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

ORDER MO-1494

Appeal MA-000374-1

Regional Municipality of Peel

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Regional Municipality of Peel ("the Region" or "Peel"), under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

As background, the Region and the Town of Caledon ("the Town" or "Caledon") have been jointly engaged in a resource study surrounding an amendment to the Town's Official Plan. The amendment is to be the subject of a hearing before the Ontario Municipal Board (the OMB), originally scheduled to commence in September of 2001, but now postponed until 2002.

The requester (now the appellant) made a request for copies of all records (including notes, letters, memoranda, reports, council minutes and resolutions, studies, etc.) with respect to:

- the Caledon Community Resources Study;
- the development, consideration and approval of Caledon Official Plan amendment 161; and
- the aggregate policies of Caledon's Official Plan.

The appellant is a lawyer who acts as counsel to the Association of Aggregate Producers of Ontario (the APAO) in the OMB proceeding.

The Region responded to the request initially with a letter dated November 3, 2000 which states in part:

> Further to your telephone conversation of November 3, 2000 with [named individual], please be advised that access will be granted to the records responsive to your request. As you know, the quantity of records responsive to your request is rather large. I have therefore scheduled Wednesday November 15, 2000 (1:00 p.m. - 3:00 p.m.) for the review process, for you to determine which records require photocopying. Please understand that prior to the review, all exempted information under [the *Act*] will be severed.

Following the appellant's review, on November 15, 2000, the Region identified, in several successive letters, the records it would permit access to as well as the exemptions it relied on to deny access to others. Some of the records to which it denied access after November 15 were ones the appellant had reviewed. Further, some of the records the Region agreed to disclose even after November 15 became the subject of later exemption claims by the Region. The Region also transferred, in several stages, a number of the records to the Town for its decision, citing the provisions of section 18(3) of the *Act*.

A number of issues are raised by this appeal. There are the exemptions the Region has relied on to deny access to a number of the records, in particular, the discretionary exemptions in section 6(1)(a) of the *Act* (draft by-law), section 7(1) (advice or recommendations), section 11(e) (information to be used in negotiations), and section 12 (solicitor-client privilege).

Further, the appellant takes issue with the transfer of part of the request, pertaining to specific identified records, from the Region to the Town. As well, the appellant objected to the Region's changes in position over the course of making its decision on access, and takes the position that

the Region is not entitled to deny access to records it has earlier decided to disclose. In this respect, the appellant takes the position that the Region cannot deny access to the records it permitted him to view on November 15. This raises an issue of whether there has been a waiver of the solicitor-client privilege or other exemptions by the Region and in general, of the effect of the November 15 review on the applicability of the exemptions relied on by the Region.

Finally, the appellant relies on the provisions of section 16 of the *Act* (public interest override).

It should be noted that on the same date as the request to the Region, the appellant made an identical request to the Town. That request has become the subject of another appeal to this office, MA010064-1, which is also currently in adjudication before me. During the course of dealing with this appeal, I denied a request from the Region and the Town to consolidate the adjudication of the two appeals (MA000374-1 and MA010064-1). I decided, however, to give formal notice of this appeal to the Town and provide it with the opportunity, as an affected party, to make representations on the facts and issues raised by the appeal.

I sent a Notice of Inquiry to the Region and the Town, initially, asking for their representations on the matters raised by the appeal. I then sent the Notice of Inquiry to the appellant, along with the representations of the other parties (edited for confidentiality) and invited his submissions, which I also received.

CONCLUSION:

I order disclosure of the records in Index "A", with the exception of records whose transfers to the Town I uphold. I uphold the Region's decision to withhold access to the records in Index "B" with the exception of Record 26(a) and further, uphold the transfers of certain records in Index "B" to the Town.

RECORDS:

Attached as Appendix "A" to this order is the list of records at issue, in four parts. Index "A" lists the records which the appellant was given an opportunity to review on November 15, 2000. Index "B" lists the records which were excluded from the appellant's review. Index "C" lists the records which were transferred by the Region on January 17, and overlaps with Index "A". Index "D" is a list of the records transferred by the Region on April 27 and September 10 and, as will be seen, also overlaps with Indexes "A" and "B".

In its representations, the Region had identified a number of records in Indexes A" and "B" which it has decided may be released to the appellant, or which have been disclosed. As a result, Record B29(a), which was listed in the Notice of Inquiry, is no longer in issue as it has been disclosed. The Region has stated that it will provide access to Records A22(a) and (b), A23(a) and (b), A24(a), A25, A27(a), A36, A40(c)(d) and (e) and Record B29(b). I will accordingly order the Region to send these to the appellant, if it has not already done so.

BACKGROUND TO THE APPEAL:

The following description of the background to the appeal is taken, in large part, from the representations of the Region.

The Town is one of three local municipalities in the Region. In 1996, the Province of Ontario issued a Provincial Policy Statement establishing a provincial policy framework for aggregate resources. The *Planning Act* requires all municipalities to "have regard to" this Statement in formulating their Official Plan policies. The first step in implementing the Statement in the Region was the formulation, adoption and approval of appropriate aggregate policies in the Regional Official Plan (the ROP), followed by the same in the Town's Official Plan. To this end, the Regional Council adopted aggregate policies in 1996. Over 100 appeals were filed with the OMB, and in early 1998, the OMB approved the Region's aggregate policies.

The Caledon Community Resources Study (CCRS) was commenced in 1996 and was originally conceived as a study that would make recommendations regarding appropriate aggregate polices for both the Regional Official Plan and Caledon's Official Plan. It is submitted by the Region, and I accept, that the development of appropriate aggregate policies for the Caledon Official Plan is a "multi-faceted complex planning and legal issue with significant implications for the future environmental, social and economic development of the Town of Caledon and the Region of Peel." The CCRS was conducted jointly by the Region and the Town between 1997 and 2000, and its purpose was to inventory aggregate resources in the Town and to recommend strategies and policies for managing those resources into the future. A number of consultants were involved in the CCRS, jointly funded by the Region and the Town. The CCRS also involved a Citizen's Advisory Group (CAG), and a Technical Study Group (TSG), created to provide technical advice and input to the study.

The study had not been completed by the time of the approval of the Regional Official Plan. The CCRS therefore focused on recommendations for Caledon's policies. The Regional Plan also recognized the potential need for amendment, depending on the results of the study. Three volumes of the CCRS report were made public in 1997, 1998 and 1999. About 25 public meetings were held during the course of the study to obtain public input and report on the progress of the study. As well, there were numerous smaller meetings among staff, lawyers and consultants representing the Region, the Town, the Province of Ontario and other parties to the process.

Caledon adopted Official Plan Amendment 161 (OPA 161) in the spring of 2000, following the completion of the CCRS. Numerous appeals have been filed with the OMB, including by the APAO, and a hearing is pending before that tribunal. The passage of the *Oak Ridges Moraine Protection Act, 2001* in May of 2001 has also affected the work of developing aggregate policies for the Town and the Region, but it is unnecessary to review that here.

DISCUSSION:

TRANSFER OF RECORDS

Introduction

Sections 18(3) and (4) provide:

> (3) If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request.
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> (4) For the purpose of subsection (3), another institution has a greater interest in a record than the institution that receives the request for access if,
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> (a) the record was originally produced in or for the other institution; or
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> (b) in the case of a record not originally produced in or for an institution, the other institution was the first institution to receive the record or a copy of it.

As I have indicated, the appellant was permitted to review a number of the records at issue, on November 15, 2000. On November 24, the Region sent a letter to the appellant identifying some twenty-six records to which it intended to grant access, and identifying others to which access was denied, including some which the appellant had reviewed. No mention was made of any intent to transfer records or part of the request to Caledon. On December 22, the Region once again wrote to the appellant revising its earlier decision and stating, among other things, that "we are in the process of determining whether any of these documents should be transferred to the Town of Caledon, pursuant to section 18." On that same date, the appellant was in the process of filing his appeal with respect to the earlier decision.

On January 17, 2001, the Region wrote to the appellant, and enclosed copies of certain records to which it had decided to grant access. Further, the Region listed fourteen records which it had decided to transfer to the Town for its decision under the *Act*, and cited section 18(3) of the *Act*.

As a result of the appeal, the Region and the appellant started having various discussions with a mediator from this office in February. On April 27, 2001, the Region transferred a further nine records to the Town for its decision under the *Act*. In July, this appeal was transferred to the adjudication stage and on July 30, I sent out the first Notices of Inquiry to the Region and to the Town. On September 10, just prior to providing me with its representations in the appeal, the Region sent a further letter to the Town indicating that it was transferring another ten records.

The appellant disputes the validity of all of the transfers.

On my review of the records at issue, I have determined that of the ten records listed in the September 10 letter from the Region to the Town, seven had already been transferred through the Region's letter of January 17 (Index "C"). One more, a one-page document dated September 29 containing an agenda for a meeting with the Ministry of Municipal Affairs and Housing, was disclosed by the Region on January 17. Therefore, of the ten records listed in the September 10 letter, only two represent new, disputed transfers. Index "D" identifies these.

It should also be noted that a number of the records transferred either on January 17 or September 10 had been reviewed by the appellant on November 15, 2000. I will discuss the significance of this below.

As a "decision of a head" under section 39(1) of the *Act*, a decision under section 18(3) to transfer a request or a record is subject to appeal to the Commissioner. Further, the Commissioner or her delegate has jurisdiction to uphold a decision by an institution to transfer a request, notwithstanding the failure to comply with the 15-day time limit set out in section 18(3) of the *Act*: see Order P-1498. Also in Order P-1948, Assistant Commissioner Tom Mitchinson identified the following as factors which may be useful in determining whether or not to uphold a transfer decision made beyond the 15-day time limit in a particular appeal:

- whether the transferring institution and/or the receiving institution have an interest in the records
- the reasons for the transfer
- the timing of the transfer
- the nature of the records
- prejudice to the parties

Representations

Recognizing that its decisions to transfer records were made beyond the 15-day time limit specified in the *Act*, the Region submits that, while time limits are established by several sections of the *Act*, these are procedural rather than substantive requirements. The appropriate test for determining whether a procedural irregularity should be allowed to determine a substantive issue is whether the appellant has suffered any significant substantive prejudice as a result of the procedural irregularity.

The Region submits that the appellant has not been prejudiced by the transfers, since he has the same rights and opportunities to obtain access to these records from Caledon. Further, if the appellant has suffered any prejudice as a result of any procedural irregularities in the way in which the transfers occurred, the degree of prejudice suffered by the appellant is inconsequential in comparison to the prejudice that would be suffered by Caledon if the disclosure of these documents was determined without providing it with the full opportunity to address the appropriateness of such disclosure in accordance with the transfer process. In effect, Caledon's substantive rights should not be prejudiced by any procedural irregularities by Peel.

On the issue of which institution has the greater interest, the Region submits that all of the records are documents that were originally produced by Caledon Staff or Legal Counsel or were received by them from others. Peel received copies of all of these documents secondarily from Caledon.

The Town submits that it has a greater interest in the transferred records than Peel. Accordingly, it has the right to determine whether to disclose documents in which it has a greater interest, regardless of whether the Region decided to allow the appellant to review them.

The appellant submits that there is no evidence or credible explanation as to why the Town is "more" interested in any records in dispute than is the Region. According to the Region's own submissions, the Region and the Town worked closely together as partners in the CCRS process and even jointly hired consultants. In light of the extensive interrelationships between the Region and the Town, the Region is as capable of considering and applying the *Act* with respect to any records in its control as the Town would be. The appellant submits that the transfers are just a delay tactic. The appellant notes that included in the transferred records are sixteen which he had reviewed and flagged for copying on November 15, 2000. Further, two of the three transfers were even made without notice to the appellant. The appellant refers to Order P-1498, in which a purported transfer made after the appeal had reached the inquiry stage was found to be invalid.

Analysis

Greater Interest

I have reviewed the records whose transfer is at issue, and I am satisfied that although Peel has some measure of interest in all of them, Caledon has a greater interest, with the exception of Records C01(b) and (c), C02(b), C03(d) and (e), C13 and C14 (all of which were transferred on January 17) and B24 (transferred on April 27).

As a general observation, all of these records were produced as part of the CCRS process, in which both the Region and the Town have an interest. By itself, the fact that a record relates to or was created for the CCRS does not lead to a conclusion that the Town has a greater interest. Which of the two institutions has the "greater interest" in a particular record produced during this process depends on the circumstances of its creation and dissemination, having regard to the criteria in sections 18(4)(a) and (b). With respect to section 18(4)(a), I find that the CCRS and the Town are not synonymous, and that a record created "for" the CCRS is not the same as a record created "for" the Town. However, a record created "for" the CCRS may still be a record in which the Town has a greater interest if it is established that the Town was the initial recipient of the record, pursuant to section 18(4)(b).

I find that a number of the records at issue meet the requirement of section 18(4)(a) that they be produced "in or for" the Town. Where the records were created by others, I accept the Region's general submission that it received the records secondarily from the Town, except where this is contradicted by the record itself. For instance, where a record was created by the Region's staff, I find it unreasonable to conclude that it was produced "in or for" the Town, or that the Town

was the initial recipient of the record. Thus, I conclude that Records C01(b) and (c) do not meet the criteria in either section 18(4)(a) or (b) as they were produced by staff with the Region. Without any specific evidence otherwise, I also conclude that the handwritten notes on Records C02(b) and B24 were produced by the Region's staff and also do not meet the criteria in section 18(4)(a) or (b).

I find that it has not been established that Records C03(d) and (e) and Records C13 and C14 were produced "in or for" the Town or that the Town was the initial recipient of them.

Some of these records were produced by consultants to the CCRS, are addressed to the Town, but are shown as having been copied to the Region. As indicated above, I have treated these records as records created "for" the CCRS rather than the Town. However, I have decided that the Town has a greater interest in these records on the basis that it was the initial recipient of them.

I also note that there are some records in which I have found the Town to have a greater interest, which bear some incidental handwritten notes. It may well be that these notes are authored by the Region's staff but since they are incidental to the main text of the records, they do not affect my findings on "greater interest".

Since a finding of "greater interest" is a prerequisite for a valid transfer decision under section 18(3), I do not uphold the Region's decision to transfer Records C01(b) and (c), C02(b), C03(d) and (e), C13 and C14 (all of which were transferred on January 17) and B24 (transferred on April 27).

My finding that the Town has a greater interest in the rest of the records at issue here does not end the matter. All of these transfers were made beyond the time limits established by the *Act*, and I will now turn to consider the other factors which may be relevant in determining whether to uphold these late transfer decisions.

Reasons for the (late) transfers

The reason for the transfer of records from the Region to the Town is the Region's belief that the Town has a greater interest in them, and accordingly should be the institution charged with making access decisions on them.

However, its own actions undermine its position in this regard, since some of the records which it ultimately decided to transfer had been made available to the appellant for review on November 15, 2000. Further, the Region clearly treated some of the records that it later transferred as records for which it had a responsibility to issue an access decision, since some of these records appear in its own Indexes of records. The Region does not seek to justify the delay in making its decisions to transfer records, or provide reasons for its apparent change of position.

Therefore, although I do not have cause to doubt the sincerity of the Region's belief that section 18(3) applies (and I see no reason to conclude, as the appellant submits, that the use of section

18(3) is a "delay tactic"), the Region has provided no compelling reasons for the delay in making its decision.

Timing of the transfers (prejudice to the appellant)

The first transfer decision (January 2001) was made approximately three months after the request, but prior to the Confirmation of Appeal from this office. The second transfer decision (April 2001) was made a few months into the mediation process, and several months before the matter was referred to adjudication. The third transfer decision (September 2001) was made during the time period for submission of representations from the Region in response to my Notice of Inquiry.

In my view, there has been no meaningful prejudice to the appellant from the timing of the January 2001 transfer decision. Although beyond the time limits specified in section 18(3), the decision was taken essentially before the appeal process was underway. This office has in other circumstances permitted institutions to amend positions or decisions in response to an access request at this stage in the process, recognizing the absence of meaningful prejudice to an appellant. For instance, the practice of this office is to permit institutions to rely on new discretionary exemptions not claimed in the original decision letter, provided they do so within 35 days of the date the parties are sent a Confirmation of Appeal. This practice, in effect, permits an institution to make a decision on access (albeit a supplementary decision) beyond the 30-day time limit set out in section 26 of the *Act*. This interpretation of section 26 has been applied in many decisions of this office, and was implicitly supported by the Ontario Court (General Division) Divisional Court in *Ontario (Minister of Consumer and Commercial Relations) v. Fineberg* (December 21, 1995), Toronto Doc. 220/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

There is potential prejudice to an appellant where a transfer decision is taken during mediation, or during the course of the adjudication of an appeal, as were the latter two decisions in this case. The potential prejudice arises from the harm that such late changes in positions cause to the mediation process. Attempts under section 40 of the *Act* to seek mediated resolutions of an appeal are undermined when the scope of the issues to be addressed changes midway through the process.

On the facts of this case, however, I find no meaningful prejudice to the appellant. As I have indicated, the appellant made an identical request to the Town, on the same date as his request to the Region. The remaining records at issue here were produced by the Town's staff or its outside counsel, were sent to the Town by others, or by their nature are likely to be in the Town's possession. I find it likely therefore, that the remaining records at issue would be found in the Town's files in any event, in addition to the Region's files, and would thus covered by the appellant's request to the Town. The transfer by the Region to the Town of these records is, in a sense, duplicative, since these records are likely already before the Town for its decision. Therefore, there is only minimal prejudice to the appellant by reason of the Region's failure to make an earlier transfer decision.

Nature of the records

It has been said that the complexity or volume of records may be a relevant factor to consider in determining whether or not to uphold a late transfer decision. I accept that in this case, the documents covered by the request were voluminous. Although the records in dispute are contained in only two bound volumes, it is likely that the initial search for records resulted in the location of many more than those before me. I also accept that the interrelationships between the Region and the Town create some complexities in determining their respective interests in the records. It is therefore not surprising that initial positions or decisions later came to be revisited, or that some time was taken in making the transfer decisions. I find, however, that the length of the delay in making the second and third transfer decisions is beyond what might have been reasonable.

Prejudice to the Region and to the Town

A decision not allowing the transfers would not result in any significant prejudice to the Region. However, I find that there would be significant prejudice to the interests of the Town. The Town's greater interest in most of the records at issue has been established. If the Town is not given the opportunity to make a decision on these records, then disclosure is dependent on the Region's decision and further, its ability to prove the applicability of the exemptions it has claimed. Without seeking to anticipate all possible outcomes, it may be that an exemption claim by the Region with respect to a given record may have a different result from an exemption claim by the Town. This factor may be mitigated by the fact that the Town is an affected party and has had the opportunity to provide its representations to me, but I find that this does not erase the prejudice.

A factor which I have also considered here is the effect or potential effect of the decision process applied by the Region. As I have indicated, the Region permitted the appellant the opportunity to review a number of records for which it subsequently claimed exemptions, or made a decision to transfer to the Town under section 18(3). A significant issue in this appeal is the effect of providing this opportunity and whether it amounts to waiver of solicitor-client privilege, and in general, whether the Region is precluded from applying exemptions after it has permitted this review. There would be significant prejudice to the Town if the Region's actions resulted in disclosure of records for which it might otherwise have a valid exemption claim.

Conclusion

I am satisfied that the Town has a greater interest in the transferred records, with the exception of those noted above. I find that although the delay between the date of the request and the first transfer decision is excusable, there are no good reasons for the delay in making the last two transfer decisions. I also find that because of the unique circumstances before me, in particular, the simultaneous and identical request to the Town and the consequent likely identity of the transferred records with the records already before the Town for its decision, there is no meaningful prejudice to the appellant by reason of the late transfers.

I conclude, however, that there would be significant prejudice to the Town if the transfers are not upheld. On balance, I agree with the Region's position that any minimal prejudice suffered by the appellant as a result of the late transfers is inconsequential in comparison to the prejudice that would be suffered by the Town if the disclosure of the records were determined without providing the Town with the full opportunity under the *Act* to address the appropriateness of such disclosure.

I therefore uphold the late transfers of records by the Region to the Town on January 17, April 27 and September 10, 2001, with the exception of Records C01(b) and (c), C02(b), C03(d) and (e), C13, C14 and B24. Records C01(b) and (c) and C03(d) are also part of Index "A". Because of my findings with respect to the records in Index "A", below, they are to be released to the appellant (and I note that in its representations, the Region has stated that access may be provided to Record C01(c) in any event). I will order the Region to make a decision with respect to Records C02(b), C03(e), C13 and C14 since it is not apparent that it has done so. I will not order the Region to make a decision with respect to Record B24, since the Region has claimed the application of specific exemptions to this record and the parties have had an opportunity to make representations on it.

I note that during the course of preparing my order, I received correspondence from the Town, querying whether it would be given an opportunity to make submissions on the disclosure of any records whose transfers I do not uphold. As indicated above, I have upheld the transfers of most records at issue. Others will be the subjects of a decision by the Region. With respect to those few whose transfers have not been upheld and whose disclosure I order, I consider that the Town, as an affected party given notice of this appeal, has already been provided with a full opportunity to make submissions on any issues relating to whether or not they should be disclosed.

I will now turn to consider the issues raised by the remaining records.

EFFECT OF APPELLANT'S REVIEW OF THE RECORDS IN INDEX "A"

Introduction

I have decided to turn to this issue first since, as will be seen, it is dispositive with respect to many of the remaining records. As set out above, Index "A" represents the set of records which the Region permitted the appellant to view on November 15, 2001, but for which it subsequently claimed the applicability of the discretionary exemptions in sections 7(1), 11(e) and 12 of the *Act*.

As also set out earlier, the letter from the Region to the appellant of November 3, 2000, preceding the appellant's review of the records, stated:

> Further to your telephone conversation of November 3, 2000 with [named individual], please be advised that access will be granted to the records responsive to your request. As you know, the quantity of records responsive to your request is rather large. I have therefore scheduled Wednesday November

> 15, 2000 (1:00 p.m. - 3:00 p.m.) for the review process, for you to determine which records require photocopying. Please understand that prior to the review, all exempted information under MFIPPA will be severed.

The appellant attended at the Region's offices on November 15 and was given an opportunity to review a number of records, which included all of the records in Index A but excluded the records in Index B. The Region has provided an affidavit from its Manager of Corporate Records, whose responsibilities include administering requests under the *Act*, setting out the circumstances surrounding this review. In the affidavit, the Manager states that she contacted the appellant on November 3 to determine if he could narrow the scope of the request to specific documents or specific topics. The appellant suggested that the easiest way to deal with the matter would be to gather all of the documentation into a boardroom and allow him to identify the documents that he was interested in having access to.

The Manager states that the Region

> felt that such an approach was a reasonable and practical solution to a very large volume request so long as a pre-screening for exempted material was undertaken, the requester was restricted from taking any notes of the content of any of the documentation and the identified documents were then examined to determine what if any further exemptions should be applied, before a final decision was made as to whether or not access would be granted.

The Manager states that she consulted with the Management Board Secretariat (MBS) for advice, and was told that the proposed "process of allowing the requester to have a restricted review of the files for the purpose of narrowing the scope of his request was a reasonable approach to a logistically large request."

On the basis of this, the Manager drafted and sent the letter of November 3. She further states that

> [a]t the time I wrote that letter, I anticipated that the comprehensive screening of the material would have been able to be completed and all of the exempted information would have already been removed from the files. Unfortunately, because of the volume of documentation, and other commitments, the time available for this matter between November 3 and November 15 did not allow for the completion of the process of screening all of the material for applicable exemptions. The documents that had been removed prior to November 15 are contained in the volume of Records that is labeled "Index B".

The Manager states that upon his arrival on November 15, the appellant was advised that his review of the documents would be restricted in nature, and conditional on a further review being conducted by Peel on the documents that he was about to identify. The appellant was told that he would not be allowed to take any notes beyond identifying the dates and the type of the document and was specifically prohibited from taking notes of the content of the records. The appellant was told to identify the documents that interested him and that the Region would

subsequently review them for exemptions. It is stated that "[a]t no time was there any actual waiver or intent to waive any exemption that the Region was entitled to claim with respect to the documents that were subject to the restricted review by [the appellant]. His review was an administrative convenience agreed to by [the appellant], to facilitate the processing of his request."

The Manager states that between November 16 and November 24, a review of the records identified by the appellant was undertaken, resulting in the decision letter of November 24. She also states that it was not until after this date that she became aware that "this was a matter that was in litigation". Legal counsel was contacted, and a further decision letter was then issued on December 22 narrowing the number of records which the Region intended to disclose.

Representations

In the Region's submissions,

> …(the) procedure was the carefully controlled implementation of an agreement with the requester for the purpose of administrative feasibility to scope what was otherwise a very broad request. It is submitted that the circumstances of that agreement created an implicit confidentiality agreement between the Region and [the appellant] that the viewing would be for no other purpose. It is submitted that such an approach is in accordance with the spirit of section 17(2) of the legislation.
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> It is submitted that the very stringent conditions placed on this limited right of review by Regional staff together with the requester's acceptance of those conditions and limitations created a confidentiality agreement between the requester and the Region. The existence of this oral confidentiality agreement is clear evidence that there was no intention by the Region of Peel to waive solicitor-client privilege or litigation privilege or any other exemption with respect to these documents.
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> [The appellant]) was advised on November 15 that his review and identification of documents to which he was seeking access was part of the process for narrowing the scope of his request. He originally suggested and subsequently agreed to that process. His review of the documents was subject to that implicit confidentiality agreement for the purpose only of narrowing the scope of his request. [The appellant] was advised that further consideration would be given to what exemptions would apply to the documents that he identified and that the documents that he did not identify would be considered by both parties to be outside the scope of his request and would not need to be addressed in the MFIPPA process. He was not permitted to make notes of any of the content of the documents, other than a brief description of what the document was and its date. He agreed to this restriction. He did not take notes of the content of any of the documents, beyond identifying them. His notes were inspected and approved by Regional staff before he was allowed to leave the Region's office. He agreed

> to these limitations; he agreed to the inspection of his notes. His notes from that meeting will reveal that he did not and was not allowed to write anything else down. He agreed to this process for scoping and administering his request.
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> [The appellant] is a lawyer and has a professional obligation to fulfill his undertakings. It is submitted that Regional staff are entitled to rely upon oral agreements with lawyers regarding administrative procedures. If [the appellant] agreed to this process and the limitations that were placed upon him, intending to subsequently argue that the limitations and restrictions were insufficient and that the process had amounted to a waiver of the Region's rights under the Act, then it is submitted that [the appellant] had a professional obligation to advise the Region's staff that they should obtain legal advice before relying upon his agreement to the process. [The appellant] knew this was an issue that his client and the Region were in litigation over; yet he did not advise the Region's MFIPPA staff of this fact…
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> It is submitted that the Adjudicator should not conclude that these circumstances amounted to a waiver of the Region's claim for exemption of the documents in Index A pursuant to section 12 or any other section of the Act…
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> ….
>
> In any event, it is submitted by the Region that any waiver of solicitor-client communication privilege or litigation privilege that may have occurred in these circumstances, only affects whether or not the exemption under s.12 of the Act can be claimed. Even if waiver occurred, there is no legislative doctrine of waiver applicable to other exemptions. The common law doctrine of waiver applies only in the context of the common law privilege that is reflected in section 12 of the Act. No common law doctrine of waiver of the legislative provisions in section 7(1) or section 11(e) exists. Nor is there any provision in the Act for implied waiver of these exemptions. Section 7(1) and 11(e) still apply to all documents in Index A and they are not waived.

The appellant submits that the agreement between him and the Region concerning the review of records is simply stated in the letter of November 3. It is clear from the face of the letter that the opportunity to review the records was not, as the Region now suggests, to narrow the Region's obligation to identify those records which were responsive to his request. It was to avoid unnecessary duplicating of records which, while responsive, were not of interest to the appellant. It is said that providing access to the appellant constituted a decision on those records and exhausted the Region's discretion over those records. In this respect, the appellant asserts that an "irrevocable decision to disclose the Appendix A records had already been made." The appellant denies that he provided an "undertaking" to permit the Region to scrutinize the records which he had already reviewed to determine which of those it might choose to exclude from ultimate production. He submits that it is absurd to suggest that any requester would have given a municipality permission to curtail his right to freedom of information in that extraordinary and improper way, and that it did not happen in this case.

In general, the appellant submits that the Region lacks jurisdiction to apply any of the discretionary exemptions under sections 7, 11 and 12 with respect to the records in Index "A". A decision had been made on or prior to November 15, 2000 with respect to these records, and the Region is not permitted to "revise" its decision to further restrict the appellant's access to records in its successive "decisions".

Analysis

I am satisfied that even if solicitor-client communication or litigation privilege could apply to the records in Index "A", this privilege has been lost through waiver when the appellant was permitted the opportunity to review them. Waiver of common law solicitor-client privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive the privilege [(*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 35 C.P.C. 146 (B.C. S.C.); Order P-1342].

In Order M-260, former Adjudicator Anita Fineberg considered the issue of waiver of solicitor-client privilege:

> Only the client may waive the solicitor-client privilege. Waiver of the solicitor-client privilege may be express or implied. As the appellant has not specifically stated whether she claims the waiver was express or implied, I shall examine both issues.
>
> In the recent text *Solicitor-Client Privilege in Canadian Law*, R.D. Manes and M.P. Silver, (Butterworth's, 1993) at pp. 189 and 191, the authors distinguish between the two types of waiver:
>
> > Express waiver occurs where the client voluntarily discloses confidential communications with his or her solicitor.
> >
> > Generally waiver can be implied where the court finds that an objective consideration of the client's conduct demonstrates an intention to waive privilege. Fairness is the touchstone of such an inquiry.
>
> . . . . .
>
> In *S. & K. Processors Ltd.* ... McLachlin J. noted:
>
> > However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require ...
> >
> > In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. (pp. 148-149)

The following passage from *Wigmore on Evidence*, vol. 8 (McNaughton rev. 1961), as set out in *The Law of Evidence in Canada* (Markham: Butterworth's, 1992), by Sopinka, Lederman and Bryant at p. 666, was quoted with approval by the Ontario Court (General Division) in the recent case of *Piché v. Lecours Lumber Co.* (1993), 13 O.R. (3d) 193 at 196:

> A privileged person would seldom be held to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not.

In Order MO-1338, Senior Adjudicator David Goodis applied the reasoning in Order M-260, in finding that the provision of a record to a third party amounted to waiver of solicitor-client privilege, notwithstanding the fact that the record was provided in confidence.

I find that the conduct of the Region in inviting the appellant to review the records on November 15, 2001 amounted to a waiver of any solicitor-client privilege which attached to those records. There is no doubt that the Region intended to permit a measure of disclosure. The Region freely acknowledges that it allowed the appellant to look through the records in question over the course of several hours. Whatever the restrictions on any notetaking it imposed on the appellant, there were no restrictions on his review during that time.

The Region characterizes this review as "limited" in the sense that it purported to reserve the right to decide which records would be subsequently photocopied and sent to the appellant. I find that any restrictions the Region placed on the appellant's review do not change the central fact that he was given access to them. Further, I find no meaningful distinction between the appellant's opportunity to read through the records, which he was given, and the ability to receive copies of the records, which he was denied. In this respect, it should be noted that section 23(1) of the *Act* indicates that receiving a copy of a record and having an opportunity to examine a record are two distinct methods of obtaining access. On the basis of the facts before me, I conclude that the conduct of the Region reached the point where, on objective considerations, an implied waiver of privilege occurred.

My finding is consistent with other orders in this area, including that in Order MO-1258, in which Senior Adjudicator David Goodis found that the appellant's view of a record at issue amounted to waiver of privilege, despite the fact that the institution claimed that the opportunity to view the record was given by mistake.

I also find that the appellant's review of the records amounts to a waiver of the other exemptions relied on by the Region, namely, sections 7(1) and 11(e). It should be noted that sections 7(1), 11(e) and 12 are all discretionary exemptions. They provide the opportunity for a Region to withhold records whose disclosure could harm its decision-making process (section 7(1)), its positions in negotiations (section 11(e)), or its interest in obtaining legal advice (section 12). Because these exemptions are discretionary, it is open to an institution to exercise its discretion

in favour of providing access to records which might otherwise be exempted from disclosure under these sections. These exemptions can be distinguished from those mandatory exemptions in the *Act* which protect the interest of third parties' privacy rights (section 14) or commercial interests (section 10).

On balance, I am satisfied that there is no reason why the objective considerations in this case which lead to a finding of waiver of solicitor-client privilege, would not also lead to a conclusion that reliance on the other discretionary exemptions has been waived.

I am supported in my findings by the decision in Order P-341, in which an institution was precluded from raising a discretionary exemption after it had already provided access to a record. In that case, the institution released the record at issue (with one severance of personal information) to the appellant, as part of a group of records released in response to the request. About two weeks later, the institution retrieved the record from the appellant, and purported to apply the solicitor-client exemption under the provincial *Act*. Assistant Commissioner Tom Mitchinson found that the institution was not entitled to rely on the solicitor-client exemption after access had been granted:

> As far as the record at issue in this appeal is concerned, without making comment on the possible application of section 19 [the provincial equivalent to section 12] to the record, it is my view that in responding to the original request the designated head must be deemed to have either concluded that the record, with the exception of the section 21 severance, did not qualify for exemption, or chosen to exercise his discretion against claiming exemption under section 19. While it is perhaps not within my jurisdiction to comment on the manner in which this record was retrieved from the appellant, it is my responsibility to determine whether access to the record has been granted under the *Act*, and I find that the appellant has been provided with access to the severed record. Therefore, I find that it is not possible for the institution to raise a claim under the discretionary exemptions provided by sections 19 and 49(a) after access has been granted.

Order P-341 was upheld on judicial review in *General Accident Assurance Co. v. Ontario (Information and Privacy Commissioner)* (March 8, 1994), Toronto Doc. 557/92 (Ont. Div. Ct.)]. In affirming the decision of the Assistant Commissioner, the Court stated, among other things that "[t]he necessary implication of the finding that the head chose to exercise his or her discretion against claiming an exemption under section 19 is that the Ministry chose to waive any privilege that might have attached to the record."

In a sense, the reasoning in Order P-341 reflects the principle expressed in the case law cited above that subjective intentions cannot always govern, and that objective consideration of conduct may lead to a conclusion of an implied waiver. I find this principle, and the reasoning in Order P-341 (including the Court endorsement) sound, and of more general application than in the area of solicitor-client privilege. The effect in this case is that, having decided to grant the appellant the opportunity to review the records, which I find on objective considerations amounts to a grant of access to the records in Index "A", the Region cannot revisit the exercise of its discretion under sections 7(1), 11(e) and 12 and purport to withdraw that access.

I note that the letter of November 3, 2001 is consistent with my finding that the Region's conduct amounted to a grant of access to the records in Index "A" on November 15. The affidavit submitted by the Region suggests that there were differences between the intentions as expressed in the letter of November 3, and what actually occurred on November 15, in that certain restrictions were placed on the appellant's review. However, even given these restrictions, it is undeniable that the appellant reviewed the records, and I am satisfied that this review amounted, objectively, to access.

As discussed above, I have permitted the Region to withdraw access to certain records in Index "A" in which the Town has a greater interest, and to permit their late transfer. I find that different considerations apply to these records, in particular, the existence of this strong third party interest. While, as a result of Order P-341, the granting of access will be generally taken as a decision on the applicability of any potential discretionary exemptions, the existence of third party interests may well lead to a different result. In this case, I have decided to permit the late transfers of records by Region, mainly because of the prejudice to the Town if the transfers were not upheld. I note that in another decision, Order MO-1209, an institution was permitted to revisit an earlier discretionary decision where the privacy interests of third parties were affected.

I appreciate that the Region may have had worthy intentions in following the process that it did. It has submitted that it was seeking a reasonable and administratively feasible process for dealing with a broad request. I approve of the intentions; however, the manner in which they were carried out was flawed. A certain measure of informality between institutions and requesters in working through requests is to be encouraged. Informal discussions will often serve to narrow, focus or clarify requests, particularly when they appear very broad at first glance. There is a point, however, where informality ends and the provisions of the law must govern. While the *Act* does not preclude informal discussions between institutions and requesters during the course of the institution's decision-making, I find that it does not allow for the type of practice represented in this case. It is not consistent with the spirit or the terms of the *Act* for an institution to grant a "quick peek" sort of access, subject to its final decision.

It should be noted that there are several different avenues, consistent with the *Act*, available to institutions seeking to find an administratively feasible process for dealing with broad requests. An institution may choose to provide an index of the records located, with enough information about the records so that a requester may narrow his or her request. The provision of a detailed index would not amount to waiver of exemptions, and may even be done verbally at this stage. An institution is entitled to extend the time limit for responding to a request under the *Act*, in the circumstances described in section 20(1). Further, where an institution encounters undue expense in gathering the records for the purpose of making a decision, the institution may provide a requester with an interim notice pursuant to section 26, accompanied by a fee estimate. The process of interim notices is described in Order 81, and has been subsequently affirmed in other orders (see, for instance, Order M-555).

Unfortunately, the Region did not consider these other avenues in this case. For the reasons I have expressed above, I find that it has waived the application of the discretionary exemptions in sections 7(1), 11(e) and 12 with respect to the records in Index "A". I will accordingly order the

Region to provide these records to the appellant, with the exception of the records whose transfers I have upheld.

INDEX "B"

The following discussion relates to the records in Index "B", with the exception of the records whose transfers I have upheld (Records B16(b), B17, B18, B30(a), B30(b), B30(c), B32 and B41), and with the exception of Records B29(a) and (b), which are no longer in issue.

ADVICE OR RECOMMENDATIONS

Section 7(1) of the *Act* provides:

> A head may refuse to disclose a record if the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

Section 7(1) is subject to the exceptions listed in section 7(2).

A number of previous orders have established that advice or recommendations for the purpose of section 7(1) [or its provincial equivalent] must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process [Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)*, Toronto Doc. 721/92 (Ont. Div. Ct.)]. Information that would permit the drawing of accurate inferences as to the nature of the actual advice or recommendation given also qualifies for exemption under section 7(1) of the *Act* (Order P-233).

In Order 94, former Commissioner Sidney B. Linden commented on the purpose and scope of this exemption. He stated that it "... purports to protect the free-flow of advice and recommendations within the deliberative process of government decision-making and policy-making". Put another way, its purpose is to ensure that:

> ... persons employed in the public service are able to advise and make recommendations freely and frankly, and to preserve the head's ability to take actions and make decisions without unfair pressure [Orders 24, P-1363].

The Region claims that section 7(1) applies to all of the records in Index "B".

The Region submits that the records must be considered in the context that they were part of a continuous process of policy making by the Region and the Town that remains ongoing. This policy making process has included the CCRS study, public meetings, consideration of consultants' advice and recommendations, consideration of legal advice and recommendations, generation of policy options, internal discussion among staff and legal counsel regarding the appropriateness of various policy options, refinement of policy options, and preparation for anticipated litigation over the appropriateness of the policy options that were eventually adopted.

The Region states that all of this was the mechanism by which staff at the Region have been developing their advice and recommendations to Regional Council regarding the appropriateness of policies adopted by the Town for the management of aggregate resources and environmental features within Caledon.

As a general matter, the Region urges me to be "very cautious" in exercising my jurisdiction in deciding on the disclosure of individual records. It is submitted that the appellant seeks to go beyond the disclosure process that the OMB may order and to use the *Act* to obtain more documents than he might otherwise be entitled to obtain in the OMB disclosure process. It is said that the OMB is empowered to grant disclosure in its proceedings, and that, because of its expertise and familiarity with these types of issues and with this matter in particular, is much better positioned than is the Commissioner to balance the rights and prejudices of the parties with the integrity of the decision making process in making the decision regarding which documents should be disclosed.

In the Region's submissions, none of the records reflects advice or recommendations of staff or consultants in its final form, but represent advice and recommendations in their evolving state. They reflect portions of the "deliberative process of government decision making and policy making" referred to in Order 94.

The Region also submits that just because a number of the records contain advice and recommendations to or from legal advisors, as opposed to any other type of professional advisor, does not make the record ineligible for exemption pursuant to section 7(1). These records contain not only legal advice in its narrowest meaning but also advice and recommendations of a strategic, procedural and general nature relating to the overall process of policy formulation.

The Region's submissions categorizes the records into six groups for the purpose of analyzing the applicability of section 7(1):

1. records which reflect briefings to and legal advice from outside counsel or the Senior Regional Solicitor;
2. records which reflect staff notes from internal meetings and negotiations among Peel staff, Peel legal staff, Peel outside counsel, Caledon representatives and legal counsel and consultants;
3. records which reflect advice or recommendations to or from consultants, including preliminary drafts/comments and budget discussions;
4. staff notes from negotiation meetings with appellants or potential appellants before the Ontario Municipal Board, all of which were conducted "without prejudice";
5. draft by-laws;
6. draft council reports.

The Region's submissions make general representations with respect to each of these categories. Their confidential submissions further elaborate on these representations, with reference to each record identified in the Index.

The appellant submits in general that the fundamental error pervading the Region's submissions on this appeal is that it has, from the outset, failed to apply the principles of freedom of information law in approaching this matter. Rather, the Region focuses on the identity of the requester (the fact that he is a lawyer who represents appellants in the OMB proceeding), even going so far as to make the improper request that the Commissioner should decline to make a determination, relying instead on the jurisdiction of the OMB to order production in its proceedings.

The appellant also notes that some of the submissions of the Region were withheld from him, putting him at the dual disadvantage of neither being able to review the record nor to respond to the Region's submissions. Accordingly, he urges me to approach the Region's submissions with considerable skepticism and caution.

With respect to section 7(1), the appellant submits that the nature of the records in question does not qualify any of them for exemption. Section 7(2) makes it clear that only a specific and narrow category of actual *advice* may be shielded by this provision. It does not permit an institution to shield information and comments which are peripheral to the decision making process.

The appellant asserts that the Region's sweeping approach implies that all staff communications should be kept confidential because anything said within government on a topic may make its way into a decision some day. In a sense, it is submitted, the Region's position is that all records which do not form part of its final information package to the public are exempted under section 7(1). Such a theory of closed government is anathema to the freedom of information safeguarded by the *Act*.

Analysis

I will begin by addressing the submissions as to the effect of the availability of documentary disclosure in the OMB proceeding, on the appeal before me. The issue of the relationship between access to records under the *Act* and access under another proceeding was considered by Former Commissioner Sidney B. Linden in Orders 48 and 53. In Order 48, he stated:

> ... [t]he existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [*Act*] is unfair ... Had the legislators intended the *Act* to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. No such exemption exists, and, in my view, subsection 14(1)(f) or section 64 cannot be interpreted so as to exempt records of this type without offending the purposes and principles of the *Act*.
>
> I am supported in my view by the decision in the case of *Playboy Enterprises Inc. v. Department of Justice* [677 F.2d 931(1982)], heard in the United States Court of Appeals, District of Columbia Circuit. In that case, which was decided under the U.S. freedom of information legislation, the government put forward the

> argument that, because its claim of privilege with respect to a certain record had been sustained in discovery proceedings in other cases, those determinations should be given "controlling weight" in the decision as to whether the record should be released under the U.S. freedom of information legislation. The court answered by stating that "... the issues in discovery proceedings and the issues in the context of a freedom of information action are quite different. That for one reason or another, a document may be exempt from discovery does not mean that it will be exempt from a demand under the *Freedom of Information Act*."

I agree with the conclusions of the former Commissioner that the *Act* must operate as an independent piece of legislation in determining whether records qualify for exemption from disclosure. It should be noted, however, that the availability of other processes may have a bearing on other issues that arise under the *Act*. In Order MO-1450, I found the fact that there had been a lengthy hearing before the OMB, and the availability of disclosure of information through that process, were relevant to a determination of whether there was a compelling public interest in the disclosure of otherwise exempt information. I will explore this further below when I discuss the public interest arguments made in this appeal.

I turn now to consider the application of the section 7(1) exemption to the records in Index "B".

I find that the following records meet the requirements of the section 7(1) exemption: Records B02, B03, B05, B06, B07(b), B08, B09, B10(b), B11(a), B11(b), B13(a), B13(b), B13(c), B13(d), B13(e), B16(a), B21, B24, B27, B34, B38 and B40. I am satisfied that disclosure of the information in these records would reveal advice or recommendations of an officer, employee or consultant for the Region, or would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations given, within the terms of section 7(1).

Although Records B02, B06, B07(b), the first page of B16(a) and the whole of B24 are minutes of meetings between representatives of the Region and other parties (such as the Town), I find that they record or would reveal advice or recommendations made to an institution by officers, employees or consultants. Records B03, B05, B08, B09, B10(b), B11(a), B11(b), B13(a), B13(b), B13(c), B13(d), B13(e), the second page of B16(a), B27 and B38 contain emails between members of the Region's planning staff, legal staff, administrative staff and outside counsel, file notes, notes of internal meetings and supporting material which also contain or would reveal advice or recommendations from either staff or consultants to the Region with respect to the Region's negotiation and litigation position on OPA 161.

Record B21 is a draft for discussion purposes of an agreement between the Region, Caledon and their joint consultant on the CCRS project. I find that this document represents the advice or recommendations of the Commissioner of Planning to Council regarding the terms and conditions upon which the consultant should be retained, and meets the requirements of the section 7(1) exemption.

Record B34 also qualifies for exemption under section 7(1). It consists of a letter from outside counsel for the Town to legal counsel at the Region, setting out the terms of a settlement proposal to be recommended to the Town. Although the "advice or recommendations" pertain

most clearly to the Town, I am satisfied that the disclosure of the record would also allow accurate inferences to be drawn with respect to the advice or recommendations to be made to the Region by its legal counsel.

Record B40 consists of a portion of the text of a draft consultants' report. Recorded by way of handwritten notations are recommended changes to the report by a member of the Region's staff. I accept that this record contains advice or recommendations of an employee within the meaning of section 7(1).

Although it is likely that section 7(1) applies to at least some of the remaining records, I have not made a specific determination under section 7(1) with respect to Records B04, B10(c), B10(d), B12, B14, B15, B19(a), B19(b), B19(c), B20, B22, B23, B25, B26(b), B28, B31(a), B31(b), B33, B35, B36, B37 and B39 because I find that it is more appropriate to consider them under section 12, and because section 12 applies in any event to exempt them from disclosure (see my discussion below).

Although Record B05 satisfies the requirements of section 7(1) because of the advice or recommendations found on the second page of this record, I find that the first page does not contain any of the information covered by that exemption.

The first page of Record B05 consists of the handwritten minutes of a meeting between Regional representatives and representatives of the APAO (the appellant's client). I am not satisfied that these notes either record or would reveal advice or recommendations of an officer, employee or consultant of the Region, to the Region. I also find that the first page can be readily severed from the second page, which I have found exempt from disclosure in my discussion above.

Further, I find that section 7(1) does not apply to exempt Records B10(a) and B26(a) from disclosure. Record B10(a) is email correspondence from the Region to the Town's Mayor, setting out the Region's negotiating position and potential litigation position with respect to the anticipated OMB proceedings, and making certain proposals. It does not reflect advice or recommendations from employees or consultants to the Region as part of the process of developing these positions and proposals but represents, rather, the culmination of that process. Advice and recommendations may have been sought in the course of developing the positions expressed in this record; this record reflects the decisions made after receipt of that advice. This is not to preclude the possibility that the Region's position may have evolved subsequent to this record; however, the record reflects its fully realized position at a point in time.

Record B26(a) is a Briefing Note prepared by planning staff for members of Regional Council regarding the status of the OMB litigation. Referenced in the briefing note and attached to it are two pieces of correspondence between the Region's legal counsel (Record B26(b), dealt with below). I am not satisfied that Record B26(a) meets the requirements of section 7(1), in that it provides generalized factual information as to the status of the work of the planning and legal staff on the Region's part in the OPA 161 process. It does not either record or reveal information about advice or recommendations from the Region's staff, counsel or consultants.

In sum, I find that the following records qualify for exemption under section 7(1): Records B02, B03, B05, B06, B07(b), B08, B09, B10(b), B11(a), B11(b), B13(a), B13(b), B13(c), B13(d), B13(e), B16(a), B21, B24, B27, B34, B38 and B40.

I find, however, that the first page of Record B05 may be severed from the second page, and that it, along with Records B10(a) and B26(a), does not qualify for exemption under section 7(1).

Some of the records to which section 7(1) applies contain information which may be disclosed pursuant to the provisions of section 7(2), such as factual material (section 7(2)(a)). I find that any such information that should be disclosed under section 7(2) is so intertwined with the advice or recommendations that it is not practicable to disclose non-exempt information without also disclosing exempt information.

Since I have upheld the Region's decision to withhold access to these records under section 7(1), it is unnecessary for me to consider them further below.

SOLICITOR-CLIENT PRIVILEGE

The records I will consider in this section are: Records B04, B10(c), B10(d), B12, B14, B15, B19(a), B19(b), B19(c), B20, B22, B23, B25, B26(b), B28, B31(a), B31(b), B33, B35, B36, B37 and B39. I will also consider Record B26(a), which I have found does not qualify for exemption under section 7(1). Since I find below that the first page of Record B05 and Record B10(a) are exempt from disclosure under section 11(e), it is unnecessary to consider the application of section 12 to them here.

It is the position of the Region that solicitor-client privilege applies to all of these records.

Introduction

Section 12 of the *Act* 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 encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for section 12 to apply, it must be established that one *or* the other, or both, of these heads of privilege apply to the records at issue.

Solicitor-client communication privilege

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].

This privilege has been described by the Supreme Court of Canada 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, cited in Order P-1409]

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

> . . . the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the 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. A letter from the client containing information may end with such words as "please advise me what I should do." But, even if it does not, there will usually be implied in the relationship an overall expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.), cited in Order P-1409].

With respect to solicitor-client communication privilege, the Region submits that all of the records at issue are communications either to or from the Director of Legal Services for the Region of Peel or outside legal counsel retained specifically with respect to this matter. In most cases, it was a member of Regional staff who was seeking or receiving the legal advice. In some cases, the legal advice was sought and given by written communications. In other cases, the legal advice was given orally, in a meeting or over the telephone, and the advice was transcribed or otherwise noted down and distributed to other members of Regional staff who needed that information.

The Region submits that this case is a clear example of the "continuum of communications" between a solicitor and client referenced in Order P-1409. While most of the communications were directly to or from the solicitor with an explicit request for legal advice, in some instances, the legal briefing and advice was sought by sending a copy of an internal memo to one of the two lawyers involved. The Region provides an example of one such internal memo to which several

people, including the lawyer, responded. It is submitted that the overall context of the relationship was clear and the mechanism of copying legal counsel with internal memos created a clear expectation on both parts that legal counsel was being briefed and implicitly requested to provide legal advice as necessary.

The appellant refers to the four criteria of the "confidential communications" branch of solicitor-client privilege, set out in Order M-394:

1. there must be a written or oral communication;
2. the communication must be of a confidential nature;
3. the communication must be between a client (or his agent) and a legal adviser; and
4. the communication must be directly related to seeking, formulating or giving legal advice.

The appellant submits that the Region has confused prejudice with privilege in its submissions; the fact that records may be prejudicial does not mean that they are privileged. It is the purpose for which the records were created, not the purpose for which they might be used by the recipient, which dictates whether solicitor-client privilege or litigation privilege applies. It is submitted that only records created for the dominant purpose of preparing for the OMB or other litigation or seeking advice from a solicitor are captured by section 12 of the *Act*.

With respect to confidentiality, it is submitted that Order M-394 supports the principle that general comments made at staff meetings are not exempt. Thus, team meetings and/or meetings with experts do not necessarily attract solicitor-client privilege.

Analysis

I find that the "solicitor" for the purposes of these records is either outside legal counsel retained to give advice to the Region with respect to the CCRS process and OPA 161, or the Region's Director of Legal Services. The "client" is the Region and, in these records, is represented by various members of its staff involved in the matters for which legal advice was sought.

Records B04, B10(c), B10(d), B12, B14, B15, B19(a), (b) and (c), B20, B22, B23, B25, B26(b), B28, B31(a), B31(b), B33, B35, B36, B37 and B39 consist of email correspondence, letters and memos between members of Regional staff and either the Region's Director of Legal Services or outside counsel. I am satisfied that all of these records form part of the "continuum of communications" between solicitor and client referred to in *Balabel v. Air India*, above. In many cases, advice is specifically provided by or requested of counsel. In other cases, information is passed by counsel or Regional staff to the other as part of the process of keeping both informed so that advice may be sought and given as required. In some cases, legal advice is either recorded for a file (Record B23), or communicated to others within the Region (Record B35).

Although not all of the records are marked as "confidential", I am satisfied from the context that they were intended to be treated confidentially as amongst the Region's representatives and legal counsel.

I am satisfied that Order M-394, referred to by the appellant, is not applicable here. In Order M-394, the Inquiry Officer rejected the submission that the comments of counsel, made at a meeting with other parties present, were privileged communications. The records to which I have found section 12 applicable do not include notes of meetings at which other parties were present, as in Order M-394.

I find that Record B26(a) does not qualify for exemption under section 12. Its purpose is to provide an update to Regional Council on the OPA 161 appeal, and I find it was not made for the purposes of seeking or giving legal advice.

I turn now to the application of the litigation privilege encompassed by section 12. The only record necessary to consider here is Record B26(a).

Litigation Privilege

In Order MO-1337-I, Assistant Commissioner Mitchinson reviewed the current state of the law with respect to the concept of litigation privilege and, in particular, the effect of the decision of the Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321). In that order, he stated:

> In *General Accident*, the majority of the Court of Appeal questioned the "zone of privacy" approach and adopted a test which requires that the "dominant purpose" for the creation of a record must have been reasonably contemplated litigation in order for it to qualify for litigation privilege
>
> ...
>
> In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:
>
> > The "dominant purpose" test was enunciated [in *Waugh v. British Railways Board*, [1979] 2 All E.R. 1169] 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.

> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> The test really consists of three elements, each of which must be met. First, it must have been *produced* with contemplated litigation in mind. Second, the document must have been produced for the *dominant purpose* of receiving legal advice or as an aid to the conduct of litigation - in other words for the dominant purpose of contemplated litigation. Third, the prospect of litigation must be *reasonable* - meaning that there is a reasonable contemplation of litigation.
>
> Thus, there must be more than a vague or general apprehension of litigation.

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.

In Order MO-1337-I, Assistant Commissioner Mitchinson found that even 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. This aspect of litigation privilege arises from a line of cases that includes *Nickmar Pty. Ltd. v. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44 (S.C.) and *Hodgkinson v. Simms* (1988), 55 D.L.R. (4th) 577 (B.C. C.A.). As the Assistant Commissioner points out in his analysis, the test for this aspect of litigation privilege from *Nickmar* was quoted with approval by two of the three judges in *General Accident*. As a result, the Assistant Commissioner concluded that this aspect of privilege remains available after *General Accident*, and he adopted the test in *Nickmar*:

> . . . the result in any such case depends on the manner in which the copy or extract is made or obtained. If it involves a selective copying or results from research or the exercise of skill and knowledge on the part of the solicitor, then I consider privilege should apply.

The Assistant Commissioner then elaborated on the potential application of the *Nickmar* test:

> The types of records to which the *Nickmar* test can be applied have been described in various ways. Justice Carthy referred to them in *General Accident* as "public" documents. *Nickmar* characterizes them as "documents which can be obtained elsewhere," and [*Hodgkinson*] calls them "documents collected by the ... solicitor from third parties and now included in his brief." Applying the reasoning from these various sources, I have concluded that the types of records that may qualify for litigation privilege under this test are those that are publicly available (such as newspaper clippings and case reports), and others which were not created with the litigation in mind. On the other hand, records that were created with real or reasonably contemplated litigation in mind cannot qualify for litigation [sic] under the *Nickmar* test and should be tested under "dominant purpose."

The Region submits that all of the records are litigation privileged because they were created for the dominant purpose of existing or reasonably contemplated litigation. They were brought into existence because of the anticipated OMB litigation. The records at issue in this appeal are the records created as part of the process of ensuring that the policy framework was responsive to appeals that were anticipated or filed or that the policy framework was defensible in light of those appeals. Consultants were retained for the specific purpose of defending the policy framework at the OMB. The meetings, strategy sessions, legal advice and associated documentation that are reflected in the records in issue were necessary only because of this anticipated litigation.

The appellant's submissions are as set out above. Again, his position is that only records prepared with the dominant purpose of preparing for the OMB or other litigation or seeking advice from a solicitor are captured by section 12 of the *Act*. Further, he states that notes of a meeting at which the appellant was present clearly do not reflect the type of confidential communication over which a municipality has discretion to claim section 12 privilege. If another party was present the documents cannot be privileged because by definition the contents of the meeting were not confidential.

I agree with the Assistant Commissioner's approach to litigation privilege as set out above, and I will apply it for the purpose of this appeal. As I have indicated, it is only necessary to consider the application of this head of solicitor-client privilege to Record B26(a).

I do not find that Record B26(a) qualifies for exemption under the litigation privilege head of solicitor-client privilege. It is not apparent that the dominant purpose for its creation was for use in the litigation (by then ongoing). Rather, it is a factual briefing note from a member of the Region's planning staff to Regional Council, advising of the status of the OMB litigation. Although the Region has asserted that it is "confidential" in nature, this alone does not qualify it for the solicitor-client privilege exemption. I have found the two attachments to Record B26(a) exempt under the solicitor client communication privilege, but I am satisfied that this briefing note is a distinct communication which does not fulfill the criteria of the section 12 exemption.

In sum, I find that Records B04, B10(c), B10(d), B12, B14, B15, B19(a), (b) and (c), B20, B22, B23, B25, B26(b), B28, B31(a), B31(b), B33, B35, B36, B37 and B39 qualify for exemption under section 12. I further find that the Region has exercised its discretion appropriately in withholding access to these records in the circumstances of this appeal. I have considered whether any exempt information in these records may reasonably be severed pursuant to section 4(2) of the *Act*, and I conclude that severance is impracticable.

ECONOMIC AND OTHER INTERESTS

Because of my findings, it is only necessary to consider the application of section 11(e), the remaining exemption relied on by the Region, to the first page of Record B05, Record B10(a) and Record B26(a). I have found all other records at issue in Index "B" to either be the subject of valid transfers to the Town, or exempt from disclosure under sections 7(1) or 12 of the *Act*.

Section 11(e) provides that an institution may refuse to disclose a record containing "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution."

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; and

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to negotiations; and

3. the negotiations must be carried on currently, or will be carried on in the future; and

4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

The Region submits, among other things, that while the Region and the Town were partners in the CCRS study, the partnership has only been maintained by the constant negotiation of differences. Virtually all of the meetings between Caledon and Peel staff, consultants and legal counsel during the policy formulating process were negotiating sessions as well as coordination and strategic planning meetings. As each issue arose and policy options were developed and discussed for addressing each issue, negotiations were necessary to reach a common position. The records in issue identify the issues and positions being discussed at any particular point in time and the options being considered for resolving differences between the Regional representatives and the Town representatives. Further, the Region has been and continues to be in negotiations with a number of the major appellants and potential appellants in the OMB proceeding.

The Region submits that since the aggregate policies of OPA 161 have not yet been approved by the OMB, future negotiation meetings with all parties are anticipated both prior to and during the upcoming OMB hearing. Premature disclosure of the Region's policy positions, strategic positions and concerns, and the performance criteria by which policy options are evaluated would severely undermine the negotiating position of the Region and the Town and make the settlement of this OMB matter much more difficult.

The appellant submits that the section 11(e) exemption does not apply to any of the records under consideration. As with records subject to litigation privilege, it is clear from the text of the provision that this exemption applies to records that, at the time of their creation, contain material to be applied to negotiations. It is submitted that the effect of disclosure on the Region's future negotiating position to a hypothetical future OMB hearing is irrelevant to the *Act*, as these negotiations cannot have been in contemplation when the records were created, in some cases three full years before the OMB proceedings were initiated.

It is not necessary for me to consider how broadly section 11(e) may apply to the records before me. Thus, is not necessary to answer the appellant's submissions about the validity of applying section 11(e) to records which may have been created some years ago. It is only necessary to consider the application of section 11(e) to the first page of Record B05, to Record B10(a), and to Record B26(a). On my review of the matter, I am satisfied that section 11(e) applies to exempt the first page of Record B05 and Record B10(a) from disclosure, but does not apply to Record B26(a).

Record B05 consists of two pages of handwritten notes. The first page records the discussion at a meeting held between the appellant and the appellant's client (the APAO) in the OMB litigation, and the Region's representatives and legal counsel. The second page records a private meeting between the Region's representatives and its legal counsel, which I have found subject to the section 7(1) exemption. It is said by the Region that the first meeting was a negotiation/settlement meeting between these parties, held "without prejudice". Although there is no year noted on the record, from the context, it appears that the meeting took place shortly before the commencement of litigation before the OMB over Caledon's OPA 161.

Record B10(a) consists of email correspondence from the Region to the Town setting out the Region's negotiating position and potential litigation position with respect to the anticipated OMB proceedings, and making certain proposals.

I accept the Region's submissions that it has been and continues to be in negotiations with a number of the major appellants and potential appellants in the OMB proceeding. From my review of the first page of Record B05 and of Record B10(a), I am satisfied that they contain information about positions, plans, procedures, criteria or instructions intended to be applied to these negotiations.

On my review of Record B26(a) I am not satisfied that it reveals "positions, plans, procedures, criteria or instructions" to be applied to the negotiations over the issues before the OMB. As I have indicated above, it is a factual update. Although it refers to the fact that settlement

discussions with various parties to the OMB litigation are ongoing, it does not provide any information about the positions of the Region in these discussions.

I accordingly find that section 11(e) does not apply to exempt Record B26(a) from disclosure.

PUBLIC INTEREST IN DISCLOSURE

In this appeal, reference is made to section 16 of the *Act*, which provides:

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

It should be noted that section 16 does not make reference to section 12. The relevance of section 16 in this appeal lies, therefore, in its potential to "override" the application of section 7(1) to the group of records I have found subject to this exemption, as well as the application of section 11(e) to the first part of Record B05 and Record B10(a).

Section 16 incorporates two components which must be established in order for this section to apply. There must be a "compelling public interest in the disclosure of the record", and this interest must "clearly outweigh the purpose of the exemption" [see, for instance, Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999)*, 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.), dealing with the provincial equivalent to section 16].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, section 7(1). Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested.

The appellant submits that the existence of the OMB hearing is irrelevant to the public interest override. Public interest in the records stems from the fact that the CCRS was intended to be a public process with multi-party participation which would resolve outstanding issues related to the future of the aggregate industry in Caledon, one of the Region's constituent municipalities. The scope, intent and purpose of participation in the CCRS is stated in its Terms of Reference. There is consequently a considerable public interest in making available to requesters the information upon which the Town's and Region's policy decisions and positions were made. The CCRS's very public nature makes the public interest in these records considerable and detracts from the extent to which the municipality's interest in keeping negotiation strategies or advice secret should be protected.

Further, it is submitted that the Region's characterization of the appellant's client's (the APAO) interest as a "private profit motive" betrays the focus on the identity of the requester, and a failure to appreciate that as a municipality their decisions are inherently open to public scrutiny, particularly when they engage in a process like CCRS. The exceptions to the *Act's* general policy of openness should be construed very narrowly and full effect should be given to the "public interest override" in light of the context in which these records were created.

The Region submits that there is no compelling public interest in the disclosure of the documents in issue in this appeal. The only party seeking such disclosure is the appellant, who is legal counsel for one of the parties to the OMB proceeding. It is said that their interest is a private profit motive. They seek to have the OMB overturn the regulatory regime adopted by the Town because they consider that the regulations that would be placed upon aggregate operations in Caledon by Caledon's policy framework would create a competitive disadvantage compared to other operations in other municipalities. The OMB hearing and the prehearing process that has commenced provides all parties with full opportunities to seek disclosure of relevant documentation. The OMB has all of the powers of an Ontario court to order the production of relevant and appropriate documents.

The Region further submits that the public interest in the issue of the CCRS and the aggregate policies of Caledon's Official Plan will be very adequately served by the extensive examination of this topic that will occur during this upcoming OMB hearing. In addition to the appellant's client, the public interest will be represented by numerous other parties before the OMB, including the province and public interest groups.

Further, the potential prejudice to the Region, the Town and the public interest of having the records in issue disclosed to the appellant would be considerable. The settlement of issues through negotiations would become considerably more difficult and the OMB hearing could become protracted and unfocused considering preliminary advice and draft recommendations and private documents developed during the internal policy making process.

I accept that there exists a public interest in the disclosure of at least some of the records. As the Region has stated in its representations, the development of aggregate policies for the Caledon Official Plan has significant implications for the future environmental, social and economic development of the Town and the Region:

> The potential social and environmental impacts of aggregate extraction can be considerable. Nuisance impacts from noise, dust and traffic can cause serious inconvenience to neighbours. The environmental impacts of extraction can include impacts on natural areas, water resources and air quality. The importance of aggregate resources to the local, regional and provincial economy is well documented. Whether or not particular lands become identified as high potential aggregate resource areas or not, and the policy framework that applies to them also has significant economic implications to the landowner and the surrounding landowners. These economic implications to landowners directly affect the assessed value of the lands throughout the Town, which directly affects tax revenues to the Town and the Region. Both the Town and the Region are also

> directly affected financially by the potential impacts on infrastructure; such as, local and regional roads that may be used as aggregate haul routes and regional water supply wells that could be impacted by hydrogeological interference from aggregate extraction below the water table.

In light of these significant implications, I am satisfied that the development of these policies warrants a high degree of public scrutiny and access.

I find, however, that there has and will continue to be a high degree of public scrutiny and access with respect to these very policies. As set out in the Region's representations, there is a considerable amount of information about the CCRS process that is already in the public domain. Approximately 25 public meetings were held during the course of the study through the Citizen's Advisory Group, created as part of the CCRS. The *Planning Act* establishes requirements for public information, public and notice and public meetings, which have been met. Three volumes of the CCRS Report were made public in 1997, 1998 and 1999. The minutes of the Technical Study Group, an advisory group created as part of the CCRS to provide technical advice and input to the study, are all public documents. Membership in this group included staff of the Region and the Town, conservation authorities, the Niagara Escarpment Commission and representatives of several provincial ministries.

Further, OPA 161 to the Town's Official Plan has been appealed to the OMB by many parties including the province, the Niagara Escarpment Commission, the APAO, individual aggregate companies, the Concerned Citizens of Caledon, individual Caledon residents and development interests. The eventual hearing before the OMB on these appeals will provide an opportunity for a full public review of the policies which are the subject of the records before me.

Against this background, I find that although there is a public interest in disclosure of the records at issue, it is not a "compelling public interest" which "clearly outweighs the purpose of the [section 7(1)] exemption".

I have rejected the appellant's submission that the existence of the OMB process is irrelevant to the application of section 16. As I have discussed above, the existence of a parallel process for obtaining access to records, such through civil discovery processes, does not affect the applicability of the exemptions at issue in this case to specific records. However, the availability of other means of providing the public scrutiny sought must certainly be relevant to the issue of whether the need for public disclosure ought to override the application of otherwise validly applied exemptions under the *Act*.

ORDER:

1. I uphold the decisions of the Region to transfer part of the request as it relates to the records in Index "C" and Index "D" to the Town, with the exception of Records C01(b) and (c), C02(b), C03(d) and (e), C13, C14 and B24.

2. I order the Region to provide a decision with respect to Records C02(b), C03(e), C13 and C14. I order the Region to provide this decision to the appellant by **January 11, 2002**, without recourse to a time extension, with a copy of this decision to me.

3. I order the Region to disclose the records in Index "A" to the appellant, with the exception of those whose transfers I have upheld. These records shall be disclosed by **January 18, 2002** but not before **January 11, 2002**.

4. I order the Region to disclose Record B26(a), as well as Records A22(a) and (b), A23(a) and (b), A24(a), A25, A27(a), A36, A40(c)(d) and (e) and Record B29(b) (if they have not already been disclosed), by **January 18, 2002**, but not before **January 11, 2002**.

5. In order to verify compliance with the terms of this order, I reserve the right to require the Region to provide me with a copy of the records which are disclosed to the appellant pursuant to my orders.

6. I uphold the Region's decision to withhold access to the remaining records in issue.

Original signed by: December 21, 2001
Sherry Liang
Adjudicator

APPENDIX "A"

INDEX OF RECORDS "A"

Doc. No.	Item	Description of Records	Number of Pages	Result
A01	a)	Fax from Region of Peel (ROP) outside counsel to ROP planning staff dated March 22, 1999 re: CCRS consultant work plan	2	Disclose
A01	b)	Fax transmittal dated March 25, 1999 from ROP planning staff to distribution list attaching comments from outside counsel on terms of reference for economic analysis Caledon Aggregate Resources Work Program	4	Disclose
A02		Handwritten CCRS meeting notes dated December 22 (year not indicated)	5	Disclose
A03		E-mail from Director, ROP Legal Services to ROP Commissioner of Planning dated September 21, 1998	1	Disclose
A04		E-mail from ROP planning staff to ROP Commissioner of Planning dated September 18, 1998, with handwritten notes and original message from ROP Commissioner of Planning	1	Disclose
A05	a)	CCRS Regional Strategy Team Meeting notes and agenda, dated September 10, 1998	4	Disclose
A05	b)	CCRS Strategy Meeting - handwritten notes, dated September10, 1998	1	Disclose
A06	a)	Memorandum dated October 3, 2000, re: September 29, 2000 meeting with Town and MMAH, by outside counsel for Town of Caledon	4	Transfer
A06	b)	Memo from member of planning staff, Town of Caledon, dated September 29,2000 regarding Agenda Meeting with MMAH (OPA 161)	1	Disclosed (Jan/01)
A06	c)	Document titled Community Based Studies, dated September 28, 2000	2	Transfer
A07	a)	E-mail from ROP planning staff to ROP Commissioner of Planning and others re: CCRS strategy meeting of August 25, 1998, dated August 27, 1998	1	Disclose
A07	b)	CCRS Meeting - handwritten notes, dated August 25	2	Disclose
A08		CCRS Co-ordination Meeting Agenda and handwritten minutes, dated February 12, 1999	4	Disclose

Doc. No.	Item	Description of Records	Number of Pages	Result
A09	a)	E-mails from Director, ROP Legal Services to ROP Commissioner of Planning and others, dated June 15, 1998, and original message from ROP planning staff	1	Disclose
A09	b)	Handwritten notes	1	Disclose
A10		Memorandum from Town of Caledon outside counsel dated June 30, 1998	4	Transfer
A11	a)	OPA 161 w/MMAH handwritten meeting notes dated September 29, 2000	3	Disclose
A12	a)	CCRS at Caledon handwritten meeting notes dated December 21 (year not specified)	1	Disclose
A12	b)	Briefing update for PEA dated December 18 (year not specified)	1	Disclose
A12	c)	Aggregate timetable dated December 14, 1998 marked "confidential"	1	Disclose
A13	a)	CCRS meeting agenda dated March 12, 1999	1	Disclose
A13	b)	Handwritten notes titled "CCRS Large Group", dated March12, 1999	11	Disclose
A13	c)	Diagram titled "Caledon Aggregate Pre-Consultation Flowchart"	1	Disclose
A13	d)	Document titled "Caledon Aggregate Application Process" with handwritten notations	1	Disclose
A14		Fax from ROP outside counsel to ROP planning staff re: CCRS final draft phase III, dated April 21, 1999	7	Disclose
A15		E-mail from ROP outside counsel to ROP planning staff re: consultant's report, dated May 27, 1999	1	Disclose
A16		E-mail from ROP Commissioner of Planning to ROP planning staff and outside counsel dated January 10, 2000	1	Disclose
A17		E-mail from ROP Commissioner of Planning to ROP planning staff and outside counsel, dated December 30, 1999	1	Disclose
A18	a)	E-mail from ROP planning staff to distribution list re: Caledon Community Resources Study	1	Disclose

Doc. No.	Item	Description of Records	Number of Pages	Result
A18	b)	Handwritten notes re: CCRS economic study meeting, dated March 31, 1999	3	Disclose
A18	c)	Table titled Statistical Summary of Prioritized Resource Areas	1	Disclose
A18	d)	Meeting agenda titled Caledon Community Resource Study Council Workshop on Phase 3, dated March 31, 1999	1	Disclose
A19		E-mail from ROP planning staff to ROP Commissioner of Planning re CCRS Phase 3, dated December 7, 1998	2	Disclose
A20		CCRS Streams and Valleys meeting notes, dated February 9 (year not stated, handwritten)	2	Disclose
A21		CCRS meeting notes w. Peel & Caledon (undated, handwritten)	2	Disclose
A22	a)	CCRS - TSG meeting notes, dated November 26 (year not stated, handwritten)	2	Disclose
A22	b)	CCRS Technical Support Group re: comments on Phase 1 report	1	Disclose
A23	a)	CAG meeting notes, dated January 21 (year not stated, handwritten)	4	Disclose
A23	b)	Table titled Caledon Community Resources Study - Summary of Opportunities and Constraints, with handwritten notations	4	Disclose
A24	a)	CCRS - TSG meeting notes, dated June 11 (year not stated, handwritten)	2	Disclose
A25		Caledon OPA 114 (old version) annotated with handwritten notes and comments, undated	2	Disclose
A26		Memo from ROP planning staff to consultants, dated July 6, 1998	3	Disclose
A27	a)	CCRS - TGS meeting notes dated December 17 (year not stated, handwritten)	2	Disclose
A28		APAO Comments meeting notes, dated February 2 (year not stated, handwritten)	2	Disclose
A29	a)	Memo from ROP planning staff to consultants, dated March 24, 1999	6	Disclose
A29	b)	Document "Application for Planning Act Approvals to Permit New Aggregate Operations" with handwritten notations	3	Disclose
A29	c)	Fax transmittal to consultants from ROP planning staff dated March 25, 1999 with handwritten notations	1	Disclose
A30		Meeting notes, dated May 14 (year not stated, handwritten notes)	2	Disclose

Doc. No.	Item	Description of Records	Number of Pages	Result
A31	a)	E-mail from ROP planning staff to ROP Commissioner of Planning and others, dated October15, 1999	1	Disclose
A31	b)	Handwritten notes re: CCRS @ IBI, dated October 15, 1999	3	Disclose
A31	c)	Handwritten notes re: CCRS @ Caledon, dated October 14 (year not stated)	4	Disclose
A32	a)	CCRS phasing strategy meeting with Caledon (handwritten notes), dated September 22, 1998	1	Disclose
A32	b)	Items for Discussion - Meeting on Resource Management Strategy, dated September 22, 1998, with handwritten notations	5	Disclose
A34	a)	Agenda re: CCRS meeting with consultants, dated January 15, 1998	1	Disclose
A34	b)	Notes (handwritten) dated January15, 1998	3	Disclose
A34	c)	Table titled "Summary of Changes/Additions to October, 1997 CCRS Report", dated January 6, 1998	2	Disclose
A34	d)	E-mail dated January13, 1998 re: CCRS Meeting notes from ROP planning staff to ROP Commissioner of Planning	1	Disclose
A34	e)	Draft table titled "Phase 2 Work Program Tasks for CCRS Study", as of December 18, 1997	1	Disclose
A35		Town of Caledon Comments on CCRS Phase 2 Report, dated July 6, 1998	11	Transfer
A36		Minutes dated December 17, 1998 regarding CCRS	4	Disclose
A37	a)	Memo from Caledon planning staff to ROP Commissioner of Planning re: CCRS Town Staff Comments, dated April 21, 1999	19	Transfer
A37	b)	Fax memo from consultant to Caledon planning staff re: draft policy 4.3.4.7 CCRS Phase 3 report, dated March.22, 1999	1	Transfer
A37	c)	Memo from Caledon planning staff to consultant re: Cancelled Licenses/Pits not included in the 1996 ARIP, dated March 26, 1999	1	Transfer
A37	d)	Letter from Ministry of Natural Resources to ROP re: cancellation of licence	4	Disclose
A38		Memo from Caledon planning staff to consultant dated May 11, 1999 regarding CCRS phase 3 report	2	Transfer
A39	a)	Email dated April 6, 1999 re: CCRS from ROP planning staff to distribution list	1	Disclose
A39	b)	Agenda re: CCRS Council Workshop	1	Disclose
A39	c)	Handwritten notes re: CCRS economic study meeting, dated March 31, 1999	3	Disclose

Doc. No.	Item	Description of Records	Number of Pages	Result
A39	d)	Table "Figure 2-7 Statistical Summary of Prioritized Resource Areas"	1	Disclose
A40	a)	Document bearing fax date January 8, 1999 "CCRS - Economic Issues"	4	Transfer
A40	b)	Fax transmittal dated January11, 1999 from ROP planning staff to ROP outside counsel re: CCRS economic terms of reference and other matters	1	Disclose
A40	c)	ROP resolution re consultant	1	Disclose
A40	d)	Letter from Town of Caledon to ROP, January12, 1999	1	Transfer
A40	e)	Document "Toronto and Region Remedial Action Plan 1998 Awards of Excellence"	1	Transfer
A40	f)	Handwritten notes re: "Presentation on [consultant] Proposal"	1	Transfer

APPENDIX "A"

INDEX OF RECORDS "B"

Doc. No.	Item	Description of Records	Number of Pages	Result
B01		Memorandum from Acting Commissioner of Planning and CAO to Chair and Members, Regional Council, dated April 19, 2000, titled "Caledon Official Plan Amendment No. 161 – Aggregate Resource Policies"	4	Withhold
B02		Hand written notes re: meeting prior to Council, dated April 20 (no year specified)	1	Withhold
B03		Email from Director, Development Review & Transportation Planning for Region of Peel (ROP), dated April 19, 2000 and email from ROP planning staff, dated April 19, 2000	2	Withhold
B04		Email from ROP outside counsel to ROP planning staff and Commissioner of Planning, dated April 19, 2000	1	Withhold
B05		Hand written notes, dated March 29 (no year specified), re: APAO meeting	1	Withhold
B06		Hand written meeting notes, dated March 24, 2000	1	Withhold
B07	a)	Agenda and handwritten notations, Town of Caledon and Region of Peel Liaison Meeting, March 21, 2000	1	Withhold
B07	b)	Handwritten notes and diagram, Caledon Aggregates OPA – Appeal Rationale	5	Withhold
B08		Email from ROP planning staff, dated March 17, 2000, re: Caledon aggregate policies	1	Withhold
B09		Email from ROP planning staff to distribution, dated March 7, 2000 re: Caledon aggregates OPA update	1	Withhold
B10	a)	Email from ROP planning staff to distribution, dated March 6, 2000 re: Caledon Aggregates – "significant"	2	Withhold
B10	b)	Email from ROP planning staff to distribution, dated March 6, 2000 re: Caledon Aggregates – "significant"	2	Withhold
B10	c)	Email from ROP outside counsel to distribution, dated March 4, 2000 re: Caledon aggregates – "significant"	2	Withhold
B10	d)	Email from ROP planning staff to ROP Associate Regional Solicitor with handwritten notations, dated February 25, 2000 re: Caledon aggregate policies update and email from ROP outside counsel to ROP planning staff, dated February 25, 2000 re: Caledon Aggregate policies update	1	Withhold

Doc. No.	Item	Description of Records	Number of Pages	Result
B11	a)	Email from ROP Commissioner of Planning to distribution dated February 22, 2000 re: Caledon Aggregate policies update; email from ROP outside counsel to ROP legal and planning staff, dated February 22, 2000; email from ROP planning staff to ROP Associate Regional Solicitor, dated February 21, 2000, with handwritten notations	2	Withhold
B11	b)	Handwritten note, undated	1	Withhold
B12		Email from ROP Commissioner of Planning, dated February 22, 2000, re: Caledon Aggregate policies update	2	Withhold
B13	a)	Email from ROP planning staff to distribution, dated February 7, 2000, re: "significant"	1	Withhold
B13	b)	Diagram titled "Accessibility Constraints to the Aggregate Resource Model"	1	Withhold
B13	c)	Emails from ROP Associate Regional Solicitor to distribution, dated February 4, 2000 re: Caledon Aggregate policies and original messages from ROP planning staff dated February 2 and 3, 2000	2	Withhold
B13	d)	Email from ROP Commissioner of Planning to distribution, dated February 5, 2000 re: Caledon Aggregate Policies	1	Withhold
B13	e)	Handwritten notes	1	Withhold
B14		Draft memo from ROP planning staff to ROP Associate Regional Solicitor, dated February 2, 2000 re: Caledon Aggregate Policies	1	Withhold
B15		Letter from ROP outside counsel to ROP planning staff, dated January 7, 2000	5	Withhold
B16	a)	Hand written meeting notes, dated December 13 (no year specified)	2	Withhold
B16	b)	Fax document from Town of Caledon outside counsel to distribution, enclosing memorandum dated December 9, 1999	3	Transfer
B17		Aggregate OPA Policy Revision Proposals (no date specified), with handwritten notations	2	Transfer
B18		Fax document dated October, 6, 1999, from Ministry of Municipal Affairs and Housing to Town of Caledon Acting Director of Planning	3	Transfer
B19	a)	Email from ROP planning staff to ROP outside counsel, dated October 19, 1999 re: CCRS; email from ROP outside counsel to ROP planning staff, dated October 18, 1999	1	Withhold

Doc. No.	Item	Description of Records	Number of Pages	Result
B19	b)	Email from ROP outside counsel to ROP planning staff, dated October 19, 2000 re: CCRS	1	Withhold
B19	c)	Fax document from ROP outside counsel to ROP planning staff, dated October 20, 1999 re: CCRS Draft OPA	5	Withhold
B20		Email from ROP planning staff to ROP Associate Regional Solicitor, dated September 15, 1999 re: CCRS meeting summary	2	Withhold
B21		Draft agreement dated February, 1997, between ROP, Town of Caledon and consulting firm	9	Withhold
B22		Letter from ROP outside counsel to ROP Director of Legal Services, dated August 8, 2000	4	Withhold
B23		Handwritten notes re: memo from ROP outside counsel, dated August 8 (no year specified)	1	Withhold
B24		Handwritten meeting notes, dated August 17 (no year specified) re: OPA 161	3	Transfer not upheld; withhold
B25		Memo from ROP planning staff to ROP outside counsel, dated August 23, 2000	2	Withhold
B26	a)	Briefing note re: Town of Caledon OPA 161 Aggregate Policies	1	Disclose
B26	b)	Letter from ROP Director of Legal Services to ROP outside counsel dated August 15, 2000 re: Town of Caledon OPA	3	Withhold
B27		Email (stamped draft) from ROP planning to ROP Admin, dated November 25, 1997	1	Withhold
B28		Letter from ROP Associate Regional Solicitor to ROP outside counsel, dated August 17, 1998	3	Withhold
B29	a)	CCRS and ROP Aggregate Policy Chronology, revised November 25, 1997	15	Disclose
B29	b)	Agenda dated November 26, 1997 re: CCRS Technical Support Group meeting	1	Disclose
B30	a)	Memo from Town of Caledon outside counsel to distribution, dated December 3, 1998	2	Transfer
B30	b)	Memo from Town of Caledon outside counsel to distribution, dated November 30, 1998	8	Transfer
B30	c)	Memo from Town of Caledon outside counsel to distribution, dated November 18, 1998	16	Transfer
B31	a)	Memo from ROP Associate Regional Solicitor to ROP planning staff, dated February 12, 1999	2	Withhold
B31	b)	Email from ROP Associate Regional Solicitor to ROP planning staff, dated March 3, 1999	1	Withhold

Doc. No.	Item	Description of Records	Number of Pages	Result
B32		Letter from consulting firm to Town of Caledon planning staff, dated July 16, 1997	5	Transfer
B33		Memo from ROP planning staff to ROP outside counsel, dated December 10, 1999 (stamped draft & confidential)	32	Withhold
B34		Letter and fax cover sheet from Town of Caledon outside counsel to ROP Associate Regional Solicitor, dated April 25, 2000	4	Withhold
B35		Email from ROP planning staff to distribution, dated February 5, 1999	1	Withhold
B36		Fax document from ROP outside counsel to ROP planning staff, dated March 9, 1999, with handwritten notations	6	Withhold
B37	a)	Cover memo from ROP planning staff to distribution, dated January 27, 1999	1	Withhold
B37	b)	Memo from ROP planning staff to ROP outside counsel and ROP Associate Regional Solicitor, dated January 27, 1999	8	Withhold
B38		Handwritten notes regarding CCRS Strategy, dated December 15 (no year specified)	1	Withhold
B39		Memo from ROP Associate Regional Solicitor to ROP planning staff, dated February 25, 1999	1	Withhold
B40		Excerpt from consultant's report, dated February 8, 1999 with handwritten comments added by ROP outside counsel	19	Withhold
B41		Fax document from Town of Caledon Planning staff to ROP planning staff, dated April 8, 1999	4	Transfer

APPENDIX "A"

INDEX OF RECORDS "C"

Doc. No.	Item	Description of Records	Number of Pages	Result
C01 (also A40)	a)	CCRS – Economic Issues Comments and Suggested Work Program	4	Transfer
C01 (also A40)	b)	Fax transmittal regarding CCRS economic terms of reference, dated January 11, 1999 from Peel planning staff to Peel outside counsel	1	Transfer not upheld; disclose
C01 (also A40)	c)	Regional Council Resolution	1	Transfer not upheld; disclose
C01 (also A40)	d)	Letter regarding Caledon Resource Management Study – Economic Issues, dated January 12, 1999 from Town Clerk Caledon to Town Clerk Peel	1	Transfer
C02	a)	Memo regarding Results of CVC Phase II and Cumulative Effects Input, dated March 3, 1999 from consultant	3	Transfer
C02	b)	Handwritten note regarding CAG, dated March 3, 1999	4	Transfer not upheld
C02	c)	Letter regarding CAG – CCRS, dated March 2, 1999 to consultant	1	Transfer
C02	d)	Document titled "Golden Star Award", no date specified	1	Transfer
C02	e)	Document titled "Executive Summary", no date specified	5	Transfer
C03 (also A37)	a)	Memo regarding CCRS: Town Staff Comments, dated April 21, 1999 to Peel Planning staff from Caledon Planning staff	19	Transfer
C03 (also A37)	b)	Letter regarding draft policy 4.3.7 CCRS Phase 3 Report, dated March 22, 1999 from consultant to Caledon Planning staff	1	Transfer
C03 (also A37)	c)	Memo regarding Cancelled Licenses/Pits Not included in the 1996 ARIP, dated March 26, 1999 to consultant from Caledon Planning staff	1	Transfer
C03 (also A37)	d)	Letter from the Ministry of Natural Resources to Peel re: cancellation of licence	1	Transfer not upheld; disclose

Doc. No.	Item	Description of Records	Number of Pages	Result
C03	e)	Letter regarding Licence No. P740013, date stamped March 13, 1992 from Minister of Natural Resources to named individual	1	Transfer not upheld
C04 (also A38)		Memo regarding CCRS Phase 3 Report, s. 4.3.6.3 dated May 11, 1999 from Caledon planning staff to consultant	2	Transfer
C05		Minutes regarding CCRS, dated December 17, 1998	4	Transfer
C06 (also A06)		Document titled "Community Based Studies", dated September 28, 2000	2	Transfer
C07		Document titled "Town of Caledon Comments on CCRS Phase 2 Report", dated July 6, 1998	11	Transfer
C08 (also A35)		Fax document regarding Assessment of Market Demand for Aggregates, dated May 10, 1999 from consultant to Town of Caledon	30	Transfer
C09		Letter regarding Comments on the Draft Report – Assessment of the Market Demand for Aggregates, dated May 12, 1999 from consultant to consultant	3	Transfer
C10		Letter regarding Available Aggregate Reserves – Region of Halton, dated May 18, 1999 from consultant to consultant	5	Transfer
C11		Memo regarding Phase 2 Work Program Refinements and Budget Revision Information, dated December 23, 1997 from consultant to Town	12	Transfer
C12		Letter regarding Coordination meeting with Municipal and Regional Staff, dated August 10, 1998 from consultant to Town	3	Transfer
C13		Letter regarding CCRS and Readings for the CAG Committee, dated October 28, 1997 from consultant to Town	1	Transfer not upheld
C14		Fax regarding completion of Phase 1 Report, dated November 18, 1997 from consultant to Town and Region	4	Transfer not upheld

APPENDIX "A"

INDEX OF RECORDS "D"

Doc. No.	Item	Description of Records	Number of Pages	Result
B16	b)	Fax document from Town of Caledon outside counsel to distribution, enclosing memorandum dated December 9, 1999	3	Transfer
B17		Aggregate OPA Policy Revision Proposals (no date specified), with handwritten notations	2	Transfer
B18		Fax document dated October, 6, 1999, from Ministry of Municipal Affairs and Housing to Town of Caledon Acting Director of Planning	3	Transfer
B24		Handwritten meeting notes, dated August 17 (no year specified) re: OPA 161	3	Transfer not upheld; withhold
B30	a)	Memo from Town of Caledon outside counsel to distribution, dated December 3, 1998	2	Transfer
B30	b)	Memo from Town of Caledon outside counsel to distribution, dated November 30, 1998	8	Transfer
B30	c)	Memo from Town of Caledon outside counsel to distribution, dated November 18, 1998	16	Transfer
B32		Letter from consulting firm to Town of Caledon planning staff, dated July 16, 1997	5	Transfer
B41		Fax document from Town of Caledon Planning staff to ROP planning staff, dated April 8, 1999	4	Transfer
A06	a)	Memorandum dated October 3, 2000, re: September 29, 2000 meeting with Town and MMAH, by outside counsel for Town of Caledon	4	Transfer
A06	b)	Memo from member of planning staff, Town of Caledon, dated September 29,2000 regarding Agenda Meeting with MMAH (OPA 161)	1	Disclosed (Jan/01)
A06 (also C06)	c)	Document titled Community Based Studies, dated September 28, 2000	2	Transfer
A10		Memorandum from Town of Caledon outside counsel dated June 30, 1998	4	Transfer
A35 (also C07)		Town of Caledon Comments on CCRS Phase 2 Report, dated July 6, 1998	11	Transfer

Doc. No.	Item	Description of Records	Number of Pages	Result
A37 (also C03)	a)	Memo from Caledon planning staff to ROP Commissioner of Planning re: CCRS Town Staff Comments, dated April 21, 1999	19	Transfer
A37 (also C03)	b)	Fax memo from consultant to Caledon planning staff re: draft policy 4.3.4.7 CCRS Phase 3 report, dated March.22, 1999	1	Transfer
A37 (also C03)	c)	Memo from Caledon planning staff to consultant re: Cancelled Licenses/Pits not included in the 1996 ARIP, dated March 26, 1999	1	Transfer
A37 (also C03)	d)	Letter from Ministry of Natural Resources to ROP re: cancellation of licence	4	Disclose
A38 (also C04)		Memo from Caledon planning staff to consultant dated May 11, 1999 regarding CCRS phase 3 report	2	Transfer