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

ORDER MO-2085-I

Appeal MA-050143-1

County of Simcoe

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The County of Simcoe (the County) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records related to a proposed Integrated Waste Management facility (waste management facility). The request states:

> I wish to access all information that speaks to the topic of the Integrated Waste Management facility which is being developed by [named company. A County official] has stated the original waste management facility being considered included the cities of Barrie and Orillia at a cost of 30 million dollars. However in the summer of 2004 [the official] advised members of the Community Monitoring Committee the city of Barrie had withdrawn its partnership role from this project and [named company] was redesigning the Facility for a smaller volume of waste at a cost of 20 million dollars. I'm especially interested in accessing any documents that speak to the issue of placing the proposed Facility in the area of Site 41 in Tiny Township.

By way of background, Site 41 is the location of a landfill operation, which is not the same as the proposed Integrated Waste Management facility mentioned in the request. A site for the Integrated Waste Management has not been selected, but the County has considered placing this facility in the area of Site 41, among other locations.

The County located a number of records that are responsive to the appellant's request about the proposed Integrated Waste Management facility. It charged a fee and granted access to a considerable amount of information, but denied access to a number of records based on the exemptions in sections 6(1)(b) (deliberations at council meetings held in the absence of the public) and 11(c) and (d) (economic interests of the institution). The requester, now the appellant, appealed the decision to deny access to these records and raised the possible application of the "public interest override" at section 16 of the *Act*. He also objected to paying a fee to gain access to the records that were disclosed.

A mediator was assigned by this office to assist the parties to resolve the issues in the appeal. During the mediation process, the County advised that it was relying on the following additional exemptions: sections 7(1) (advice and recommendations); 9(1)(a) (relations with governments); and 12 (solicitor-client privilege). The County provided the appellant and this office with a detailed index of the records. The index described each record and the exemption or exemptions claimed for it as well as explaining the refusal to disclose it. The new discretionary exemptions mentioned in the index were all raised by the County within the 35-day window for doing so, after notice of an appeal is given to an institution such as the County (see section 11 of this office's *Code of Procedure*).

During mediation, and after reviewing the index of records, the appellant questioned whether the County had conducted a reasonable search for records. Accordingly, the issue of reasonable search was added to the appeal.

Also during mediation, the appellant indicated that the question of fees was no longer an issue in the appeal.

As mediation did not resolve all of the issues, the appeal entered the adjudication stage. This office sent a Notice of Inquiry to the County outlining the facts and issues in the appeal, and invited the County to provide representations. The County responded with representations. In its representations, the County reconsidered its position and agreed to disclose many of the withheld records, either entirely, or with some information severed. Accordingly, the County disclosed Appendices B, C, H, J, N, S, T, and V in full as well as portions of Appendices A, D, E, L, O and U to the appellant. The County also raised section 12 for a further record, Appendix G. This raised the issue of whether it was entitled to do so, since it was outside the 35-day window identified in section 11 of the *Code of Procedure*. Representations were received on this issue, but Appendix G was disclosed to the appellant during the inquiry, as noted below, and therefore I will not address that issue in this order.

The County's initial representations also raised the possible application of section 52(3) to Appendices Q and R. This section excludes certain employment and labour-relations related records from the scope of the *Act*.

This office sent a Notice of Inquiry to the appellant along with a complete copy of the County's initial representations. The appellant responded with representations.

As well, this office notified two affected parties, one with respect to Appendices F and I, and the other with respect to Appendix I only. As a result of this correspondence, the County decided to disclose both of these appendices, as well as Appendix G (see above). Appendices F, G and I have now been disclosed to the appellant and are therefore no longer at issue. The County has now disclosed all records for which it claimed section 7(1), and this exemption is therefore no longer at issue in this appeal.

The appeal was subsequently transferred to me to complete the adjudication process. I asked for supplementary representations from the County concerning several issues. In each case, the appellant was invited to respond to those representations, and did so.

The appellant provided various additional pieces of correspondence during the inquiry. I have considered these in reaching my decision in this case. In a letter sent at the conclusion of mediation, the appellant refers to section 5(1) of the *Act*, which requires the head of an institution to disclose information "… if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public." Previous orders of this office have found that the duties and responsibilities set out in the identical version of this section found at section 11(1) of the provincial *Freedom of Information and Protection of Privacy Act* belong to the head alone (Orders 65, 187 and P-293). As a result, I do not have the power to make an order pursuant to section 5 of the *Act*.

RECORDS AT ISSUE:

The following table outlines the records that remain at issue and the basis upon which the County continues to deny access to them.

Appendix	General Description of Records	Exemptions Claimed by County	
A	County Officers item CO 05-023, dated April 26, 2005 – IWMF preferred siting	6(1)(b) 9(1)(a)	Partial release
D	Corporate Services Committee Item CS 03-103, dated April 9, 2003 – update on the IWMF	6(1)(b) 9(1)(a) 14(1) 14(2)(i)	Partial release
E	Corporate Services Committee Item CS 02-341, dated November 13, 2002 – update on the IWMF	6(1)(b) 9(1)(a) 11(c),(d)& (e)	Partial release
K	Letter, dated November 27, 2000 from the Director of Environmental Services to third party supplier	Non-responsive 10(1)(a) & (b) in the alternative	Withheld
L	Environmental Services Committee Report 00-040, dated September 26, 2000 – A siting report for an IWMF	6(1)(b) 9(1)(a) 11(c),(d)& (e)	Partial release
M	Draft Evaluation Notes concerning a Siting Report	10(1)(a) & (b) 11(c),(d)& (e)	Withheld
O	Faxed Notes to Russell Environmental Services, regarding a 'Siting Report' (no date)	11(c),(d)& (e)	Partial release
P	E-mail from Russell Environmental Services, regarding third party supplier proposal, dated June 26, 2000	10(1)(a) & (b)	Withheld
Q	Legal opinion from County's outside counsel, with attached internal memorandum	52(3) 12 in the alternative	Withheld
R	Memorandum from Human Resources Officer to Acting Director of Environmental Services, dated April 6, 2000, regarding legal opinion letter – IWMF	52(3) 12 in the alternative	Withheld
U	Draft IWMF Siting Report, dated January 2000	11(c),(d)& (e)	Partial release

DISCUSSION:

RESPONSIVENESS OF RECORDS

The County claims that Appendix K is non-responsive to the appellant's request. The County submits that this record should not have formed part of the responsive records as it does not reference proposed locations of the waste management facility.

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose of and spirit of the Act. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

The appellant's representations refer to this principle:

> I do appreciate the County's efforts in determining the *responsiveness of records* and in fairness to the County, I was contacted for clarification. Having said that, the Act does require that "ambiguity in the request should be resolved in the requester's favour".

The County's representations refer to the clarification provided by the appellant, stating that upon receipt of the request it:

> … contacted the requester to clarify the request and to determine whether he literally wished "all" information. As a result of the discussion the requester narrowed the scope of the request to "any documents that speak to the issue [of] this proposed waste management facility in the area of Site 41".

Previous orders have also established that in order to be responsive, a record must be "reasonably related" to the request [Order P-880]. I have reviewed Appendix K and confirm that it is a letter addressed to a named company from the County. While the letter does not contain information relating to the location of Site 41 or other potential sites for the waste management facility, it does discuss design issues related to the waste management facility.

I have some sympathy for the County in attempting to ascertain whether Appendix K is responsive. Nevertheless, in my view, Appendix K speaks to the issue of the proposed facility, irrespective of whether it is built in the area of Site 41 or somewhere else. I therefore find that it reasonably relates to the request. Resolving the ambiguity in the request in the appellant's favour, I find Appendix K to be responsive. Since the County states that if it is responsive, it is exempt under section 10(1), I will issue a Supplementary Notice of Inquiry seeking its input, and that of the named company, regarding the application of this exemption.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

The County claims that Appendices Q and R are excluded from the scope of the *Act* under section 52(3). The County submits:

> Both records address labour relations/staff issues with respect to the establishment of [a waste management facility] and as such fall outside of the *Act* pursuant to Section 52(3).

Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3)1, 2 or 3 applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The County's representations do not indicate which provision under section 52(3) it relies upon. Based on my review of the records, I have decided to analyse this issue under section 52(3)3.

For section 52(3)3 to apply, the institution must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Requirements 1 and 2

Given that Appendix R is a legal opinion responding to a consultation with the County's external solicitors (with an attached internal memorandum), I find that it was prepared on behalf of the County in relation to consultations, meeting requirements 1 and 2.

Appendix Q is a memorandum prepared by the County employee who received the legal opinion in Appendix R, and the memorandum was sent to another County employee with an interest in its subject matter. I therefore find that Appendix Q was prepared by the County in relation to communications, meeting requirements 1 and 2.

Requirement 3

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern". [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507]. "Labour relations" has a broader meaning than collective bargaining, and may extend to include individuals who are not directly employed by an institution (*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.]

Both Appendix Q (the legal opinion) and R (the memorandum) deal with matters involving staffing and labour relations issues at the proposed facility and the possible impact of a collective agreement to which the County is a party. I am not able to provide further detail in this regard without disclosing confidential information contained in the records. Nevertheless, it is clear from the contents of Appendices Q and R that the consultations and communications reflected in these records are about labour relations or employment-related matters in which the County has an interest, meeting requirement 3.

I find that Appendices Q and R are excluded from the scope of the *Act* under section 52(3)3. Accordingly, I will not address them further in this order. Also, because section 12 is claimed only for these records, I will not consider it further in this appeal.

CLOSED MEETING

The County claims the exemption in section 6(1)(b) applies to the withheld portions of Appendices A, D, E and L on the basis that the withheld information would reveal sites considered by the County for the waste management facility. Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

For this exemption to apply, the institution must satisfy each of the following requirements:

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

> 3. disclosure of the record would reveal the actual substance of the deliberations of the meeting
>
> [Orders M-64, M-102, MO-1248]

Under requirement 3,

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]
- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344]

Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

Requirements 1 and 2

The County submits that these records were considered at closed meetings of council and several committees, and that disclosure would, in effect, reveal the substance of the discussions at the closed meetings. The County also submits that it was authorized by statute to hold these closed meetings.

Based on the County's submissions and the records themselves, I am satisfied that Records A and D were considered at closed meetings of Council and the County's Corporate Services Committee on April 26, 2005 and April 9, 2003, respectively. The County relies on section 239(2) of the *Municipal Act, 2001* as the statutory basis for holding these meetings in the absence of the public. This section states:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board;

It is evident that this subject was discussed in the closed sessions, and accordingly, I find that requirements 1 and 2, outlined above, are met with respect to Appendices A and D.

Based on the County's submissions and the records themselves, I am also satisfied that Records E and L were considered at closed meetings of the County's Corporate Services Committee and by Council itself on November 13, 2002 and September 26, 2000, respectively. These closed sessions were held prior to the effective date of the *Municipal Act, 2001*. Section 55(5)(c) of the

predecessor *Municipal Act* contains the exact wording of section 239(2) of the *Municipal Act, 2001*.

Again, it is evident that the pending acquisition of land was discussed at these meetings, and accordingly, I find that requirements 1 and 2 are met with respect to Appendices A and D.

Requirement 3

With regard to requirement 3, the County submits that the release of the records would reveal the substance of the deliberations of the meetings. I have reviewed Appendices A, D, E and L. I find that, with the exception of the information withheld from Appendix D on the basis that it is personal information, the withheld portions refer to the location of properties which, if disclosed, would reveal the Committee's deliberations about proposed or pending acquisition of the sites themselves, or surrounding properties. This information therefore meets requirement 3 and, subject to the discussion of the exceptions to this exemption, below, it meets all three requirements and is exempt under section 6(1)(b).

The information withheld from Appendix D as personal information is only the name of an individual. The surrounding text in that record, which has been disclosed, is what reveals the substance of that part of the deliberations. Accordingly, I find that the individual's name does *not* meet requirement 3 and is therefore not exempt under section 6(1)(b).

Section 6(2) – Exceptions to the Exemptions

Section 6(2) of the *Act* sets out the exceptions to section 6(1)(b). The appellant claims section 6(2)(b) applies to records A, D, E and L. Section 6(2)(b) reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> (b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public

The appellant states:

> As I have previously noted, I understand that it may be necessary to close meetings from time to time, but not to simply avoid public scrutiny. The matter at hand has been discussed in several public meetings and has been widely reported in the local press.

I note that throughout the appeal process the appellant has provided documentary evidence supporting his claim that it is public knowledge that the area of Site 41 has been considered by the County for the waste management facility. The County's representations state:

> It should be noted that the Site 41 location (property adjacent to the landfill site which was purchased as part of the landfill compensation policy) was originally identified as a location for the [waste management facility] based on an initial Siting Report that was completed five years ago. However, for the past two years the County has dedicated its efforts on developing at a different location.

The issue I am to determine is whether the County is entitled to withhold information which would identify other locations for the waste management site that have also been considered by the County. The appellant has failed to establish that this information has been considered in a meeting open to the public. Accordingly, I am not satisfied that the exception in section 6(2)(b) applies to the portions of the records that I have found are otherwise exempt from disclosure under section 6(1)(b).

As I have found that the withheld portions of Appendices A, D, E and L (except the part of Appendix D claimed to be "personal information") are exempt under section 6(1)(b), I need not consider other exemptions claimed for that information. Moreover, as I have found all the information at issue for which the County relies on section 9 to be exempt under section 6(1)(b), I will not consider section 9 in this order.

PERSONAL INFORMATION/ PERSONAL PRIVACY

The County's representations state that it relies on section 14(1) and 14(2)(i) of the *Act* to protect the identity of the individual whose name is referenced in Appendix D. The County does not claim that other exemptions apply to this part of Appendix D.

The section 14(1) personal privacy exemption claimed by the County applies only to information that qualifies as "personal information" under section 2(1) of the *Act*.

"Personal information" is defined, in part, to mean recorded information about an identifiable individual, including, information relating to the personal opinions or views of the individual except where they relate to another individual [paragraph (e)] and the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

The individual named in Appendix D is a member of the Community Monitoring Committee for County Landfill Site 41, but the nature of the discussion in the record makes it clear that the references to this individual are in a personal, rather than official, capacity.

I therefore find that the references to this individual are recorded information about an identifiable individual, and disclosing the name would reveal other personal information about him (paragraph (h) of the definition).

Under section 14(1), the County submits that disclosure of the individual's name would identify the individual and may unfairly influence public opinion about the individual's intentions. The appellant does not comment on this issue in his representations.

Unfortunately, I do not have the benefit of this individual's views on disclosure. Accordingly, forthwith after issuing this order, this office will contact the appellant to determine whether he wishes to purse access to the personal information severed from Appendix D. If he does, I will provide a Supplementary Notice of Inquiry to the named individual to obtain his views concerning disclosure.

ECONOMIC AND OTHER INTERESTS

The County relies on sections 11(c), (d) and (e) of the *Act* to withhold portions of Appendix E, L, O and U, and Appendix M in its entirety. As I have already found that the withheld portions of Appendices E and L qualify for the exemption under section 6(1)(b), it is not necessary for me to determine whether sections 11(c), (d) and (e) also apply to them.

The County granted partial access to Appendices O and U. Appendix O is a fax from the County to an engineering company. The fax contains handwritten notes relating to Appendix U, which is a draft siting report. Appendix M was withheld in its entirety. The first three pages of Appendix M contain information that relates to a named company. The remaining information is the County's evaluation notes related to evaluation of potential sites for the proposed waste management facility.

Accordingly, I will determine whether sections 11(c), (d) and (e) of the *Act* apply to the withheld portions of Appendices O and U, and to Appendix M. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 11(d): information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution

The County submits that it does not currently own the properties identified in Appendices O and U and, therefore, negotiations would have to occur with the landowners. The County states:

> Premature disclosure of a potential land acquisition and the purpose of its use may impair the County's ability to compete at a fair market value.

With respect to Appendix M, the County submits that disclosure would reveal locations of all properties identified as candidate sites for the establishment of the waste management facility.

The appellant's representations state:

> I am at a loss to understand the *economic & other interests* argument presented by the County. Surely the County isn't suggesting that the surrounding property values will increase as a result of disclosure, thus "impairing the County's ability to compete at a fair market value." If past performance is any indicator, the establishment of a waste disposal facility will cause surrounding land values to drop. Furthermore, it is within the vendor's sole discretion to seek competitive bids or not. The fair market value is determined when an informed purchaser and an informed vendor reach an agreed upon price. In the event that a negotiated

> price cannot be reached, the lands in question may be subject to expropriation at appraised value, in any case.

During the adjudication process, I asked the County to confirm the status of the waste management facility project. The County provided a written response which indicated that:

- Though a site for the waste management facility has not been formally selected, Site 23 and Site 41 and surrounding lands are not currently being considered as candidate sites;

- An application for funding for the waste management facility has not been made;

- Though legal, consulting and some property costs have been budgeted, construction costs have not been budgeted; and

- The County continues negotiations with a named company they have described as the "preferred supplier" for the waste management facility.

The appellant was provided with a copy of the County's letter and given an opportunity to respond. The appellant's response questioned whether the County continues to consider Site 41 as a candidate site. In support of his position, the appellant forwarded a copy of a letter from the County to a municipality and states:

> How can the County have it both ways? The County argues to your office they are not considering a [Waste management facility] at Site 41 at this time, yet they argue to the Ontario Municipal Board they want the right to develop a [Waste management facility] on Site 41.

The appellant's response does not address the question of whether the information is exempt from disclosure under the *Act*. It is not my role to resolve the issue of whether the Site 41 area is or is not under consideration for the proposed waste management facility.

In the circumstances of this appeal, and in view of the surrounding circumstances and the contents of the records themselves, I am satisfied that disclosure of information that would identify the locations of potential sites being considered by the County for a waste management site, or lands that might need to be acquired, could reasonably be expected to be injurious to the County's financial interests. In making my decision, I rely on the County's evidence that a waste management facility site has not yet been selected. Accordingly, disclosure of potential sites, or related properties to be acquired, could reasonably be expected to injure the financial interests of the County in its future negotiations to acquire the eventually selected site and/or other lands that need to be acquired.

Accordingly, I find that section 11(d) applies to the portions of Appendices O, U and M which identify properties that might need to be acquired, or proposed sites other than Site 41, by name and/or location. This describes all of the withheld information in Appendix U, which is therefore exempt under section 11(d).

It also describes the information withheld from page 4 of Appendix O, which is exempt under section 11(d). The other withheld information in this appendix appears on page 2, which consists of selection criteria and their weighting, as well as the scores and ranking of Site 41 and other potential sites in that regard. Given that the site has not yet been selected and the possible sites other than Site 41 remain confidential, I am satisfied that disclosure of the information about the other sites, and the ranking (but not the actual scores) of Site 41, could reasonably be expected to be injurious to the County's financial position in the ultimate acquisition of property, and this information is therefore exempt under section 11(d). However, I am not persuaded by the County's representations or the content of the records that disclosing the selection criteria themselves, or their weighting, could reasonably be expected to be injurious to the County's financial interests, and I find that section 11(d) does not apply to that information. I also note that the selection criteria and weighting have already been disclosed in Appendix O.

Appendix M also contains information about Site 41 and other potential sites. For the same reasons given in relation to page 2 of Appendix O, the information about other potential sites is exempt under section 11(d), and the information about Site 41 is not. Appendix M also contains a great deal of information about the project generally that does not relate to a particular site, or reveal the locations of sites under consideration. The representations of the County, and the records themselves, do not provide "detailed and convincing" evidence to conclude that disclosure of this information could reasonably be expected to be injurious to the County's financial interests. I find that section 11(d) does not apply to it.

Sections 11(c) and (e)

Having reviewed the records, and the representations provided, I am also not persuaded that the disclosure of the information I have found not to be exempt under section 11(d) in Records O and M could reasonably be expected to prejudice the County's economic interests under section 11(c), or that it constitutes "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution" under section 11(e).

As the County has not claimed other exemptions for Appendix O, I will order disclosure of the parts I have found not to be exempt. I will provide a highlighted copy to the County with this order to show the portions that *are* exempt.

EXERCISE OF DISCRETION

The section 6 and 11 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The initial Notice of Inquiry this office sent to the County sought representations as to whether the County properly exercised its discretion. I did not receive representations from the County in response. I also sought the representations of the appellant who responded that the County erred in exercising its discretion by failing to take into account the following relevant considerations:

> 1. The purpose of the *Municipal Freedom of Information and Protection of Privacy Act*, and in particular the principles that
>
> a) Information should be available to the public; and
>
> b) Exemptions from the right of access should be limited and specific.
>
> It is critical that ratepayers of a municipality are able to access information regarding activities undertaken or proposed to be undertaken in their community by their municipal government. Deviations from this principle should be limited to specific cases where there is clear and reasonable justification for denying access to the public. In this case the County has failed to demonstrate that it considered the importance of access to information to its ratepayers.
>
> 2. Whether the requester has a sympathetic or compelling need to receive the information.
>
> In this case the requester is an individual who has a long history of involvement with the proposed landfill at Site 41. The requester has actively participated at

> every stage of the landfill approval process to date. The requester's need to receive information about a proposed [waste management facility] in Simcoe County is inextricably linked to the requester's ongoing leadership role in community participation regarding decisions about waste disposal in Simcoe County. The County has failed to demonstrate that it considered the importance of the appellant's request in relation to his role in community participation in waste disposal decisions.
>
> 3. Whether disclosure will increase public confidence in the operation of the institution.
>
> Disclosure … would increase public confidence in the County's operations. The County's decision to deny access to information about a proposed [waste management facility] in Simcoe County shrouds the issue in secrecy. The County failed to demonstrate that it considered the impact on the public's perception of its access to information in deciding to refuse access…

As the County has failed to provide evidence supporting a position that it considered relevant factors in exercising its discretion, there is no basis to conclude that the County properly exercised its discretion. Accordingly, I will order the County to re-exercise its discretion with respect to the information I have found to be exempt under sections 6(1)(b) and 11(d), and to provide representations in this regard to me, taking into account the representations of the appellant.

If I ultimately determine that the County properly exercised its discretion under section 11(d), I will then go on to determine whether the public interest override at section 16, relied on by the appellant, applies to the records I found exempt under section 11(d). I will not do so with respect to the information found to be exempt under section 6(1)(b) because section 16 does not apply to override that exemption.

THIRD PARTY INFORMATION

The County claims that sections 10(1)(a) and (b) apply to Appendices K, M and P. Sections 10(1)(a) and (b) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

The County's representations submit that though it is publicly known that it is negotiating a contract with a particular company for the establishment of the waste management facility, the content of the company's bid is confidential. I have reviewed Appendices K, M and P and it appears that portions of these records relate to the third party's proposal submitted to the County.

As I require the representations of the company and the County to determine whether section 10(1) applies I will issue a Notice of Inquiry to them and invite their representations as to whether the parts of Appendix M that are not exempt under section 11(c), (d) or (e), and Appendices K and P in their entirety, are exempt under section 10(1). If I uphold the application of this exemption to any of the records, I will also consider whether the "public interest override" at section 16 applies to that information.

SEARCH FOR RESPONSIVE RECORDS

Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records [Order P-624].

Institutions should adopt a liberal interpretation of a request in order to best serve the purpose or spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As noted previously, the County contacted the requester to clarify the request and to determine whether he literally wished "all" information. The requester indicated he seeks access to "any documents that speak to the issue [of] this proposed waste management facility in the area of Site 41".

The County submits that the search for responsive records was conducted by two individuals, its Environmental Services Manager and Contract and Collections Monitor. The County states that the two individuals conducted a search in the filing system located within the Environmental Services Division. The County's representations state:

> The files related to the development of the [waste management facility] were searched, and files relating to Site 41 that predated the [waste management facility] project were not searched. The County issued its decision to the requester based on the files that were found and an index of confidential records was later submitted to the IPC. Following the issuance of the Mediator's Report and notification by the Commission that the appellant had added the issue of whether the County had conducted a reasonable search, [the two individuals] again searched for responsive records held by the Corporation. One additional letter was found, specifically the May 20, 2003 letter from the [Environment Services Manager to another individual].

The County's representations also explain why it did not locate records referred to by the appellant, and in one case, explains that the record *was* located in its subsequent search.

The appellant states:

> On the issue of *reasonable search,* it may be helpful to know that Site 41 was originally rejected as a dumpsite on the basis that the site selection process could not be replicated. Given this history, it seems quite improbable that the County would embark on another site selection matter without the benefit of well documented criteria and copious records of the proceedings. I can state with certainty that additional records exist. I have contacted the other levels of government, municipal, provincial and federal and all have been able to provide me with records they share in common with the County of Simcoe. Records which the County of Simcoe failed to provide or list on their list of exclusions.

I have reviewed the representations of the parties and am satisfied that experienced employees of the County conducted a reasonable search to identify and locate responsive records. In making my decision, I took into account the County's explanations relating to records referred to by the appellant, the fact that it has now conducted two searches, and the lack of persuasive evidence adduced by the appellant to demonstrate a reasonable basis for concluding that further records exist. Accordingly, I find that the County has conducted a reasonable search for records as required by section 17 of the *Act*.

CONCLUSION

As noted in this order, I will issue a Supplementary Notice of Inquiry to the County and the company referred to in Appendices K, M and P, to obtain their positions on whether the withheld portions of these records are exempt under section 10(1). This office will also contact the

appellant to see whether he wishes to pursue access to the personal information severed from Appendix D, and if he does, I will issue a Supplementary Notice of Inquiry to obtain that individual's representations on disclosure of that information. Other actions to be taken after the issuance of this order are identified in the order provisions that follow.

In closing, I note that one of the letters received from the appellant during the inquiry states that the information previously disclosed to him is not being made available on the County's website. He asks if it is the function of this office to "make it truly accessible". This office encourages institutions to make information of public importance available by adopting a practice of "routine disclosure/active dissemination". The Commissioner published a paper on this subject in 1994, which is available on our website at www.ipc.on.ca. This is not an issue before me in the inquiry, and I mention this paper for the information of the appellant and the County.

ORDER:

1. I uphold the County's decision that Appendices Q and R are excluded from the scope of the *Act*.

2. I order the County to re-exercise its discretion under section 6(1)(b) and 11(d), taking into account the representations of the appellant, and to provide me with representations on this issue no later than **September 22, 2006**.

3. I order the County to disclose the portions of Appendix of O which are not exempt under section 11(c), (d) or (e), which are identified on a highlighted copy of this record that is being sent to the County with this order, not later than **September 29, 2006**.

4. The County has conducted a reasonable search for records responsive to the request and dismiss this aspect of the appeal.

5. The information contained in Appendix K is responsive to the appellant's request.

6. I remain seized of this appeal to deal with all outstanding issues including the third party information and personal privacy exemptions claimed by the County in addition to the County's exercise of discretion under sections 6(1)(b) and 11(d), and the possible application of the public interest override at section 16 of the *Act*.

Original signed by: September 8, 2006
John Higgins
Senior Adjudicator