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

ORDER MO-2416

Appeal MA07-365

County of Simcoe

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NATURE OF THE APPEAL:

Background

The County of Simcoe (the County) is responsible for a range of municipal services, including solid waste management. It manages six active landfill sites and several closed sites.

The County is currently developing a new landfill site, known as "Site 41." This site is located in Tiny Township and is licensed to receive waste from the following municipalities when it opens: Tiny Township, Tay Township, Town of Midland and Town of Penetanguishene.

Site 41 is controversial and is facing opposition from some residents in the surrounding communities. A recent article in *The Globe and Mail* [*The battle over the world's purest water*, May 4, 2009, p. A8] characterized the controversy over Site 41 in the following manner:

> Groundwater beneath Ontario's Tiny Township has been called the cleanest in the world, as pristine as if it were drawn from ancient ice buried deep in an Arctic glacier.
>
> The Ontario government is about to find out whether this super-clean water – found gushing out of artesian wells in a rural, farming area about 120 kilometres north of Toronto – can coexist with a notorious source of contaminants: a garbage dump.
>
> If all goes according to plan, some time this year trucks will begin dumping municipal trash into a provincially approved landfill atop the unspoiled water, which won its reputation as the cleanest in the world after testing at a German university in 2006 found that samples had some of the lowest levels of trace metals ever observed.
>
> The province says the location of the dump is nothing to worry about, but Ontario's Environmental Commissioner is decrying the selection of the site. So are prominent conservationists …
>
> ….
>
> The Ministry and Simcoe County, which will operate the site, both insist it won't pose a risk. "This site, when we build it, will be the most protective site in the county," said Rob McCullough, Simcoe County's director of environmental services.
>
> The site sits over thick clay, which is an added defence against groundwater contamination, and it will have a plastic liner, another barrier.

Site 41 has gone through a lengthy and complex approval process over the past 20 years, and I will only summarize those steps that are relevant to this particular access-to-information appeal.

The development of a new landfill site in Ontario must comply with strict statutory and regulatory requirements, particularly under the *Environmental Protection Act* (the *EPA*). The Ministry issued a Provisional Certificate of Approval (the PCA) under the *EPA* for Site 41 on April 30, 1998. This document sets out certain conditions that the County must meet before constructing and developing the landfill site. On the issue of community consultation, condition 24.1 requires that the County establish a "Community Monitoring Committee" (CMC) 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."

Condition 10.1 of the PCA requires the County to submit a "final detailed design and operations report" to the Ministry for approval. This report must include "a geotechnical evaluation of the site" [condition 10.1(c)] and a "supplemental hydrogeological investigation to address the effect of landfilling" [condition 10.1(d)]. In addition, condition 9 of the PCA requires that "the extent of downward gradients in the northwest corner of the site" be investigated.

To comply with conditions 9, 10.1(c) and 10.1(d), the County retained an engineering firm, Jagger Hims Limited, to conduct a "geotechnical evaluation" and "supplemental hydrogeological investigation" of Site 41. Jagger Hims used a computer software program known as "Modflow" to construct a hydrogeological model that would assist in predicting, for example, whether any environmental impacts could result from the development of Site 41, based on specific scenarios.

"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." It defines "Modflow" as "a three-dimensional finite-difference ground-water model that was first published in 1984" and notes that "many new capabilities have been added to the original model." Modified commercial versions of the Modflow software are also available for purchase from private companies.

It is my understanding that Jagger Hims used Modflow software to develop a hydrogeological model for Site 41. It calibrated the model and inputted data to assess specific scenarios. 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"). This report was submitted to the County and then to the Ministry's Assessment and Approvals Branch for a technical review. (In compliance with condition 10.1 of the PCA, the County also submitted other documents to the Ministry, including a "Development and Operations Report.")

Between 2003 and 2006, Site 41 continued to proceed through the required approval process, and the County submitted additional documents and revised reports to the Ministry with respect to the design and operation of the site. On October 20, 2006, the Ministry issued an Amendment to the PCA, which approved the County's "final design and operations report and related documentation" for most of Site 41. In June 2007, Simcoe County Council voted 16-15 to

authorize staff to begin construction of the landfill site. It is my understanding that this construction work is currently taking place.

Access request

The County received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following record:

> … a copy of the County's calibrated USGS Modflow model for landfill site 41. Reference: Jagger Hims Limited June 28/07 letter to Rob McCullough [the County's Environmental Services Director]: Re County of Simcoe landfill site 41, Response to CMC Request File 880007•21.

The requester is an alternate member of the CMC, which was established in accordance with condition 24.1 of the PCA for Site 41. The County issued a decision letter to the requester stating that his request was being denied because the County did not have custody or control of the record he was seeking. Under section 4(1), the *Act* applies only to records that are in the custody or under the control of an institution. The decision letter also stated the following:

> If you are requesting a copy of the [supplemental report] that is in the County's custody, a copy will be provided, but if your request is for the model information which is in the custody and control of the third party consultant [Jagger Hims], your request is hereby denied.

The requester (now the appellant) appealed the County's decision to this office, which appointed a mediator to assist the parties in resolving the issues in this appeal. During mediation, both the appellant and the County agreed that the request was for the "model information," not the supplemental report that Jagger Hims submitted to the County.

This appeal was not resolved in mediation and was moved to the adjudication stage of the appeal process for an inquiry. I started my inquiry by sending a Notice of Inquiry, setting out the facts and issues in this appeal, to the County, which submitted representations in response. I then sent the same Notice of Inquiry to the appellant, along with the representations of the County. The appellant submitted representations in response.

Next, I sent the appellant's representations to the County and invited it to submit reply representations. The County submitted representations by way of reply. Finally, I sent the County's reply representations to the appellant and invited him to respond. The appellant submitted sur-reply representations to this office.

RECORDS:

The records at issue in this appeal are the calibrated hydrogeological model and accompanying input data that were prepared by the County's external consultant, Jagger Hims.

DISCUSSION:

CUSTODY OR CONTROL

General principles

Section 4(1) of the *Act* states:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> (a) the record or the part of the record falls within one of the exemptions under sections 6 to 15; or
>
> (b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

In short, section 4(1) provides the public with a right of access to a record that is "in the custody or under the control of an institution." If an institution's custody or control of a record is established, the right of access under section 4(1) applies, subject to the exceptions in paragraphs (a) and (b).

The courts and this office have applied a broad and liberal approach to the custody or control question [*Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 4072, *Canada Post Corp. v. Canada (Minister of Public Works)* (1995), 30 Admin. L.R. (2d) 242 (Fed. C.A.), Order MO-1251].

Factors in determining custody or control

Based on the above approach, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution [Orders 120, MO-1251]. The list is not intended to be exhaustive. Some of the listed factors may not apply in a specific case, while other unlisted factors may apply. The list is as follows:

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*, *supra*]
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]

- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]

- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]

- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]

- Does the institution have a right to possession of the record? [Orders P-120, P-239]

- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?

- To what extent has the institution relied upon the record? [Orders P-120, P-239]

- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]

- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

The following factors may apply where an individual or organization other than the institution holds the record:

- If the record is not in the physical possession of the institution, who has possession of the record, and why?

- Is the individual, agency or group who or which has physical possession of the record an "institution" for the purposes of the *Act*?

- Who owns the record? [Order M-315]

- Who paid for the creation of the record? [Order M-506]

- What are the circumstances surrounding the creation, use and retention of the record?

- Are there any provisions in any contracts between the institution and the individual who created the record in relation to the activity that resulted in the creation of the record, which expressly or by implication give the institution the right to possess or otherwise control the record? [*Greater Vancouver Mental Health Service Society v. British Columbia (Information and Privacy Commissioner)*, [1999] B.C.J. No. 198 (S.C.)]

- Was there an understanding or agreement between the institution, the individual who created the record or any other party that the record was not to be disclosed to the institution? [Order M-165] If so, what were the precise undertakings of confidentiality given by the individual who created the record, to whom were they given, when, why and in what form?

- Is there any other contract, practice, procedure or circumstance that affects the control, retention or disposal of the record by the institution?

- Was the individual who created the record an agent of the institution for the purposes of the activity in question? If so, what was the scope of that agency, and did it carry with it a right of the institution to possess or otherwise control the records? [*Walmsley v. Ontario (Attorney General)* (1997), 34 O.R. (3d) 611 (C.A.)]

- What is the customary practice of the individual who created the record and others in a similar trade, calling or profession in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

- To what extent, if any, should the fact that the individual or organization that created the record has refused to provide the institution with a copy of the record determine the control issue? [Order MO-1251]

Court decisions

There have been three important court decisions with respect to whether certain records are in the custody or under the control of an institution for the purposes of section 4(1) of the *Act* or section 10(1) of its provincial equivalent, the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*):

- *Walmsley v. Ontario (Attorney General), supra* [hereinafter *Walmsley*]

- *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner), supra* [hereinafter *Ontario Criminal Code Review Board*]

- *David v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4351 (Div. Ct.) [hereinafter *David*]

Walmsley

In this case, the key issue was whether the Ministry of the Attorney General had control over the records of the Judicial Appointments Advisory Committee, an independent body set up by the provincial government to recommend suitable candidates for judicial appointment. In Order P-704, former Assistant Commissioner Irwin Glasberg found that, for the purposes of section 10(1) of the provincial *Act*, the Ministry had "control" over records in the hands of the Committee's Chair and individual members that related to the selection of a specific individual for a judicial position. His decision was upheld by the Divisional Court, but the Ministry appealed.

The Court of Appeal allowed the appeal. It concluded that former Assistant Commissioner Glasberg erred in his finding and therefore quashed his order. The Court noted that the records clearly were not in the Ministry's custody, so the key question was whether documents in the possession of the Committee's individual members were under the Ministry's control. It stated that the "answer properly depends on an examination of all aspects of the relationship between Committee members and the Ministry that are relevant to control over the documents."

The Court concluded that the documents in the possession of individual Committee members were *not* under the Ministry's control, after considering the following factors:

- Individual Committee members were neither employees nor officers of the Ministry.

- They constituted a committee that was set up to provide recommendations that were arrived at independently and at arm's length from the Ministry.

- The Ministry had no statutory or contractual right to dictate to the Committee or its individual members what documents they should create, use or maintain or what use to make of the documents they do possess.

- The Ministry had no statutory or contractual basis upon which to assert the right to possess or dispose of these documents, nor was there any basis for finding that the Ministry had a property right in them.

- While there may have been elements of agency in the relationship between individual Committee members and the Ministry, nothing suggests that that agency carried with it the right of the Ministry to control these documents.

- Finally, there is nothing in the record that allows the conclusion that these documents were <u>in fact</u> controlled by the Ministry.

Ontario Criminal Code Review Board

In this case, the key issue was whether the Ontario Criminal Code Review Board (the Board) had control over backup audio tapes prepared by a court reporter who was an independent contractor

hired by the Board. In Order P-912, Inquiry Officer Donald Hale found that, for the purposes of section 10(1) of the provincial *Act*, the Board had "control" over the audiotapes prepared by the court reporter. His decision was upheld by the Divisional Court, but the Board appealed.

The Court of Appeal upheld the Divisional Court's decision and dismissed the Board's appeal. It distinguished the facts in the case before it from its previous decision in *Walmsley*, which involved a Judicial Appointments Advisory Committee that operated independently and at arm's length from the Ministry. It found that unlike in *Walmsley*, the court reporter does not operate "independently or at arm's length" from the Board.

The Court further found that the backup tapes were under the control of the Board for the purposes of section 10(1) of the provincial *Act* and based its conclusion on the following three factors:

- The sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate under section 672.51(1) of the *Criminal Code* to keep an accurate record.

- It was within the Board's power to limit the use to which the backup tapes may be put and reasonable to expect that the Board would ensure, by contract if necessary, that any records of proceedings, backup records included, be used solely for the purposes of the Board.

- The Board must have access to all of the records prepared by the court reporter in the event that an issue arises about the accuracy of either the record or a transcript. For this purpose, the Board must have access to the backup tapes regardless of who has physical custody of them.

David

In this case, the key issue was whether the City of Toronto (the City) had control over the notes of the Honourable Coulter Osbourne, who was retained to conduct an independent review of the City's process for selecting a company to renovate Union Station. In Order MO-1892, Adjudicator Donald Hale found that, for the purpose of section 4(1) of the *Act*, the City did not have "control" over Mr. Osbourne's notes. The appellant sought judicial review of his decision before the Divisional Court.

The Divisional Court upheld Adjudicator Hale's decision and dismissed the appellant's judicial review application. It found that the City did not have control over Mr. Osbourne's notes after considering the following factors:

- Mr. Osbourne was neither an employee nor an officer of the City.

- He was to conduct the inquiry and make his report independently of, and at arm's length from, the City.

- He was not an agent of the City in the traditional sense of one who has the authority to bind his principal. His recommendations were not to be binding on anyone.

- Nothing in the record leads to the conclusion that the documents were actually ever controlled by the City. Although they were in some cases stored in a computer owned by the City, this computer was allocated to the inquiry and not accessible to persons not associated with the actual inquiry.

At para. 24, the Court compared the facts in the case before it to the Court of Appeal's decision in *Walmsley*:

> On these criteria, I am of the view that the case is very similar to *Walmsley* and the result should be the same: the records are not under the control of the City, for the same reasons the Appointment Committee's records were not under the control of the Ministry.

Analysis and findings

Introduction

As noted above, 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." If an institution's custody or control of a record is established, the right of access under section 4(1) applies, subject to the exceptions in paragraphs (a) and (b) of that provision.

In its representations, the County submits that the model and input data are not in its custody or under its control, while the appellant asserts that these records are under the County's control.

However, both parties agree on the following points:

- The model was created by Jagger Hims, not by an officer or employee of the County.

- Jagger Hims created the model for the purpose of preparing the supplemental report that it submitted to the County. It did not provide the County with the model and input data.

- Jagger Hims has physical possession of the model and input data, not the County.

- The model and input data are not being held by an officer or employee of the County for the purposes of his or her duties.

In my view, these factors clearly establish that the County does not have "custody" of the model and input data. Consequently, the sole issue that must be determined in this appeal is whether these records, which are in Jagger Hims' possession, are under the "control" of the County, for the purposes of section 4(1) of the *Act*.

For the reasons that follow, I find that the model and input data are under the County's control. Therefore, the right of access under section 4(1) applies to these records, subject to the exceptions in paragraphs (a) and (b) of that provision.

Factors

As noted above, this office has developed a list of factors to consider in determining whether or not a record is in the custody or control of an institution. The list is not intended to be exhaustive. Some of the listed factors may not apply in this appeal, while other unlisted factors may apply. In addition, the Court of Appeal stated in *Walmsley* that the answer properly depends on an examination of all aspects of the relationship between the third party holding the records and the institution that are relevant to control over the records.

Both the County and the appellant provided lengthy and detailed representations with respect to whether the factors listed above apply in the circumstances of this appeal. I have carefully reviewed both parties' representations in their entirety and taken them into account in reaching my decision. In my view, the following factors are relevant in determining whether the County has control over the model and input data for the purposes of section 4(1) of the *Act*.

(1) Did the County have a statutory or any other legal duty that resulted in the creation of the model?

A relevant factor to consider at the outset of the control analysis is whether the institution had a statutory duty that resulted in the creation of the record, either directly or indirectly. In my view, it is also important to consider whether the institution had any other legal duty that resulted in the creation of the record. If the County had such a duty, this factor would weigh in favour of finding that the model and input data are under its control. Conversely, the lack of any such duty would weigh against finding that the model and input data are under the County's control.

As noted above, in *Ontario Criminal Code Review Board*, the Court of Appeal found that the backup tapes created by the court reporter were under the Board's control. One factor that it applied in reaching this conclusion was the fact that the sole purpose for creating the backup tapes was to fulfill the Board's statutory mandate under section 672.51(1) of the *Criminal Code* to keep an accurate record.

In its reply representations, the County submits that it did not have a statutory duty to carry out the activity that resulted in the creation of the record. It submits that the facts in this case are distinguishable from *Ontario Criminal Code Review Board*, in which the Board had a statutory duty under the *Criminal Code* to keep a record of its proceedings. It asserts that the Board would have been in breach of its statutory duty if it did not maintain an accurate record of its proceedings. In contrast, the County would not have breached any statutory duty if Jagger Hims failed to create the model while preparing the supplemental report.

The appellant submits that the County had a "statutory duty" to create the model and input data, which flows from condition 10.1(d) of the PCA. It then cites the Court of Appeal's decision in *Ontario Criminal Code Review Board* and submits that, "when read together, the [model] and the [supplemental report] provide a complete response to the County's statutory mandate."

I agree with the appellant that the creation of the model by Jagger Hims flows from the requirements of the PCA. However, although the PCA was issued by the Ministry under the *EPA*, which sets out strict rules for the development of new landfill sites in Ontario, I would characterize the County's duty to create certain records as simply a "legal" duty rather than a "statutory" duty.

As noted above, to comply with the requirements of the PCA, particularly conditions 10.1(c) and (d), the County retained Jagger Hims to conduct a "geotechnical evaluation" and "supplemental hydrogeological investigation" of Site 41. This firm used the Modflow software program to construct and run a hydrogeological model. The output from this model formed a basis of the supplemental report that the firm submitted to the County.

The PCA did not specifically require the County to create the model. However, it is evident that the supplemental report could not have been prepared without the model, because the output from the model forms a basis of this report. The sole purpose for creating the model was to fulfill the County's legal duty under condition 10.1(d) of the PCA 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.

In short, I find that the County's legal duty under condition 10.1(d) of the PCA resulted in the creation of the model, and that this is a relevant factor that weighs in favour of finding that the model and input data are under the County's control for the purposes of section 4(1) of the *Act*.

(2) Who paid for the creation of the model?

If a third party holds the requested record, a relevant factor in determining whether this record is under the control of an institution is determining who paid for its creation. If Jagger Hims used public money to create the model, either in whole or in part, this is a factor that would weigh in favour of finding that the model and input data are under the County's control. If, however, no public money was used to create the model, this factor would weigh against finding that the model and input data are under the County's control.

The County submits that although it paid for the supplemental report prepared by Jagger Hims, it did not specifically pay for the model that formed a basis of this report and "would not have any use for it." The appellant disagrees and submits that the County paid for "all actions" undertaken to create the supplemental report, including the creation of the model by Jagger Hims. Elsewhere in its representations, the appellant submits that the model and supplemental report are "inextricably linked."

As noted above, to comply with the requirements of the PCA, particularly conditions 10.1(c) and (d), the County retained Jagger Hims to conduct a "geotechnical evaluation" and "supplemental hydrogeological investigation" of Site 41. This firm used the Modflow software program to construct and run a hydrogeological model. The output from this model formed a basis of the supplemental report that the firm submitted to the County.

In my view, although the County claims that it did not "specifically" pay for the model, the facts suggest otherwise. The County paid Jagger Hims 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. The firm 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.

I find, therefore, that the County paid for the creation of the model. Given that Jagger Hims received and used public money to create the model, I find that this is a relevant factor that weighs in favour of finding that the model and input data are under the County's control.

(3) Does Jagger Hims operate at arm's length from the County?

If a third party that performs work for an institution holds the requested record, another relevant factor in determining whether this record is under the institution's control is whether the third party operates at arm's length from the institution. If Jagger Hims does not operate at arm's length from the County, this factor would weigh in favour of finding that the model and input data are under the County's control. If, however, there is an arm's length relationship between the County and Jagger Hims, this factor would weigh against finding that these records are under the County's control.

In both *Walmsley* and *David*, the courts found that the arm's length status of the third parties holding the requested records was one of the relevant factors suggesting that these records were not under the control of the institutions that received the access requests. In *Walmsley*, the provincial government had set up the Judicial Appointments Advisory Committee at arm's length to provide independent recommendations for judicial appointments, free from political influence. In *David*, the City of Toronto retained Mr. Osbourne to conduct an independent review, free from political interference, of its procurement practices for the renovation of Union Station.

The County submits that Jagger Hims, which has possession of the model and input data, operates at arm's length from the County in the same manner as the Judicial Appointments Advisory Committee in *Walmsley*:

> … the court found that the records should not be disclosed as the [Judicial Appointments Advisory Committee] has no statutory or regulatory foundation and was only loosely associated with the Attorney General's office. Furthermore, none of the committee members were employees of the Attorney General. In

> [*Criminal Code Review Board*], the court distinguished *Walmsley* due to the fact that the committee was at arm's length from the Ministry. Jagger Hims is a third party consulting firm, which is at arm's length from the County.

The County further submits that the facts in *David* are "analogous" to the facts surrounding the appellant's request for the model and input data, and that the Court of Appeal's decision in *Walmsley*, which was applied in *David*, "supports the County's denial to produce the record that the appellant has requested."

However, the appellant submits that the facts in *Ontario Criminal Code Review Board* are more applicable in the circumstances of the appeal before me. In that case, the Court of Appeal distinguished the facts in the case before it from its decision in *Walmsley*. At para. 36, the Court found that unlike in *Walmsley*, the court reporter did not operate "independently or at arm's length" from the Board:

> In argument, the Board placed a great deal of reliance on this court's decision in *Walmsley*. In my view, *Walmsley* is distinguishable … The situation in this appeal is very different. The court reporter is specifically hired to fulfil the statutory duty of the Board to keep a record and to make transcripts available, if requested. Although the court reporter is an independent contractor, she plays an integral part in fulfilling the mandate of the Board under the Criminal Code. Unlike the situation in *Walmsley*, the court reporter's function is part of the Board's function. The court reporter has no independent role. She does not operate "independently or at arm's length" from the Board.

Although Jagger Hims' working relationship with the County is different in many respects from the one between the court reporter and the Board in *Ontario Criminal Code Review Board*, the situation in the appeal before me can also be distinguished from both *Walmsley* and *David*. The Judicial Appointments Advisory Committee in *Walmsley* and the Honourable Coulter Osbourne in *David* were both 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 such circumstances, I find that Jagger Hims does not operate at arm's length from the County. Consequently, unlike in *Walmsley* and *David*, there is no arm's length relationship that can be relied upon to argue that the records are not under the County's control. On the contrary, the absence of an arm's length relationship between the County and Jagger Hims is a relevant factor that weighs in favour of finding that the model and input data are under the County's control, for the purposes of section 4(1) of the *Act*.

(4) Does the County have the right or power to obtain the model and input data from Jagger Hims?

If a third party that performs work for an institution holds the requested record, another relevant factor in determining whether this record is under the institution's control is whether the institution has a right or power, either contractually or otherwise, to obtain the record. If the County has such a right or power, this factor would weigh in favour of finding that the model and input data are under the County's control. If, however, the County does not have such a right or power, this factor would weigh against finding that these records are under the County's control.

The County states that it did not enter into a formal retainer agreement with Jagger Hims. However, it submits that its "arrangements" with Jagger Hims do not give it the right to possess or otherwise exercise control over the model and input data. It asserts that even if it obtained the model and input data from the firm, it does not have the computer software required to make use of the data. It further submits that there was no requirement that the model and input data specifically be withheld from the County and similarly no agreement that they be provided to the County.

The County further states that it contacted both Jagger Hims and another engineering firm that it retains on a regular basis, and asked them what their customary practice is with respect to providing their clients with modelling information. It states that both engineering firms advised that if they carry out "complicated modelling" or similar work, they do not provide this information to their clients:

> … the response from [the representative of Jagger Hims], attached as Schedule "B" is that he has never provided modelling information. The response from [the representative of the other engineering firm], attached as Schedule "C" is that in his 17 years of practice, he has never provided modelling information nor been required to.

The letter from the representative of Jagger Hims (Schedule "B") states, in part:

> 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.

The letter from the representative of the other engineering firm (Schedule "C") states, in part:

> I would be reluctant to submit electronic run versions of model input files to a third party, if for example the intent is to use the input files for additional sensitivity analyses. The input files would not be appropriate if the sensitivity analyses are not compatible with the model calibration.
>
> In a recent case, [we] did submit electronic run versions of model input files to the parties who retained us. However, they had the expertise to run the model and were involved in the initial set-up/calibration of the model.

The appellant submits that the County has a right to possess the model and input data, in part because it paid for the creation of these records. It further submits that contrary to the assertions made by the County, the letter submitted by Jagger Hims (Schedule "B") indicates that if the County provided its consent, Jagger Hims would release the model to a third party (such as the appellant) or the County. It asserts that this letter demonstrates that the "client" dictates how the records are to be treated, and that the County can therefore exercise control over the model.

In its reply representations on this issue, the County submits that Jagger Hims' letter is consistent with its previous submission that the County does not have the right to possess the model and input data. It asserts that the letter makes it clear that the "final determination" for disclosing the model and input data is at Jagger Hims' discretion.

I have carefully considered the parties' representations as to whether the County has the right or power to obtain the model and input data from Jagger Hims. The County did not enter into a formal retainer agreement with Jagger Hims to conduct the "supplemental hydrogeological investigation" required under condition 10.1(d) of the PCA for Site 41. Consequently, I find that the County does not have an express contractual right to obtain the model and input data from Jagger Hims.

In my view, however, 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.

In addition, I note that although both Jagger Hims and the other engineering firm submit that it is not their customary practice to disclose a model to a third party (such as the appellant), it is evident from their letters that they would consider doing so in some circumstances. More importantly, however, they do not cite any legal basis for refusing to provide a model to their clients. This is not surprising, given that a client, such as the County, pays these firms 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 the implicit right or power to obtain the model and input data from Jagger Hims, and that this is a relevant factor that weighs in favour of finding that these records are under the County's control.

Conclusion

The following relevant factors have 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* and the Honourable Coulter Osbourne in *David*, which were both 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*, 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 its representations, the County cites several other factors that it claims would weigh against finding that the model and input data are under its control. In my view, however, those factors are significantly outweighed by the relevant factors listed above.

In short, I find that the model and input data are under the County's control for the purposes of section 4(1) of the *Act*. Consequently, the right of access under section 4(1) applies to these records, subject to the exceptions in paragraphs (a) and (b).

The appellant submits that if I find that the model and input data are under the County's control for the purposes of section 4(1) of the *Act*, I should order that these records be disclosed to him. He asserts that providing the County with the opportunity to claim any of the exemptions in the *Act* would cause "great prejudice" to both him and the CMC:

> … It will take months if not years for the appellant to exercise its rights once an exemption is claimed. By the time the process has run its course, the information will be of little utility to the appellant and the CMC because time periods of comment and appeal of MOE permits related to the landfill may have expired.

In contrast, the County submits that if I find that the model and input data are under the County's control for the purposes of section 4(1) of the *Act*, the County and Jagger Hims "should be allowed the opportunity to then examine and, if appropriate, claim applicable exemptions under the *Act*."

I have carefully considered the parties' representations on this issue. As noted above, section 4(1) provides the public with a right of access to a record that is "in the custody or under the control of an institution." If an institution's custody or control of a record is established, as is the case here, the right of access under section 4(1) is still subject to the exceptions in paragraphs (a) and (b) of that provision.

Although I recognize the appellant's need for a timely resolution of this matter, the County clearly has the right to consider whether any of the exemptions in sections 6 to 15 of the *Act* apply to the model and input data. In my view, not providing the County with this opportunity would run contrary to the scheme set out in the *Act* and would also constitute a breach of the rules of fair procedure.

However, I would encourage the County, when making its access decision, to consider the purposes of the *Act* in section 1, which state, in part, that information under the control of government "should be available to the public," and that "necessary" exemptions from the right of access should be "limited and specific."

ORDER:

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.

Original signed by: May 13, 2009
Colin Bhattacharjee
Adjudicator