

ORDER ON APPLICATION BY THE CITY OF HAMILTON FOR PRIVILEGE

DATE: Heard on August 9, 2022

ARBITRATOR: Frank Marrocco, Q.C.

APPEARANCES:

Counsel:

Parties:

**Counsel for the moving party,
the City of Hamilton:**

Eli S. Lederman, Delna Contractor, and Samantha Hale,
Lenczner Slaght LLP

**Counsel for the responding
party, Commission Counsel:**

Tina Lie, Shawna Leclair, and Lauren Rainsford,
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Overview

1. The moving party, the City of Hamilton (the “**City**”), has commenced this application to quash the summons issued by the responding party, Commission Counsel, in the Red Hill Valley Parkway Inquiry (the “**RHVPI**”). Specifically, the City takes the position that Commission Counsel cannot compel the production of 56 unique documents over which it asserts solicitor-client privilege and/or litigation privilege.
2. Commission Counsel contests the City’s characterization of the application, and distills the parties’ dispute to two fundamental questions:
 1. Does solicitor-client privilege and/or litigation privilege apply to each of the 56 unique documents?; and
 2. If so, has that claim of privilege been waived by the City’s decision to call the RHVPI?

3. I find that my jurisdiction only extends to the two issues set out by Commission Counsel. As such, I provide my reasons on the admissibility of each individual document in chart format.

Framework & Applicable Law

(a) The Purpose of Public Inquiries

4. Public inquiries fulfill an important function in Canadian society. They are “ad hoc bodies” that can be called on an “as needed” basis. However, they are often convened in the aftermath of a major event or tragedy to help the community “uncover the truth” of what occurred, and to develop recommendations for the prevention of similar, future incidents. According to the Supreme Court of Canada, the primary purpose of public inquiries is “fact-finding.”¹ To that end, public inquiries are usually granted broad investigative powers and work independently, free of the many procedural impediments that can constrain other institutions like the judiciary.
5. In Ontario, the *Public Inquiries Act, 2009*, S.O. 2009, c. 33, Sched. 6, provides the framework for the establishment of public inquiries, and the processes to be followed. Subsections 8(3) and 33(13) make clear that a commission cannot collect or receive evidence as part of the public inquiry if the information is inadmissible “by reason of any privilege under the law of evidence.”
6. Here, the City asserts solicitor-client privilege and/or litigation privilege over the 56 unique documents. I thus restrict my reasons to these two types of privilege.

(b) Solicitor-Client Privilege

7. Solicitor-client privilege is fundamental to the operation of our justice system. It ensures that individuals can speak with a lawyer candidly, so they can obtain appropriate advice and have

¹ [1995] 2 S.C.R. 97, at paras. 60 and 62.

their interests fully represented.² Over the years, “solicitor-client privilege has evolved from being treated as a mere evidentiary rule to being considered a rule of substance and, now, a principle of fundamental justice.”³

8. Solicitor-client privilege comes into existence the moment that a client seeks legal advice from their lawyer, irrespective of whether they face current or imminent litigation.⁴ The privilege attaches not only to the advice itself, but to all communications between the lawyer and their client for the provision of legal advice.⁵ This includes documents that constitute a “necessary step” in the process of receiving legal advice, that become “incidental” to the acts of obtaining and giving of legal advice, and/or that if produced, could reveal the legal advice.⁶
9. In order to assert solicitor-client privilege, a party must make out three elements:
 - (1) That there is a communication between a solicitor and their client;
 - (2) That the communication entails the seeking or giving of legal advice; and
 - (3) That the parties intended the communication to be confidential.⁷
10. Solicitor-client privilege may apply to communications between a lawyer and a third party. In the seminal case of *General Accident Assurance Co. v. Chrusz*, Doherty J.A. stated that when a third party serves as a messenger, translator, or conduit for the client to instruct their lawyer, the communications between the third party and the lawyer would be privileged. Additionally, any communications from a third party, which assemble or explain the client’s information so

² *Foster Wheeler Power Co. v. Société intermunicipale de gestion et d’élimination des déchets (SIGED) inc.*, 2004 SCC 18, [2004] 1 S.C.R. 456, at para. 34.

³ *Canada (National Revenue) v. Thompson*, 2016 SCC 21, [2016] 1 S.C.R. 381, at para. 17.

⁴ *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319, at para. 28 [“Blank”].

⁵ *Archean Energy Ltd. v. Minister of National Revenue* (1997), 202 A.R. 198 (Alta. Q.B.), at para. 5.

⁶ *Wintercorn v. Global Learning Group Inc.*, 2022 ONSC 4576, at para. 45(viii).

⁷ *Solosky v. The Queen*, [1980] 1 S.C.R. 821, at p. 837.

that they can seek out or obtain legal advice, would be privileged. The key question is whether the third party plays an essential role in the formation and maintenance of the solicitor-client relationship.⁸

11. Documents, information, or communications deemed to be solicitor-client privileged are *prima facie* inadmissible, subject to a few limited exceptions.⁹ The privilege will remain in force even after the parties' solicitor-client relationship has been terminated.¹⁰ As emphasized by Major J. in his oft-quoted sentence from *R. v. McClure*, once proven, "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance."¹¹

(c) Litigation Privilege

12. Unlike solicitor-client privilege, the law does not restrict the application of litigation privilege to the communications between a lawyer and their client. It can also cover non-confidential communications, and sometimes other documents, that pass between a lawyer and third parties.
13. The objective of litigation privilege is to ensure the efficacy of the adversarial process. Parties "represented or not, must [therefore] be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure."¹²
14. A party can assert this privilege over a certain document or communication if the dominant purpose behind its creation was the preparation for any existing, reasonably contemplated, or

⁸ (1999), 45 O.R. (3d) 321 (C.A.), at 353-59.

⁹ *Currie v. Symcor Inc.*, [2008] O.J. No. 2987 (Div. Ct.), at para. 35.

¹⁰ *Blank*, at para. 37.

¹¹ 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 35.

¹² *Blank*, at paras. 27-28.

anticipated litigation.¹³ However, litigation privilege is neither absolute in scope nor permanent in duration. It ends when litigation, or related litigation, concludes.¹⁴

(d) Implied Waiver

15. As described above, Commission Counsel submits that the City implicitly waived its claims of privilege over the 56 unique documents when Council called the RHVPI and enacted the associated Terms of Reference.

16. In *Roynat Capital Inc. v. Repeatseat Ltd.*, the Divisional Court confirmed that a party may be held to have implicitly waived solicitor-client privilege “where fairness and consistency so require.” The “double elements” of “implied intention,” as well as “fairness and consistency,” must be present. That is, the client must show “some manifestation of a voluntary intention to waive the privilege, at least to a limited extent.”¹⁵

17. Ultimately, “whether fairness and consistency require [an] implied waiver of privilege is case specific and factually dependent.” The use of implied waiver “will be limited to circumstances where the relevance of the evidence in question is high, and the principles of fairness and consistency require disclosure....”[Emphasis added.]

18. The jurisprudence suggests that there can be an implied waiver of litigation privilege on the same basis as solicitor-client privilege.¹⁶

19. For the purpose of my reasons, I note that public inquiries operate differently from adversarial proceedings. They are established to perform certain fact-finding and recommendation-making

¹³ *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52, [2016] 2 SCR 521, at para. 19.

¹⁴ *Blank*, at paras. 34-35, 37.

¹⁵ 2015 ONSC 1108, 125 O.R. (3d) 596, at paras. 80-81.

¹⁶ *Cromb et. al. v. Bouwmeester et al.*, 2014 ONSC 5318, at para. 48.

functions, including in relation to misconduct. In order to strike a balance between the need to maintain privilege and advance the truth-seeking, fact-finding, and recommendation-making goals of the RHVPI, I only found a waiver of privilege over the City's documents if they were "highly relevant" to the plain and ordinary meaning of the Terms of Reference. Fairness and consistency to all those who may be affected by the final report from the RHVPI mean that it is necessary to produce documents highly relevant to the Terms of Reference, so as to avoid factual inconsistencies, erroneous findings of misconduct, and unsuitable recommendations.

Dated Toronto, Ontario this 15th day of August 2022



The Honourable Frank Marrocco, Q.C.

Document	Description	Decision
Tab 1 SPE_04332112_0001	Letter from Shillington LLP to Diana Swaby (Supervisor, Claims Administration), dated January 31, 2018	<p>The letter from Shillingtons is solicitor-client privileged.</p> <p>The reference to “buried reports” in the letter is not sufficiently precise to permit the conclusion that the letter is referring to the Tradewind Report. However, the reference could mean that there were other buried reports. As such, the letter is “highly relevant” to the Terms of Reference, specifically term (xiv), i.e., whether there were subsequent consultant reports which provided additional support or rebuttal to the conclusions contained in the Tradewind report. Accordingly, there is an implied waiver of privilege over this portion of the letter.</p>
Tab 2 CIM0022413	Notes of Brian Malone from March 5, 2018 to December 13, 2018	<p>The notes which pre-date Mr. Malone’s “retainer” are available for production.</p> <p>As for the period after Mr. Malone’s retainer, the notes are neither solicitor-client privileged nor litigation privileged. Mr. Malone’s notes were made so that he could have a record of the phone call with Mr. Boghosian, and refresh his memory as needed. When the notes are considered in the entire context of Mr. Boghosian’s phone call with Mr. Malone, the dominant purpose was to obtain Mr. Malone’s perspective on public safety, i.e., whether the City needed to take immediate additional steps to make the Red Hill Valley Parkway safe.</p>
Tab 3 SPE_04289386_001	E-mail from Nicole Auty to Ron Sabo, dated November 20, 2018	<p>Any privilege that attaches to Ms. Auty’s comment in her e-mail is waived by the Terms of Reference, specifically terms (viii), (x), and (xi), i.e., whether appropriate steps were taken to disclose the Tradewind Report upon its discovery, whether the failure to disclose the Tradewind Report put the public at risk, and whether the Tradewind Report contained information that would have caused Council to implement additional safety measures.</p> <p>Ms. Auty’s comment speaks to steps taken by internal counsel with respect to the forthcoming disclosure of the Tradewind Report. The reference to the word, “interim,” raises questions about whether counsel were worried about the need for immediate safety measures due to the findings in the Tradewind Report.</p>
Tab 5 SPE_04288940_0001	Retainer agreement between City and David Boghosian, dated December 7, 2018.	<p>The retainer is solicitor-client privileged.</p> <p>However, the privilege was waived by the Terms of Reference. Specifically, term (viii). The retainer is “highly relevant” to the questions of what steps the City took before disclosing the Tradewind Report to Council, and why.</p>

<p>Tab 5a SPE_04288939_0001</p>	<p>E-mail between Nicole Auty and David Boghosian, dated December 7, 2018</p>	<p>The e-mail is to be released in conjunction with the retainer.</p>
<p>Tab 6 SPE_04332689_0001</p>	<p>Transcript from the examination of Marco Oddi, a City representative, in <i>Hansen v. Bernat</i>, dated December 7, 2018</p>	<p>The transcript is not privileged, and therefore producible in response to the summons. The ultimate use of the transcript is up to the Commissioner.</p>
<p>Tab 9 SPE_0428885_0001</p>	<p>Email chain between Nicole Auty and David Boghosian, dated December 7, 2018 to December 11, 2018</p>	<p>The e-mail chain is solicitor-client privileged.</p> <p>However, the privilege has been waived by the Terms of Reference. Specifically, terms (viii), (ix), and (xi). In December 2018, at the time of this e-mail chain, nobody knew what the safety implications of the Tradewind Report would be. The e-mail chain is “highly relevant” to whether the City’s internal and external counsel took appropriate steps to disclose the “information and recommendations” contained in the Tradewind Report, and what, if any, steps they took towards the maintenance of public safety.</p>
<p>Tab 15 SPE_04288799_0001</p>	<p>Draft opinion letter from David Boghosian to Nicole Auty, dated December 13, 2018</p>	<p>The opinion letter is solicitor-client privileged. This includes the sections of the letter where Mr. Boghosian summarizes his conversation with Mr. Malone, which are inseparable from the advice that Mr. Boghosian ultimately provided to the City.</p> <p>However, the privilege is waived by the Terms of Reference, specifically term (viii). The opinion letter, and especially the conversation with Mr. Malone, are “highly relevant” because they form part of the narrative which describes the City’s use of the Tradewind Report (and its contents) in the period up to its disclosure.</p>
<p>Tab 15a SPE_04288798_0001</p>	<p>E-mail thread between David Boghosian and Nicole Auty, dated December 13, 2018</p>	<p>The e-mail is admissible for the same reasons as above. In asking whether the City took appropriate steps to disclose the Tradewind Wind, it is “highly relevant” to the RHVPI that Mr. Boghosian sent his opinion letter about the Tradewind Report to Mr. Auty and asked for her feedback prior to his finalization.</p>
<p>Tab 19 CIM0022412</p>	<p>Notes of Brian Malone, dated January 2, 2019 to January 31, 2019</p>	<p>The City has not demonstrated that Mr. Malone’s notes were made for the dominant purpose of litigation.</p> <p>If any such privilege attaches to Mr. Malone’s notes, then that privilege had been waived by the Terms of Reference, specifically terms (vii) and (viii). Mr. Malone’s notes reveal other individuals who were aware of the Tradewind Report, and involved in the process of its disclosure to Council. In addition, the notes relate to the “contents and recommendations” within the Tradewind Report,</p>

		and accordingly, are “highly relevant” to the Commissioner’s consideration of the appropriateness of the steps taken to disclose the Tradewind Report or the information contained therein once it was discovered in 2018.
Tab 21 HAM0061607_0001	Crisis Communication Plan, Draft 1.0, dated January 16, 2019	Ms. Auty’s comment—i.e., “Litigation point of view – we need to have him on board”—is solicitor-client privileged. However, the privilege has been waived by the Terms of Reference, specifically term (viii). This is because Ms. Auty is considering an appropriate step to take in the disclosure of the Tradewind Report to Council.
Tab 23 HAM0062071_0001	E-mail thread between David Boghosian, Gord McGuire, Rob Sabo, and Nicole Auty, dated January 17, 2019 to January 19, 2019	The comments of Mr. Boghosian’s are solicitor-client privileged. However, the privilege has been waived by the Terms of Reference, specifically term (viii). This is because Mr. Boghosian’s comments draw attention to the steps taken by the City’s internal and external counsel concerning the disclosure of the Tradewind Report.
Tab 25 SPE_04312139_0001	E-mail from Rob Sabo to Nicole Auty, dated January 31, 2019	Any privilege that attaches to Mr. Sabo’s e-mail is waived. The e-mail relates directly to the approach adopted by the City’s counsel with respect to the disclosure of the Tradewind Report. It is “highly relevant” to the question of whether steps for the disclosure of the Tradewind Report were appropriate, pursuant to term (viii) of the Terms of Reference.
Tab 26 SPE_04288129_0001	E-mail thread between Nicole Auty and David Boghosian, dated January 30, 2019 to January 31, 2019	Any privilege that attaches to the e-mail thread is waived by the Terms of Reference, specifically (viii), (x), and (xi). At the time that Ms. Auty and Mr. Boghosian contemplated contact with Mr. Malone, no one knew whether the findings in the Tradewind Report would affect public safety on the RHVP. The e-mail thread is “highly relevant” to the RHVPI, so that the Commissioner can assess the appropriateness of counsel’s decision to contact Mr. Malone, and their reasons for doing so regardless of Mr. Malone’s ultimate conclusions about safety.
Tab 30 CIM0017209	E-mail thread between Brian Malone and David Boghosian, dated January 31, 2019	The e-mail thread, including the proposed redactions, are covered litigation privilege. However, the privilege is waived by the Terms of Reference, specifically (vii), (viii), (xi), and (xiv). Mr. Boghosian asked Mr. Malone’s advice on a series of questions related to public safety, and disclosed the Tradewind Report to CIMA for the first time. Mr. Malone then turned around and asked some of his colleague at CIMA. The immediate concern appeared to be whether any interim safety measures were required as a result of the findings in the Tradewind Report. This is “highly relevant” to the questions of who knew about the Tradewind Report, and whether appropriate steps were taken prior to its disclosure.

<p>Tab 30a CIM0017209.0001</p>	<p>Tradewind Report, dated November 20, 2013</p>	<p>The Tradewind Report is not privileged, and should be disclosed in response to the summons.</p>
<p>Tab 30b CIM0017209.0002</p>	<p>Letter from Ludomir Uzarowski to Gord McGuire, dated December 17, 2018</p>	<p>This letter is not privileged, and should be disclosed in response to the summons.</p>
<p>Tab 37 SPE_04288119_001</p>	<p>E-mail thread between Nicole Auty and David Boghosian, dated January 30, 2019 to January 31, 2019</p>	<p>The proposed redactions in the e-mail thread are solicitor-client privileged, because Mr. Boghosian advised Ms. Auty with respect to the questions that Mr. Zegerec should ask Mr. Moore.</p> <p>However, the privilege has been waived by the Terms of Reference, specifically (viii). The e-mail exchange concerns the extraction of information from Mr. Moore, who ordered the Tradewind Report. The information from Mr. Moore would have helped counsel acquire a better understanding of the Tradewind Report before they briefed Council. As such, the e-mail thread is “highly relevant” to whether appropriate steps were taken to disclose the Report once it was discovered in 2018.</p>
<p>Tab 46 CIM0017171.0001</p>	<p>Draft memo from Brian Malone to David Boghosian, dated February 3, 2019</p>	<p>The comments of Mr. Boghosian on the draft memo are litigation privileged.</p> <p>However, the privilege has been waived by the Terms of Reference, specifically (viii). Council asked Mr. Malone and CIMA to prepare the memo. Mr. Malone did so. Then, Mr. Boghosian advised him about the need to include certain information, so that Council could have a full picture of the safety concerns (if any) raised by the Tradewind Report. The draft memo is thus “highly relevant” to assess whether Mr. Boghosian’s comments amounted to an appropriate step in the context of disclosing the Tradewind Report to Council.</p> <p>In addition, the final Malone report, which was edited to address Mr. Boghosian’s comments, was disclosed to Council on February 6, 2019. The information contained therein directly speaks to term (xiv), i.e., whether subsequent consultant reports confirmed or rebutted the Tradewind Report.</p>
<p>Tab 46a CIM0017171.0001</p>	<p>E-mail thread between Brian Malone and David Boghosian, dated February 3, 2019 to February 4, 2019</p>	<p>This e-mail thread is “highly relevant” to the steps that were taken to disclose the contents of the Tradewind Report. Term (viii) is sufficiently broad to encompass steps taken to summarize and interpret the Tradewind Report.</p>
<p>Tab 47 SPE_04315841_0001</p>	<p>E-mail thread between Nicole Auty and David Boghosian, dated February 2, 2019 to February 4, 2019</p>	<p>The e-mail thread is solicitor-client privileged.</p> <p>However, the privilege has been waived by the Terms of Reference, specifically (viii). The email thread in which Mr. Boghosian and Ms. Auty discussed how to best present the Tradewind Report to Council at an upcoming in-camera meeting is “highly relevant” to whether appropriate steps were taken to disclose the Tradewind Report.</p>

<p>Tab 48 SPE_04310197_0001</p>	<p>Crisis Communication Plan, Draft 1.1., dated February 3, 2019</p>	<p>The comments of Mr. Boghosian’s are solicitor-client privileged.</p> <p>However, the privilege has been waived by the Terms of Reference, specifically (viii). This is because Mr. Boghosian has provided the City with advice on how the Tradewind Report (including the information and recommendations contained therein) should be disclosed to Council, and as such, his comments are “highly relevant” to term (viii).</p>
<p>Tab 48a SPE_04310196_0001</p>	<p>E-mail thread between Jasmine Graham, Nicole Auty, and David Boghosian, dated February 3, 2019 to February 4, 2019</p>	<p>The e-mail thread is solicitor-client privileged.</p> <p>However, the privilege has been waived by the Terms of Reference. The e-mail thread reveals that a “Jasmine Graham” was aware of the Tradewind Report, i.e. term (vii). As for the remainder of the thread, to the extent that it shows the steps taken by Ms. Auty and Mr. Boghosian to disclose the Tradewind Report to Council, it is “highly relevant” to term (viii).</p>
<p>Tab 50 SPE_04288032_0001</p>	<p>E-mail thread between Ron Sabo and Nicole Auty, dated February 4, 2019 [REDACTED]</p>	<p>The e-mail thread is litigation privileged, and does not seem to be “highly relevant” to the Terms of Reference.</p>
<p>Tab 51 SPE_00468889_0001</p>	<p>E-mail thread between Jasmine Graham and Nicole Auty, dated February 3, 2019 to February 4, 2019</p>	<p>The proposed redaction is solicitor-client privileged. However, the privilege has been waived by the Terms of Reference, specifically (viii), because the communications of Ms. Auty concerned how the Tradewind Report would ultimately be presented to Council and the public, and as such, is “highly relevant” to that term.</p>
<p>Tab 54 SPE_04315831_0001</p>	<p>Speaking points of David Boghosian, undated</p>	<p>The speaking points are solicitor-client privileged. The speaking points were drafted by Mr. Boghosian in advance of his presentation to Council. His presentation to Council would have constituted legal advice.</p> <p>Commission Counsel has not demonstrated that the speaking notes are “highly relevant” to the RHVPI.</p>
<p>Tba 54a SPE_04315830_0001</p>	<p>E-mail from David Boghosian to Nicole Auty, dated February 4, 2019</p>	<p>The e-mail is solicitor-client privileged. Commission Counsel has not demonstrated that the e-mail is “highly relevant” to the RHVPI.</p>
<p>Tab 55 SPE_04312098_0001</p>	<p>E-mail from Ron Sabo to Nicole Auty, dated February 4, 2019</p>	<p>The e-mail from Mr. Sabo is solicitor-client privileged.</p> <p>However, the privilege is waived by the Terms of Reference, specifically term (viii). Term (viii) includes any attempts made by counsel to affect Council’s impression of the Tradewind Report upon its disclosure, and thus the email is “highly relevant” to whether appropriate steps were taken in the disclosure of the Tradewind Report.</p>

Tab 56 SPE_04301891_0001	E-mail from David Boghosian to Nicole Auty, dated February 4, 2019	The e-mail itself is not subject to privilege. The e-mail is not confidential, and contains no legal advice. No genuine question of waiver arises with respect the e-mail itself.
Tab 57 SPE_04301892_0001	Final opinion letter of David Boghosian, dated February 4, 2019	<p>The opinion letter is solicitor-client privileged. This includes the parts of the letter where Mr. Boghosian summarizes his conversations with Mr. Malone, which are inseparable from the advice Mr. Boghosian ultimately provides to the City.</p> <p>However, the privilege is waived by the Terms of Reference, specifically (viii). The opinion letter, and especially the conversations with Mr. Malone, describe his use of the Tradewind Report (and its contents) in the period up to its disclosure. The email is “highly relevant” to whether such use of the Tradewind Report prior to its disclosure was appropriate.</p>
Tab 60 SPE_04315822_0001	E-mail thread between David Boghosian and Nicole Auty, dated February 4, 2019	The proposed reduction [REDACTED] is solicitor-client privileged and not “highly relevant” to the Terms of Reference. [REDACTED]
Tab 61 SPE_04310168_0001	E-mail thread between David Boghosian and Ron Sabo, dated February 4, 2019 to February 5, 2019	The two e-mails are solicitor-client privileged and not “highly relevant” to the Terms of Reference.
Tab 62 SPE_04312987_0001	E-mail thread between Nicole Auty and Rob Sabo, dated February 5, 2019	<p>The e-mail from Mr. Sabo is solicitor-client privileged.</p> <p>However, the privilege is waived by the Terms of Reference, specifically term (viii). The e-mail is “highly relevant” to the appropriate steps taken by the City’s counsel to disclose the Tradewind Report because it describes the preparation of Ms. Auty’s presentation to Council, and the changes made by Mr. Sabo in lead-up to the presentation.</p>
Tab 63 SPE_04312086_0001	E-mail thread between Nicole Auty and Rob Sabo, dated February 5, 2019	<p>The e-mail from Mr. Sabo is solicitor-client privileged.</p> <p>However, the privilege is waived by the Terms of Reference, specifically term (viii). The e-mail is “highly relevant” to the appropriate steps taken by the City’s counsel to disclose the Tradewind Report because it describes the preparation of Ms. Auty’s presentation to Council, and the changes made by Mr. Sabo in lead-up to the presentation.</p>
Tab 64 SPE_04312085_0001	E-mail thread between Nicole Auty and Rob Sabo, dated February 5, 2019	<p>The e-mail from Mr. Sabo is solicitor-client privileged.</p> <p>However, the privilege is waived by the Terms of Reference, specifically term (viii). The e-mail is “highly relevant” to the appropriate steps taken by the City’s counsel to disclose the Tradewind Report because it describes the preparation of Ms. Auty’s presentation to Council, and the changes made by Mr. Sabo in lead-up to the presentation.</p>

Tab 66 SPE_04310162_0001	E-mail thread between Nicole Auty and David Boghosian, dated February 5, 2019	The City claims solicitor-client privilege over this document. However, any such privilege is waived because the e-mail thread is “highly relevant” to term (viii). It describes the steps taken to prepare for the disclosure of the Tradewind Report to Council.
Tab 70 SPE_04315806_0001	E-mail thread between David Boghosian and Nicole Auty, dated February 4, 2019 to February 5, 2019	Any privilege that attaches to the proposed redaction is waived because the e-mail thread describes the steps taken to prepare for the disclosure of the Tradewind Report to Council, and is thus “highly relevant” to term (viii).
Tab 71 SPE_04287914_0001	E-mail thread between Nicole Auty and David Boghosian, dated February 6, 2019	Any privilege that attaches to the proposed redactions is waived because the e-mail thread describes the steps taken to prepare for the disclosure of the Tradewind Report to Council, and is thus “highly relevant” to term (viii).
Tab 72 SPE_04247468_0001	Notes of Jasmine Graham, undated	Any privilege that attaches to the proposed redactions is waived because the notes are “highly relevant” to the questions of who knew about the Tradewind Report (term (vii)), whether appropriate steps were taken by City staff to disclose the Tradewind Report (and the information or recommendations contained therein) (term (viii)), and whether there were public safety concerns caused by the Tradewind Report (term (x)).
Tab 73 SPE_04312041_0001	E-mail thread between Geoffrey Tennant and Rob Sabo, dated February 6, 2019 to February 7, 2019	This e-mail thread is litigation privileged. The conversations took place on the same day as, or after, the release of the Tradewind Report to Council and the public. There is no information in the e-mail thread that is “highly relevant” to the Terms of Reference. Litigation privilege has thus not been waived.
Tab 75 HAM0054450_0001	Letter from David Boghosian to Nicole Auty, dated December 13, 2018	See reasons provided Tab 15.
Tab 75a HAM0054449_0001	E-mail from John McLennan to Kirk C. Boggs	The e-mail is unexplained by either of the parties. [REDACTED] [REDACTED] [REDACTED] [REDACTED]
Tab 76 SPE_04310089_0001	E-mail from Linda Clayton to Rob Sabo, dated February 7, 2019	The e-mail thread is litigation privileged. Since the e-mail thread is not “highly relevant” to the Terms of Reference, the privilege has not been waived.

<p>Tab 77 SPE_04287842_0001</p>	<p>E-mail thread between Nicole Auty and David Boghosian, dated February 8, 2019, [REDACTED] [REDACTED] [REDACTED]</p>	<p>The proposed redactions are solicitor-client privileged. This privilege has not been waived. The communications took place after the Tradewind Report was released to the public, and the safety concerns associated with the RHVP were already left to the direction of Council. The contents of the proposed redactions concern [REDACTED] [REDACTED] The e-mail thread with the proposed redactions is therefore not “highly relevant” to the Terms of Reference.</p>
<p>Tab 78 HAM0061901_0001</p>	<p>E-mail thread between Rob Sabo and Nicole Auty, dated February 8, 2019</p>	<p>The proposed redactions are solicitor-client privileged. This privilege has not been waived. The communications took place after the Tradewind Report was released to the public, and the safety concerns associated with the RHVP were already left to the direction of Council. The contents of the proposed redactions concern [REDACTED] [REDACTED] The e-mail thread with the proposed redactions is therefore not “highly relevant” to the Terms of Reference.</p>
<p>Tab 79 SPE_04312031_0001</p>	<p>E-mail thread between Nicole Auty, David Boghosian, and Ron Sabo, dated February 8, 2019</p>	<p>The proposed redactions are solicitor-client privileged. This privilege has not been waived. The communications took place after the Tradewind Report was released to the public, and the safety concerns associated with the RHVP were already left to the direction of Council. The contents of the proposed redactions concern [REDACTED] [REDACTED] The e-mail thread with the proposed redactions is therefore not “highly relevant” to the Terms of Reference.</p>
<p>Tab 80 SPE_04315898_0001</p>	<p>E-mail thread between Nicole Auty and David Boghosian, dated February 11, 2019, [REDACTED] [REDACTED] [REDACTED]</p>	<p>The proposed redaction is solicitor-client privileged. The information contained therein is not “highly relevant” to the RHVP. [REDACTED] [REDACTED] The privilege has not been waived.</p>
<p>Tab 83 SPE_04552112_0001</p>	<p>Transcript from the examination of Stephen Cooper, a City representative, in <i>Melo et al. v. Vanderburgh et al.</i>, dated June 23, 2021</p>	<p>The transcript is not privileged, and therefore producible in response to the summons. The ultimate use of the transcript is up to the Commissioner.</p>
<p>Tab 84 SPE_04332690_0001</p>	<p>Transcript from the examination of Marco Oddi, a City representative, in <i>Hansen v. Bernat</i>, dated October 26, 2021</p>	<p>The transcript is not privileged, and therefore producible in response to the summons. The ultimate use of the transcript is up to the Commissioner.</p>
<p>Tab 85 SPE_04317040_0001 Tab 85a</p>	<p>Notes of David Boghosian, dated December 7, 2018</p>	<p>Different portions of the notes appear to attract solicitor-client privilege, litigation privilege, or both. Regardless of the privilege, it has been waived by the Terms of Reference, specifically term (viii). The notes, which describe the information made available to Mr. Boghosian, are “highly relevant”</p>

SPE_04317040_0001		to the issue of the appropriateness of the steps taken by the City to disclose the report to Council after its discovery in 2018.
Tab 86 SPE_04552171_0001 Tab 86a SPE_04552171_0001	Notes of Nicole Auty, dated December 11, 2018 and December 14, 2018	Different portions of the notes appear to attract solicitor-client privilege, litigation privilege, or both. The notes describe the thought processes of internal and external counsel for the city. Regardless of which privilege attaches, it has been waived by the Terms of Reference, specifically term (viii). The notes are “highly relevant” to an assessment of the appropriateness of the steps taken by the City after discovery of the Tradewind Report and prior to its disclosure to Council.
Tab 87 SPE_04317039_0001 Tab 87a SPE_04317039_0001	Notes of David Boghosian, dated December 11, 2018	Any privilege that attaches to Mr. Boghosian’s notes it has been waived by the Terms of Reference, specifically (vii), (viii), (x), and (xi). The notes suggest that Mr. Boghosian informed Mr. Malone about the information and/or recommendations contained within the Tradewind Report, and as such, they are relevant to term (viii). Additionally, the notes are “highly relevant” to the assessment of whether Mr. Boghosian’s decision to contact Mr. Malone in December 2018 was appropriate, what safety concerns, if any, the City had, and how, if at all, the staff responded, i.e. terms (viii), (x), and (xi).
Tab 88 SPE_04552141_0001 Tab 88a SPE_04552141_0001	Notes of Ron Sabo, dated December 11, 2018	Different portions of the notes appear to attract solicitor-client privilege, litigation privilege, or both. Regardless of which privilege attaches, it has been waived by the Terms of Reference, specifically (viii). The information known to Mr. Sabo at the time, and his thought processes, are “highly relevant” to the appropriateness of the steps taken by the City’s counsel prior to disclosure of the Tradewind Report.
Tab 89 SPE_04552166_0001 Tab 89a SPE_04552166_0001	Notes of Ron Sabo, undated	Any privilege that attaches to these notes has been waived by the Terms of Reference, specifically term (viii). The notes are undated. However, they are “highly relevant” to Mr. Sabo’s thought process on the disclosure of the Tradewind Report in December 2018, and can thus provide a basis for questioning him about the nature and timing of the disclosure.
Tab 90 SPE_04552169_0001 Tab 90a SPE_04552169_0001	Notes of Nicole Auty on Boghosian Opinion Letter, undated	Any privilege that attaches to these notes has been waived by the Terms of Reference, specifically term (viii). The notes are “highly relevant” to the inquiry into the appropriate of the steps taken by the City, including how internal counsel responded to Mr. Boghosian’s opinion letter about the potential challenges associated with forthcoming disclosure of the Tradewind Report.

<p>Tab 91 SPE_04552142_0001</p> <p>Tab 91a SPE_04552169_0001</p>	<p>Notes of Ron Sabo on Boghosian Opinion Letter, undated</p>	<p>Any privilege that attaches to these notes has been waived by the Terms of Reference, specifically term (viii) the notes are “highly relevant” to the inquiry into the appropriateness of the steps taken by the City, including how internal counsel responded to Mr. Boghosian’s opinion letter about the potential challenges associated with the forthcoming disclosure of the Tradewind Report.</p>
<p>Tab 93 SPE_04552163_0001</p> <p>Tab 93a SPE_04552163_0001</p>	<p>Notes of Ron Sabo, undated</p>	<p>Any privilege that attaches to these notes has been waived by the Terms of Reference, specifically term (viii), (x), and (xi). The notes are undated. However, they seem to reflect Mr. Sabo’s thought processes around the disclosure of the Tradewind Report, and can provide a basis for questioning him about same. In addition, the notes are “highly relevant” to question Mr. Sabo about his reference to CIMA and consideration of the safety standards on the RHVP.</p>
<p>Tab 94 SPE_04319041_0001</p> <p>Tab 94a SPE_04317041_0001</p>	<p>Notes of David Boghosian, dated January 8, 2019</p>	<p>Different portions of the notes appear to attract solicitor-client privilege, litigation privilege, or both.</p> <p>Regardless of which privilege attaches, it has been waived by the Terms of Reference, specifically (viii). The notes are “highly relevant” to assess the appropriateness of the steps taken by the City, including any discussions about how to present the Tradewind Report to Council and the public.</p>
<p>Tab 96 SPE_04317042_0001</p> <p>Tab 96a SPE_04317042_0001</p>	<p>Notes of David Boghosian, dated January 30, 2019</p>	<p>Any privilege that attaches to Mr. Boghosian’s notes has been waived by the Terms of Reference, specifically (viii) and (xi). The notes are “highly relevant” to the steps taken, specifically with respect to considerations of safety on the RHVP between the time Council became aware of the Tradewind Report and received disclosure of it.</p>
<p>Tab 97 SPE_04552155_0001</p> <p>Tab 97a SPE_04552155_0001</p>	<p>Notes of Ron Sabo, dated January 30, 2019</p>	<p>Any privilege that attaches to Mr. Sabo’s notes have been waived by the Terms of Reference, specifically (viii), (x), and (xi). The notes are “highly relevant” to assess the appropriateness of the steps taken by the City between the time they informed Council about the existence of the Tradewind Report and the time they disclosed same. The notes seem to relate to the issue of safety on the RHVP.</p>
<p>Tab 98 SPE_04317043_0001</p> <p>Tab 98a SPE_04317043_0001</p>	<p>Notes of David Boghosian, dated January 30, 2019</p>	<p>Different portions of the notes appear to attract solicitor-client privilege, litigation privilege, or both.</p> <p>Regardless of which privilege attaches, it has been waived by the Terms of Reference, specifically (viii). The notes are “highly relevant” to question the appropriateness of the steps taken by the City with respect to the Tradewind Report.</p>
<p>Tab 99 SPE_04552154_0001</p> <p>Tab 99a</p>	<p>Notes of Ron Sabo, dated January 30, 2019</p>	<p>Different portions of the notes appear to attract solicitor-client privilege, litigation privilege, or both.</p> <p>Regardless of which privilege attaches, it has been waived by the Terms of Reference, specifically (viii), (x) and (xi). The notes are “highly relevant” to the appropriateness of the steps taken by the</p>

SPE_04552153_0001		City with respect to the Tradewind Report. In addition, the notes relate to whether there was a need for safety measures on the RHVP.
Tab 101 SPE_04552160_0001 Tab 101a SPE_04552160_0001	Note of Ron Sabo, undated	Any privilege that attaches to this note is waived by the Terms of Reference, specifically (viii), (x), and (xi). The note reveals an additional question that Mr. Sabo wants to ask about Mr. Malone about the RHVP. As such, the notes are “highly relevant” to assess the appropriateness of steps taken concerning public safety risks on the RHVP.
Tab 104 SPE_04552290_0001	Letter from Belinda A. Bain to Diana Swaby [REDACTED] dated November 9, 2020	The letter is solicitor-client privileged. [REDACTED] The contents of the letter are not “highly relevant” to the Terms of Reference. In addition, the letter post-dates the disclosure of the Tradewind Report to the public and Council.