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

ORDER MO-1658

Appeal MA-020031-1

City of Hamilton

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BACKGROUND:

In 1964 the Regional Municipality of Hamilton-Wentworth (now the City of Hamilton – referred to in this order as the City) adopted the recommendations of the Hamilton Area Transportation Plan for a north-south expressway linking two existing east-west expressways (now the Lincoln M. Alexander Parkway and the Queen Elizabeth Way). In 1979, City Council approved a route for the expressway that would run through the Red Hill Creek Valley. I will refer to this proposed expressway as the Project.

At that time, municipal undertakings were not subject to the Ontario *Environmental Assessment Act* (*EAA*). However, the City asked the provincial Minister of the Environment to designate the Project as an *EAA* undertaking, on the condition that the resulting environmental assessment hearing would be consolidated with all other required approval hearings. The Minister approved this request.

The City then prepared an environmental assessment submission and provided it to a Joint Board consisting of members of the Ontario Municipal Board and the Ontario Environmental Assessment Board (the Joint Board). The Joint Board held a public hearing and in 1985 it approved the Project. Subsequent legal challenges to the decision, to the Ontario Cabinet (1987) and to the Divisional Court (1990), failed.

In 1990, the City began the work on the Project. Later in 1990, the newly elected provincial government, citing environmental concerns, withdrew its funding and the City suspended most of the construction.

In 1995 the province restored funding for the Project. Upon restoration of the funding, the City initiated consultations to see whether and how the original design could be improved.

During these consultations, the federal Department of Fisheries and Oceans (DFO) advised the City of its view that the *Canadian Environmental Assessment Act* (*CEAA*) would apply to the Project since it would impact on fish and fish habitat.

In May 1996 the City applied to the Ontario Cabinet for an order exempting the Project from the *EAA* approval process (which now applied to municipal undertakings). The City's submission indicated that the City would undertake a broad range of detailed environmental studies, including those that would "provide accurate locations of all known regionally, provincially or nationally significant [land animal] species and habitats according to [Ministry of Natural Resources] requirements."

In March 1997 the Ontario Cabinet granted the *EAA* exemption and issued an exemption order (sometimes referred to as the declaration order). In the exemption order, the Ontario Minister of Environment and Energy noted that the City intended to make improvements to the Project that will reduce its environmental impact. The Minister then stated that the exemption was in the public interest for a number of stated reasons.

The Minister then stated that the declaration order was subject to terms and conditions, including that the City must carry out the planning and implementation for the Project in accordance with its May 1996 submission.

As a result of the declaration order that approved the City's proposed environmental assessment process, the City has retained consultants (who in turn retained sub-consultants) to carry out a wide array of environmental studies, including studies of various species of land animals. (I will use the term "consultants" to refer generally to consultants and sub-consultants.) One of these species is the southern flying squirrel, the subject of the requests in this case, which I will discuss in more detail below.

In late 1997 the City submitted a draft summary report to the federal DFO that described options for the Project. In response, the DFO advised the City that the Project might have harmful impacts on fish and fish habitat, contrary to the Canada *Fisheries Act*. In May 1998 the City advised DFO that it would be applying to DFO for a *Fisheries Act* authorization. The City submitted its application in July 1998.

In response the DFO indicated that it proposed a review of the project under the *CEAA* in order to determine whether or not the *Fisheries Act* authorization should be granted. Further discussions between the City and DFO ensued and, in May 1999, the federal Minister of the Environment referred the matter of the Project to a review panel for a hearing under the *CEAA*. The City challenged this proposed hearing and commenced a judicial review in August 1999. After a hearing in November 2000, the Federal Court of Canada, Trial Division, upheld the challenge and declared that the *CEAA* does not apply to the Project in a decision dated April 24, 2001. On appeal, on November 14, 2001, the Federal Court of Appeal upheld the Trial Division judgment.

NATURE OF THE APPEAL:

The appellant made a request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to:

> information/reports/correspondence/studies that have conducted and relate to endangered species, including the southern flying squirrel, which lives in the Red Hill Valley. The information requested would also include any studies/ reports/correspondence/information gathering papers/which involve outside agencies/businesses/consultants, that were employed by the current municipality or former municipalities including Hamilton-Wentworth Region.

The City located a large number of responsive records (approximately 800), and granted access to one of them. In its decision letter, the City stated:

> . . . Upon review of the records it was determined that all of the records related to the Red Hill Creek Valley Southern Flying Squirrel Population Study.
>
> The study was prepared for outside counsel retained by the City in contemplation of litigation and a Canadian Environmental Assessment Agency hearing, and was the subject of legal advice.

> The records, which include meeting agendas; correspondence between City staff, the consultants and their agents, and the City's counsel, all pertain to the Red Hill Creek Valley Southern Flying Squirrel Population Study and are directly linked to the Study.
>
> Therefore, in accordance with section 12 [the solicitor-client privilege exemption], branch 2 of the [*Act*], access is denied to the Red Hill Creek Valley Southern Flying Squirrel Population Study and all the records associated with the creation of the study.

The City also stated that it was relying on the exemptions at sections 11 (valuable government information) and 14 (personal privacy) of the *Act* to deny access to records.

The appellant appealed the City's decision.

During mediation of the appeal, the appellant narrowed the scope of his request, and advised that he was no longer interested in records relating to the following:

- requests from field workers to schedule meetings with project consultant;
- project administrative details concerning receipts, payments to the field technicians, personal home and e-mail addresses and telephone numbers; hiring of co-op summer student, insurance coverage for field technicians;
- comments concerning the text, graphics and set-up of draft squirrel reports;
- flying squirrel "wanted" poster;
- trapping protocols;
- letters to ministries concerning trapping permits; and
- meeting agendas.

In addition, the City agreed to disclose additional records. Also, the City advised that it was no longer relying on sections 11 or 14 to withhold records. As a result, the only exemption at issue is section 12.

I sent a Notice of Inquiry setting out the issues in the appeal initially to the City, which provided representations in response. In its representations, the City raised for the first time the argument that certain responsive records are not within its custody or control under section 4(1) of the *Act*. I then sent the Notice of Inquiry, together with the City's representations, to the appellant, who in turn provided representations. I then sought and received representations from the City in reply.

After I received the City's reply representations, I became aware through media reports that the City had released a number of reports concerning the Project, including the "Southern Flying Squirrel Study" (as it is described in a City press release). As a result, I asked the City to provide more details about this disclosure, and its possible impact on the outcome of the appeal. The City did so.

RECORDS:

There are 76 records at issue in this appeal, as described in the attached index. All relate to work done by the consultants on the flying squirrel study. I have removed from the index records that are clearly duplicates of other records at issue, as well as records the City submits are no longer at issue due to the appellant's narrowed request (the appellant takes no issue with this submission).

The records fall into six general categories:

1. Draft flying squirrel study reports and portions of reports prepared by the consultants

2. Study proposals and agreements

3. Communications among consultants (all of which consist of emails)

4. Communications between consultants and the City (including correspondence and emails)

5. Meeting notes

6. Miscellaneous records, consisting of raw data and drawings resulting from the study

DISCUSSION:

CUSTODY OR CONTROL OF THE RECORDS

Section 4(1) of the *Act* provides a right of access to records "in the custody or under the control of an institution". The general right of access cannot apply if the records are neither in the City's custody nor under its control.

The City takes the position that many of the records it identified as responsive to the request "were not within the custody or control of the City . . ."

The City provides a list of such records. Given that I have removed many of the records from the scope of the appeal based on their being either duplicates or not responsive, the remaining four records the City claims are outside its custody or control are Records 2-21, 2-28, 3-19, 3-23.

More specifically, the City submits:

> We are specifically referring to internal e-mails between the consultant and sub-consultant and their staff on this file who are communicating with each other as to the progress of their work as well as memos and notes to their file as well as memos/e-mails to persons other than the City, and internal working drafts of portions of reports.

> The consultant, [named consultant firm], provided these documents to the City's Access and Privacy Officer under the misapprehension that the consultant was under a legal obligation to do so because of the FOI request. In fact, those documents were neither within the custody or control of the City. They were the consultant's internal documents which the consultant maintains as its own private records. They are not documents which the City had any knowledge of prior to the access request and they are not documents which the City would expect to ever see or examine, and in any event they are not documents which the City controls. The City contracted for the production of a study on squirrels and the City is not entitled to require the consultant to produce the consultant's internal communications or even partial internal drafts of the study . . .

The City included a letter from a representative of the consultant in which he states that he understood he was legally required to produce these records and that, normally, internal drafts and minor communications of this nature are not provided to his clients.

The City goes on to submit:

> We also refer you to Order P-267 of the Information and Privacy Commissioner which refers to a decision of Commissioner Sidney B. Linden setting out a number of factors that would assist in determining whether an institution has custody or control of a record. The relevant questions (and answers in this case) are as follows:
>
> 1. Was the record created by an officer or employee of the institution?
>
>   Answer: No.
>
> 2. What use did the creator intend to make of the record?
>
>   Answer: These are internal e-mails communicating information amongst the employees of the consultant and were never intended to be communicated to the City.
>
> 3. Does the institution have possession of the record either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
>
>   Answer: The City did not have possession of any of the records [in question] until the City Access and Privacy Officer asked the consultant to provide documents in its file. As indicated above, the consultant was of the mistaken impression that it was legally required to provide all internal documents to the City access coordinator. The creator consultant had no mandatory, statutory or other obligation to provide such records to the City and it is not its practice to do so.

4. 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?

   Answer: Not relevant.

5. Does the institution have a right to possession of the record?

   Answer: No.

6. Does the content of the record relate to the institution's mandate and functions?

   Answer: No.

7. Does the institution have the authority to regulate the records used?

   Answer: No.

8. To what extent has the record been relied upon by the institution?

   Answer: Not relied on.

9. How closely is the record integrated with other records held by the institution?

   Answer: Not at all.

10. Does the institution have the authority to dispose of the records?

    Answer: No.

We also refer you to the Commissioner's Order M-152 which determines that working papers in the possession of an auditor carrying out an audit for an institution subject to access were not in the possession or control of that institution. Words used in that decision may be appropriately applied here i.e. "while the Board may rely upon the auditor's professional opinion as contained in the audit report, there is no reliance on the papers which the auditor prepared in support of the opinion. Furthermore, the papers have no relationship to any other records held by the Board."

The appellant makes no submissions on this point.

The records the City claims are outside its custody and/or control are very similar to those for which the City does not make this claim. Record 2-21 is a draft study report portion, which is similar to the corresponding portion of the draft report that forms Record 1-2. Record 2-28 is a

draft letter to the City from the consultant, and is almost identical to another draft letter, Record 3-56. Records 3-19 and 3-23 are emails between consultants, and are very similar in nature to several other records that the City concedes are within its custody and control, including Records 4-13, 4-23, 4-26, 4-29 and 4-53. In any event, these four records should be considered within the City's control based on similar orders issued in similar circumstances. For example, in Order MO-1251, I found that a municipality had control over records generated by a consultant and a sub-consultant on the municipality's behalf. In that case, I concluded as follows:

> The legal framework and factual circumstances as described above support a finding that the Township has control of records arising from the septic survey process in the possession of the sub-consultant. This finding is largely dictated by the relevant statutory framework (points 1, 2), as well as the nature of the agency relationships among the Township, the Region and the consultants (point 6) pursuant to the express or implied terms of the contract (point 3), and as evidenced by the Township's payment for creation of the records (point 5), ability to limit use and disclosure of the records (points 3, 4, 6) and reliance on the records (point 9). This conclusion also is supported by the fact that the records were sent to the Ministry in support of the Township's funding application (point 12). As a result of the agency relationships among the parties, the Township has a right of ownership (point 10) and possession (point 6) of the records. The Township's failure to enter into contractual arrangements explicitly giving it the right to control the records cannot dictate a finding that it does not control them [*Ontario (Criminal Code Review Board)*, p. 6, para. 36]. Accordingly, I find that the relevant records are under the "control" of the Township for the purpose of section 4(1) of the *Act*.

[See also Order MO-1289 of Assistant Commissioner Tom Mitchinson, in which he found that a draft report prepared by an environmental consultant was within the control of the municipality for purposes of section 4(1) of the *Act*].

In my view, similar to the situation in these earlier cases, the records were prepared by a consultant on behalf of the City for the purpose of the City discharging a statutory duty, in this case a declaration order made pursuant to the *EAA*. I therefore do not accept the City's submission that the four records in question are not within its custody and/or control under section 4(1) of the *Act*. Therefore, the section 4(1) right of access applies to all of the records at issue in this appeal, subject to any applicable exemption.

SOLICITOR-CLIENT PRIVILEGE

Introduction

The City claims that the records at issue are exempt under section 12 of the *Act*, which reads:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Section 12 contains two branches as described below. The City must establish that one or the other (or both) branches apply. The City submits that both branches apply to the records at issue.

Branch 1: common law privileges

This branch applies to a record that is subject to "solicitor-client privilege" at common law. The term "solicitor-client privilege" encompasses two heads of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

Solicitor-client communication privilege

General principles

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining professional legal advice.

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The Supreme Court of Canada has described the privilege as follows:

> . . . all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship . . . [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 at 618].

The privilege has been found to apply to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

Solicitor-client communication privilege has been found to apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. As stated in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 at 349 (C.A.):

> The confidentiality of the communications is an underlying component of each of the purposes which justify client-solicitor privilege. In McCormick, supra, at p. 333, it is said:
>
> > It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.
>
> The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. . .

Therefore, the City must demonstrate that the communications were made in confidence, either expressly or by implication, and that this expectation of confidence had a reasonable basis in the circumstances.

Representations

The City submits that solicitor-client communication privilege applies to the "study" since it was "consistently subject to confidential legal advice by the City's outside environmental [legal] counsel . . ." More specifically, the City states that the records were produced in the context of three legal processes:

1. from May 1997 to the present, fulfilment of the declaration order;

2. from May 1999 to January 2002, litigation in the Federal Court concerning the application of the *CEAA*; and

3. from May 1999 to January 2002, a hearing under the *CEAA*.

The City states that it "appropriately and prudently required these studies to be produced in confidence" and had "its outside environmental legal counsel scrutinize the work in progress in preparation of such studies, in order to advise the City as to the appropriateness of the studies both for the *CEAA* process and as required by the Declaration Order process." The City then states:

> Based on the above facts the City submits that both branches of the "solicitor-client privilege" test are met i.e. that the draft studies and the work product leading to those study reports are protected as documents which the City's environmental legal counsel would review in order to provide legal advice to the City in respect of the City's compliance with the Declaration Order.

In addition, the City argues that "records confirming that the southern flying squirrel studies and back-up materials were understood by the consultant to be subject to solicitor-client privilege." The City goes on to identify various records at issue that on their face indicate they are subject to

solicitor-client privilege. The City also states that many of the records in question constitute "drafts" that were provided to the environmental legal counsel for the purpose of seeking legal advice, and for which legal counsel was to "review" and "approve".

The City argues that the *Balabel* "continuum of communications" test applies here, as well as the *Susan Hosiery* "working papers" test:

> It is clear from the factual background of this matter that these documents were being considered for legal advice having regard to what was then outstanding litigation as well as a hearing that was to continue after the Federal Court process was completed i.e. a hearing under the [*CEAA*] if such litigation was unsuccessful, as well as other litigation that has now been in effect threatened with respect to the adequacy of the studies and process under the [Ontario *EAA*].

The City attempts to differentiate the records at issue from the records it disclosed during the course of the appeal. It submits that it did not consider the disclosed reports to be privileged, since they were prepared "for public release":

> . . . Earlier studies which may or may not have formed a component of the publicly released report were prepared for different purposes and remain privileged. Records 1-1 and 1-2 are drafts of component research underway in 1999 and 2000, upon which legal advice was to be given and in preparation of litigation then in progress. The 1999 and 2000 records were always intended to be privileged and to date there has been no waiver of that privilege. The October 2002 draft final reports may or may not reflect input from earlier component research – but regardless each type of record was prepared under different circumstances and for different purposes.
>
> . . . . .
>
> . . . Although some research work contained in [Records 1-1 and 1-2] may form the basis for some of the content of the Flying Squirrel Report that was released in October 2002, Records 1-1 and 1-2 were not prepared at any point for public release but only for confidential legal purposes; a situation completely different from the reason for preparation of the October 2002 draft report which was prepared specifically for public release.

The City goes on to submit why I should not find that the City waived privilege in Records 1-1 and 1-2, or any of the records at issue, by virtue of its public disclosure of reports during the course of the appeal.

The appellant submits:

> I believe that, upon review, it will be apparent that the Red Hill Flying Squirrels Report falls to meet the basic test for solicitor/client privilege inasmuch as these documents do not constitute any direct form of communication between the city

and its solicitor, do not contain legal advice, and the study was not specifically prepared in anticipation of litigation. Rather, this study appears to have been commissioned in response to the Order in Council issued by the Lieutenant Governor of Ontario dated March 5, 1997 (see page 6 of Aug. 1, 2002 letter from Gowlings).

It is my hope that upon examination of the documents in question, the Commissioner will determine that the subject matter of these documents is most definitely environmental, and not legal in nature.

Should the Commissioner conclude that these documents constitute "an environmental impact statement or similar record," then the conclusion that can be made is that they are not protected by privilege, and the reports should be fully disclosed under the exemption specified in Section 7(2)(d) of the [*Act*] ("a head shall not refuse under subsection (1) to disclose a record that contains (d) an environmental impact statement or similar record").

In order to qualify for "litigation privilege" these documents must pass the "dominant purpose" test.

In Interim Order MO-1337-I, Assistant Commissioner T. Mitchinson outlines the test for determining the "dominant purpose" of a document when he writes:

> Applying the direction of the Courts and experts in the area of litigation privilege, in my view, a record must satisfy each of the following requirements in order to meet the "dominant purpose" test:
>
> 1. The record must have been created with existing or contemplated litigation in mind.
>
> 2. The record must have been created for the dominant purpose of existing or contemplated litigation.
>
> 3. If litigation had not been commenced when the record was created, there must have been a reasonable contemplation of litigation at that time, i.e. more than a vague or general apprehension of litigation.

The City is claiming that the "Red Hill Creek Valley Southern Flying Squirrel Population Study" was prepared for outside counsel, . . . which has the effect of cloaking it in solicitor-client privilege. On page 7 of [legal counsel's] letter to the Commission, dated August 1, 2002, it is stated that [the consultant was] retained by the [City] to carry out a study of flying squirrels in the vicinity of the proposed expressway. As is stated on page 8 of [legal counsel's] letter, the litigation for

> which the city is claiming "litigation privilege" did not commence until well after the Red Hill Flying Squirrels Report had been commissioned.
>
> Here again, it is my submission that the "dominant purpose" for the creation of the documents in question was not in anticipation of litigation, but rather as a condition of the Order in Council issued by the Lieutenant Governor of Ontario dated March 5, 1997 (see page 6 of Aug. 1, 2002 letter from Gowlings). That the [City] and its solicitor later decided that this report may be useful in the event of future litigation does not by itself extend "solicitor/client privilege" to the report and its associated documents.
>
> If the "dominant purpose" for the creation of the Red Hill Flying Squirrels Report was to comply with the March 5, 1997 Order in Council (O.C. 582/97), then as Commissioner Mitchinson describes in Interim Order MO-1337-I, these documents would not become privileged simply because they have found their way into a solicitor's "brief".

Findings

Category 1 records consist of draft study reports and portions of reports prepared by the consultants. Category 3 records are emails among the consultants discussing the progress of the study. Category 4 records consist of various letters and emails from the consultants to the City and/or legal counsel reporting to the client City on the progress of the study. Category 5 records are notes of meetings between City staff and consultants regarding the study. Category 6 records consist of various forms of "raw data" generated by the study. In my view, the Branch 1 common law solicitor-client communication privilege does not apply to the category 1, 3, 4, 5 or 6 records because, on an objective basis, the requisite degree of confidentiality is not present for these records.

I accept that some or all of these records may be construed as communications between a lawyer and an agent (the consultants) of a client (the City). However, I agree with the appellant that the dominant purpose for the creation of the study reports was for the purpose of complying with the declaration order of March 1997 attached to the order in council. It was the declaration order that caused the City to undertake this environmental study, and the fact that it may have been used later for other, secondary purposes does not negate this fact. The declaration order strongly suggests that communications of the nature of category 1, 3, 4, 5 and 6 records, which are essentially the progress and results of the study, would be available to the public. The declaration order includes the following statement from the Minister then stated that the exemption was in the public interest for a number of reasons, including:

- the City agreed to implement an assessment process to establish a forum for government agencies, community groups and the public to exchange ideas and information, clarify positions and expectations, and work cooperatively to develop a design that reduces impacts to the environment; and

- opportunities for public participation have been provided throughout the history of the Project. The initial environmental assessment was subject to an extensive public review and hearing before the Joint Board prior to its approval. As part of the current planning exercise, the City has undertaken a public consultation program consisting of public notices, meetings and the circulation of its proposed assessment process outlined in the City's May 1996 submission. This process will provide the public and agencies with further opportunity for involvement in the development of the Project.

In my view, these statements clearly conflict with the City's submissions that the category 1, 3, 4, 5 and 6 records were communicated to its legal counsel "in confidence". Any expectation of the City and/or its legal counsel that such records would remain confidential in these circumstances is, in my view, unreasonable and untenable in the face of the Minister's expectations to the contrary as described above.

In addition, while I make no finding with respect to waiver, I find that the City's public disclosure of a very similar flying squirrel study report supports a finding that the requisite degree of confidentiality in the records at issue is lacking. I find the City's attempt to distinguish the various reports of the results of the flying squirrel study to be artificial and unconvincing. The overall study and its results are firmly rooted in the declaration order, and the later use of the results of the study for different purposes does not alter that fact. I also find support for this view in the following information that appears on the City's website regarding the Project and the recent release of study reports, including a report on the flying squirrel study:

> **Why is the City releasing new draft reports for review in October, 2002?**
>
> In response to comments rising out of the 1998 draft technical report review and Declaration Order commitments, the City undertook additional work to address important questions like what impact will the project have on vulnerable wildlife like the southern flying squirrel. Three seasons of work (1999, 2000, and 2001) and time to consolidate the findings into one report enable us now to release this information.

These statements made by the City suggest that the dominant and continuing purpose of the flying squirrel study was to comply with the declaration order requirements, which carried an expectation of public disclosure.

Therefore, I find that the category 1, 3, 4, 5 and 6 are not subject to Branch 1 solicitor-client communication privilege.

Category 2 records are various forms of proposals from the consultants to the City, as well as various forms of agreements between the City and the consultants for the study. These records do not qualify for common law solicitor-client privilege for different reasons. The City's representations do not specifically address these records and there is nothing on the face of the records that suggests they constitute confidential communications between legal counsel, the

City and/or their agents made for the purpose of giving or receiving legal advice. Therefore, Branch 1 solicitor-client communication privilege does not apply to category 2 records.

To conclude, I find that Branch 1 common law solicitor-client communication privilege does not apply to any of the records at issue.

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co.*].

The purpose of this privilege is to protect the adversarial process by ensuring counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial. The privilege prevents such counsel from being compelled to prematurely produce documents to an opposing party or its counsel [*General Accident Assurance Co.*].

English courts have described the "dominant purpose" test as follows:

> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [*Waugh v. British Railways Board*, [1979] 2 All E.R. 1169 (H.L.); see also Order PO-2037, upheld on judicial review in *Ontario (Attorney General) v. Goodis* (May 21, 2003), Toronto Doc. 570/02 (Ont. Div. Ct.)].

To meet the "dominant purpose" test, there must be more than a vague or general apprehension of litigation [Order MO-1337-I].

Where records were not created for the dominant purpose of litigation, copies of those records may become privileged if they have found their way into the lawyer's brief [Order MO-1337-I; *General Accident Assurance Co.*; *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.)].

The City relies on its submissions described above in the context of litigation privilege. In my view, for reasons I expressed above, I find that none of the records meets the "dominant purpose" test. In other words, in the circumstances, I am not persuaded that any of the records at issue in this case were prepared for the dominant purpose of using them in the subsequent litigation, whether under the *CEAA* or in the Federal Court proceedings connected to the *CEAA* hearing. Rather, the records were prepared for the dominant purpose of meeting the requirements of the Ontario Minister's declaration order.

In addition, the City makes no submissions on the application of the "lawyers brief" aspect of litigation privilege, and I am not persuaded on the basis of the records and the surrounding circumstances that the records at issue meet this test.

To conclude, I find that Branch 1 common law litigation privilege does not apply to any of the records at issue.

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to Branch 1, this branch encompasses two heads of privilege as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The statutory and common law heads of privilege, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether the statutory privilege applies.

In my view, for similar reasons as set out above, neither the statutory solicitor-client communication privilege nor the statutory litigation privilege applies here. In other words, the absence of a reasonable basis for an expectation of confidentiality negates the application of the statutory solicitor-client communication privilege, and the dominant purpose test is required but has not been met for the statutory litigation privilege.

Conclusion

I find that section 12 does not apply to any of the records at issue. Although it is not determinative, and I make no finding in this regard, I agree with the appellant that disclosure of the records at issue is consistent with the intent of the legislature and the spirit of the *Act*. Specifically, section 7(2) indicates that (a) factual material, (b) a statistical survey, and particularly (d) an environmental impact statement or similar record and (g) a report containing the results of field research undertaken before the formulation of a policy proposal are *not* exempt under the "advice or recommendations" exemption. It is arguable that at least one, if not more, of these exceptions would apply to the records.

SEVERANCE

The City submits that portions of certain records are not responsive to the request, since they pertain to matters other than the study. This information includes personal telephone numbers and email addresses of individuals, as well as discussions of unrelated matters. The appellant makes no specific submissions on this point. I agree with the City's position. Accordingly, the portions of Records 2-5, 3-19, 3-23, 3-30, 3-32, 3-46, 3-48, 3-49, 3-51, 3-59, 3-64, 4-13, 4-20, 4-23, 4-26, 4-29, 4-37, 4-42(b), 4-43, 4-45, 4-53, 4-62, 4-66, 4-72, 4-75, 5-2, 5-4, 5-14, 5-29, 5-36, 5-37, 5-77(h), 5-105 as highlighted by the City may be withheld from the appellant.

ORDER:

1. I uphold the City's decision to withhold portions of Records 2-5, 3-19, 3-23, 3-30, 3-32, 3-46, 3-48, 3-49, 3-51, 3-59, 3-64, 4-13, 4-20, 4-23, 4-26, 4-29, 4-37, 4-42(b), 4-43, 4-45, 4-53, 4-62, 4-66, 4-72, 4-75, 5-2, 5-4, 5-14, 5-29, 5-36, 5-37, 5-77(h), 5-105 as highlighted by the City.

2. I order the City to disclose the remainder of the records or portions of records at issue to the appellant no later than **June 17, 2003**.

Original signed by: June 3, 2003
David Goodis
Senior Adjudicator

APPENDIX

INDEX OF RECORDS

Record Number	Description	Number of Pages
1-1	1999 Red Hill Valley Southern Flying Squirrel (*Glaucomys volans*) Presence/Absence Study – Draft Final Report prepared by environmental consultant dated January 17, 2000	15
1-2	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) Population Study 2000 – Draft: March 2001 prepared by environmental consultant	67
1-16	Letter to counsel for the City from environmental consultant re: flying squirrel study budget dated December 4, 2000	2
1-18	Letter to the City's Environmental Planning and Management Department from environmental consultant dated April 30, 2001	1
1-19	Southern Flying Squirrel (*Glaucomys volans*) 2001 Field Study Proposal by environmental consultant	2
2-3	Email to the City from environmental consultant dated August 2, 2001	1
2-5	Email to the City from environmental consultant dated July 11, 2001	2
2-19	Emails between environmental consultants dated March 14, 2001 and March 15, 2001	1
2-21	Draft introduction to 2000 population study report	1
2-28	Letter to counsel for the City from environmental consultant dated December 4, 2000	2
3-23	Emails between environmental consultants dated June 21, 2001	2
3-30	Emails between environmental consultants dated October 11, 2001 and October 15, 2001	2
3-32	Emails between environmental consultants dated between April 27, 2002 and April 30, 2001	2
3-35	Southern Flying Squirrel (*Glaucomys volans*) 2001 Field Study Proposal by environmental consultant	2
3-46	Email between environmental consultants dated March 14, 2001	1
3-48	Email between environmental consultants dated between January 2, 2001	1
3-49	Emails between environmental consultants dated between December 11, 2000 and December 13, 2000	2
3-51	Emails between environmental consultants dated December 7, 2000 and December 8, 2000	2
3-56	Draft letter to counsel for the City from environmental consultant dated December 4, 2000	2
3-59	Emails between environmental consultants dated November 27, 2000	2
3-64	Emails between environmental consultants dated November 9, 2000	2
4-4	Cover letter to counsel from the City from environmental consultant dated March 16, 2001, enclosing Record 1-2	1
4-5	Cover letter to counsel from the City from environmental consultant dated January 19, 2000, enclosing Record 1-1	1

4-13	Email between environmental consultants dated June 23, 2001	1
4-20	Emails between environmental consultants dated April 17, 2001	1
4-23	Email between environmental consultants dated June 13, 2001	1
4-25	Draft summary of population study report	2
4-26	Email between environmental consultants dated between June 20, 2001	2
4-29	Email between environmental consultants dated July 12, 2001	1
4-37	Email between environmental consultants dated August 28, 2000	1
4-39	Results of the presence/absence study	2
4-42(b)	Email between environmental consultants dated March 5, 2001	1
4-43	Email between environmental consultants dated June 30, 2000	1
4-45	Emails between environmental consultants dated June 19, 2000 and June 20, 2000	1
4-50	Draft summary of population study report	2
4-53	Emails between environmental consultants dated June 22, 2001	1
4-55	Southern Flying Squirrel (*Glaucomys volans*) 2001 Field Study Proposal by environmental consultant	2
4-62	Flying Squirrel Trap Locations in the Upper Red Hill Valley	8
4-63	Letter to counsel for the City from environmental consultant dated January 19, 2000	1
4-66	Email between environmental consultants dated July 12, 1999	1
4-72	Email between environmental consultants dated October 10, 1997	1
4-75	"Southern Flying Squirrel Refs."	2
4-79	Draft portion of Southern Flying Squirrel study report	1
4-82	Draft 1999 Red Hill Valley Southern Flying Squirrel (*Glaucomys volans*) Presence/Absence Study: Final Report dated January 17, 2000	12
4-86	Handwritten notes, trapping charts and map	4
4-87	Environmental consultant Wildlife Diagnostic Report dated August 5, 1999	4
4-88	Environmental consultant Wildlife Diagnostic Report dated August 5, 1999	4
4-89	Red Hill Valley Southern Flying Squirrel (*Glaucomys volans*) – Presence/Absence Study: Brief Summary Report	1
4-90	Red Hill Valley Southern Flying Squirrel (*Glaucomys volans*) – Presence/Absence Study: Brief Summary Report	1
4-91	Red Hill Valley Southern Flying Squirrel (*Glaucomys volans*) – Presence/Absence Study: Brief Summary Report	1
4-92	Flying Squirrel field notes	11
4-93	Red Hill Creek maps	5
4-94	Flying Squirrel Trap Locations in the Upper Red Hill Valley	3
5-2	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) – Population Study Meeting dated April 25, 2000	6
5-4	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) – Population Study Meeting dated April 19, 2001	2

5-11	Letter to environmental consultant from City dated December 8, 2000, enclosing "ADT Traffic Volumes"	2
5-14	Emails between City and environmental consultant dated May 16, 2000	2
5-27	Red Hill Creek Valley Southern Flying Squirrel Population Study proposal and agreement dated 2000	1
5-29	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) – Population Study Meeting dated April 25, 2000	3
5-31	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) Population Study proposal and agreement dated 2000	1
5-34	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) Population Study: Preliminary Agreement dated April 25, 2000	2
5-35	Red Hill Creek Flying Squirrel Study Progress Report dated May 12, 2000 to June 22, 2000	2
5-36	Emails between environmental consultants dated May 25, 2000	2
5-37	Flying Squirrel found on May 6, 2000	1
5-77	Handwritten notes of meeting	3
5-77(a)	Handwritten notes of meeting	1
5-77(b)	Handwritten notes of meeting	2
5-77(c)	Handwritten notes of meeting	1
5-77(d)	Handwritten notes of meeting	1
5-77(e)	Handwritten notes of meeting	3
5-77(f)	Handwritten notes of meeting	2
5-77(g)	Handwritten notes of meeting	2
5-77(h)	Handwritten notes of meeting	1
5-77(i)	Handwritten notes of meeting	2
5-101	Letter to counsel for the City from environmental consultant dated March 1, 2000	4
5-105	Red Hill Creek Valley Southern Flying Squirrel (*Glaucomys volans*) Road Effects Study Meeting dated May 14, 2001	1