



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER MO-2449

Appeal MA07-365

County of Simcoe



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NATURE OF THE APPEAL:

The purpose of the following order is to address the County of Simcoe's failure to comply with Order Provision 2 of Order MO-2416, which I issued on May 13, 2009. This lack of compliance has resulted from the refusal of the County's external engineering consultant, Jagger Hims Limited, to comply with the County's written direction that Jagger Hims provide the County with the records responsive to an access request filed by the appellant under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

By way of background, the County is currently developing a new landfill site, known as "Site 41," which is located in Tiny Township. The proposed site, which has been approved by the Ministry of the Environment (the Ministry), is facing vigorous opposition from residents in the surrounding communities, who are concerned that leachate will contaminate the groundwater that lies beneath the site. In particular, they wish to scrutinize a hydrogeological model and input data prepared by Jagger Hims which simulates groundwater flow in the proposed site.

To comply with the requirements of the Ministry's Provisional Certificate of Approval (PCA) for Site 41, particularly conditions 9, 10.1(c) and 10.1(d), the County retained Jagger Hims to conduct a "geotechnical evaluation" and "supplemental hydrogeological investigation" of the proposed landfill site. Jagger Hims used a software program called "Modflow" to construct and run a hydrogeological model. The results or output were incorporated into a report, "County of Simcoe Landfill 41, Supplemental Hydrogeological and Geotechnical Investigation," dated January, 2003 (the "supplemental report") that Jagger Hims submitted to the County.

"Modflow" is open-source software that was developed by the U.S. Geological Survey (USGS), which is a science agency within the U.S. Department of the Interior. On its website, the USGS states that its software is "to be used in the public interest and the advancement of science. You may, without any fee or cost, use, copy, modify, or distribute this software." Modified commercial versions of the Modflow software are also available for purchase from private companies.

The County has posted a factsheet on its website ["Modflow Model – North Simcoe Landfill (Site 41)"] that states, in part:

MODFLOW ... is used to simulate groundwater flow systems and is considered to be the gold standard in its field. The County's hydrogeological consultants, Jagger Hims Limited, used a version of this software to construct a calibrated model for the area of the North Simcoe Landfill to simulate the way in which water moves through the area's soils and to predict how the water movement may change with the operation of the landfill site.

The appellant is seeking access under the *Act* to the calibrated hydrogeological model and accompanying input data (i.e., the Modflow model and data) that were prepared by Jagger Hims. He is an alternate member of the Community Monitoring Committee (CMC), which was established in accordance with condition 24.1 of the PCA for Site 41. The mandate of the CMC is to "serve as a focal point for the collection, review and exchange of information relevant to both County and local concerns in connection with the landfill site."

Section 4(1) of the *Act* provides the public with a right of access to a record that is “in the custody or under the control of an institution, subject to the exceptions in paragraphs (a) and (b). In Order MO-2416, I found that the model and input data held by Jagger Hims are under the County’s “control,” for the purposes of section 4(1) of the *Act*. Consequently, I issued the following order provisions:

1. I order the County to issue a written direction to Jagger Hims to provide the County with the records responsive to the appellant’s request. The County’s written direction should be issued no later than **June 17, 2009** but no earlier than **June 12, 2009**. It should require that the records be delivered to the County no later than **June 26, 2009**.
2. I order the County to issue an access decision to the appellant upon receipt of the records in accordance with Part I of the *Act*, treating the date of receipt of the records as the date of the request.
3. I remain seized of any compliance issues that may arise from this order and any new appeal that the appellant may file with respect to the access decision that the County is required to issue under Order Provision 2.

In response, the County issued a written direction to Jagger Hims, dated June 15, 2009 that instructed the firm to provide the County with the records at issue no later than June 26, 2009. In response, Jagger Hims sent a letter to the County, dated June 26, 2009, in which it refuses to provide the County with the records.

As noted above, Order Provision 3 of Order MO-2416 states that, “I remain seized of any compliance issues that may arise from this order” Jagger Hims’ refusal to provide the County with the records has created an unacceptable compliance issue. In particular, it prevents the County from complying with Order Provision 2, which requires the County to issue an access decision to the appellant upon receipt of the records in accordance with Part I of the *Act*.

Consequently, I decided to continue my inquiry into Appeal MA07-365 as a result of Jagger Hims’ refusal to comply with the County’s written direction that Jagger Hims provide it with the records responsive to the appellant’s request. The continuation of this inquiry relates solely to the issue of compliance with Order MO-2416.

I started by sending a letter to the County which stated, in part:

... I have decided to continue my inquiry into Appeal MA07-365 for the purpose of determining whether I should issue a further order to address the County’s failure to comply with Order Provision 2. The only way that the County can comply with this order provision is if Jagger Hims first provides the County with the records at issue. Consequently, I am inviting the County to provide representations to me on the following three issues:

1. What is the County's position with respect to Jagger Hims' refusal to comply with the County's written direction that the firm provide the County with the calibrated hydrogeological model and accompanying input data?
2. Is the County able to take additional actions, including legal proceedings if necessary, to encourage and/or compel Jagger Hims to provide the County with these records?

In responding to this question, please consider commenting on the application of the reasoning in Order MO-1251 to this appeal, and in particular, the following passage from B.M. McLachlin et al., *The Canadian Law of Architecture and Engineering*, cited in that order:

... a client who decides to proceed with a project for which an architect or engineer has prepared designs, expressly or by implication appoints the architect or engineer as his or her agent for various purposes... The documents the architect or engineer receives or creates in his or her role as agent for the client are owned by the client.

3. If the County is able to take additional actions to encourage or compel Jagger Hims to provide the County with these records, please specify what actions the County would be willing to take voluntarily or if ordered by this office.

In response, the County provided answers to these three questions in representations that it submitted to this office. I then provided both the appellant and Jagger Hims with a complete copy of the County's representations and invited them to respond. I received representations from the appellant and a one-page response from Genivar, a Montreal-based engineering company which acquired Jagger Hims in May 2009.

Summary of the parties' representations

The County's representations

At the outset of its representations, the County cautions that its submissions reflect the advice of its staff and legal counsel and not County Council.

The County provided the following responses to the issues set out above:

Issue #1: The County's position

The County states that it has no particular "position" with respect to Jagger Hims' refusal to comply with the County's written direction that the firm provide it with the calibrated hydrogeological model and input data. It submits that these records were not part of the "deliverables" under the County's contract with Jagger Hims, nor is it part of the "custom in the trade" that such computer models are delivered to the client.

Issue #2: Legal action

The County submits that it is not aware of any basis upon which it could take legal action against Jagger Hims to obtain the records. It further submits that the quote from B.M. McLachlin et al., in *The Canadian Law of Architecture and Engineering*, refers to the "product" that Jagger Hims was contracted to provide to the County, which is the supplemental report, not the hydrogeological model and input data. It asserts that it does not have any legal basis for obtaining these latter records from Jagger Hims:

... to extend the principle to maintain that the details of [Jagger Hims'] own computer program also belongs to us we feel is beyond our legal rights under the contract that we have with the engineering firm. We feel that we would lose any legal proceedings taken against Jagger Hims. This is particularly so since, as we set out above, we have been advised that the position taken by Jagger Hims reflects the custom in the trade with respect to engineers creating this kind of material.

Issue #3: Additional action

The County further states it is not willing to take any additional actions to obtain the hydrogeological model and input data from Jagger Hims:

We are somewhat mystified by the "additional actions" that you feel we might be able to take "to encourage or compel" the engineer to provide the computer model. We can only imagine that what you are referring to is some form of threat to cancel the contract or seek other consultants. At best, we think that this would be very damaging from a commercial point of view and endanger our relationship with other consultants. At the worst, this appears to be some form of blackmail that could leave us open to proceedings brought by Jagger Hims.

Other issues

In its representations, the County also states that it wishes to "point out an important fact which does not appear to have been made known to your office." It states that the Ministry set up three days of workshops in the fall of 2008 in which Jagger Hims provided demonstrations of the hydrogeological model to members of the CMC, including the appellant. This included

reviewing different “scenarios” that the CMC’s hydrogeologist proposed be run on the model. The County further states that it spent more than \$100,000 to make Jagger Hims’ computer modelling experts available for this process.

The County submits that the CMC’s own hydrogeologist was satisfied with the outcome:

On September 28, 2008, Mr. [Kerry] Rowe wrote a letter to the Ministry in which he stated:

“In summary, the MODFLOW model appears to have been well constructed and for the cases examined in the Supplemental Hydrogeological Report and the additional scenarios run at my request, the predicted average water levels in the confined aquifer beneath the area of the site approved for landfilling are high enough to provide inward gradients with an operating leachate collection system.”

The appellant’s representations

The appellant states that he is a member of the CMC, which was established under condition 24.1 of the Ministry’s PCA for Site 41. He submits that he has requested access to the calibrated hydrogeological model and input data to enable the CMC to execute its statutory mandate.

The appellant provided the following responses to the issues set out above:

Issue #1: The County’s position

The appellant submits that the County’s response to this issue amounts to an attempt to re-argue whether the hydrogeological model and input data are within the County’s “control” for the purposes of section 4(1) of the *Act*. It asserts that given that the County has not challenged Order MO-2416, it should “take every step to encourage Jagger Hims to enable the County to comply with the Order.”

Issue #2: Legal action

The appellant also challenges the County’s statement that it cannot take legal action against Jagger Hims because the model is “beyond our legal rights under the contract that we have with the engineering firm.” He states that the County did not provide any evidence of a contract with Jagger Hims during the initial inquiry that led to Order MO-2416, but now claims that a contract exists. In such circumstances, he submits that this office should not give any weight to the County’s arguments without seeing the “purported contract” and must conclude that the common law applies.

The appellant further submits that as a matter of common law, the principles in Order MO-1251 (including the quote from B.M. McLachlin et al., in *The Canadian Law of Architecture and Engineering*) would apply:

[T]he County is a client of Jagger Hims, an environmental consulting engineering firm. Jagger Hims, as the environmental consulting engineer and agent, generated input data and the calibrated model as part of their provision of services for the County. The information gathered and interpreted by Jagger Hims (using the calibrated model) was then used by the County to inform decisions to proceed with the landfill project. As an agent of the County, Jagger Hims has the duty to provide the County with all the documents relating to the services provided by Jagger Hims. All documents received or created by Jagger Hims in their work for the County are owned by the County.

The appellant also states the County could also seek the permission of the Attorney General to prosecute Jagger Hims under section 48(1)(f) of the *Act* for failing to comply with Order MO-2416.

Issue #3: Additional action

In terms of other actions that the County could take to encourage or compel Jagger Hims to provide the records, the appellant states that the County should consider reminding Jagger Hims of the position it took in its letter to the County's director of environmental services, dated June 28, 2007:

In this letter, Jagger Hims states the County should ensure the CMC obtains an experienced modeler who could adequately review the calibrated model for the CMC. There is no claim to any proprietary rights, but rather a concern that a proper expert is hired to review the calibrated model. Alternatively, the County could simply seek to purchase a copy of the calibrated model.

In addition, the appellant rebuts the County's assertion that taking certain actions against Jagger Hims could be construed as "blackmail":

Choosing not to continue to hire Jagger Hims to provide engineering services in the future is not an illegal or even illogical decision. Jagger Hims is failing to deliver a product that was paid for using taxpayer funds, is owned by the County, and is required for the County to comply with an Order of the IPC. Choosing to no longer engage Jagger Hims' services would be a logical business decision. The lack of a contract between the County and Jagger Hims removes the potential for a legal suit brought by Jagger Hims for breach of contract.

Other issues

The appellant also challenges the County's assertion that he was provided with access to the hydrogeological model and input data during the three days of workshops facilitated by the Ministry:

The facilitation described by the County does not meet the IPC Order MO-2416. The facilitation was a three-day process, which comprised only one day of a demonstration of a model. Further, the model demonstrated was not the same model used by Jagger Hims in constructing their reports. Input data was entered into a different version of the program. This change was not revealed until after the facilitation meetings had begun. The original calibrated model, the subject of the Order, was not presented at the facilitation. The CMC's expert, Mr. Rowe, was not given time to prepare for the facilitation, nor was he allowed to actually see and use the model.

The appellant further submits that the quote ascribed to Mr. Rowe by the County has been taken "out of context" and is "misleading":

Mr. Rowe's letter addresses only the confined aquifer. Mr. Rowe's letter states that the ability to compare changes in the model with the Jagger Hims report at the facilitation was challenging because of the quick pace and lack of data provided to Mr. Rowe. Mr. Rowe states he "likely missed things". Further, whether or not Mr. Rowe was satisfied by his very brief glimpse at a model not at issue in this proceeding is irrelevant. The County has been ordered by the IPC to obtain the calibrated model from Jagger Hims. Further proclamations by the County, misquoted or otherwise, will not alter the Order. The IPC has made the Order and the County must now comply.

Genivar's response

Although I sent Jagger Hims a complete copy of the County's representations and invited it to respond, the firm chose not to submit any representations. Instead, the Chief Legal Counsel for Genivar, which acquired Jagger Hims in May 2009, sent a one-page letter to this office, which states the following:

As you know, Jagger Hims' position has already been made clear to its client on more than one occasion.

We respect and recognize the importance of the Information and Privacy Commissioner Office and its role. However, we respectfully submit that the institution may be exceeding its jurisdiction by forcing an independent third party into this debate.

As a direct result of your position voiced strongly, namely in your initial submissions, our professionals are now the target of complaints.

In light of this development, I would ask that all further correspondence be sent exclusively to my attention.

Furthermore, I will be reviewing the impact of your actions to determine what if any actions should be taken in these circumstances.

Analysis and findings

Before addressing the legal issues in this appeal, I have decided that it is necessary to comment on the letter received from Genivar.

The Information and Privacy Commissioner of Ontario is an Officer of the Ontario Legislature and has a statutory mandate to resolve access-to-information appeals and promote the protection of individual privacy. In my view, the tone of Genivar's letter could be construed as an attempt to intimidate an Officer of the Legislature. Any adverse impact that Jagger Hims may have suffered is a direct result of the firm's own actions, not the conduct of any other party. I would urge Genivar to reconsider its position and focus instead on the role that it can play in resolving the compliance issues that have arisen in this appeal.

As noted above, Jagger Hims' refusal to provide the County with the hydrogeological model and input data has created an unacceptable compliance issue. In particular, it prevents the County from complying with Order Provision 2 of Order MO-2416, which requires the County to issue an access decision to the appellant upon receipt of these records in accordance with Part I of the *Act*.

Consequently, I decided to continue my inquiry into Appeal MA07-365 for the purpose of determining whether I should issue a further order to address the County's failure to comply with Order Provision 2. I have carefully considered the representations that I received from the parties on this issue. For the reasons that follow, I have decided to order the County to take all steps, including legal proceedings if necessary, to obtain the hydrogeological model and input data from Jagger Hims.

The thrust of the County's submissions is that it does not have any grounds, legal or otherwise, to encourage or compel Jagger Hims to provide the County with the hydrogeological model and input data. I do not find these submissions credible or persuasive. In my view, the County is continuing an unacceptable pattern of conduct in which it is deliberately disassociating itself from key records relating to the environmental integrity of Site 41, despite the fact that these records were created by Jagger Hims with the use of taxpayers' money.

In assessing whether the County has any grounds to compel Jagger Hims to provide the County with these records, it is useful to summarize my findings in Order MO-2416. In that order, the

following relevant factors led me to conclude that the model and input data held by Jagger Hims are under the County's "control," for the purposes of section 4(1) of the *Act*:

- The County's legal duty under condition 10.1(d) of the PCA resulted in the creation of the model. The sole purpose for creating the model was to fulfill the County's legal duty under condition 10.1(d) to conduct a "supplemental hydrogeological investigation." Jagger Hims did not create the model on its own volition. There is a substantial connection between the legal duty imposed on the County in condition 10.1(d) and the creation of the model.
- Jagger Hims received and used public money to create the model. Although the County does not have a formal contract with Jagger Hims, it paid the firm to prepare the supplemental report, which would have covered all related work undertaken by the firm, including developing the model that formed a basis of the report. Jagger Hims did not, on its own volition, decide to randomly create the model for some purpose unrelated to its arrangements with the County. It built the model for the purpose of preparing the supplemental report that it submitted to the County.
- Jagger Hims does not operate at arm's length from the County. The firm is distinguishable from the Judicial Appointments Advisory Committee in *Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.) and the Honourable Coulter Osbourne in *David v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4351 (Div. Ct.). Both of these latter bodies were set up to operate at arm's length from government to ensure that they could conduct their work free from political influence. There is no evidence in the present appeal to suggest that the County retained Jagger Hims to carry out its work with a similar independent mandate.
- The County has an implicit right to obtain the model and input data from Jagger Hims, particularly since the firm received and used public money to create the model. As in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, the County's failure to enter into a contractual arrangement with Jagger Hims that would enable the County to obtain the model and input data cannot be a reason for finding that such a right or power does not exist.

Although both the County and Jagger Hims have stated that they disagree with the outcome of Order MO-2416, neither party has addressed the key fact that Jagger Hims received and used taxpayers' money to create the hydrogeological model and input data. In its letter of June 26, 2009 to the County, Jagger Hims claims that the model and input data are "proprietary information" and expresses its "deep concern with opinions voiced by the adjudicator in his Order, namely his conclusion to the effect that our consulting firm was not acting at arm's length with the [County] upon executing its professional mandate."

In the interests of clarifying my finding with respect to the relationship between the County and Jagger Hims, I would note that Jagger Hims is clearly an independent entity and not part of the County. However, the firm does not operate at arm's length from the County in the same

manner as the Judicial Appointments Advisory Committee in *Walmsley* and the Honourable Coulter Osbourne in *David*. As noted above, both of these latter bodies were set up to operate at arm's length from government to ensure that they could conduct their work free from political influence. There is no evidence in the present appeal to suggest that the County retained Jagger Hims to carry out its work with a similar independent mandate.

In light of my findings in Order MO-2416 and particularly the fact that Jagger Hims received and used taxpayers' money to create the hydrogeological model and input data, I find that the County has a potent legal basis for compelling the firm to provide the County with these records.

I am not persuaded by the County's submission that it cannot legally compel Jagger Hims to provide it with the records because doing so is "beyond our legal rights under the contract that we have with the engineering firm." An institution cannot "contract out" of its obligations under the *Act*. In addition, I would note that the County has never provided this office with a copy of this alleged contract. In fact, during my initial inquiry that led to Order MO-2416, the County stated in its representations of February 14, 2008 (at page 5) that it "did not enter into a formal retainer agreement with this third party consultant ..."

More importantly, however, the issue of whether the County has a right or power to obtain the model and input data from Jagger Hims was specifically addressed in Order MO-2416 (at pp. 14-16):

In my view ... the fact that Jagger Hims received and used public funds to create the model gives the County an implicit right to obtain the model and input data from the firm.

In its representations, the County makes strenuous efforts to disassociate itself from the model, insisting that its "arrangements" with Jagger Hims do not give it the right to possess or otherwise exercise control over this record. However, in *Ontario Criminal Code Review Board*, the Court of Appeal addressed similar arguments from the Board in that case, which insisted that it did not have the contractual power to compel the court reporter to deliver the backup tapes to it. The Court addressed this argument in the following manner at para. 35:

... I must say I find this a rather surprising proposition. We were told that at some time in the past the Board had used employees to do what independent court reporters now do. If the Board had continued to use employees there would be no issue; the backup tapes would be in the Board's custody and under its control. However, the Board chose to enter into arrangements with independent court reporters to meet its court reporting requirements. Assuming the court reporter now refuses to deliver the backup tapes to the Board, the Board's failure to enter into a contractual arrangement with the reporter that would enable it to

fulfil its statutory duty to provide access to documents under its control cannot be a reason for finding that the duty does not exist. Put another way, the Board cannot avoid the access provisions of the *Act* by entering into arrangements under which third parties hold custody of the Board's records that would otherwise be subject to the provisions of the *Act*.

As noted above, the relationship between the County and Jagger Hims is different in many respects from the one between the Board and the court reporter in *Ontario Criminal Code Review Board*. In my view, however, some of the reasoning applied by the Court of Appeal still applies in this case. The County presumably retained Jagger Hims because its own staff do not have the specialized expertise required to undertake the work required to prepare the supplemental report, including creating the model. However, as in *Ontario Criminal Code Review Board*, the County's failure to enter into a contractual arrangement with Jagger Hims that would enable the County to obtain the model and input data cannot be a reason for finding that such a right or power does not exist. In particular, I find the fact that Jagger Hims used public funds to create the model and input data gives the County an implicit right to obtain these records from the firm.

Moreover, I am not persuaded by the County's submission that it cannot compel Jagger Hims to provide it with the records because it is not part of the "custom in the trade" that such computer models are delivered to the client. In my view, the County's status as Jagger Hims' client provides it with significant authority to compel the firm to provide it with the hydrogeological model and input data. Jagger Hims received and used taxpayers' money to create these records. Accordingly, the public has a right to expect that the County will take all steps to obtain these records from the firm.

Although Jagger Hims now claims that the hydrogeological model and input data are "proprietary" and has therefore refused to provide these records to the County, the firm took a much more flexible approach earlier in this process. During my initial inquiry that led to Order MO-2416, Jagger Hims submitted a letter that the County included with its representations. This letter (Schedule "B") stated the following:

Jagger Hims Limited has a confidentiality policy. The policy does not permit the release of any written or oral technical information on a project to a third party without the permission of the Client, subject to our discretion. Except in the matter of a hearing, we would evaluate the sensitivity of the information requested to determine the appropriateness of its release. It would be unusual to release calculations. I do not recall our release of a calibrated site specific model to a third party or to a client. If any information is released, the information is the report and then only if permission is granted by the Client.

It is my understanding that the customary practice of most others in the consulting industry is similar to my practice. There may be some exceptions when circumstances differ.

In addition, Jagger Hims own website indicates that it can provide its clients with “groundwater models.” In the “Our Services” section of its website, Jagger Hims states that “we have successfully completed numerous projects involving the development and application of groundwater models such as MODFLOW to predict groundwater flow and interference, groundwater and surface water interactions, and subsurface contaminant movement.” In addition, a sidebar on the same webpage entitled “Geomatics and Modelling” states the following with respect to the types of products that Jagger Hims can provide to its clients:

As part of our service to you, we can provide technical drawings, GIS maps and databases, *groundwater models*, and much more ... (emphasis added)

As I noted in Order MO-2416, although Jagger Hims submits that it is not its customary practice to disclose a model to a third party (such as the appellant), it is evident from its letter that it would consider doing so in some circumstances. More importantly, however, Jagger Hims does not cite any legal basis for refusing to provide a model to its own clients (e.g., the County). On the contrary, its website indicates that it provides “groundwater models” to its clients. This is not surprising, given that a client, such as the County, pays Jagger Hims to undertake the work that results in the creation of a model. It would be contrary to the principle of accountability if the County had no right to obtain these types of records.

In short, I find that the County has sufficient authority, both legal and otherwise, to compel Jagger Hims to provide it with the hydrogeological model and input data. Consequently, I will be ordering the County to take further steps to ensure that Jagger Hims provides it with these records.

ORDER:

1. I order the County to immediately take all steps, including legal proceedings if necessary, to obtain the calibrated hydrogeological model and input data from Jagger Hims.
2. I order the County to issue an access decision to the appellant within 30 days of receipt of the records, in accordance with Part I of the *Act*, treating the date of receipt of the records as the date of the request.

3. I remain seized of any compliance issues that may arise from this order and any new appeal that the appellant or Jagger Hims may file with respect to the access decision that the County is required to issue under Order Provision 2.

Original signed by: _____

Colin Bhattacharjee
Adjudicator

August 21, 2009 _____