



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

VIA COURIER

February 12, 2010

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Dear Ms. Shody and Ms. Stevens:

**RE: Stay decision
Orders MO-2416 & MO-2449
Appeal MA07-365
Institution File Number: A17-5520-07**

This letter constitutes my decision with respect to the County of Simcoe's (the County's) request that I grant a full stay of Orders MO-2416 and MO-2449, pending the disposition of its judicial review application. For the reasons that follow, I have decided to grant a full stay of these two orders.

Background

On December 15, 2009, the County filed a judicial review application which asks, in part, that Orders MO-2416 and MO-2449 be quashed. On December 22, 2009, it filed a formal stay application with this office, asking that these two orders be stayed pending the resolution of the judicial review proceedings.

On December 30, 2009, I granted an interim stay of these orders and invited both the County and the appellant to provide representations to me as to whether a full stay should be granted. In my letter to the County, I indicated that I was prepared to treat its letter of December 22, 2009 as its submissions on this issue. I also asked the County to provide me with representations that address the requirements set out in this office's stay protocol.



In response, the County submitted further representations, dated January 14, 2010, in which it provides undertakings that are outlined in this office's stay protocol. In addition, in his representations, dated January 14, 2010, the appellant asks that a stay not be granted, or in the alternative, that specific conditions be attached to any stay that is granted.

I then sent the appellant's representations to the County and invited it to submit reply representations. In response, the County provided me with reply representations.

Analysis and findings

Requirements for a stay

In order to secure a stay of an order for disclosure pursuant to this office's stay protocol, counsel for the applicant (the County) must undertake (i) to perfect the application for judicial review within the time specified by the Rules of Civil Procedure, and (ii) to co-operate in efforts to expedite the proceedings, including the hearing of the application, should this office or any other party to the judicial review proceedings seek to have the matter expedited. The County's legal counsel provided these undertakings in her representations of January 14, 2010. Consequently, I find that this preliminary requirement has been met.

As outlined in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 35, all three of the following requirements must be met in order to grant a stay:

- (i) there are serious matters to be determined in the application;
- (ii) the applicant for judicial review will suffer irreparable harm if the stay is not granted; and
- (iii) the balance of convenience favours granting the stay.

(i) Serious matters to be determined

With respect to the first requirement for granting a stay, the County states that its judicial review application sets out a number of serious issues to be tried. The appellant's legal counsel does not provide submissions with respect to whether this specific requirement has been met, other than to point out that her firm has not been retained to provide comments on the merits of the issues raised by the County.

I have reviewed the County's judicial review application, which sets out the grounds for its application. I agree with the County that there are serious matters to be determined in its application. Consequently, I find that the County has met the first requirement for granting a stay.

(ii) Irreparable harm

With respect to the second requirement for granting a stay, the County submits that it will suffer irreparable harm if the stay is not granted because its judicial review application will be rendered moot before it is heard. It further submits that the failure to grant a stay of an order granting

access to information would result in the disclosure of the information, which would render any appeal or review nugatory.

To support its submission that irreparable harm would result if a stay is not granted, the County cites *O'Connor v. Nova Scotia (Deputy Minister of the Priorities & Planning Secretariat)* [2001] N.S.J. No. 90 (C.A.) and also refers to *Gaudet v. Ontario (Securities Commission)* 1990 CarswellOnt 702 (Div. Ct.), *Universal Settlements Inc. v. Ontario (Securities Commission)* 2003 CarswellOnt 924 (Div. Ct.) and *Reid v. Halifax Regional School Board* [2006] N.S.J. No. 101 (C.A.).

The appellant submits that the release of the Modflow information would not harm the County because this information was disclosed to the Ministry of the Environment (the Ministry) and is part of the public record. In its reply representations, the County characterizes the appellant's submission as "misleading" and submits that the Ministry neither requested nor received the Modflow model from Genivar.

In addition, the County submits that the appellant has not addressed whether the judicial review application will be rendered moot if a stay is not granted. It reiterates that if it is required to comply with the two orders before the hearing of the judicial review application, the "very core" of its application will be frustrated.

I have carefully considered the parties' representations on the second requirement for granting a stay. At the outset, I would emphasize that although both the County and the appellant suggest that compliance with Orders MO-2416 and MO-2449 would result in the disclosure of the records, neither order directed the County to disclose them to the appellant. The sole issue in Appeal MA07-365, which led to Orders MO-2416 and MO-2449, was whether the calibrated hydrogeological model and accompanying input data are in the custody or under the control of the County, for the purposes of section 4(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

Although both orders directed the County to issue an access decision to the appellant after receiving these records from Genivar, Order MO-2416 made it clear that the County has the right to consider whether any of the exemptions in sections 6 to 15 of the *Act* apply to records, and is also required to consider whether any mandatory exemption might apply. If the County decided to refuse disclosure of the records pursuant to one or more of the exemptions in the *Act*, the appellant would have the right to appeal that decision to this office. If the County decided to disclose the records to the appellant, Genivar would have the right to appeal that decision to this office if it believed that the mandatory third party exemption in section 10(1) of the *Act* applied to the records.

In short, in assessing whether the County will suffer irreparable harm if Orders MO-2416 and MO-2449 are not stayed, it is important to emphasize that these two orders did not direct the County to disclose the records to the appellant.

Nevertheless, I am satisfied that the County will suffer irreparable harm if these two orders are not stayed. The County's judicial review application asserts, for example, that this office acted

without jurisdiction, exceeded its jurisdiction, acted unreasonably and erred in law by ordering the County in Order MO-2449 to take "all steps, including legal proceedings if necessary" to obtain the records from Genivar. In my view, not granting a stay of both orders would render this and other parts of the County's judicial review application moot before it is even heard. In addition, the County, which is a publicly funded institution, would be required to incur additional and potentially unrecoverable financial costs to comply with two orders whose findings are being challenged on judicial review.

In short, I find that the County will suffer irreparable harm if a stay of the two orders is not granted. Consequently, I find that the County has met the second requirement for granting a stay.

(iii) Balance of convenience

With respect to the third requirement for granting a stay, the County submits that this requirement usually involves a determination of which party will suffer greater harm if a stay is not granted. It asserts that the appellant will suffer no harm if the Modflow information is not provided to him pending the County's judicial review application. In addition, it points out that there is no construction-related pressure regarding the timing for disclosure of the records, because in September 2009, County Council voted to cancel the construction of the proposed landfill on the site.

The County further submits that, in contrast to the appellant, who will suffer no harm if a stay is granted, the County will suffer irreparable harm "if compelled to attempt to force disclosure of the Modflow information before its judicial review application is heard." Consequently, it asserts that the balance of convenience favours the granting of a stay.

In his representations, the appellant does not specifically address whether the balance of convenience favours granting a stay of the two orders. However, he points out that despite the County's decision not to develop a landfill at the site, potential harm continues to exist because the Certificate of Approval allows the County to proceed to develop a landfill at the site, if County Council chooses to do so.

I have carefully considered the parties' representations. At the outset, I would reiterate that although the County asserts that it will suffer irreparable harm "if compelled to attempt to force disclosure of the Modflow information before its judicial review application is heard," neither order issued by this office requires the County to disclose the records to the appellant. Orders MO-2416 and MO-2449 only require the County to make a decision with respect to whether access will be granted once it has received the records from Genivar.

In assessing whether the balance of convenience favours the granting of a stay, I would note that the appellant could clearly suffer some harm if a stay is granted. If the County's judicial review application fails, there will have been a significant delay in compliance with the two orders. In my view, however, the harm that could be suffered by the appellant is outweighed by the irreparable harm the County will suffer if the two orders are not stayed. As noted above, not granting a stay will render the County's judicial review application moot before it is even heard.

In addition, the County, which is a publicly funded institution, would be required to incur additional and potentially unrecoverable financial costs to comply with two orders whose findings are being challenged on judicial review.

In short, I find that the balance of convenience favours the granting of a stay, pending the resolution of the County's judicial review application. Consequently, I find that the County has met the third requirement for granting a stay.

Conditions

The appellant submits that any stay decision issued by this office with respect to Orders MO-2416 and MO-2449 should include the following conditions:

1. The stay and any conditions be granted until the day of the hearing of the Judicial Review Application. The continuance of the stay and any conditions beyond the date of the hearing of the Judicial Review Application should be left to the Court that will consider the merits of the judicial review.
2. The County will co-operate with all parties involved to have the Judicial Review Application heard at the earliest available date.
3. The County and Council shall not in any way alter Council's September 2009 decision to not develop or construct a landfill at Site 41 until the hearing of the Judicial Review Application and the determination by the Court hearing the Judicial Review Application whether the stay and any conditions should be continued.
4. The County shall not undertake any activities related to development of Site 41 until the hearing of the Judicial Review Application and the determination by the Court hearing the Judicial Review Application whether the stay and any conditions should be continued.
5. The County shall not take any steps or undertake any activities related to the Certificate of Approval until the hearing of the Judicial Review Application and the determination by the Court hearing the Judicial Review Application whether the stay and any conditions should be continued.
6. The County shall not sell or dispose of Site 41 and/or transfer the Certificate of Approval until the hearing of the Judicial Review Application and the determination by the Court hearing the Judicial Review Application whether the stay and any conditions should be continued.

In its reply representations, the County submits that with respect to the first condition sought by the appellant, it is neither "economical nor necessary" to require a re-argument of the stay before the Divisional Court. With respect to the second condition sought by the appellant, the County states that it has already undertaken to have the judicial review application heard as expeditiously as possible. I agree with the County's submissions with respect to the first two conditions sought by the appellant and am not prepared to attach them to this stay decision.

The County further submits that the remainder of the conditions sought by the appellant are not relevant to the issue of the stay. I also agree with the County on this point. These proposed conditions concern matters that should be addressed in the political realm or in other legal forums. The issue of whether the landfill should or should not proceed, for example, was not before me in Appeal MA07-365, nor is it before the Court in the judicial review application. For these reasons, it would not be appropriate to attach such conditions to this stay decision.

Decision

I have decided to grant a full stay of Orders MO-2416 and MO-2449, pending the disposition of the County's judicial review application.

If you have any questions or wish to discuss this matter, please contact my legal counsel, David Goodis, at 416-326-8723.

Yours truly,



Colin Bhattacharjee
Adjudicator

cc: David Goodis