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

ORDER M-905

Appeal M_9600085

The Corporation of the County of Northumberland

BACKGROUND:

The requesters, a husband and wife, submitted a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Corporation of the County of Northumberland (the County) on August 28, 1995. The request was for copies of the husband's General Welfare Assistance (GWA) file and C.I.T.E. employment file, and the wife's C.I.T.E. employment file and personnel file.

The County acknowledged this request on August 29, 1995. On September 26, 1995, the requesters contacted the County to advise that the 30 day time limit for responding to the request had arrived and that they would like the records to be ready for pick-up the next day. The County did not provide a written access decision. However, it appears that the requesters were granted full access to the records on September 27, 1995. At that time, the husband submitted a written request for copies of any other working files or information relating to him or his wife. The County did not acknowledge or respond to this request.

The husband filed an appeal with this office on October 5, 1995 on behalf of himself and his wife. The Commissioner's office opened Appeal Number M-9500624. In his letter of appeal, the husband indicated that the photocopies of the records he received on September 27 were of such poor quality that he was unable to read them. He also stated that specific information from his wife's personnel file and information from his GWA file, as well as a number of other records, were missing. Some of this information, it appears, may be responsive to the second request submitted on September 27.

On October 26, 1995, the husband wrote to the County and requested all information which he believed was missing from the records he received. He also requested that the County provide him with legible copies of the records he received. The County responded that it had only received one access request (the August 28 request), with which it had complied. The County then advised the husband to send all further correspondence and requests to the County's solicitors. The County did not take any further steps to respond to the September 27 request.

The husband's appeal regarding his September 27 request was premature at the time he originally appealed the County's response to his August 28 request. However, as of October 26, the County had still not responded to the September 27 request. As the issues relating to these two requests were closely related, and cover much of the same information, the issues arising from the September 27 request were incorporated into Appeal Number M-9500624, which resulted in Interim Order M-715 (which I issued on February 21, 1996).

Interim Order M-715

In the Notice of Inquiry which was sent to the County and the husband in Appeal Number M_9500624, the sole issue raised was whether the County's search for responsive records was reasonable in the circumstances of that appeal. However, I determined that the factual circumstances of that appeal raised a number of issues which needed to be addressed before the issues raised in the Notice of Inquiry could be dealt with. These issues concerned the provision

of a decision letter regarding access to the requested records, and legibility of the records which were disclosed.

In Interim Order M-715, I ordered the County to provide a decision letter to the husband regarding the records requested in his August 28 and September 27, 1995 letters. I also indicated that if the husband was not satisfied with this further response from the County, he was to notify me in writing that he wished his appeal to continue. Finally, with respect to the legibility of the copies which the husband received, although I did not make an order on this issue, I indicated to the County that if the copies of the records are illegible, and it is not possible to reproduce them clearly, the County must give the appellant the opportunity to examine the records pursuant to sections 23(1) and (2) of the Act.

The County subsequently issued a decision letter dated February 27, 1996 in which it denied access to some records. In regards to the legibility issue the requesters were invited to view the original records which they had received copies of at the County office to compare their clarity. The County also advised that it possessed records pertaining to the wife's grievance arising out of a job posting and other related information and that it would provide this information to the appellants upon request.

Appeal Number M-9600085

The husband notified me by letter dated March 1, 1996, that he and his wife were jointly appealing the County's February 27 decision to deny access. This office opened Appeal Number M_9600085 to address this second appeal. For ease of reference in this order, I will refer to the husband and wife as the appellants.

The solicitors representing the County issued a letter dated March 7, 1996 in which they stated that this office no longer had any jurisdiction over the records at issue because of section 52(3)1 of the Act. In response to the Confirmation of Appeal the County did not provide the records at issue to this office.

NATURE OF THE CURRENT APPEAL:

Based on the appellants' appeal letter, the decision letter of February 27, 1996, and the solicitor's letter of March 7, 1996, the issues in this appeal were identified as: reasonable search, whether section 8(3) of the Act applies to the records for which it has been claimed, sections 8(1) and 8(2) of the Act (which relate to section 8(3)), and whether section 52(3)1 of the Act applies to the records at issue.

A Notice of Inquiry (the NOI) was sent by this office to the County and the appellants. Representations were received from the appellants. Counsel for the County responded on behalf of the County.

In Interim Order M-715, I indicated that I remained seized of all the issues in that appeal. This includes any issues arising as a result of the Interim Order. Therefore, the representations submitted in Appeal Number M-9500624 will be incorporated into the submissions provided in

response to the current appeal and, where relevant, will be considered in determining the issues in this appeal.

Mediation during the inquiry stage

Following receipt of the representations, the parties entered into a course of mediation with the Appeals Officer which resulted in a number of changes to the issues in this appeal.

The County located further records, and issued a supplemental decision regarding these records in which it raised the application of section 12 of the Act (solicitor-client privilege). The County also issued a new decision regarding some other records previously withheld in which it withdrew its reliance on section 8(3), although it continues to rely on sections 8(1)(a), (b) and (c) with respect to these records. In addition, the County provided copies of other records which it had erroneously believed had been provided to the appellants. On October 28, 1996, the County provided representations on the application of section 12 to the recently located records.

Despite the above, the appellants continue to believe that further records exist.

A supplemental NOI was provided to the appellants which noted that the County is no longer relying on section 8(3), and raised the application of section 12 as an issue in this appeal. The appellants did not submit representations in response to the supplemental NOI. During the Inquiry stage, it became apparent that the records might contain the personal information of the appellants and this office raised the possible application of section 38(a) of the Act (discretion to refuse requesters' own information). The appellants indicated that they would not be submitting further representations.

While the representations were being considered, former Inquiry Officer Holly Big Canoe issued Order P-1342 in which she examined the issue of, and concluded that, the limitations on the common law privilege (Branch 1 of section 19 of the provincial Act, which is similar to section 12 of the Act) should also generally apply to Branch 2 of this section. Because this decision altered the previous approaches of this office to the Branch 2 analysis, a copy of this order was sent to the County and it was invited to submit further representations on this issue. The County did not submit additional representations.

Issues on Appeal

As a result of the above, the issues to be determined in this appeal pertain to the following:

- section 52(3)1 - application of the Act
- sections 8(1)(a), (b) and (c) - law enforcement
- section 12 - solicitor-client privilege
- reasonableness of search.

Records

The records at issue in this appeal consist of 85 pages of facsimiles, memoranda and letters between the County and its solicitors or between the County's solicitors and other individuals

(section 12), and two reports prepared by County staff which contain correspondence with two law enforcement agencies, witness statements and summaries (section 8). The documents provided by the County are not indexed. For ease of reference, I have numbered each of the 85 pages for which section 12 has been claimed, and will refer to these numbers in my discussion of this section.

PRELIMINARY MATTERS:

APPLICATION OF THE ACT

As I indicated above, on March 7, 1996, the County issued a letter in which it stated that this office no longer had jurisdiction over the records at issue because of section 52(3)1 of the Act. This section was recently added to the Act as a result of amendments to the Act under Bill 7. Section 52(3)1 provides:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

The County did not provide specific representations on this issue, however, in providing certain background to this appeal, the County indicated that the wife's employment with the County was governed by a Collective Agreement. The County advised that the wife had filed a grievance which has proceeded to arbitration in accordance with the Labour Relations Act (the LRA).

As I indicated above, the appellants initially submitted a request for information on August 28, 1995. A second request was submitted on September 27, 1995. The County did not provide a written decision with respect to the first request, and did not respond at all to the second one. The subject of both requests was incorporated into one appeal, and, in Order M-715, the County was ordered to issue a decision in response to both requests. This decision was issued on February 27, 1996. Bill 7 came into force on November 10, 1995, when it received royal assent.

In Order M-796, issued June 28, 1996, Inquiry Officer Holly Big Canoe commented on whether these amendments to the Act should be applied retrospectively. In finding that the amendments do not apply retrospectively to requests made prior to their passage, she stated:

> I do not agree with the Board's submissions. This appeal was brought under the part of the Act which focuses on a request for access to records. In my view, it is the date of the request, which will not be difficult or onerous to discern, which determines whether or not the amendments will apply, not the date of the records.
>
> The amendments eliminate certain rights and obligations which previously existed. The general rule with respect to statutes affecting substantive matters is

> that they do not apply to pending cases, even those under appeal (see Pierre-André Côté, The Interpretation of Legislation in Canada, Quebec, 1991 at p.160).
>
> In addition, the amendments obviously affect the Commissioner's jurisdiction. In Royal Bank of Canada v. Concrete Column Clamps (1961) Ltd., [1971] S.C.R. 1038, 1040, the court found that a statute modifying a court's jurisdiction is not generally applicable to pending cases, because "... it is well established that jurisdiction is not a procedural matter ...". This has been applied to lower courts and courts sitting on review and there have also been cases involving administrative tribunals where similar reasoning has been applied (see Picard v. Public Service Staff Relations Board, [1978] 2 F.C. 296 and Garcia v. Minister of Employment and Immigration and Immigration Appeal Board, [1979] 2 F.C. 772 (C.A.)).
>
> In my view, the above cases make it clear that any request made prior to the passage of the amendments should be dealt with, both at the request stage and on appeal, under the Act as it was at the time of the request. Once a request has been submitted, the case can be said to be "pending" in the same way as a civil action is "pending" once a statement of claim has been issued and served. The case law supports the view that it would be at that point that the right of the requester to information or correction would crystallize.
>
> Further, I note that the government had initially drafted the bill such that the amendments had clear retroactive effect. This wording was later changed, demonstrating a legislative intention that the amendments are not meant to operate retrospectively.

I agree with the Inquiry Officer's analysis, and I adopt it for the purposes of this appeal. Accordingly, I find that as both requests were made prior to the enactment of the amendments, they should be dealt with under the provisions of the Act as they were at that time.

Having found that the Act applies to the records at issue, I will now consider the other issues raised in this appeal.

DISCUSSION:

PERSONAL INFORMATION

Under section 2(1) of the Act, "personal information" is defined, in part, to mean recorded information about an identifiable individual. I have reviewed the records and I find that they contain the personal information of the appellants and other identifiable individuals.

DISCRETION TO REFUSE REQUESTERS' OWN INFORMATION

Under section 38(a) of the Act, the County has the discretion to deny access to an individual's own personal information in instances where certain exemptions would otherwise apply to that information. Section 38(a) states:

> A head may refuse to disclose to the individual to whom the information relates personal information,
>
> > if section 6, 7, **8**, 9, 10, 11, **12**, 13 or 15 would apply to the disclosure of that personal information. [emphasis added]

The County has exercised its discretion to refuse access to the records at issue under sections 8 and 12. In order to determine whether the exemption provided by section 38(a) applies to the information in these records, I will first consider whether the exemptions in sections 8 and 12 apply.

LAW ENFORCEMENT

The County claims that the two reports prepared by County staff are exempt from disclosure under sections 8(1)(a), (b) and (c). These sections provide:

> A head may refuse to disclose a record if the disclosure could reasonably be expected to,
>
> > (a) interfere with a law enforcement matter;
> >
> > (b) interfere with an investigation undertaken with a view to a law enforcement proceeding or from which a law enforcement proceeding is likely to result;
> >
> > (c) reveal investigative techniques and procedures currently in use or likely to be used in law enforcement.

I will begin my discussion with sections 8(1)(a) and (b).

In order for a record to qualify for exemption under sections 8(1)(a) or (b), the matter to which the records relate must first satisfy the definition of the term "law enforcement", found in section 2(1) of the Act, which states:

> "law enforcement" means,
>
> > (a) policing,
> >
> > (b) investigations or inspections that lead or could lead to proceedings in a court or tribunal if a penalty or sanction could be imposed in those proceedings, and
> >
> > (c) the conduct of proceedings referred to in clause (b).

The County states that as a result of certain suspicions by County staff regarding the activities of one of the appellants, internal investigations were conducted by County staff. The County

compiled the evidence obtained as a result of these investigations into two reports. The County indicates that it forwarded one report to the Cobourg Police Service and one to the Ontario Provincial Police (the OPP) and requested that further criminal investigations be conducted. As a result of one of the subsequent police investigations, charges were brought against both appellants under the Criminal Code. The County indicates that the police are currently investigating the subject matter of the second report.

In this case, the County has established that both the Cobourg police and the OPP have undertaken investigations which relate to the subject matter of the reports provided to them by the County. I am satisfied that the investigations and proceedings undertaken by both police forces qualify as law enforcement as defined in the Act.

The purpose of the sections 8(1)(a) and (b) exemptions is to provide an institution with the discretion to preclude access to records in circumstances where disclosure could reasonably be expected to interfere with an **ongoing** law enforcement investigation.

The sections 8(1)(a) and (b) exemptions are time sensitive and are only available if an investigation is ongoing. Once a law enforcement investigation has been completed, it is not possible for the County to rely on these sections as the basis for denying access.

The County submits that charges under the Criminal Code have been laid and additional charges may still be brought before the courts. Based on the representations of the County, I find that both investigations remain ongoing. I am also satisfied, based on the totality of the evidence presented by the County, that the disclosure of the records while these investigations and proceedings are in progress could reasonably be expected to interfere with an ongoing law enforcement investigation. Accordingly, I find that the records qualify for exemption under section 8(1)(b) of the Act. These records contain the personal information of the appellants and are, therefore, exempt under section 38(a).

Because I have found that these records are exempt under section 8(1)(b), it is not necessary for me to consider the application of sections 8(1)(a) or (c) of the Act.

SOLICITOR-CLIENT PRIVILEGE

The County claims that section 12 applies to exempt the correspondence to or from its solicitors. This section consists of two branches, which provide the County with the discretion to refuse to disclose:

1. a record that is subject to the common law solicitor-client privilege; (Branch 1) and

2. a record which was prepared by or for counsel employed or retained by the County for use in giving legal advice or in contemplation of or for use in litigation (Branch 2).

The County relies on both branches of the exemption.

In order for a record to be subject to the common law solicitor-client privilege (Branch 1), the County must provide evidence that the record satisfies either of the following tests:

1. (a) there is a written or oral communication, **and**

   (b) the communication must be of a confidential nature, **and**

   (c) the communication must be between a client (or his agent) and a legal advisor, **and**

   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

2. the record was created or obtained especially for the lawyer's brief for existing or contemplated litigation.

A record can be exempt under Branch 2 of section 12 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for counsel employed or retained by the County; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation.

With respect to Branch 2, the County submits that the records were prepared by or for counsel employed or retained by the County for use in giving legal advice or in contemplation of or for use in litigation, and pertain primarily to the defence of the grievance brought by one of the appellants under the Collective Agreement between the County and the Canadian Union of Public Employees.

The County submits further that these records should similarly be afforded the common law privilege under Branch 1 of the exemption.

I have reviewed the records and the representations of the parties and I make the following conclusions:

1. Pages 1 - 13, 24, 25, 52, 53, 55, 70 - 72 and 82 - 85 consist of correspondence or memoranda from counsel to the County. I find that these pages were prepared by counsel retained by the County for use in giving legal advice. Therefore, these records qualify for exemption under Branch 2 of the section 12 exemption.

2. Pages 59, 60, 73 - 76 and 78 - 81 consist of correspondence from counsel to the County. These documents simply provide information pertaining to the Arbitration and/or to

services provided by other parties with respect to the proceedings. These pages were neither prepared for use in giving legal advice, nor are they directly related to seeking, formulating or giving legal advice. Therefore, the County cannot rely on the legal advice component of either Branch of the exemption.

3. Pages 14 - 23, 26 - 51, 54, 56 - 58, 61 - 69 and 77 consist of letters, facsimiles and memoranda between counsel or the County and other parties. None of these pages contain confidential communications between the client (the County) and counsel, nor were they prepared by or for counsel retained by the County for use in giving legal advice. Accordingly, these pages do not qualify under the legal advice component of either branch of the exemption..

4. All of the pages referred to in points 2 and 3 above pertain to the grievance brought by one of the appellants, and to the Arbitration proceedings. I am satisfied that these pages were prepared by or for counsel retained by the County for use in litigation.

The appellant withdrew her grievance in August, 1996. In Order P-1342, former Inquiry Officer Big Canoe examined the common law "litigation" privilege as it relates to both branches of the exemption in section 19 of the provincial Act (which is similar to section 12 of the Act). Regarding the common law privilege, she noted that:

> Unlike traditional solicitor-client communications privilege, the litigation type of privilege, which encompasses the lawyer's work product for litigation, does not last indefinitely. It ends with the litigation for which it was prepared.

Based on this principle, she found that upon the termination of litigation, the character of the records as privileged documents at common law (Branch 1) ended with the litigation.

With respect to Branch 2, she stated:

> In my view, Branch 2 of section 19 is not intended to enable government lawyers to assert a privilege which is more expansive or durable than that which is available at common law to other solicitor-client relationships.

She concluded that the rationale behind the two branches of the section 19 exemption is essentially the same. Therefore, upon termination of the litigation in question, the litigation privilege under Branch 2 also ends.

I agree with both the conclusions and the rationale behind them in Order P-1342. Accordingly, because the grievance issues, and primarily the Arbitration, have been withdrawn, the County is not entitled to rely on the litigation component of either branch of the section 12 exemption.

In summary, I find that pages 1 - 13, 24, 25, 52, 53, 55, 70 - 72 and 82 - 85 qualify for exemption under Branch 2 of the section 19 exemption. Because these pages contain the personal information of the appellants, they are exempt under section 38(a).

The remaining pages (pages 14 - 23, 26 - 51, 54, 56 - 69 and 73 - 81) do not qualify for exemption under this section. As no other exemptions have been claimed for these pages, they should be disclosed to the appellants. For clarity, I have attached copies of these pages to the copy of this order which is being sent to the County's Freedom of Information and Privacy Co-ordinator.

REASONABLENESS OF SEARCH

In cases where a requester provides sufficient details about the records which he or she is seeking and the County indicates that records do not exist, it is my responsibility to insure that the County has made a reasonable search to identify any records that are responsive to the request. The Act does not require the County to prove with absolute certainty that records do not exist. However, in my view, in order to properly discharge its obligations under the Act, the County must provide me with sufficient evidence to show that it has made a **reasonable** effort to identify and locate responsive records.

In affidavits sworn by the Clerk/Treasurer (the Clerk) and the Director of the Social Services Department, Income Maintenance Division (the Director) which the County provided with its original representations (submitted in response to Appeal Number M-9500624), both affiants appeared to allude to the possible existence of records other than those which had been disclosed to the appellants.

In its representations in response to the current appeal, the County indicated that the appellants have been charged with numerous offences under the Criminal Code, and advise that they have had full disclosure of "all documentation" in accordance with the rules of criminal procedure. This disclosure was made by the local Crown Attorney.

The County stated further that all of the records which are the subject matter of this Inquiry have been disclosed to the appellants' legal counsel and union representative. The county indicated that the union has represented the appellants' interests in proceedings under the LRA.

The appellants maintained that this was not the case and, even if some disclosure did occur, it did not encompass all of the records which would be responsive to the request.

As a result of the apparently unresolvable discrepancies between the parties views regarding this issue, I took the very unusual steps of visiting the County's offices to conduct inquiries into its file maintenance and its processing of the appellants' requests. I met with the Clerk, the Director and the County's legal counsel. They responded to all of my questions regarding the types of files maintained by the County, the files that were searched and the reasons for their inability to locate certain records, which they admit should exist.

Following my visit, the County contacted the Appeals Officer to advise that further records had been located. This led to further mediation (which I referred to above).

As a result, I am satisfied that the County has now identified all of the records it has in its custody and/or control which are responsive to the appellants' request, and find that the County's search was reasonable in the circumstances.

ORDER:

1. I uphold the County's decision to withhold pages 1 - 13, 24, 25, 52, 53, 55, 70 - 72 and 82 - 85 and the two reports.

2. I order the County to disclose pages 14 - 23, 26 - 51, 54, 56 - 69 and 73 - 81 to the appellants by sending them a copy by **March 24, 1997**. Copies of these pages are attached to the copy of this order which is being sent to the County's Freedom of Information and Privacy Co-ordinator.

3. The County's search for records was reasonable and this part of the appeal is dismissed.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the County to provide me with a copy of the records which are disclosed to the appellants pursuant to Provision 2.

Original signed by: March 4, 1997
Laurel Cropley
Inquiry Officer