the CMC trying to obtain the calibrated model through the representations to the Information and Privacy Commissioner and so on.

A. Yap.

Q. And so paragraph 23, you begin, "Prior to the filing of the formal request.." and by that you mean the formal request with the Information and Privacy Commissioner, right?

A. I'd have to read it in context, me with the F.O.I. Yes, it looks like it is.

Q. I'm suggesting to you that your first sentence here "Prior to the filing of the formal request, the CMC had requested of the County and JH that they make the MODFLOW available."

A. Right.

Q. You meant that before they made a formal request to the Privacy Commission they informally asked you for it and we just looked at some of the evidence of that?

A. Right.

Q. And again, throughout you use MODFLOW model. But what we mean is the calibrated MODFLOW model just understand.

A. I agree.

Q. We don't mean the abstract program.

A. No.

Q. Now, you indicate in the next sentence of your affidavit at paragraph 23 “Mr. Jagger of the JH firm had cautioned that the MODFLOW model was a sensitive computer calibration that was developed by his firm.” Now, that’s true, we looked at the correspondence about that, right?

A. Yeah.

Q. “He was reluctant to make it available to others because of its sensitivity and also since he felt that his firm had proprietary rights to its development.”

A. Uh huh.

THE COURT: You have to say yes or no.

A. Yes, sorry, yes.

MR. ROSENTHAL: Q. I suggest to you, sir, that that also did not arise until a couple of years later?

A. No. I quite firmly believe that this was something that Mr. Jagger raised. I understand that it’s not in this letter that you showed me or may not be in the second page. I didn’t see that.

Q. No, it’s not in the letter

A. Okay.

Q. And sir, it’s not in your email right?

A. Right, correct.

Q. And in your email you said the concern was the sensitivity and possibility of erroneous results, right?

A. Right.

Q. And I put it to you, sir that you were telling the truth in that email, that was the concern at the time.

A. Yes it was the concern but there – when we talked to Mr. Jagger and again we’re talking a couple of years ago at this time he did express those sort of concerns to us over the phone.

Q. Well, sir I would respectfully suggest that you didn't raise the possibility of proprietary rights until after the proceedings before the Privacy Commissioner had gone some distance.

A. No, I disagree. I believe even at the piece that you showed me at the CMC meeting I raised the concern whether it was a work product issue.

Q. And you indicated you thought it was not, correct?

A. That's what I thought at the time.

Q. Yes. And there was no indication from Mr. Jagger that it was at that time.

A. Not in his letter. What I'm saying is there was conversations about it and that was something that he has raised over the phone to us at the time.

Q. As early, you're claiming sir, as early as June or July 2007?

A. In around the issue when he -- when it's been brought up by the CMC and the I.P.C. yes. Back in that time I couldn't tell you by what --

Q. No. I would respectfully suggest sir that it was not until some months at least after that time that any work product issue was raised by Jagger, isn't that fair?

A. No. What I'm saying is, I believe I recall phone conversations where Mr. Jagger brought it up back in that time.

Q. Yes. But I'm suggesting to you those phone conversations were well after, at least several months after June and July 2007.

A. I don't believe so. I believe it was back around that timeframe but you're right, I can't nail down exactly what --

Q. You can't be sure of that, can you sir?

A. I can be reasonably sure that it was back around that time. Yes, I'm reasonably sure.

Q. But sir, would it not have been your responsibility in being honest to the Community Monitoring Committee to an email inform them of the work product problem if that problem had been raised?

A. As I said, I had already did bring up the work product issue as potential in the CMC minutes. I don't recall when that conversation with Mr. Jagger happened, whether it was before or after the communication back the CMC.

Q. Yes. And what you're referring to in front of the CMC was your discussion that we looked at where you said there could possibly be such an issue or work product issue. You don't think so, but who knows, right?

A. Correct, correct.

Q. Okay. Now, you state that it come before Simcoe County council the question of whether or not to provide this model and the counsel decided not to provide it to support you in your recommendation, right?

A. Yes. That was my recommendation.

Q. And was that before or after there was a formal request through the Freedom of Information Act that this calibrated model be produced?

A. I believe it was before but I'm not certain of that.

Q. Okay. There was approximately a two year process before the Privacy Commissioner with respect to the efforts of the CMC to obtain this calibrated model, is that fair?

A. I understand that as well, yes.

Q. And you were constantly apprised of what was going on during that process, were you not sir?

A. I wouldn't say constantly apprised I was aware of it happening since it was a potential record in my area but I don't run Freedom of Information area of the county.

Q. Yes. Mr. Knox does that, does he sir?

A. Correct.

Q. Now, in the course of that, sir, was there any other time when the Simcoe County council dealt with the issue after it was before the Privacy Commissioner as to what the position of the county should be before the Privacy Commissioner?

A. That's a question you're going to have to ask Mr. Knox, Mr. Rosenthal. I wouldn't necessarily be aware of it or not.

Q. Thank you. We shall ask Mr. Knox. Now on May 13 2009 you're aware that the Privacy Commissioner did order production of the calibrated model, is that correct?

A. Yes, I believe that's the date, yes.

Q. May 13 2009 several months ago.

A. Right.

Q. And that was after a couple of years of various proceedings including mediation attempts and lots of legal argument back and forth, right?

A. Well, it wasn't – again, this is an area that Mr. Knox is more schooled in. My understanding of the letter was not that we must produce it. The letter that I think you're referring to requires that we request it and then we had to go through the full process of deciding whether or not it had to be produced or not. But again, that's more Mr. Knox's area.

THE COURT: Is the letter somewhere in the material that's been filed?

MR. WAYLAND: Yes, Your Honour. It speaks for itself. It's in M-3 –

MR. ROSENTHAL: Sorry, Your Honour which letter?

THE COURT: The I.P.C. letter.

MR. ROSENTHAL: It's in the original affidavit, the ruling of the I.P.C. is in the affidavit of Stephen Ogden.

MR. WAYLAND: M-3, Your Honour, Tab D.

MR. ROSENTHAL: Yes it is at Tab D.

Q. And perhaps I should just show it to the witness to see if he recognizes this document. At Tab D of Mr. Ogden's affidavit we see a document entitled order MO-2416.

A. Yes.

Q. County of Simcoe and it's a document of some pages that describes the nature of the appeal and so on at the beginning. And there's a conclusion beginning at the bottom of page 16 about the relevant factors, about the county's duty to produce this model, right?

A. Okay. I – I can tell you I've never read the entire letter.

Q. Yes. The document speaks for itself and it's before the court.

A. Okay.

Q. But you did become aware of the order at the end --

A. Correct.

Q. – on page 18.

A. Yes.

Q. And it is dated May 13th, 2009, right?

A. Yes.

Q. And it says 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 shall be issued no later than June 17th, 2009 but no earlier than June 12 2009. It should require the records be delivered to the county no later than June 26th 2009, right?

A. Yes. I was aware of that.

Q. You were aware of that. And were you then the main person who liaised with Jagger Hims about dealing with this issue?

A. No.

Q. I see. Who was that person?

A. I would – I would understand it would be either the clerks or legal counsel, but – that dealt with that.

Q. When you say the clerks, you mean Mr. Knox.

A. Yes.

Q. Is there anyone else?

A. In his office the deputy clerk also looks at F.O.I. issues.

Q. I see. And then it continues I order the county to issue an access decision to the appellant upon receipt of the records. So you understood, did you not sir, that the combined effect of those two paragraphs of the order was that you should get the calibrated model from Jagger Hims and produce it to the person --

A. No, not at all.

Q. I see.

MR. WAYLAND: Your Honour....

OBJECTION MADE

Q. But your understanding was –was it not your understanding, sir, that the Privacy Commissioner after these two years of hearings had determined that it was appropriate for the applicant for the calibrated model to get it?

A. No.

Q. You didn't understand that?

A. Again, you're asking the wrong guy to interpret it, but no, it's not my understanding that he was to get it. My understanding was we were to ask for it and then a system of vetting to determine whether it would be released had to take place.

Q. A system of vetting.

A. Yes.

Q. What suggested to you there should be a system of vetting?

A. I order the county to issue an access decision.

Q. Upon the receipt of the records.

A. An access decision. We would have the opportunity, my understanding is to determine whether the access would be provided. It's not a record we had.

Q. Thank you. And then you were aware of the third paragraph here I remain seized of any compliance issues that may arise from this order and any new appeal that the appellant may file in respect to the access decision that the county is required to issue under the order provision 2, right?

A. Aware of it, yes.

Q. But you didn't understand that the thrust of this ruling was that the calibrated model should be made available.

A. No.

Q. You didn't interpret it that way?

A. I'm – no.

Q. Okay. Now after all this time in the two years of trying to get the calibrated model and so on, didn't you as you're a person responsible for the environmental issues surrounding this dump site didn't you ever feel maybe we should give them the calibrated model and see what the results are when their expert looks at?

A. I absolutely thought we should take part in something that gave them more access to it and that's why I recommended that we take part in a tri-party meeting with the Ministry of the Environment, County – corporate serv – sorry, the County of Simcoe and the Community Monitoring Committee.

A. Yes.

Q. But at that tri-party meeting, they did not make the calibrated model available, did they?

A. Absolutely. It was on the table in front of the expert that was hired for the CMC that basically there was a number of requests that came from him to see how the model worked, understand how the

model was put together and run new scenarios through it and that happened.

Q. He had to do it right there in front of everyone. He wasn't allowed to really study the model to take it away, was he?

A. No. He didn't – he did not take it away.

Q. Now, how much time did he have to examine the model, sir?

A. It was three days in the tri-party meeting. I believe their expert was available for the first two days of that tri-party meeting.

Q. And in your view that's a reason not to give it to another expert who wants to have it to be able to examine it in detail.

MR. WAYLAND: Your Honour, I have an objection.

OBJECTION MADE

Q. Sir, you recommended that the county oppose production of the model, that's what you told us, right?

A. Correct. But I also recommended that we go to a significant expense to provide better understanding of what the model was and have more independent review of it to the Community Monitoring Committee.

Q. Why would you recommend a partial measure like that rather than a full measure of allowing their expert full access to the calibrated model?

A. I felt it was reasonable and continue to feel what we did was reasonable.

Q. Now, throughout the two year period that this was before the Privacy Commissioner, did it come to Simcoe County council any other time as to what their position should be, should continue to be with respect to the proceedings in front of the Privacy Commissioner?

A. It may have, Mr. Rosenthal, but I don't recollect it. Perhaps the clerk might as I mentioned.

Q. Thank you. Okay. Now, if we could look at your affidavit of August 11 which is now C-8 and if we could look at the first volume (b) at Tab 12, Exhibit 12.

THE COURT: Tab 12.

MR. ROSENTHAL: Tab 12, Your Honour.

A. Yes I'm there.

Q. This is a letter that you included as an exhibit to your affidavit addressed from two consulting engineers from Jagger Hims to Mr. Glen Knox the county clerk of June 26th 2009, correct?

A. Yes.

Q. And this is of course in response to the letter from Simcoe County dated June 15th requesting that Jagger Hims provide the calibrated model, right?

A. Yes.

Q. The letter from Jagger Hims states in the second paragraph, "As an introductory comment, we wish to express our deep concern with opinions voiced by the adjudicator in his Order" and it continues to explain why they have those concerns and then paragraph three it talks about, "Our industry, as you...know, is highly regulated.." and then turning to the second page of that letter "This being said and as stated on more than one occasion, the County authorized Jagger Hims in May 1998 for the production of a hydrogeological report in order to fulfill the applicable Certificate of Approval Conditions...relating to land fill site 41. That is correct, right?

A. Yes.

Q. And you understood this report was essential in order to fulfill those conditions, right?

A. It's before my employ, but absolutely, that's my understanding.

Q. And they indicate the report was duly produced and our mandate then came to an end. At no time was there any agreement

stipulated or implied to the effect that ownership of documentation proprietary to Jagger Hims Limited would be transferred to or considered as the County's property. In fact, this was never at issue since the County simply requested the report, nothing else."

Now, that last sentence is correct, is it sir that up to and including at least June 28th, 2009 when this was written and except for the letter of June 15th, 2009 which preceded it, the county never requested the calibrated model be provided, is that correct?

A. I'm not sure it's 100 percent correct. Obviously I – I – I first from the CMC when they first asked for it went to Jagger Hims and asked for it and got their first letter back that you've already gone over previously, but I know of no other occasion.

Q. And you determined that it shouldn't be produced at that time and that was your recommendation?

A. Yes, based on Mr. Jagger's response to me, yes.

Q. And as far as you know, the County never asked for the report up until June 15th, 2009 – sorry for the calibrated model?

A. Yeah, never requested to be provided to us, that's right, certainly work happened as I mentioned at the tri-party meetings with it so it continued to be used by the consultant, but you know, I – I – if your question is, did we ask for it other than those events that are specific, no I don't believe we did.

Q. And towards the bottom of the second and last part – the second paragraph on this page two, Jagger Hims writes, To disclose such information would therefore be detrimental to the firm not to mention our confidentiality policy which protects all our clients." Did you or anyone else as far as you're aware inform Jagger Hims that you the client Simcoe County had no confidentiality concerns about the calibrated model, you wanted it produced?

A. I'm not sure I understand your question if I could Mr. Rosenthal.

Q. I'm sorry, perhaps I didn't phrase it very well. I'll try again. Could you read the sentence, please sir with me?

A. Okay.

Q. It refers to the latter part of it to our confidentiality policy which protects all our clients.

A. Which paragraph is it in? I just don't --

Q. The last part of the second paragraph on page two.

A. Okay. Yes.

Q. Okay. Now you understood that the calibrated model was something that had been as we indicated before developed specifically to pertain to dump site 41, right?

A. Yes.

Q. And it had been developed as part of the process when Jagger Hims was retained by Simcoe County to do the report required, right?

A. Correct.

Q. They seem to be alluding here to some possibility of clients having confidentiality concerns with respect to the work that they might do on behalf of a client, right?

A. They do.

Q. Yes. And so you were the client, you Simcoe County, did you inform them at any point in your discussions with them that Simcoe County had no confidentiality concerns about this calibrated model and in fact they wanted it produced?

A. No I don't recall any discussion about County's position on any confidentiality them -- with --with Jagger Hims.

Q. You personally spoke with Mr. Jagger a number of times about this issue, sir?

A. Certainly in the beginning I did, yes.

Q. Beginning meaning around --

A. When it was first requested by the -- by the CMC.

Q. The summer of 2007 is the period you're talking about.

A. Yes, yes.

Q. And after that did you speak with him?

A. I don't recall any conversations with Mr. Jagger specific to this, no.

Q. Did you discuss this issue of production of the calibrated model with any other employees of Jagger Hims to your recollection?

A. Not to my recollection, no.

Q. In particular this letter of June 26th, 2009 is signed by a Jason Balsdon and an Andrew Hims, did you ever have discussions with either of them about the issue of production of the calibrated model?

A. I don't recall any specific discussions with them Mr. Rosenthal. I deal with this firm on a number of different landfill sites all the time so I'm discussing different items with them all the time. I don't recall specifically discussing MODFLOW when it became part of the I.P.C. process.

Q. Thank you. By the way, Jagger Hims is still involved as a consultant with respect to this project, is that correct?

A. That's correct.

Q. As the construction is ongoing, from time to time, the County and other people working on the site would be consulting with Jagger Hims about various issues.

A. That's right. And just to clarify if I could Mr. Rosenthal. They're still operating I believe as Jagger Hims but they have been bought by a bigger firm called Genivar and I think they operate sort of as a division – Jagger Hims a division of Genivar.

Q. Thank you. Yes. They were recently purchased by a firm called Genivar which is also involved in waste management.

A. Yes, they're a large consulting firm.

Q. A large consulting firm. But it's your understanding that it's still the Jagger Hims subsidiary if you like of Genivar that is dealing with ongoing issues with respect to dumpsite 41.

A. Yeah. If your question is am I still dealing with the same people for the most part, I would say that's right. I'm dealing with the same people for the most part.

Q. And you're continuing to pay those people --

A. Yes.

Q. -- you meaning Simcoe County.

A. Yes.

Q. Now sir, the recent story of what happened in front of the Privacy Commissioner continues in your affidavit. If we turn to Exhibit 13 of C-8 (b), a letter of July 28 2009 from the Information and Privacy Commissioner addressed to Mr. Tony Guergis Warden c/o of Mr. Knox and said to be re continuation of inquiry we've been discussing, right?

A. Yes.

Q. And the first paragraph of that document says "I a 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 the order." "The records at issue are the calibrated hydrogeological model..." and so on. There's a review of the previous order.

And then if you could please turn to page three of that document. Sorry, I should begin at the bottom of page two of the document, "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. Continuing on the next page. 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.”

Top of everything I have a nasty cold. Please excuse me.

Sorry for the interruption, sir. I was reading the citation from *the Canadian Law of Architecture and Engineering*. 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.”

Did you read that paragraph before I read it to you today, sir?

A. Yes, I've read the letter.

Q. Yes. And you understood that what was meant there, whether or not you agreed with it, in a situation such as this Simcoe County, they're suggesting that Simcoe County owns the calibrated model, right?

A. You're asking for decisions above my pay grade. I – I didn't draw any decisions from --

Q. I'm asking for your understanding, sir.

A. Okay.

Q. This is not the law I'm asking for. Only His Honour can tell us the law. I'm asking for your understanding sir?

MR. WAYLAND: Sorry...

OBJECTION MADE

Q. The witness' understanding as to the impact of this paragraph. Did he not – did you not, sir, if I may clarify, translate this as indicating that you were being told by the privacy commissioner, you the Simcoe County people they were writing to that a product such as the calibrated model is owned by Simcoe County.

MR. WAYLAND: Your Honour...

OBJECTION MADE

Q. Thank you, Your Honour, I'll move on. Paragraph three of this letter reads, "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." That would be yesterday, correct sir?

A. Correct.

Q. "Please note that I may share your representations with both the appellant". By the way you understood the appellant was Mr. Steve Ogden, is that correct?

A. The name has been mentioned by Mr. Ogden at CMC meetings that he was doing this so I do understand that through him.

Q. That was your understanding?

A. Yeah.

Q. "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 these parties with a copy of this letter."

So you read and understood this paragraph.

A. I've read it, yes.

Q. I won't quiz you as to your understanding of it. Now, if you could please turn to the next exhibit that you included Exhibit 14 of your affidavit. This is a letter on the letterhead of Graham, Wilson, & Green Barristers and Solicitors dated August 5th, 2009 addressed to Mr. Colin Bhattacharjee adjudicator Information and Privacy Commissioner of Ontario re continuation of inquiry order MO-2416.

It begins, "We have your letter of July 28th, 2009. That would appear to the document we just looked at, is that correct, sir?"

A. Yes.

Q. "We do admit to being somewhat unfamiliar with the process of having issued an order and then resuming an inquiry. However, and without prejudice to any rights we may have under the Municipal Freedom of Information and Protection of Privacy Act, we are considering your request for further information and a further position from the County."

I'm going to stop there, sir, this question of having issued an order and then resuming an inquiry, wasn't it your understanding I appreciate you were not involved at the time back in the late 1980's and early 1990's that that was exactly what happened with respect to the environmental assessment hearing with respect to dumpsite 41, namely they issued an order that the dumpsite should not be constructed after which there was an order in council indicating that hearing should continue and then the order was reversed. Isn't that your understanding, sir?

A. I'm sorry, you're asking me my understanding of what happened at the first environmental --

Q. Yes. I'm suggesting that the process of something being reopened after an order is in fact exactly what happened with respect to the environmental assessment hearings on this particular issue, isn't that right?

A. I'm again --

Q. It's not worth the time—

THE COURT: We're rather far a field, absolutely.

MR. ROSENTHAL: I'll move on if I may, Your Honour.

THE COURT: Thank you.

Q. Now sir, did you read this letter of August 5th, 2009?

A. I have seen it before yes.

Q. Did you see it before it was sent?

A. I don't believe I did see before it was sent.

Q. Okay. The letter continues then in the third

paragraph "Unfortunately, you have asked us to specifically indicate whether the County would be willing to on the one hand take further legal proceedings against Jagger Hims and secondly take "other action". Clearly this is something that neither staff, nor legal counsel for that matter, can advise you on. We need to put the matter before council."

Now sir, it was your understanding that in fact the various steps in the proceeding before the Information and Privacy Commissioner were not brought before council as to what the county's position should be with respect to the issues that arose, is that correct?

A. I had no understanding about once it had been the IPC certainly it had been brought to county council before the request for Freedom of Information.

Q. Yes.

A. And just to be clear --

Q. But not after.

A. Just to be clear, I don't know what happened to council after. It could have been. That wouldn't -- that would be Mr. Knox, you'd be best to ask that.

Q. Okay. We shall ask him. It continues, "Clearly this is something that neither staff, nor legal counsel for that matter, can advise you on. 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 2nd.”

That’s what it says, right?

A. Correct.

Q. And you were hoping that the whole construction would be completed by October 2nd, weren’t you?

A. My original hope was that all of the construction would allow a mid-fall opening. I’m not sure what you’re asking me.

Q. Yes. In particular, that the construction would be completed before October 2nd, right?

A. Before the delays at the site, before construction stopped at the site, my hope was that mid-fall we would open the site. I’m not sure that I’m answering – I’m addressing your question because I’m not sure I understand it, in relation to this anyways.

MR. WAYLAND: I’m not sure...

OBJECTION MADE

Q. I put it to you sir that even as recently as August 5th, 2009 and in fact even today, you hope that the construction can go ahead expeditiously, the weather will be good and it will be finished by October 2nd, don’t you?

A. Absolute -- hat I’ve been asked by council was to construct the site and it’s my hope that weather will hold and we’ll be able to do that construction as I’ve been requested.

Q. By October 2nd.

A. I’ve always said mid-fall. I – I think that might – that might be a little early to have – to have it there but in that time range.

Q. By around that time.

A. I think now it’s unrealistic that I’ll be able to open it by that time, but I would hope, yes.

Q. And you're going to use your best efforts to get it open by that time if you're allowed to?

A. Correct.

Q. Now, when did you first read this letter of August 5th?

A. I don't recall Mr. Rosenthal.

Q. You certainly read it before you put it in your affidavit on August 11th.

A. Yes.

MR. ROSENTHAL: Now, if we could turn to Exhibit 15, please of your affidavit. Your Honour, I don't know your custom to morning break.....

TIMING OF RECESS WAS DISCUSSED

MR. ROSENTHAL: Q. So this document is Exhibit 15 is a letter from the Information and Privacy Commissioner addressed to Graham Wilson & Green responding to the letter that we just looked at, right of August 5th, right?

A. Yes, that's my understanding.

Q. And this document is an exhibit to your affidavit, sir, did you read before August 11th?

A. Yes I did.

Q. Do you recall approximately when?

A. No I don't probably after the county had received it within the week after the county received it.

Q. Sometime August 7, 8, --

A. Sure.

Q. -- something like that?

A. Yeah.

Q. And this letter reads in part, "I am responding to your letter of August 5... In your letter, you state that you are "somewhat unfamiliar with the process of having issued an order and then resuming an inquiry. Please note that in Order Provision 3 of Order M0-2416,

Adjudicator Bhattacharjee expressly stated as follows: 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.”

“Your Letter asks for an extension of the August 12, 2009 deadline for a response to Adjudicator Bhattacharjee’s letter of July 29th, 2009 to the County of Simcoe. You state that it is “too late” for the matter to be placed before Council on August 25, and would have to wait until the September 22nd, meeting.”

By the way, sir, it’s your understanding I think you indicated to us that at the meeting of August 25th, some issues with respect to dump site 41 will be on the table, is that correct?

A. That’s correct, yes sir.

Q. Do you have any idea as to why it might be too late to put this issue before them on August 25th?

A. My understanding is the normal process this follows certainly in the committee that I speak to is before I bring something to council, it goes through a subcommittee and those subcommittee meetings happen two weeks prior generally than the council meeting.

Q. I see. And have the matters with respect to dumpsite 41 then to be brought before council on August 25th gone through such a subcommittee meeting, sir?

A. Not everything that’s being brought. Essentially my understanding is there will be county officer’s reports prepared specifically to address some of those issues –

Q. And --

A. --and they go directly to county council.

Q. And sir, a matter that’s been as well documented as this issue has, the production of the calibrated model over a period of two years could certainly be brought before the council on August 25th, could it not sir?

A. My understanding is that under extenuating circumstances, you're right, county officers reports can be written to go directly to county council but again that's not my area, that would be more specifically Mr. Knox as to what allows that or not.

Q. I would put it to you, sir that the reason for this letter to the Privacy Commissioner suggesting that it be put off to the September meeting and ten days to October 2nd, was to try to allow the county to complete the project to make it a fait accompli before this calibrated model was produced. Is that not fair, sir?

A. I'm not sure what you're asking me that it was to make it --

Q. It was a stalling tactic sir.

MR. WAYLAND: Your Honour...

OBJECTION MADE

Q. And would you give us a fair answer sir?

A. It appears that --

Q. I'm suggesting to you that --

A. -- could someone read it to believe it's a stalling tactic?

Q. I'm suggesting to you, you were involved in this matter for two years trying to keep the calibrated model from the Community Monitoring Committee. I'm suggesting to you this letter is further stalling tactics on behalf of the county to try to prevent the committee from getting this model in time to use it before the site is fully constructed. That's what I'm suggesting to you, sir.

A. I don't know that that's the case. I can see how someone could interpret it to be that.

Q. You can see how that would be a reasonable interpretation, sir, of the facts?

A. I can see how it could be interpreted to be that, yes.

Q. Thank you. And this letter that we're not looking at at Exhibit 15 concludes, from the adjudicator at the Privacy Commission.

Please ensure that Adjudicator Bhattacharjee receives the County's response to his letter of July 28, 2009 no later than August 12, 2009."

A. Yes.

Q. You became aware of this letter sometime you told us probably August 7, 8, something?

A. Correct.

Q. We're in modern times now, a week ago.

A. Yes.

Q. And then Exhibit 16 and then we'll suggest a break after this, Your Honour. Is a letter dated August 10th, 2009 from Graham, Wilson & Green to Mr. Colin Bhattacharjee re continuation of inquiry. Now this letter is dated August 10th 2009. Did you become aware of this letter prior to the idea that such a letter would be written and discuss some of the contents prior to August 10th, 2009, sir?

A. I was – this letter I was aware of before it went out. I was already at our legal counsel putting together some of these affidavits when work on this was going on in the same room. So I'm somewhat aware of this letter.

Q. And so sometime before August 10th, and we're talking sometime like August 7, 8 or 9, I guess, is that correct?

A. Or it could have been on August 10th.

Q. Could have been even on August 10th.

A. Yeah.

Q. I don't think we have a time that this letter was prepared. In any event, this letter indicates it's in reply to the letter of July 28th 2009 to Warden Tony Guergis.

And it also says, "We further acknowledge your office's letter (Mr. Higgins) responding to our request for an extension in order to obtain the directions of Council. That request was denied, so we must make it clear that the points being made in this letter are without Council instruction, and specifically the representations that you have asked for as

to Council's "position" on the three items below are, at this time, to be considered only what would be the advice or recommendation of staff and legal counsel."

Now sir, are you one of the staff that's referred to when it says recommendation of staff?

A. Maybe there's a clarification here Mr. Rosenthal. I was aware of this being drafted but I don't believe I had any impact into the drafting of it whatsoever.

Q. So when it says advice or recommendation of staff and legal counsel, the staff does not include Mr. McCullough.

A. That's right. At the same time I was aware of it, I don't believe I was participating.

Q. You were aware of it but you did not give either advice or make a recommendation with respect to the position taken?

A. That's right.

Q. And do you know who would have given advice and/or made a recommendation?

A. I would imagine it would either be the CAO or the clerk.

Q. The CAO is Mr. Aitken.

A. And Mr. Knox.

Q. Mr. Knox. One of those or perhaps both would probably have been the sources of advice and/or recommendation.

A. Right.

Q. Thank you. And then it continues this letter, August 10, "We have previously written to you and provided our opinion with respect to the prior issue and that is, whether or not the 'MODFLOW' computer model was in fact a County record. You made your adjudication on that point and although we respectfully disagree with your conclusion, we did follow your Order and made the request of Jagger Hims for the

data. In a letter they sent to us on June 26, 2009, they refused to provide the material to the County.”

“Prior to dealing with the substance of your July 28th letter, we feel we must respond to your reference to the offence section of the Municipal Freedom of Information and Privacy Act. We note your comment that you are not alleging any offence...” and so on.

And then it says, “Dealing with the substance of your continuing inquiry and dealing with your items in order, we advise the following:

1. We have no particular position with respect to Jagger Hims refusal to answer our request for their computer model.”

Now, sir, is it your understanding and is it your understanding that Simcoe County has the understanding that the county even at this point has no position with respect to whether or not Jagger Hims should produce the calibrated model?

A. That is my understanding.

Q. Thank you. “As we have previously indicated, this model is not part of the records kept at the County, nor is it part of the project that was delivered to the county.”

Now sir, that was the position in part at least that the county took in front of the Privacy Commissioner, right?

A. I believe so, but I’m only peripherally aware of what those positions were through the F.O.I. process so I’m in – I’m in a difficult position to respond to that Mr. Rosenthal.

Q. And they say we haven’t asked our consultants for this kind of information in the past? Is that true as far as you know?

A. As far as I know that’s correct, yes.

Q. We understand that it’s not part of the custom in the trade” that these computer models are delivered to the client.”

A. That’s my understanding yes.

Q. "We are unaware of any basis upon which the county could take legal action against the engineering firm in order to obtain the records.

A. Again, that's -- that's outside of my area. That's my understanding but that's --

Q. Right.

A. -- only for what it's worth.

Q. Sir,

A. I said that's only -- that's my understanding but I don't know that that's only for that it's worth.

Q. The last paragraph of this letter, it's a long letter, Your Honour and I shan't read it all and you have it in front of you. The next last paragraph is, "Finally, we are concerned that your position, and that of Mr. Higgins in refusing our extension request, appear to be influenced by your view of the environmental merits of the landfill. There has been no adjudicative process by your office on that subject, nor, respectfully, is it within your regulatory ambit, as we understand it."

You weren't involved in any discussions that led to that paragraph, I guess, sir, were you?

A. I'm aware of them. I wasn't consulted. I was possibly in the room where that was discussed by our lawyers.

Q. Well, I don't want you to tell me anything that was discussed by your lawyers, sir, because you have a privilege with respect to that, it's probably been explained to you with respect to any conversations with your lawyers. Were you part of the discussions of this issue and other issues in this letter with Mr. Knox, Mr. Aitken or any other Simcoe County officials?

A. Not in any other way than would be on the periphery as per my understanding what the model is to explain that.

Q. I see. Okay. And you were – when any such discussions took place, you were the expert on what the model was and the nature of it and so on, right?

A. To be clear, I'm not an expert on the model but certainly I'm the staff with the best understanding of it.

Q. You're the staff who understands that better than any other staff person.

A. Correct.

Q. Sir, you knew that the request for the calibrated model had nothing to do with understanding the environmental merits of the proposal. It was a request for a model that would allow someone to do an independent assessment, right, you understood that, right?

A. The request for the model was to be done – for a Doctor Charlesworth or someone to independently look at it from the CMC, yes, I understand that.

Q. For an assessment.

A. Yes.

Q. And many people might think there should be another assessment, just to make sure when you're building something of this type, right?

A. Which in fact we did with the tri-party meetings, correct.

Q. I won't debate that any further with you. And I will suggest sir, this might be a time for the morning break.

THE COURT: We'll take 15 minutes.

RECESS TAKEN

UPON RESUMING

MR. ROSENTHAL: Q. Good morning, again sir.

A. Mr. Rosenthal.

MR. ROSENTHAL: Your Honour I continue to be plagued by my mistake by leaving out the second page of that

exhibit for which I apologize once more. I have a copy with both pages stapled together. I did want to refer to something on the second page.

THE COURT: Let's make that an exhibit just so we're sure it's part of the record.

MR. ROSENTHAL: This is Exhibit B to the original affidavit of Mr. Ogden properly presented this time with two pages instead of one.

THE COURT: Thank you. It's going to be the next marked. Exhibit Two.

REGISTRAR: Exhibit Two.

EXHIBIT NUMBER TWO – Two page letter dated July 28, 2007 -- Produce and marked

MR. ROSENTHAL: Q. There was as we know a second page to this and I just wanted to ask you it says beginning of the second page, sorry, do you have a copy in front you? "The modeling output was carefully scrutinized by two independent peer reviewers. The output, that doesn't include he calibrated model of course, right ?

A. Right.

Q. And then it says a further review in our opinion is redundant and then it says, as an alternative it is suggested that if the CMC wants the scenarios modeled Jagger Hims Limited be retained to complete the work for the following reasons. We have the capacity to operate the model. We know all the details of the model and so on. It was suggesting you retain them if you want any more work on this, right?

A. That's right, and that's in fact what happened through the tri-party meetings.

Q. Right. Now, you mentioned these tri-party meetings. Now you said there was a model available at that meeting, it was looked at by several experts. Is that correct?

A. Yes. I – I know that the majority of that work happened on the second of the three days and I was – I wasn't in attendance unfortunately on that day, I had another commitment so I can't --

Q. It was your understanding, was it not that the model that was used there was slightly different from the model that had been used by Jagger Hims?

A. Yes it is my understanding.

Q. It had been tweaked by somebody so to speak, correct?

A. No. My understanding was that a newer version of the software was available and so the model was in some ways recreated with similar outputs.

Q. By Jagger Hims?

A. By Jagger Hims.

Q. And it had somewhat different outputs this time, sir?

A. I – I'm not sure certain. All I understood from the outcome of that as I was reading the minutes of the meetings is that their peer review specialist Doctor Kerry Rowe was satisfied with it.

Q. You mentioned sir, earlier in your evidence that a company called Genivar is that spell G-E-N-E-V-A-R Consulting.

A. It may be, I spelled it I-V-A-R, but I'm not certain which is correct.

Q. I believe you are correct sir, it's G-E-N-I-V-A-R, is that correct?

A. I believe that – yes.

Q. And you understand that's a rather large company that has several subsidiaries it that correct?

A. Correct.

Q. And one of them is Jagger Hims.

A. Correct.

Q. And another is Henderson Padon?

A. That's correct.

Q. And according to your affidavit and you don't necessarily have to turn back to it but paragraph 15 of your affidavit of August 15 (sic) Jagger Hims had been retained to conduct a hydrogeological investigations and Henderson Padon had been retained to undertake the design and operations report, right?

A. That's correct, sir

Q. And those are now both owned by Genivar, right?

A. That's correct, sir.

Q. And they're both doing continuing work and getting monies from the County for that work, right?

A. That's right.

Q. On dumpsite 41, right?

A. County Landfill site 41, yes.

Q. And millions of dollars are being paid by Simcoe County to those organizations, isn't that correct?

A. Over the years certainly, not in any one year but yes, over the millions I'm sure a million dollars has been spent on that.

Q. And they're billing you right now for work being done right now?

A. Absolutely.

Q. Do you recognize that they would have a very serious vested interest in trying to obstruct anyone having access to their earlier work in a way that might lead to criticism of it because they might lose the current monies that are being paid by you if there were flaws established in their earlier reports?

A. It's a bit of a mouthful, can you break it down?

Q. I'm sorry sir perhaps it is. I'm suggesting to you the following. You as the person responsible from the County point of view in dealing with these organizations that are retained, and being paid millions of dollars to work on dumpsite 41, should recognize that there is a serious problem here that one company now owns both of the consulting companies that were retained to evaluate the project and that company is making money from the continuation of that project. And that very same company is taking the position that they should not put the calibrated model before the monitoring committee. Doesn't that cause you great concern, sir?

A. No Mr. Rosenthal it does not.

Q. I see, thank you. Has that question been discussed by Simcoe County officials to your knowledge in the question of shouldn't we maybe have an independent assessment here given the fact that the company, one company has controlled all aspects of those assessment.

A. I would say an independent assessment was done on a number of occasions from it including the tri-party meeting, but I'm not aware that county council has had that specific discussion in front of them.

Q. Did you raise any concerns with county officials, staff, or anyone when one company Genevar purchased both of these companies that had done the consulting?

A. No. I did make my superiors aware that that was happening when it came to my understanding, but I do not have a concern with that having happened.

Q. You don't have a concern?

A. No. Both companies had independent specific areas of practice which I could have got through a larger firm to do it in the beginning. My understanding was with the background that both of them had it made sense to continue with them as separate companies. I don't

see any reason why a single company couldn't have done and performed that same function.

Q. The concern I'm suggesting you perhaps should consider even at this date is that the company that is refusing to provide the calibrated model, is the company that stands to lose millions of dollars in current and future income if there are faults found with that calibrated model. Isn't that correct, sir?

A. It's not my understanding there would be faults found with it. The – it's been independently reviewed a number of times.

Q. I understand that, sir. And you would hope that there wouldn't be faults found with it.

A. I would hope that there wouldn't be any faults with it and I'm assured by that by the Ministry's review and independent peer reviews that have happened on it.

Q. But they didn't review the calibrated model. They never had the calibrated model.

A. Yes. My understanding that that's not necessary to review the outputs.

Q. I see.

REGISTRAR: I'm going to ask you to keep order, please.

MR. ROSENTHAL: Q. Now, moving to some other areas quickly, if I may, Your Honour.

THE COURT: Quick is good.

MR. ROSENTHAL: I'm sorry, sir.

THE COURT: Quick is good.

TIMING OF THE CROSS-EXAMINATIONS WAS DISCUSSED

MR. ROSENTHAL: Q. Do you claim in your affidavit that there was consultation with Beausoleil First Nation and I'm not going to go into it in details. I'll leave that for legal argument and factual argument. Do you claim that there was consultation with other any First Nations groups other than Beausoleil First Nations, sir?

MR. WAYLAND: Any...

OBJECTION MADE

MR. ROSENTHAL: Q. Are you aware of anyone doing any consultation, having any consultation with any First Nation other than Beausoleil First Nation?

A. I've certainly participated in a meeting and I'm not sure the status, but the Métis group in North Simcoe asked me to come had speak to them and I did that.

Q. The Métis group in North Simcoe asked you to speak to them.

A. Yes.

Q. To tell them about this project?

A. Yes.

Q. And you did so?

A. I did so.

Q. Okay. Are you aware of any other interaction that could be considered by any wide definition consultation with any other First Nation by any person associated with this project?

A. I – I am aware that there may have been discussions that I wasn't present at. The CAO Mark Aitken at other discussions with Chippewa but I'm not – I wasn't present so again I'd ask you maybe direct that to him.

Q. Thank you sir.

A. And as far as the record goes, everything else that I'm aware of is in here already. If it discusses other groups other than Beausoleil it may be in here, yes.

Q. Thank you. Now, did you sir and other staff suggest that this should not be a Simcoe County council vote on whether or not to continue further work on Site 41 because it would be very divisive to bring that in front of council?

A. Did I participate in something to that effect?

Q. Some discussions to that effect?

A. I don't recall discussions to that effect.

Q. I see. Can you give us any explanation as to why there's not been such a motion in spite of all the surrounding calls for such?

MR. WAYLAND: What specific motion...

MR. ROSENTHAL: Q. A motion with respect to further work on dumpsite 41 after the preliminary motion of 2007?

A. Mr. Rosenthal, it's my understanding that that's not required. We had budget approval to go forward with it in subsequent years.

Q. Yes. I understand that's your position. Are you – you're not aware of any discussion as to why there's not been such a motion?

A. Certainly not that I was an intricate part of. No. Has there been discussions? Possibly, I'm not certain of it.

Q. You're not aware of any such discussions or are you?

A. I can't – I can't recall them, no.

Q. Mr. Aitken or Mr. Guergis or any of those people with their discussions that you either heard or were involved in of the question of whether or not we should have another resolution in front of council clarifying what work should be done --

A. No.

Q. – on this dumpsite 41?

A. I'm not aware of that.

Q. Thank you. Now, there is a drainage ditch that you've told us about that was dug on an adjoining property, is that correct?

A. No.

Q. A ditch for a drainage pipe.

A. Oh, a shallow ditch in which a drainage pipe was installed in, yes.

Q. Yes.

A. We didn't – we didn't make a ditch per se.

Q. Well, you had to make a ditch to put the pipe in,
right?

A. Well, I'm not sure if you're talking about the swale or
the outflow from the storm water pond.

Q. The outflow required a ditch, did it not?

A. Yeah, it required – yeah, an excavation to be done.

Q. An excavation?

A. Yes.

Q. And the excavation was about two to three metres
deep is that correct?

A. No. The excavation was shallower than that. The
area where the headwall was placed, the concrete retaining structure at
the end of that pipe, yes, it could have been as deep as two or three meters
in a small area.

Q. So the amount needed to excavate varied as you went
along the length of the pipe, right, is that what you're telling me?
Sometimes you had to excavate two to three metres sometimes less?

A. No, only at one location did we had to excavate as
deep as two or three metres and that was to place for bearing capacity for
the concrete headwall at the end, the very end of the structure. The rest of
it I can't recall, it was certainly much shallower than that.

Q. Yes.

THE COURT: Can you just enlighten me on what a
concrete headwall is?

A. The pipe itself is rather large in the area of a metre or
perhaps larger and where the pipe empties out, the end of
the pipe there's a concrete structure to ensure that that
exit has basically a structure that's held in place rather
than water if it was running through a hole one metre. It

would be a significant amount of water that would be in the pipe that would start moving and so the concrete –
THE COURT: It's to prevent the erosion from occurring at that point?

A. Both it does two functions. That is certainly probably the most important one is to stop the erosion. The second thing is just to hold the pipe in place so that if the volume of water starts moving the pipe, it can't because it's fixed.

THE COURT: Okay.

MR. ROSENTHAL: Q. Thank you sir. Now, for the original property for dumpsite 41, there was an archeological assessment before construction began, is that correct, sir?

A. I'm aware of that yes, through the E.A. process.

Q. And the assessment found that there were no heritage concerns and the project could not be stopped on that basis.

A. That's my understanding.

Q. There was no assessment of the area that was recently excavated for this pipe that you described, correct?

A. That's correct.

Q. And wasn't it your understanding that an assessment should be made in order to ensure that that excavation did not interfere with First Nations burial sites or other heritage --

A. No, it was not my understanding and I've heard that issue brought up since, but no, not at the time I was installing it or planning for it has that ever come to light.

Q. So that concern didn't cross your mind at the time it was planned for, is that what you've just told us?

A. I've heard about that concern through your filings since, but no, nothing – nothing was brought to attention before.

Q. And after you did hear about that concern, did you commission such an assessment?

A. No, no commission – no assessment has been commissioned.

Q. Are you investigating the possibility of commissioning such an assessment?

A. The requirement to do that has been discussed with our legals but I think we're getting into that other area you told me to stay away from.

Q. Okay. So it a fair summary though that at the present time, it's being considered whether or not such an assessment is legally required?

A. Not legally required. It's a fair assessment to say that we are considering whether to do further assessment around there. There's no more development plans. Everything that was going to be done, is done. And the land continues to be used as it always has for agriculture.

Q. But you are considering assessing whether or not the excavation required for the pipe created such concerns.

A. That has been a matter that's been discussed with our legal counsel --

Q. Yes.

A. Whether there was a duty to do that or not, I'm not sure that --

Q. Right, okay. You've reviewed this supplementary affidavit of Stephen Ogden.

THE COURT: Let me ask you, during the course of the excavation of the pipe and the headwall, did you run into any native burial sites?

A. None.

THE COURT: Thank you.

MR. ROSENTHAL: Q. If I may Your Honour supplementary to that, it's recognized, sir, it is not that people doing excavations may not recognize heritage materials and that's why an archeological assessment is required in order to prevent them damaging such materials, correct?

A. I don't know that. That's not an area that I practice in.

Q. But you know when you're commissioning things like this, like dumpsite 41 originally or this ditch, you know that --

A. When we did the excavation that's not our intent. That's not what we're looking for.

Q. That's not what you're looking for?

A. Yeah.

Q. And it's not reasonable to expect the workers who are easily excavating to be examining -- to see if this stone is really a stone or if it's a bone of some person buried. It's not their business.

A. Something obvious would obviously be picked up but no we didn't -- that's not -- that's not what they're trained to do is any archeological. If anything was obvious, obviously it would have been brought to our attention.

Q. Yes, if they saw an obvious full human body you would hope they would notice it and report it to someone.

A. Yes.

Q. Thank you. In reviewing the supplementary affidavit of Stephen Ogden, I should like to --

MR. GREEN: M-4, Your Honour.

MR. ROSENTHAL: M-4. Q. Bring to your attention Exhibit D which purports to be a letter from you on July 27th, 2009 addressed to Don Morgan.

A. Yes sir.

Q. Is that an accurate copy of that letter sir --

A. Yes

Q. – as far as you can tell? So you wrote to Mr. Morgan. Mr. Morgan you understood was a resident near the site who is concerned about these matters and has some archeological background and wrote to you about those concerns.

A. Yes. I don't know his background, but yes he's written to me with concerns.

Q. And he was concerned about the lack of assessment and his understanding of the area where this ditch for the pipe was built in particular.

A. Yeah, I can't recall what his specific letter said but yes.

Q. And so you respond to him, this correspondence is in response to your undated note to me regarding an archeological assessment of the county owned properties adjoining North Simcoe landfill site. Now the note was undated, but you received it within a couple of days of July 27th, right?

A. Recent correspondence.

Q. But you responded promptly to his letter.

A. Yes.

Q. Then you write, an archeological assessment of the landfill property has been conducted however the adjoining county owned property did not have an assessment as these lands are not part of the site development and the land use has essentially not changed. That's correct, that's what you wrote?

A. Yes sir.

Q. But that's what is being further considered by you and your colleagues.

A. That's right.

Q. Now sir, were you involved in the decision by Simcoe County to seek a court injunction against those protesting at the site of the dumpsite 41.

A. Again, I made a recommendation to senior management yes.

Q. And your recommendation was that such an injunction be sought?

A. Based on our legal recommendation yes.

Q. And to whom did you make that recommendation, sir?

A. To Mr. Mark Aitken, the CAO.

Q. Mr. Mark Aitken.

A. Yes. And I believe as well my direct manager Rick Newlove may have been involved but it was – it was more a decision that was brought to Mark as well.

Q. And was Mr. Guergis involved in that decision as far as you know?

A. I'm sure he was but not certainly when I was there.

Q. Not to your direct knowledge.

A. Yes.

Q. Was that matter brought before Simcoe County council?

A. No, not into open council. I believe that's one of the matters that will be addressed on the 25th.

Q. I see. Now, as you know Simcoe County council has launched a lawsuit against my client and another person, right?

A. Yes sir.

Q. Was the matter of whether or not to begin that lawsuit against those persons brought before Simcoe County council?

A. Not yet, that again will be on the 25th. Certainly it has been informed but they have not had an opportunity to discuss it as a council yet.

Q. I see. Were they informed before or after the suit was filed?

A. I can't recall that. It might be a question to ask Mr. Aitken instead.

Q. Thank you I shall. Were they informed in writing or in some other way?

A. I'm not certain. I would guess it was probably by an email.

MR. WAYLAND: I don't want the witness to guess.

OBJECTON MADE

Q. Sir, what did you think might have happened?

A. Well, the normal way to communicate with council when there is not a report in front of them, it would be some sort of email so that may have been how it happened, I can't recall.

Q. So it's quite common for staff to send an email to all the council members.

A. Not all staff certainly the CAO or the warden.

Q. The CAO Mr. Aitken or the warden Mr. Guergis would have the capacity to email all council members and if they thought it appropriate they would do so is your understanding?

A. That's my understanding.

Q. But you would not have that capacity.

A. Anyone can email, but no I wouldn't – I would think it out of the ordinary for me to send anything to all council, yes.

MR. ROSENTHAL: Thank you. Your indulgence, Your Honour. Thank you, Your Honour, those are my questions of this witness.

GLEN ROBERT KNOX: (SWORN)**CROSS-EXAMINATION BY MR. REID:**

Q. Good afternoon Mr. Knox. My name is Chris Reid and I'm going to be asking you some questions today on your two affidavits. Do you have a copy of them in front of you? It doesn't look like it. I wonder if your counsel could help you with that.

Well we're looking for that I apologize if I start rhyming anything your name is the same as the main character in my three year old son's favourite book Fox and Socks and there's a lot of Mr. Knox this and Mr. Knox that. He'll get a kick out of me meeting you.

Okay. I could spend a few minutes on the first one while you're looking if that's not distracting. Maybe it's distracting though. His Honour is asking to me proceed. I'm going to get right into then Mr. Knox. Looking at your first affidavit. That's the one sworn on July 22nd. You do say in the first couple of paragraphs that you are the county clerk of the County of Simcoe and that's understood. And I believe in your other affidavit you said that prior to that you were the clerk for Prince Edward County, is that correct?

A. That's correct sir.

Q. What was the year of that? Was that 2002 you moved from Prince Edward County to Simcoe?

A. Yes sir.

Q. What were a county clerk or a municipal clerk or somewhere prior to that?

A. Prior to --

Q. Prior to Prince Edward County.

A. Yes sir.

Q. And where was that?

A. The Village of Bayfield. I was clerk/treasurer.

Q. Okay. And prior to that?

A. Prior to that I was self-employed. And prior to that I was employed by the Township of North Monagan. And prior to that by the Regional Municipality of Peel and prior to that the Town of Oakville.

Q. Thank you. Now, I'm going to cut right to the chase here and ask you questions about a couple of municipal votes concerning this project. In volume II of your affidavit at Tab B. Do you have that in front of you?

A. Yes sir.

Q. We have a resolution number 2007-013 from January 23rd, 2007. I'm not going to read the whole thing, but I just want to refer to the last phrase, last half sentence in that resolution which says that staff be directed not to perform any onsite construction until direction is received from City council. And what is your understanding of that phrase?

A. That the funds were to remain in the 2007 budget but were not to be expended until direction was provided by county council.

Q. Okay. But that's not talking just about funding is it, doesn't it say more that, that they're not to perform any onsite construction until further direction is received from council?

A. Yes.

Q. Okay. If we could look at the next page. Again, just reading the last sentence. And the amount of 5.5 million dollars – I'm sorry do you have it in front of you? This is the resolution 2007-014.

A. Yes sir.

Q. Okay. And that the amount of 5.5 million dollars earmarked for the development of Site 41 continue to remain in the waste management reserve until such time as further direction is received from county council. So that's the one that speaks specifically to the money for construction, is that correct?

A. I believe so yes.

Q. Okay. Would it be fair to say that these resolutions suggest that county council wanted to proceed for lack of a better word, slowly one step at a time with this project?

A. I – I think it's fair to say that county council wished to provide further direction on the expen – on the expending of the funds, the construction and the expending of the funds.

Q. But not just the expenditure of the funds, the resolution 013 very clearly says staff are directed are not to perform any onsite construction until direction is received from county council, correct?

A. Yes.

Q. And has that direction been received?

A. In – subsequently I believe it was June of 2007 county council enacted a resolution to, and I believe the wording was preliminary construction and I believe that is --

Q. Tab D.

A. – Tab D.

Q. Yes, that's resolution number 2007-177. I'll read that last sentence that based on the discussion held at the May 21st– May 1st, sorry, May 1st 2007 waste management workshop, staff be directed to begin preliminary onsite construction of Site 41 in 2007.

So in answer to my question whether council ever gave further direction, you've referred us to this resolution which speaks to preliminary onsite construction. Which is meant by preliminary?

A. That would – the technical details of the construction are not in my area of expertise.

Q. So it certainly suggests that council at this point was not prepared to proceed with the completion of the site, wouldn't that be obvious from the use of the words 'preliminary'. It's obviously not directing them to complete it, is it?

A. For the June 26th resolution, yes I would agree.

Q. Okay. You referred us to this one; my question that you were answering was, whether there was any further direction from council?

A. I – I believe the adoption of the 2008 County of Simcoe budget provided the further direction to county staff on the project.

Q. Well, let's look at that. That's certainly the position that you and Mr. McCullough have taken in your affidavits. The only reference that I see to Site 41 construction is at page 196 of the budget. If there is anything else maybe you can draw our attention to that, sir. And counsel has referred me to page 189 as well.

Let's look first at page 189. This is under the heading budget highlights, the sub heading capital. Page 189, the page numbers are in the bottom right.

A. Yes, page 189.

Q. Yes. Okay. Under the subheading capital, it says, the major capital projects of 2008 are to create landfill cells at Site 41 and Site 11 and to roll out the curbside organics collection program. Okay. And looking at page 196. We see the line item, the budget item for that.

A. Yes, I believe it's at the top of the page number one.

Q. Okay. That speaks to cell and facilities construction. Construction to provide North Simcoe area with garbage disposal capacity. Now, is it your understanding that by allocating the money for that item in the budget that counsel had approved the completion of this facility, the Site 41 facility or is it simply another phase in the construction of it?

A. Again, I can't speak to the technical aspects of the construction. It's beyond the description of Site 41 cell and facilities construction.

Q. Let me ask you this; you would agree with me that on the plain wording of that item in the budget there's no mention there of actually operating a dump, is there? It speaks to construction, correct?

A. Construction to provide North Simcoe area with garbage disposal capacity.

Q. Right. Nothing about actually putting garbage in the facility, is there?

A. It doesn't mention that specifically.

Q. It doesn't mention that at all, does it?

NO VERBAL RESPONSE

Q. Is there anywhere else – can you refer us to anywhere else sir in the budget or in any other appendixes to your affidavits where council has approved any phase of this project?

A. I believe it is also included in the 2009 County of Simcoe budget.

Q. Yes. In this case, again, I'm sure counsel will point out if I've missing anything. But under the budget highlights I don't see a specific reference. That's on page 98. I don't see any specific reference to Site 41. The only place in this budget where I see a reference to Site 41 is in the line item on page 100, is that correct?

A. It is referred to as a line item on page 100, yes.

Q. Yes. And that again speaks to it says Site 41 cell and facilities construction.

A. Yes.

Q. Again, I don't see anything in there about actually operating Site 41, do you? Can you point us to anywhere in this budget where council approved the operation of a garbage dump at Site 41?

A. I – I personally cannot. There may be further details in the budget that operating expenses that Mr. McCullough would be more familiar with than I would be.

Q. Maybe during the break, if there's a break, during your cross-examination you'd have an opportunity to look through that again maybe your counsel could point that out. I've read through it, I read

this whole thing last thing both of them and I couldn't find any other reference to Site 41.

MR. WAYLAND: Your Honour....

OBJECTION MADE and witness excused

MR. REID: I guess we're left with the issue whether counsel and his witness do want to take a break to go through the material. It's my, as I said, my reading of the material that there is no other reference to Site 41 in the budgets or anywhere else in his materials other than what we've just referred to in questioning. I'm content to leave it at that.

MR. WAYLAND: If we're going to do that, I feel compelled to correct my friend. In the budget highlight, and I was going to save this for re-examination but there's no point having the witness spend 20 minutes going through the budget. Page 98, Your Honour of the budget highlight for 2009 second paragraph wages have increased due to the expansion of diversion programs. Addition of extra drivers to reduce haulage costs, additional staff to operate the North Simcoe landfill site all of which are offset by the reduction in staffing at the North Simcoe material etcetera. So there's the reference in the highlight to the operation of the landfill site the witness was going to have to be searching for.

THE COURT: The North Simcoe landfill site is –

MR. WAYLAND: Site 41.

MR. REID: Q. I hadn't got to the 2009 budget but I'll thank my friend for that reference. So there is apparently one – the word operation of the site apparently does appear once in the materials.

So let me ask you the question, based on what your counsel has just referred you to, is it your view that by adopting the 2009

budget with that sentence in it, that counsel that's sufficient to – in your view to approve the operation of a garbage dump at Site 41?

A. Yes sir, county council approval, yes.

Q. And yet if we look at the line item on page 100 of that budget would you turn to that page please sir? There it speaks of again Site 41 cell and facilities construction. You see where I'm looking?

A. Yes sir.

Q. There's no mention there of operation is there?

THE COURT: It's a capital budget, it's not an operating budget.

MR. REID: Yes, I understand.

THE COURT: I get that too. If you're going – that's a cheap point, it doesn't count. If you're going to deal with the operating issue, deal with it, don't take me to capital budget and expect me to find it in there something in there about operations because I'm not. That doesn't count.

MR. REID: Q. Mr. Knox, you've indicated in your affidavit that as long as you've worked as the county clerk for the County of Simcoe the council has operated this way that simply by approving the budget they've approved everything that has to be done in connection with the budget? I'm paraphrasing you. If you disagree with that characterization or that paragraphing please say so.

You've indicated in your answers to my first questions about your experience that you've worked for a number of municipalities including in the capacity of clerk.

NO VERBAL RESPONSE

Q. You have to answer yes rather than nodding.

A. Yes, sorry, yes.

Q. Is this way of proceeding to your knowledge is this unusual or is this typical of municipality councils?

A. I believe it's typical.

Q. They approve a budget and by doing that, everything else is approved, everything that has to be done in connection with the budget is approved?

A. I think certainly different municipalities may have different requirements in terms of contracts and so on that would come back to county council, but I believe the County of Simcoe purchasing bylaw addresses that issue.

Q. Are you usually present at council sessions when budgets are debated?

A. Yes sir.

Q. And do you recall in the debates on these budgets, the 2007, 2008 and 2009 budgets, do you recall that councilors were particularly interested in discussing the construction or operation of Site 41?

A. Certainly the 2007 budget there were the two resolutions are – excuse me the motion and the resolution that were presented that are noted in my affidavit I – I don't specifically remember detailed discussion in the 2008 or 2009 budget discussions regarding Site 41.

Q. Okay. This is obviously a controversial project, would you agree with that characterization?

A. Yes.

Q. Okay. Given the controversy around it, do you think it's unusual that the budgets of 2008, 2009 passed without any discussion of this project?

A. No. I don't – I don't find that unusual.

Q. Do you recall what the vote numbers were on these budgets, whether they were unanimous or divided?

A. I don't recall exactly and to be honest, I don't recall whether there were recorded votes on either of those – the '08 or '09 budgets.

Q. Okay. I recall reading in your material somewhere, it may have been in another affidavit that there was one vote, I think it was one of those resolutions of 2007 it was very close, 16 to 15. Do you recall that vote?

A. Yes sir.

Q. And which one was that?

A. That I believe was the June 2007 vote.

Q. Okay. That was the one that approved preliminary onsite construction, right?

A. Yes sir.

Q. Well, given the closeness of that vote and you've acknowledged that this project is controversial, I'm not sure I understand why you would say that you didn't find it at all surprising that when the budgets were debate for 2008, 2009 you said you did not find it surprising that there was no particular discussion of Site 41 especially if as you said councilors were by approving these budgets were approving not only the construction but were told the operation of this dump site as well. Apparently this just sailed through with no debate in both years and this doesn't surprise you?

A. I – I don't know as I would say no debate but I certainly do not recall lengthy debate on it. And – sorry --

Q. Go ahead.

A. If I may in response to the second part of your question, I believe you're wondering if I thought that was surprising and I don't particularly think it was. I think council had – council was well aware of what was in the budget.

Q. So you believe then that there was no particular debate because the councilors by this time had simply come around to

accepting the dumpsite 41 and there was no longer any controversy amongst them?

MR. WAYLAND: Your Honor....

OBJECTION MADE

Q. I'll move on to the next area.

THE COURT: Can I just ask a question myself? What's the process – is there a process at council for dividing a question? Can a councilor stand up and say I would like to have this motion divided into two pieces and voted on separately. Is that a process that exists at this municipality?

A. Yes sir.

THE COURT: So if somebody wanted to isolate out a budget item, they could do that by simply asking the question?

A. Yes sir.

THE COURT: And that doesn't require a vote, does it? It's just simply a request to the chair, I take it?

A. Yes sir.

THE COURT: Thank you.

MR. REID: Q. Along the same lines, sir, do you recall whether in the debates on the 2008 and 2009 budgets, whether any councilors requested additional information about dumpsite 41, additional to what is in the budgets?

A. I – I have no memory of an individual, a member of council asking that.

Q. Okay. It doesn't sound like there was a lot of debate about the site at either of those budget sessions was there?

A. I said I don't recall a lengthy debate for either the '09 – excuse me, the '08 or the '09 budgets on Site 41.

Q. Okay. Well, certainly let's come up to the present time then. Certainly over the last couple months, this issue has been front and centre in the local news, hasn't it, you understand that?

A. Yes sir.

Q. And your job includes, I'm sure briefing the councilors on many subjects including what might be on the agenda for an upcoming meeting, is that correct?

A. I wouldn't suggest that I brief the members of the council. My office certainly prepares the agendas.

Q. You prepare a draft agenda and then councilor decides whether to accept it or not, is that the way it works?

A. We prepare an agenda for committee meetings and one of the first items on that agenda is approval of the agenda. County council does not enact a resolution to approve its agenda.

Q. Okay. When was the last time the whole council met?

A. I believe it was June 30th, 2009.

Q. And was there discussion at that time of any issues around dumpsite 41?

A. Yes.

Q. And could you summarize what those discussions were about?

A. The – as I recall the comments were made regarding the amount of – the amount of press and interest that the site – the work on the site was generating and the need for the council to consider a communications plan to address the issue.

Q. Okay. And since then, and would you agree with, since this project has been even more notorious? It's in the news even more than it was before June 30th, is that fair?

A. Yes, I wouldn't – I would agree with that.

Q. And it would appear just from what's been on the media, on the radio and in the newspapers that councilors remain divided on this issue some for, and some against, is that fair?

A. I don't follow the media reports closely, but I would suspect that that's the case, yes.

Q. This has always been a controversial project and it remains so, is that fair?

A. Again, I can only speak to the time I have been here but certainly it has been controversial in the time that I have been here yes.

Q. Now, since June 30th when council last met, have you been involved in preparing any memos or briefings for councilors with respect to this project?

A. No I have not.

Q. We're told that the next council meeting is scheduled for August 25th, is that correct?

A. Yes sir.

Q. And have you prepared an agenda for that meeting yet?

A. No sir, I have not.

Q. Have you begun preparing an agenda for that meeting yet?

A. No.

Q. We were told by Mr. McCullough that it was his understanding that some issues around this project would be discussed at that meeting.

A. Yes I would agree with that. But the actual preparation of the agenda has not begun.

Q. Okay. If the agenda hasn't even – the preparation of the agenda hasn't even begun, how do we know that this issue, all the related issues will be discussed at that meeting on August 25th?

A. I guess – and I sir – I don't want to – want split hairs sir, but there's a process we go to prepare an agenda. You know, we take the documents, we plug them into the agenda template and that sort of thing. That has not begun. The agenda goes out next week so that process would happen at a later date.

In terms of items that are going to be on the agenda, we are certainly aware of some of the items that are going to be on the agenda.

Q. So okay, would it be fair to say that this simply common knowledge then even though an agenda hasn't been prepared everybody knows that this issue will be on the agenda along with some other matters, everybody knows will be on the agenda?

A. There was certainly – yeah, I think it's fair to say that people are certainly aware that issues around this will be on the agenda for the August 25th, council meeting.

Q. Do councilors request that items be on the agenda? I just want to get at how this – I'm a little confused still because it sounds like the preparation of the agenda is at a very preliminary stage in fact, earlier, you said you hadn't even begun to prepare an agenda and yet we're pretty sure now according to your evidence and Mr. McCullough's that the August 25th meeting will include dumpsite 41 on the agenda.

I'm just – maybe you can help me understand that a little bit more. How does this happen? Do councilors – you said councilors sometimes ask what about the warden, would he say like this, Mr. Knox this item has to be on the agenda, I'm getting hundreds of emails about it, how does it work?

A. I don't believe I said that councilors put items on the – on the agenda for council. Council, the template for county council agendas is spelled out in the county's procedure bylaw. For example, reports of the standing committee meetings that have met. So we had three standing committee meetings this week. The reports from those meetings will be on the agenda. We know that we are also aware that there will be

items regarding Site 41 on the agenda. Whether those items have actually been prepared at this point or not, I don't know.

Q. Okay. From your experience does council ever hold emergency meetings to deal with urgent matters?

A. Council has held special meetings.

Q. Okay. And what kind of notice would be required to hold a special meeting?

A. The – there is a provision in the procedure bylaw and I believe it's – it's just a day or two. I'm sorry, I don't remember the exact timeframe but --

Q. Okay. So a council meeting could if the circumstances warranted could be called on one or two days notice.

A. Yes sir.

Q. Okay. Has there been any discussion that you were aware of about holding a special meeting to discuss this issue, to discuss dumpsite 41 issue over the last two months?

A. Yes.

Q. There has been some discussion of holding a special meeting.

A. I have had some discussions with – with people yes.

Q. Okay. Who have you discussed that with?

A. I had a number of emails and conversation with Mr. Shribman (ph).

Q. Mr. Shribman is?

A. I believe is a lawyer who is acting on behalf of the council of – Council for Canadians.

Q. Okay.

A. And I also received one email from a member of council regarding holding of a special meeting of council.

Q. By that do you mean on councilor who was suggesting that a special meeting should be held?

A. Supporting it, yes.

Q. Yes, okay. Anyone else involved in these discussions?

A. Not that I recall.

Q. Okay. And based on these discussions have you made any decision as to whether or not there will be a special meeting? First of all, let me back up. Is it your decision whether to call that meeting or is it the warden who would decide whether to call a special meeting?

A. There are two provisions regarding the calling of a special meeting in the county's procedure bylaw. The first is that the warden may summon a special meeting or I am required to summon a special meeting if petitioned by a majority of the members of county council.

Q. Okay. Thank you, that's clear. Have you had any discussions with the warden, then about calling a special meeting to discuss this issue?

A. No sir.

Q. And since no special meeting has been called, I guess it's fair to say that the warden has not – that the warden hasn't called a special meeting that you're aware of, has he?

A. No.

Q. Okay. And I believe you just said that you wouldn't do that unless a majority of councilors asked for it, is that right?

MR. WAYLAND: I believe the witness' evidence was that he could not do that unless the majority of councilors asked for it, Your Honour.

MR. REID: Okay. Q. Is that your understanding too?

A. Yes, that's correct. As county clerk I do not have the authority to call a special meeting of county council.

Q. Okay. Would it within your authority to canvass council members to see if a majority wanted to hold a meeting?

A. Yes.

Q. So you could for example send an email out saying look this issue is front page every day to the news, a lot of public concern, may be a special meeting should be held. You could send an email out to all councilors with that and simply ask them their views on it, correct?

A. I – I suppose I could but I certainly wouldn't without instructions to do so.

Q. And who would instruct you to do that?

A. I would be looking for instructions from either the warden or the chief administrative officer.

Q. Mr. Aitken?

A. Yes.

Q. And have you had any discussions with Mr. Aitken about the possibility of holding a special meeting?

A. Other than making him aware of the – the information that Mr. Shribman has requested, no.

Q. Thank you. I would like to move onto one other area and ask you a few questions about sir. Sir, you are aware of an entity called the citizens monitoring committee, is that correct?

A. Yes sir, I'm aware of that organization.

Q. I suppose you refer to by acronym CMC.

A. Yes sir.

Q. And are you aware of the appeal by a member of the CMC, Mr. Stephen Ogden to the Information and Privacy Commission for access to what's called the calibrated MODFLOW?

A. Yes sir, I'm aware of that request.

Q. Okay. And have you read the order of the Information and Privacy Commissioner?

A. Yes sir.

Q. I don't – you don't have a copy of it in front of you, do you?

A. I don't believe I do sir.

Q. I'm wondering if your counsel could – it's attached as an exhibit to Mr. Ogden's July 28th affidavit at Tab D. I'm wondering if your counsel could refer you to that. I could stand with the witness as –

THE COURT: Go ahead.

MR. REID: As Mr. Rosenthal did earlier.

Q. I want to refer to page 17 of the Privacy Commissioner's order sir. And if you read that last paragraph and the quote below it.

A. "The appellant submits that if I might that the model and input data are under the County's control for the purposes of section 4(1) of the Act, I should order that these records be disclosed to him. He asserts that providing the county with the opportunity to claim any of the exemptions in the Act would cause quote great prejudice close quote to both him and the CMC. It will take months, if not years for the appellant to exercise its rights once an exemption is claimed. By the time the purpose has run its course, the information will be of little utility to the applicant – excuse me appellant and the CMC because time periods of comment and appeal of MOE permits related to the landfill may have expired.

Q. Thank you.

MR. WAYLAND: Sorry, what page was that?

MR. REID: 17, bottom of page 17 of the order.

Q. Now you read that before that. This isn't the first time you read it, is it Mr. Knox?

A. Correct.

Q. Would you agree with me that the Privacy Commissioner seems in this passage to be concerned about getting that calibrated MODFLOW into the hands of the CMC as soon as possible?

MR. WAYLAND: Your Honour, I object.

OBJECTION MADE

MR. REID: Q. I'll move on. Have you been involved in discussions within the county administration since this order about whether or not to release the calibrated MODFLOW, Mr. Knox?

A. I have been involved in discussions on the appeal, yes.

Q. Okay. And who else has been involved in those discussions with you?

A. Certainly I have worked with the county's deputy clerk and Mr. McCullough and legal counsel.

Q. What about councilors, have you been involved in discussions with them about how to respond to the order of the Privacy Commissioner?

A. No.

Q. To the best of your knowledge, have any of the senior officials with the county been involved in discussions with the elected representatives on this issue?

A. Not that I'm aware of.

Q. So as far as you know, the elected representatives, the county councilors have had no role in deciding how to respond to this order of the Privacy Commissioner?

A. That would – the – the county warden is the head for the purposes of the Municipal Freedom of Information and Protection of Privacy Act and to the best of my knowledge I can't think of an occasion where we went to – to county council.

Q. Okay. But you just mentioned the warden, I wasn't sure were you including him when you say we didn't go to council or are you saying he was involved in the discussions about how to respond to the Privacy Commissioner's order?

A. The warden as head certainly is the one that actually submits the letter – letters to the IPC, the decision letters and so on. The normal course of action would be that staff would research an issue and

prepare and in most cases would go to the head of council because they're signing the letter.

Q. Okay. Now, at some point, I don't have the date handy, but at some point the council, the Simcoe County council did discuss the issue, this was before, I say long before the Information and Privacy Commissioner became involved but at some point before that there had been a request from the CMC and the county council discussed it and decided not to – to disclose the information, right, the calibrated MODFLOW.

A. That's my understanding.

Q. Do you know approximately when that was?

A. I believe it was early 2007 but I stand to be corrected.

Q. Okay. Now, let me ask you this, and I understand what you've said about how council operates, but given that on one previous occasion they've seen fit to discuss this issue, debate it, make a decision and then since then, this issue has gone to a quasi judicial process through the Information and Privacy Commissioner. An order has been made and there's been a great deal of correspondence as you know since that order about how whether to respond to that order, given that, does it not seem appropriate to you that the council should be directly and immediately involved in deciding how to respond to the Information and Privacy Commissioner's order?

A. The – it's my understanding that this matter will be discussed by county council at its next meeting.

Q. But again, we don't have an agenda for that meeting yet, correct?

A. That's correct, sir.

Q. Are you telling us now it will be on the agenda?

A. It's my understanding, but again I – as you indicate the agenda hasn't been prepared so the material may not be available for council's next meeting.

Q. But just to be clear, you indicated that the agenda hadn't been prepared.

A. I'm anticipating it but as you know, I'm not preparing it.

Q. Is there is a chance that the meeting will happen and this item won't be on the agenda and staff will continue to deal with the issue without any direction from council?

A. Again, it depends on whether the material is available for county council's meeting on the 25th.

Q. Okay. Thank you. And is it also correct to assume then that there hasn't been any canvassing of councilors to see whether there should be an emergency or special meeting to discuss this issue before August 25th?

A. That's correct, there has not.

Q. And there's been no direction from the warden either to hold a special meeting on this issue, has there?

A. That's correct, sir.

Q. So it's quite possible then that this meeting on August 25th could go by without any discussion and city staff will continue to deal with this along with their counsel, legal counsel as they see fit without any direction from the elected representatives of the people. Is that correct?

A. The process of the county does not involve going back to council with – with every F.O.I. request.

Q. I understand that. But this just isn't just any F.O.I. request is it? This is an F.O.I. request where there's been an order made, a very clear order made in my submission and you and other senior staff of the county are responding to that order, right?

A. Yes sir.

Q. So this isn't just any information request, is it? This is a pretty significant one, would you agree?

A. It's certainly we are complying – we have complied with the – with the order of – of the Information and Privacy Commission.

Q. Well, that's a matter of interpretation. I know that's your view and your counsel's view that you've complied with it but we don't have the views of any of the elected representatives of the people on that, do we?

A. No. I certainly haven't got them, no.

Q. Okay. Now, I'm not going to go through the correspondence in detail Mr. Rosenthal did that with Mr. McCullough. But you're certainly aware, are you, Mr. Knox, of the correspondence between the Privacy Commissioner, the senior officials of the county and the firm Jagger Hims, you're aware of this correspondence, correct?

A. Yes sir.

Q. Okay. So I'll just ask you a few questions. Have you been involved yourself directly in any discussions with staff or senior officials at Jagger Hims about how to respond to this issue?

A. No sir.

Q. Okay. Who do you deal with on this issue?

A. The – this has been handled with legal counsel and as I indicated with the clerk, deputy clerk and Mr. McCullough.

Q. Okay. Then speaking of Mr. McCullough, I understand that he has the lead on the technical issues. I'm not going to ask you to answer technical questions about this issue but Mr. McCullough went beyond I would suggest simply talking about what has and hasn't been done. He said that he still feels that the position that he and yourself have taken in response to the Privacy Commissioner's order are reasonable. Would you accept that? Do you also feel that the position that you and Mr. McCullough have taken on this issue is reasonable?

A. Yes.

Q. So you continue to believe that there's really nothing more that the council, that Simcoe County has to do to respect the – or comply with the Privacy Commissioner's order?

A. Certainly we – as I recall the order, the Privacy Commissioner asked the county to request the material from Jagger Hims which I believe we did. We received the response from Jagger Hims, which was provided to the IPC.

Q. Okay. Thank you. You're paraphrasing what the order said; I'm just going to ask you a follow up to that. Would you agree with me that it would be a fair characterization to say that the Privacy Commissioner wants that calibrated MODFLOW in the hands of the CMC as soon as possible so that they can have their independent consultant have a look at it? Would you agree with me that that's a fair characterization of what the Privacy Commissioner is ordering?

A. In – in my opinion the Privacy Commissioner ordered us to take steps to request the model from Jagger Hims which the county did.

MR. WAYLAND: Your Honour, it's...

OBJECTION MADE

MR. REID: Q. Other than what we have in the court record, Mr. Knox, are you aware of any other requests being made to Jagger Hims to produce the calibrated MODFLOW to turn it over to the CMC for the review of their consultant?

A. No, I'm not.

Q. Okay. You haven't made any such requests, have you?

A. No sir.

Q. There is correspondence in the record, a letter from the legal counsel for the county suggesting that in fact it's too late, I think the words were used, too late to put this issue on the agenda for the August 25th council meeting. You're aware of that correspondence, are you?

A. Yes sir.

Q. Now, earlier we talked about what would be on the agenda for that meeting. This is what gives some people some concern, I would suggest as to whether or not council will discuss this issue on August 25th. It seems to be the view of yourself and Mr. McCullough. Let me ask you this, do you adopt that view too, that it's too late to put this issue on the agenda for the August 25th, meeting?

A. If the material can be prepared and to my office on – on time, it is not too late.

Q. And who would prepare the material?

A. It is my understanding that material will be coming from legal counsel.

Q. From legal counsel?

A. Yes.

Q. So it's up to them whether it gets on the agenda? When would you have to have it in order to put on the agenda for August 25th?

A. Our agenda is scheduled to go out on Tuesday the 18th.

Q. Next Tuesday?

A. Yes sir.

Q. So we'll know then whether it's going to be on the agenda for August 25th, or not.

A. Yes. I think that's fair. That's the day that we are scheduled to release the council agenda.

Q. If it's not on the draft agenda at that time, could councilors on August 25th say we're discussing it anyway? This is on the agenda now?

A. That would be up to the warden as presiding officer at the meeting.

Q. All right. Sorry, the warden and who?

A. As presiding officer.

Q. And now the warden, Mr. Guergis has already made his views. He's been in the media on a daily basis making his views known, hasn't he on this issue that he strongly supports the completion and operation of dump 41, right?

A. As I said I don't read all of the – all of the media material on that so I can't comment whether he's been in it every day.

Q. Thank you. Now, just a couple more questions about Jagger Hims, Mr. Knox, were you involved at all in the decision to originally to retain Jagger Hims to do the consulting work that they've been doing on this project?

A. No sir.

Q. Okay. Is it your understanding that they were retained not to promote the project but to do an independent assessment of the potential risk to ground water using the calibrated MODFLOW?

A. I – I can't answer that sir. I'm sorry; I don't know the answer to that question.

Q. Let me ask you a question then that has nothing to do with that. Let's assume for the sake of this question that that is their role, not to promote the project, the completion and operation of it, but to independently assess the risks to the ground water, if that – if that's correct, would it concern you or does it concern you that Jagger Hims is now owned by a company called Genivar which is in the landfill business?

A. No, I don't – I don't think it would – it would concern me.

Q. In your view that wouldn't compromise their impartiality at all?

A. Yeah, I'm not familiar with Genivar and so on, but the – in principle I – I don't have a problem with it.

Q. Are you familiar with the firm Henderson Padon?

A. No sir.

Q. Okay. I have only a few more questions, Your Honour. Would you be involved at all, sir, in any consultations with First Nations with respect to projects like this? Is that within your job description or is it one of your duties?

A. I have not been involved in any consultations with the First Nations during my time with the County of Simcoe.

Q. Now, if such consultations were being held, would you as the county clerk be made aware of those consultations at some point?

A. Not necessarily.

Q. Okay. Are you familiar with the Beausoleil First Nation, at least in a general way, are you sir?

A. In a general way.

Q. Do you have any knowledge with respect to rights that they claim in the area that would be affected by dumpsite 41?

A. I have absolutely no knowledge of that.

Q. Who would be responsible for that consultations on behalf of the county, sir, if any were done?

A. I guess it would depend on the nature of the project. If you're – if you're speaking specifically about landfill site matters I would suspect, although I don't know for sure that Mr. McCullough would have some involvement.

Q. Okay. What about with respect to archeological assessment of the site of the area that could be impacted by the site, would you have any knowledge about that?

A. No. I have no knowledge of that.

Q. Are you aware of whether any assessment has ever been done?

A. I don't know.

Q. And now with respect to the legal proceedings that we are now involved in today, were you involved in discussions on whether to initiate these proceedings?

A. No sir.

Q. How did you become – how did you first become aware of these injunction proceedings?

A. I believe it was regarding the preparation of my affidavit.

Q. Prior to that, you were not aware of these proceedings?

A. I – I do not believe so.

Q. So who would have made that decision to initiate legal action?

A. I believe the decision was made by more senior people than myself and I believe Mr. Aitken was involved and I believe legal counsel was consulted.

Q. Let me ask you this then, were any of the elected representatives of the people of Simcoe County involved in that decision as far as you know?

A. I – I don't know.

Q. So you couldn't say whether the warden Mr. Guergis was involved in those decisions at all?

A. As I said sir, I wasn't involved in the decision to initiate.

Q. And with respect to the arrests, let me ask you first of all, you're aware that again, it's been in the news, you said you don't pay a lot of attention to the news media. That's fine. Are you aware that, my understanding, ten people have been arrested over the last week or so in connection with protests at the dump site?

A. I'm not 100 percent sure the number but I am aware that there have been arrests, yes.

Q. And were you involved at all in any discussions around that issue, around the arrests of people

MR. WAYLAND: Your Honour, I object...

OBJECTION MADE

MR. REID: Q. This may also be beyond your area, Mr. Knox, but let me ask you, are you – your understanding is that currently of course there's no immediate plans to put garbage at dumpsite 41, so the garbage is now going to other landfills, correct?

A. That's my understanding, yes.

Q. And as far as you know, let me ask you this, do you have any information about how long those landfills will last before the county has to use an alternative site?

A. No sir.

MR. REID: Those are my questions. Thank you

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is a true and accurate transcription
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to the best of my skill and ability.

Cathy Knelsen
Certified Court Reporter

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