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

ORDER MO-2179-F

Appeal MA-050143-1

County of Simcoe

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NATURE OF THE APPEAL:

The County of Simcoe (the County) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*Act*) for access to records related to a proposed Integrated Waste Management facility (waste management facility or IWMF). The request indicated that the requester was especially interested in accessing documents that spoke to the issue of placing the proposed facility in the area of Site 41 in Tiny Township, which is, in turn, part of the County. By way of background, Site 41 is the location of an existing landfill operation, which is not the same as the proposed waste management facility mentioned in the request. A site for the waste management facility has not been selected, but the County has considered placing it in the area of Site 41, among other locations. The County issued a Request for Proposals and selected a preferred third party supplier. The County is now in the process of negotiating a contract with this supplier (the affected party) for the establishment of the facility.

The County located a number of records that are responsive to the appellant's request about the proposed 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) (closed meeting) and 11(c), (d) and (e) (economic and other interests). 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*.

After obtaining representations from the parties, I issued Order MO-2085-I, which resolved most of the issues in the appeal. Some issues could not be resolved without hearing further from the parties. This final order disposes of the outstanding issues in this appeal, which are as follows:

- Did the County properly exercise its discretion under sections 6(1)(b) and 11(d) of the *Act*?

- Does the mandatory exemption at section 10(1) of the *Act* apply to the portions of Appendix M found not to be exempt under section 11(c), (d) or (e), and to Appendices K and P in their entirety?

- If the exercise of discretion under section 11(d) is upheld in this order, does the "public interest override" at section 16 apply to override that exemption? If the mandatory exemption at section 10(1) applies, does section 16 apply to override it? (Section 6(1)(b) is not part of this issue because it is not listed in section 16 as an exemption that can be overridden.)

Order MO-2085-I also identified the further issue of whether the mandatory exemption at section 14(1) of the *Act* (personal privacy) applies to an individual's name that was severed from Appendix D. Subsequent to the issuance of Order MO-2085-I, I wrote to this individual to inquire whether he was prepared to consent to the release of his information contained in Appendix D to the appellant. The affected individual consented to the release of his information and the County, in turn, provided the appellant with a copy of Appendix D that disclosed the individual's name. All non-exempt parts of Appendix D have therefore been disclosed and all issues concerning this record have been resolved. I will not refer to it again. The mandatory

exemption at section 14(1) is not claimed for any other information and as a result, it is also no longer an issue in this appeal.

In Order MO-2085-I, I ordered the County to provide this office with representations concerning its exercise of discretion under sections 6(1)(b) and 11(d) of the *Act*, which were duly provided by the County pursuant to the order. I subsequently sought the representations of the County and the affected party with respect to whether section 10(1) applies to the portions of Appendix M found not to be exempt under section 11(1)(c), (d) or (e), and Appendices K and P in their entirety, and concerning the potential application of section 16 of the *Act*. The County's representations on its exercise of discretion, and the County's and affected party's representations on the applicability of section 10(1), were then provided to the appellant, who was invited to make representations. The appellant's representations are specifically directed at section 16.

RECORDS:

Appendix K Letter dated November 27, 2000 from the Director of Environmental Services to the third party supplier;

Appendix M Draft Evaluation Notes concerning a Siting Report (not dated);

Appendix P E-mail from [named environmental firm] regarding the affected party's proposal, dated June 26, 2000.

DISCUSSION:

EXERCISE OF DISCRETION

An institution must exercise its discretion. 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)].

In Order MO-2085-I, I found that portions of Appendices A, D, E and L were exempt under section 6(1)(b) of the *Act*. I also found that section 11(d) applied to the portions of Appendices

O, U and M which identified properties or potential sites that the County may acquire to place the facility, other than Site 41, by name and/or location.

I went on to consider whether the County properly exercised its discretion under sections 6(1)(b) and 11(d). The appellant had submitted that the County failed to take into account the purpose of the *Act* and the importance of the information to ratepayers. The appellant also submitted that the County failed to consider his ongoing leadership role in the community's discussions about the proposed facility. Finally, the appellant submitted that disclosure of the information at issue would increase public confidence.

The County did not address this issue in its representations in the inquiry leading up to Order MO-2085-I. As a result, I found that the County had failed to establish that it considered relevant factors in exercising its discretion. Accordingly, I ordered the County to re-exercise its discretion with respect to the information I found to be exempt under sections 6(1)(b) and 11(d) of the *Act*.

As noted, the County provided representations on this issue in response to Order MO-2085-I. It submits that the disclosures it made during the mediation and the adjudication stage of this appeal demonstrate its consideration of the public interest and commitment to transparency. The County advises that, in making its decision to withhold portions of Appendices A, D, E and L under section 6(1)(b) and Appendices O, U and M under section 11(d) of the *Act*, it took into consideration the appellant's role as an active leader in his community and provided him as much information as possible without compromising the financial viability of the project. The appellant was provided with a copy of the County's representations concerning its exercise of discretion provided in response to Order MO-2085-I, but he did not make additional representations on this issue.

I have carefully reviewed the County's representations and considered its re-exercise of discretion and am now satisfied that the County considered relevant factors, and not irrelevant factors, in deciding not to disclose portions of Appendices A, D, E, L O, U and M that were withheld under sections 6(1)(b) and 11(d) of the *Act*.

THIRD PARTY INFORMATION

The County claims that sections 10(1)(a) and (b) apply to the parts of Appendix M not exempted under section 11(d), and to Appendices K and P in their entirety. The affected party raises the application of sections 10(1)(a), (b) and (c).

Sections 10(1)(a), (b) and (c) 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency

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 contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

For section 10(1) to apply, the institution and/or the affected party must satisfy each part of the following three-part test:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The County submits that that Appendices K, M and P contain scientific, technical, commercial and financial information. The affected party submits that these records contain technical, commercial, financial and trade secret information. The types of information listed in section 10(1) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

Appendix K is a letter from the County to the affected party which identifies possible opportunities to reduce the capital and/or operating costs of the facility.

The first three pages of Appendix M contain information which relates to the affected party's proposal. The remaining pages consist of: the County's evaluation criteria; notes linking those criteria to potential sites for the facility; and a number of pages of maps. In Order MO-2085-I, I found that section 11(d) applied to the portions of Appendix M that identified properties, by name and/or location that the County may need to acquire for the waste management facility. No information in pages 1-3 of this record meets these criteria, but in the remainder of the record, all evaluations of particular sites and all mapping information (except a generic map of the County) are exempt under section 11(d). I am considering whether the remaining information in this record is exempt under section 10(1).

Appendix P is an e-mail from an environmental firm to the County which identifies outstanding items concerning the affected party's bid. During the adjudication stage of this appeal, the County advised this office that this environmental firm was retained by the County as a consultant to develop the Request for Proposal.

Having conducted a detailed review of the information at issue, and given that the records all relate to a commercial proposal to construct a waste management facility, I am satisfied that the information under consideration in relation to section 10(1) is technical, commercial and/or financial information, meeting part 1 of the test. Although this is sufficient to dispose of part 1, I will review the other types of information claimed by the parties for the sake of a complete analysis that may be helpful in understanding the nature of the records.

As noted, in addition to financial, commercial and technical information, as discussed above, the County also claims that the records contain scientific information. The affected party makes no such submission. The County points to no particular information in this regard. Having reviewed the records, I am not satisfied that they "relate to the observation and testing of a specific hypothesis or conclusion" or were "undertaken by an expert in the field," and accordingly, I find that they do not contain scientific information.

The affected party claims that these records contain its trade secrets. In particular, it refers to the alternatives or exceptions to aspects of the RFP that are proposed by the affected party. These appear in table form in Appendix K. For its part, the County refers to the affected party's information as "proprietary" but does not refer specifically to trade secrets. The information referred to by the affected party in Appendix K consists of reactions, comments and suggestions by the affected party in relation to particular requirements of the RFP. I have reviewed these, as well as the other information at issue to determine whether they meet the definition of trade secrets set out above. In my view, they do not reveal a "formula, pattern, compilation, programme, method, technique, or process or information" and even if they did, this would not be "contained or embodied in a product, device or mechanism". I find that Appendices K, M and P do not contain trade secrets within the meaning of section 10(1).

However, as note above, Appendices K, M and P meet part 1 of the test because they contain technical, commercial and/or financial information.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by an affected party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by an affected party [Orders PO-2020, PO-2043].

As the records remaining at issue were not created nor directly supplied by the affected party, I must determine whether disclosure of the information at issue would reveal or permit the drawing of accurate inferences with respect to information the affected party supplied to the County. The County submits that Appendices K, M and P may disclose portions of the affected party's proposal. The representations of the affected party submit that the information relating to capital costs, curing areas and technical/operational exceptions constitute "informational assets" which were supplied to the County when it submitted its proposal.

Appendices K and M

The County's representations describe Appendix K as a letter that "outlines observations by [County] staff relative to items contained in the proposal …" As I have already mentioned, Appendix K also includes a table of alternatives or exceptions to RFP requirements. This table restates certain stipulated requirements contained in the RFP in one column. The second column describes the affected party's comments on how some of the stipulated requirements could be modified. The affected party also describes the second column of this table as containing "technical and operational exceptions".

The representations of the County describe Appendix M as a "compilation of information discussed at a staff planning meeting regarding the evaluation of potential sites related to the IWMF as well as a critique of the affected party supplier's proposal." In some instances, Appendices K and M contain similar information.

Much of the information contained in Appendix K and the first three pages of Appendix M refers to requirements set out in the RFP and identifies, in very general terms, items to be discussed between the County and the affected party in an attempt to reduce capital and operating costs. This information was not "supplied" as it is the County's assessment relating to future discussions. However, I am satisfied that dollar figures in Appendix M about capital costs calculated on the basis of two different numbers of "streams" (presumably a reference to the number of processing lines), and dollar figures calculated for various numbers of compost vessel(s), were "supplied" to the County within the meaning of section 17(1). I also find that the information referenced in Appendix K in the column of the table under the heading, "technical

and operational exceptions" was supplied to the County by the affected party. In addition, I find that the dollar figure in both Appendices K and M for spare parts was "supplied" by the affected party.

Regarding both these appendices, I note that although the affected party is the "preferred" supplier, these are not contractual documents and the exception for negotiated contracts referred to above does not apply. I will consider, below, whether the information that I have found was "supplied" meets the other component of part 2, namely, that it was supplied 'in confidence".

I find that the remaining information in Appendices K and M (with the exception of the portions of Appendix M that I found exempt under section 11(d) in Order MO-2085-I) was not "supplied" and does not meet part 2 of the test. As all three parts of the section 10(1) test must be met, this information is not exempt and, as no other exemptions have been claimed, it should be disclosed to the appellant.

Appendix P

The representations of the County describe Appendix P is "an e-mail critique of the proposal submitted by the [affected] party supplier identifying potential omissions." The affected party's representations state that this e-mail and its attachments contain information regarding the affected party's achievable diversion rate as well as details about the affected party's insurance arrangements. The e-mail also contains general comments on outstanding matters identified after reviewing the affected party's proposal, and areas where further information is required. It was prepared by a consulting firm retained by the County that is no longer in operation.

Most of the information in the e-mail represents the consultant's opinions and neither reveals nor permits the drawing of accurate inferences concerning information that was "supplied" by the affected party to the County. However, I find that the affected party's proposed diversion rate was "supplied" to the County within the meaning of section 10(1). I also find that the consultant's calculation of the probable diversion rate would permit accurate inferences to be drawn about information that was "supplied" and accordingly, this also qualifies as "supplied". The other information in the e-mail was generated by the County or the consultant and was not "supplied".

Attached to the e-mail is a chart entitled "Table A-1: Residential Waste Composition" which calculates a projected diversion percentage and compares it with the proposed diversion rate set out in the affected party's proposal and repeated in the e-mail itself. In calculating the projected diversion rate, the consultant took into account different types of waste stream components along with figures of actual, projected and accepted tonnage. Neither the County nor the affected party explains which of the columns in the table were "supplied" by the affected party. Based on my review of the record, I am satisfied that the "tonnes accepted" information derives from the affected party's proposal and was "supplied". I also find that the "diversion" column and the resulting projected diversion rate (also referenced above in the context of the e-mail) would permit the drawing of accurate inferences about the actual proposed diversion rate, and I am

therefore satisfied that it was "supplied" within the meaning of section 10(1). I am not satisfied that the remaining information in this chart was "supplied".

A further attachment to the e-mail is a chart prepared by the consultant that contains information about outstanding items arising from the affected party's proposal in one column and the status of the outstanding matter in the second column. In reporting the status of two insurance matters, the consultant identifies the affected party's chosen insurance supplier. Two other entries reveal the current limit of liability insurance held by the affected party. I am satisfied that these items were "supplied" to the County within the meaning of section 10(1). The remainder of this chart sets out requirements identified by the RFP or the consultant and neither reveals, nor permits the drawing of accurate inferences about, information that was "supplied" by the affected party to the County.

To summarize regarding Appendix P, the only portions which were "supplied" to the County by the affected party are the references to the proposed and projected diversion rates, the data in the columns entitled "Tonnes Accepted" and "Diversion" in Table A-1, the identity of the proposed insurer and the limits on the liability insurance held by the affected party. The remaining information does not meet the "supplied" component of part 2 and is therefore not exempt under section 10(1). As no other exemptions have been claimed for this information, it should be disclosed, with one exception.

The exception relates to the e-mail portion of Appendix P, and in particular to a sentence that reveals a possible property acquisition. I found this information to be exempt under section 11(d) where it appeared in other records. It would be absurd not to apply this exemption here. I find this information, consisting of one sentence in the e-mail, is exempt under section 11(d).

In confidence

Based on my "supplied" findings, the following is the information that must be considered to determine whether it was supplied "in confidence":

- capital cost information (dollar figures) in Appendix M regarding different options for the number of "streams" at the IWMF;
- capital cost information (dollar figures) in Appendix M regarding different options for the number of compost vessels at the IWMF;
- capital cost information (dollar figures) in Appendices K and M regarding supply of spare parts;
- the "technical and operational exceptions" information in column 2 of the table in Appendix K;
- the proposed and projected diversion rates in the e-mail in Appendix P, and all information in the "Tonnes Accepted" and "Diversion" columns in Table A-1 in Appendix P;
- The identity of the proposed insurer and information about the affected party's insurance limits in Appendix P.

In order to satisfy the "in confidence" component of part 2, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

The County and the affected party submit that disclosure of the information at issue in Appendices K, M, and P would reveal information the affected party supplied to the County in confidence as part of its proposal. In support of its position, the affected party states that its cover letter to the County, which was attached to its proposal, states:

> This proposal contains proprietary information that is sensitive to [the affected party's] competitive position. We request the County to make no additional copies of this proposal. If further copies are required, please contact [a named individual] in our office and they will be provided.
>
> In addition, if [the affected party corporation] is not awarded the contract we ask that all proposals provided be returned to [the affected party corporation] and any information pertaining to this proposal be treated as confidential.

As to whether the portions of the records at issue that meet the "supplied" component of part 2 of the section 10(1) test also meet the "in confidence" component, I am satisfied with the County's and affected party's submission that it supplied its proposal to the County under an explicit expectation of confidentiality. Under the circumstances, I find that the affected party's expectation of confidentiality was reasonable taking into account the manner the affected party submitted its proposal to the County.

Accordingly, I find that part 2 of the test has been met with respect to the information I found to have been supplied by the affected party to the County.

Part 3: harms

To meet this part of the test, the institution and/or the affected party 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.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a)

Section 10(1)(a) requires that disclosure could reasonably be expected to "… prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organizations". The County's representations state:

> The third party information contained within these Appendices forms part of ongoing high level negotiations with the preferred supplier of the Integrated Waste Management Facility, albeit negotiations are somewhat stalled because the site has not yet been selected. If this information is disclosed, the County's credibility would be harmed with the preferred supplier and potentially interfere with the ongoing negotiations process with respect to aspects of the proposal. The County would not be able to provide assurances that further documentation between the two parties would remain confidential, thus limiting the opportunities to seek reduction of capital and/or operating costs of the IWMF or improvements in operating efficiencies with the preferred supplier where they consider such information as proprietary. The preferred supplier is under no contractual obligation to continue with negotiations. The development of an IWMF is in the best interest of the entire County. This facility will extend the life of our landfill sites and will mitigate expenditures on future disposal capacity needs. The County and the preferred supplier have invested time and effort towards the potential future development of this facility which will meet the needs of the County's residents.

The affected party's representations state:

> The disclosure of this information could reasonably be expected to put [the affected party] at a significant disadvantage to its competitors in the marketplace for the design, construction and operation of waste management facilities. The

> information could come into the hands of [the affected party's] competitors who could appropriate [the affected party's] informational assets for their own benefit in bidding on similar projects in competition with [the affected party]… The disclosure of this information could also reasonably be expected to interfere with the continuing negotiations between [the affected party] and the County with respect to the IWMF as [the affected party] would lose confidence in the County's ability to maintain its informational assets in confidence.

The affected party's also submits that the information at issue "…impacts the proponent's costs" and represent "…key elements in the cost structure of companies that compete in the design/build/operate sector", and therefore disclosure could reasonably be expected to place it at a significant disadvantage to its competitors.

The appellant did not provide representations on this issue.

To reiterate, section 10(1)(a) requires that there be a reasonable expectation that disclosure could reasonably be expected to "… prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization." As noted above, detailed and convincing evidence of harm must be provided to establish a reasonable expectation of harm.

I find that the affected party's submission on prejudice to its competitive position fails to go beyond general statements of possible harm to describe the anticipated harm in sufficient detail to meet the "detailed and convincing" requirement. For example, the affected party's argument that disclosure of the information at issue "impacts the proponent's costs" lacks the requisite degree of specificity required to meet the part 3 harms test as the affected party has failed to connect how disclosure of the total estimated cost amounts referred in the records could reasonably be expected to affect its competitive position.

I am, however, persuaded by the evidence of the County and the affected party that disclosure of the information at issue could reasonably be expected to interfere significantly with their pending negotiations concerning the establishment of the waste management facility. In making my decision, I considered Order PO-1894, where former Assistant Commissioner Tom Mitchinson decided that section 17(1)(a) of the provincial *Act* (equivalent to section 10(1)(a) of the *Act*) applied to records concerning a pending sale of a property. One of the conditions of sale related to the zoning of property, which was the subject of an appeal to the Ontario Municipal Board (OMB). Though the hearing before the OMB appeal was complete at the time Order PO-1894 was issued, the decision of the OMB remained pending. In making his decision, Former Assistant Commissioner Mitchinson stated:

> Given the status of the sale and the possibility that the Ministry may have to enter into a new process should the current conditional Agreement of Purchase and Sale not close, in my view, disclosure of the records could reasonably be expected to

> result in significant prejudice to the competitive position of the third parties - both the prospective purchaser and the unsuccessful affected party bidders.

The circumstances of this appeal are similar to those in Order PO-1894, in that the records at issue relate to a pending commercial transaction. As previously noted, though the County has selected the affected party as the preferred supplier, it has not finalized its negotiations relating to the affected party's design and construction of a waste management facility in Simcoe County. The information remaining at issue in this appeal relates to communication between the County, its consultant and the affected party about outstanding matters concerning the affected party's proposal. The information at issue contained in the records date back to 2000, which highlights the length and protracted nature of the negotiations to date. I therefore accept County's and affected party's position that disclosure of the information remaining at issue could be reasonably expected to interfere significantly with their pending negotiations. In making my decision I took into account that the affected party is not under contractual obligation to continue negotiations with the County and concluded that it is reasonable to expect that disclosure of the information at issue could significantly interfere with negotiations as a result of the affected party limiting its participation or completely withdrawing from the negotiation process.

As I have found that the information that was supplied to the County in confidence qualifies for exemption under section 10(1)(a), it is not necessary for me to consider the application of sections 10(1)(b) and 10(1)(c).

PUBLIC INTEREST OVERRIDE

In Order MO-2085-I, I stated that if I ultimately determined that the County properly exercised its discretion under section 11(d), I would then go on to determine whether the public interest override at section 16, relied on by the appellant, 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. In this order, I have also determined that one sentence in Appendix P is exempt on this same basis. I will also determine whether the public interest override applies to the information I found exempt under section 10(1)(a) of the *Act*.

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, **10**, **11**, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphases added.]

Section 16 does not apply to records I have found to be exempt under sections 6(1)(b). For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

Is there a compelling public interest?

The County does not dispute there is a compelling interest in the disclosure of records relating to the development of a waste management facility. In fact, the County's representations state that it considered the public interest and made disclosures to address the public interest issues. The County's position, however, is that the remaining information at issue in this appeal, if disclosed would not inform citizens of the public interest issues arising from the development of the waste management facility as it relates to "technical, scientific and commercial process." Further, as previously mentioned in this order, the County is of the view that the development of a waste management facility is "in the best interest of the entire County" as it would extend the life of its landfill sites and mitigate expenditures on future disposal capacity needs. This argument raises the question of whether, if there is a compelling interest in disclosure, there is also a public interest in non-disclosure.

In its representations on section 16, the affected party submits:

> …the records in question relate primarily to the technical and commercial features of [the affected party's] proposal and do not raise issues of general public interest. For example, these records do not involve issues of public safety, government integrity or other broad public policy issues that might justify disclosure.

Throughout the appeal process, the appellant has asserted that there is considerable public interest concerning the use of Site 41 as a landfill site, which I accept. The appellant's representations state:

> The community is concerned that the location of a waste disposal site or any other waste management facility in the area of Site 41 poses potential risks to the surrounding environment, and in particular, to groundwater resources and drinking water quality.

> The substantial public concern surrounding the approval of Site 41 as a waste disposal site clearly extends to development of an IWMF in the community, particularly if it is developed within the Site 41 area.
>
> The records that the County has exempted from disclosure under sections 10(1) and 11(d) relate to the proposed design, construction, operation and siting of the IWMF. The records clearly shed light on the County's plans to use significant tax dollars for the development of an IWMF in Simcoe County. Accordingly, there is a clear relationship between the records and the *Act*'s central purpose of shedding light on the operations of government.
>
> The very nature of a waste disposal site or any other waste management facility being located in the area of Site 41 has roused and continues rouse a strong interest and attention from the Simcoe County community.
>
> The appellant submits that there is a compelling public interest in the disclosure of the information contained in the records because such information about the proposed design, construction, operation and siting of the IWMF would serve the purpose of informing the citizenry of the activities of the County in the development of a waste management facility in the community. Further, this information could be used by the concerned public as a means to express their opinion about the proposed IWMF and/or to make political choices.

I have carefully reviewed the representations provided to me on this issue. In my view, the fact that I have only exempted a limited amount of information from the records at issue is relevant, as is the kind of information exempted. This includes: possible sites under consideration for purchase other than Site 41 itself (exempt under section 11(d)); several specific capital cost calculations from the affected party's proposal; "technical and operating exceptions" to items in the RFP identified by the affected party; information about the accepted tonnage and the diversion rate proposed by the affected party and/or projected by the consultant; and information about the affected party's insurance arrangements.

In view of the nature of the limited information I have found to be exempt, I do not accept the appellant's position that its disclosure would serve the purpose of informing citizens about health, safety and environmental issues related to the proposed facility. This is particularly so given that no site has been chosen. As well, the necessary approvals process for the eventually selected site will provide an adequate forum for such concerns to be addressed.

With respect to the information exempted under section 11(d) about the location of potential sites for the facility, even if I found that there were such a public interest, I would find that it is outweighed by the public interest in non-disclosure in the circumstances of this appeal because there is an important public interest in having adequate waste management facilities and in having them constructed at a reasonable cost. Disclosing information about potential sites would

likely have a significant impact on that identified public interest. For this same reason, I would also not find that if there were a compelling public interest in disclosure, it would be outweighed by the purpose of section 11(d), which exists to protect the financial interests of institutions.

In support of its position that there is a compelling public interest that outweighs the purpose of the exemptions, the appellant referred me to Adjudicator Sherry Liang's decision in Order MO-1823. In Order MO-1823, Adjudicator Liang found that the public interest override applied to records relating to the design and construction of a head hog barn, which was faced with community opposition. Former Adjudicator Liang rejected the institution's claim that the records were exempt under section 10(1) but went on to consider the application of the public interest override in the event she was incorrect. In making her decision Adjudicator Liang stated:

> As expressed in previous cases, the purpose of the section 10(1) relates to the protection of the interests of private parties whose commercial activities lead to the sharing of their information with a government institution. Essentially, it protects these private interests from public scrutiny. In this case, it has been recognized that the proposed development engages more than just the private interests of the farm owners, the building contractor and the engineer, but extends to the "broader community" and requires the balancing of legitimate competing interests. In this context, I am satisfied that the compelling public interest in disclosure outweighs the purpose served by the section 10(1).

Although I am persuaded that there is an interest in the "broader community" about the construction and operation of waste management facilities, I am not satisfied that the situation identified in Order MO-1823 exists here. As discussed above, I am not satisfied that there is such a public interest in the particular information I have found to be exempt. On this basis, I have concluded that Order MO-1823 is distinguishable from the present situation. I also note that Order MO-1823 dealt with an identified proposal relating to a specific location. No such arrangement exists here. As well, the requested records in that case were "an application for a building permit, construction drawings, a Nutrient Management Plan and the Environmental Assessment which is now required by the Township's manure pits and manure management by-laws". The list of responsive records in Order MO-1823 makes it clear that they include detailed information about a defined proposal and assessments of its potential environmental impacts. There is no information of this nature in what I have found to be exempt.

Order MO-1823 also involved a situation where there had been previous litigation about the granting of a building permit to the facility. In quashing the building permit, the Court observed that some actions of the municipality in that case had been "unreasonable", an "improper exercise of discretion" and "wrong." As well, the Court was satisfied that the issue raised a broader public interest. No such surrounding circumstances exist here.

To summarize, I find that there is no compelling interest in disclosure of the information I have found to be exempt under sections 11(d) and 10(1). I find further that if there were such an interest in the information about potential locations I have exempted under section 11(d), it

would yield to the public interest in non-disclosure, and the compelling public interest in disclosure would also not outweigh the purpose of section 11(d).

ORDER:

1. I find that the County properly exercised its discretion its decision to withhold portions of Appendices A, D, E, L, O, U and M under sections 6(1)(b) and 11(d) of the *Act*.

2. I order the County to disclose to the appellant the portions of Appendices K, M and P remaining at issue which I have not found exempt under section 10(1) or 11(d) of the *Act*. The County is to disclose this information on or before **May 7, 2007** but not before **May 1, 2007**. For the sake of clarity, I have highlighted the information in these records that is exempt on copies that I will provide to the County with this order. I uphold the County's decision not to disclose this information.

3. I find that the public interest override found at section 16 of the *Act* does not apply to the portions of records I found exempt under sections 10(1)(a) and 11(d) of the *Act*.

4. In order to verify compliance with this order, I reserve the right to require a copy of the information disclosed by the County pursuant to order provision 2.

Original signed by: March 29, 2007
John Higgins
Senior Adjudicator