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

ORDER PO-2221-I

Appeal PA-000370-4

Ministry of the Solicitor General

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The Ministry of the Solicitor General (now the Ministry of Community Safety and Correctional Services) (the Ministry) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*), from a member of the media, for access to "all video footage recorded by the Ontario Provincial Police (OPP) at Ipperwash Provincial Park (Ipperwash) from September 5-7, 1995" and "all photos taken by the OPP at Ipperwash Provincial Park from September 5-7, 1995."

The Ministry identified a number of responsive videotapes and photographs, and denied access to all of them. The appellant appealed.

During the course of processing this appeal, the records were divided into four categories.

After conducting various inquiries under the *Act*, I issued two interim orders and one reconsideration order that dealt with all records in Categories 1, 2, and 3 (Interim Order PO-2033-I, Reconsideration Order PO-2063-R and Interim Order PO-2056-I).

Category 4, which dealt with videotaped surveillance records purportedly obtained under Parts VI and XV of the *Criminal Code* of Canada, was addressed in Final Order PO-2092-F. The Ministry had claimed that the *Criminal Code* prohibited disclosure of these records. I disagreed, and ordered the Ministry to make an access decision concerning them. The Ministry brought an application for judicial review of my decision. The appellant also brought an application for judicial review, seeking the immediate disclosure of the Category 4 records.

Both of these judicial review applications were subsequently abandoned. In the case of the Ministry's application, the reason for abandoning was that there are no warrants to support the *Criminal Code* arguments. The Ministry also advised the appellant that more responsive Category 2 records had been located.

I asked for and received a number of affidavits from the Ministry on the following matters:

1. non-compliance with certain provisions of Interim Order PO-2033-I;

2. why I had been provided with inaccurate information throughout my inquiries, particularly the inquiry leading to Final Order PO-2092-F;

3. why additional records were identified at this late stage; and

4. the adequacy of the Ministry's search for all responsive records.

I also required the Ministry to provide the appellant with proper access decisions regarding the Category 4 records, in compliance with Final Order PO-2092-F, and for the newly identified Category 2 records. The Ministry issued two decisions to the appellant on September 16, 2003.

In these decisions, the Ministry provided access to all records or portions of records in both categories where consents had been obtained from the individuals identified in the photographs or videotapes. Where consents could not be obtained, the Ministry denied access on the basis of

the exemption in section 21 of the *Act* (invasion of privacy). The Ministry also changed its position with respect to portions of one videotape (Maintenance Tape 10), now claiming that it falls outside the scope of the appellant's request because it depicts activities taking place at Ipperwash after midnight on September 7, 1995.

The appellant appealed the Ministry's decisions.

In her letter of appeal, the appellant identifies the following grounds of appeal:

1. The public interest override in section 23 of the *Act* should outweigh the section 21 exemption for all withheld records, as it did with respect to similar records considered in Interim Orders PO-2033-I and PO-2056-I.

2. Any withheld portions of records containing unidentifiable images or voices do not contain "personal information" and do not qualify for exemption under section 21 of the *Act*.

3. Any withheld portions of records containing images or voices of media representatives or OPP personnel do not contain "personal information" and do not qualify for exemption under section 21 of the *Act*.

4. The Ministry should be precluded from now claiming that portions of one videotape are not responsive, and in any event these portions are responsive.

5. The Ministry's search for responsive records is still inadequate.

6. The Ministry is still not in compliance with Interim Order PO-2033-I.

The appellant provides detailed submissions in support of each ground of appeal.

I combined the Ministry's two decisions into one appeal.

The appeal was streamed directly to the adjudication stage of the appeal process. I sent a Notice of Inquiry to the Ministry, seeking representations on the six issues. I required affidavit evidence from a number of identified individuals with respect to issues 5 and 6.

The Ministry submitted representations on all issues, with the exception of issues 5 and 6. I decided to proceed with issues 1-4, and sent a copy of the Notice of Inquiry along with the Ministry's representations on these issues to the appellant. The appellant responded with representations.

As far as issues 5 and 6 are concerned, I granted the Ministry an extension of the original due date for providing the required affidavit evidence, but as of the date of this interim order I have received no affidavits on either issue. I will include provisions in this interim order requiring the Ministry to submit the required affidavit evidence on issues 5 and 6.

RECORDS:

The records at issue in this appeal are all Category 4 and all new Category 2 photographs and videotapes that have not been disclosed to the appellant, either in whole or in part. The parties have maintained a running inventory of these records, which has been provided to me, so I see no need to repeat it here.

As a result of discussions between the Ministry and the appellant, a number of records originally withheld by the Ministry have been disclosed on consent of the various individuals depicted in the photographs and videotapes.

DISCUSSION:

RESPONSIVENESS

Among the various Category 4 videotapes is one, referred to by the Ministry as "Maintenance Tape 10". This record consists of audio and video recordings beginning at approximately 11:04 pm on September 7, 1995 and continuing to approximately 5:10 am on September 8, 1995. The Ministry initially identified this entire record as responsive to the appellant's request. However, in its September 16, 2003 decision letter, the Ministry changed its position. The Ministry outlines the reasons in its representations as follows:

> The scope of the appellant's request is from September 5th to September 7th, and comprises an enormous number of records. As a result, the Ministry initially and inadvertently included the latter portion of Maintenance Tape 10 as being responsive to this request. However, the latter portion of this videotape continues into the early morning hours of September 8th. To suggest that the continuation of the videotape after midnight is responsive to the request, as the appellant does, is to ignore the reality of the request. The Ministry submits that the appellant should not be entitled to expand the scope of its request due to an oversight of the Ministry, and should follow the same procedures in making access requests that all other requesters must follow.

The appellant disagrees, and submits:

> [The Ministry] treated all of Tape 10 of the Maintenance Building series as responsive to the request for the first three years of this proceeding. It provided the entire tape to the Assistant Commissioner in the earlier phase of this inquiry and to counsel for [the appellant] pursuant to Justice Benotto's access order [in the context of the judicial review application for Final Order PO-2092-F]. It also included the entire tape in the index for its September 3, 2003 decision letters.
>
> Out of the blue, during the September 3, 2003 viewing of the records by the Stoney Point community members chosen to identify the depicted individuals, counsel for [the Ministry] took the position that only the first part of the tape, up

> to midnight on September 7, 1995, would be shown to them, as the remainder of the tape fell outside the scope of the request.
>
> [The appellant] submits that a three-year delay is too long for [the Ministry] to wait to try to remove part of a record from the scope of this appeal. It is unfair to now require [the appellant] to make a new request and suffer the resulting delay to obtain a record that has been in issue throughout a three-year proceeding.
>
> In any event, the continuation of the videotape after midnight is responsive. It is clearly connected to the events at Ipperwash Provincial Park on September 5-7, 1995, and includes a wiretapped telephone conversation between two individuals who have consented to disclosure …, in which [one named individual] describes what he witnessed during the confrontation with the OPP and the shooting of [a named protestor] on September 6, 1995. This first-person description of what happened on September 6 is of supreme public importance. …

In my view, the Ministry should not be allowed to change its position at this late stage of the appeal. Maintenance Tape 10 was identified as a responsive record at the first stage of this matter, more than three years ago. Its treatment under the *Act* was addressed through mediation by this office, and by the Ministry during the course of my inquiry leading to Final Order PO-2092-F. The entire record was also included within the scope of the judicial review application brought by the Ministry following the issuance of that order. In my view, the Ministry had sufficient opportunity to raise issues of responsiveness on a number of occasions over the course of the past three years and should not be permitted to change its position now. In my view, to require the appellant to submit a new request is simply not reasonable in the circumstances.

That being said, I also find that all portions of Maintenance Tape 10, including those that depict activities taking place after midnight on September 7, 1995, are responsive to the request.

Previous orders have established that in order to be responsive, a record must be "reasonably related" to the request:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to a request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.
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> (Order P-880, P-1051)

Maintenance Tape 10 is a single record. It begins at approximately 11:04 pm on September 7 and continues uninterrupted until approximately 5:10 am on September 8. The activities captured by the record are the same - audio and video depictions of activities taking place in the maintenance shed at Ipperwash in the viewing range of a stationary camera installed in that building, and recordings of telephone conversations on a phone installed in the viewing area. One portion of the tape, from approximately 1:16 am to 1:57 am, consists of a video recording of an occupier talking on the telephone, together with an audio recording of his conversation with an individual outside the park. The subject matter of this conversation deals, in part, with activities taking place at Ipperwash during September of 1995, including specific events that transpired during the time period of the appellant's request. As such, I find that, regardless of the fact that the Maintenance Tape 10 includes recordings of the first approximately five hours of September 8, its entire content is reasonably related to the subject matter and time period of the appellant's request, and is therefore responsive.

PERSONAL INFORMATION

The section 21(1) personal privacy exemption applies only to information that qualifies as "personal information" under section 2(1) of the *Act*. "Personal information" is defined as recorded information about an identifiable individual.

Occupiers

In Interim Order PO-2033-I, I found that the depiction of occupiers in Ipperwash contained in Category 2 photographs and videotapes constituted their "personal information" under section 2(1) of the *Act*. After considering the representations of both parties in this inquiry, I have reached the same conclusion for the same reasons. The Ministry and the appellant both acknowledge in their representations that images of identifiable occupiers depicted on videotapes or photographs constitute their "personal information". I also find that voice recordings of identifiable occupiers on the audio portion of the various videotapes constitute the "personal information" of these individuals. As noted earlier, the Ministry has disclosed any records depicting occupiers who have provided their consent.

"Unidentifiable" individuals

The appellant takes the position that some individuals who appear in various photographs and videotapes cannot be identified "due to lack of light, obscuring objects such as trees or blurring of the photographic or video image", and that these portions of records do not contain "personal information".

The Ministry disagrees, taking the position that because these individuals are "still potentially identifiable" the records "may contain their personal information". In support of this position, the Ministry submits that:

- although not identifiable by anyone who has yet viewed the records, the individuals could be identified by the public at large if the records are disclosed;

- the records could be "enhanced" such that individuals currently not identifiable could in fact become identifiable;

Having reviewed the various records, I find that some contain images that are unmistakably of occupiers, but there is no "reasonable expectation" that they can be identified due to the quality of the photograph or videotape and/or the fact that they are blocked from view either by lack of light or interference with other objects (*Ontario (Attorney General) v. Pascoe*, [2002] O.J. 4300 at para.2 (C.A.)). Even if these records do contain "personal information", my finding under section 23 below would apply to any such information, and for that reason it is not necessary for me to identify the particular photographs and videotapes containing unidentifiable images of occupiers.

Media representatives

The Ministry acknowledges that some of the records depict images of individuals who would appear to represent media outlets, but takes the position that because "we have no factual confirmation that all of the persons in the relevant photographs and videotapes are of media representatives", these individuals must be notified under section 50(3) of the *Act* and given "the opportunity to make separate representations, regardless of whether the information about them is determined to be their personal information or not". The Ministry points to the decision in *Ontario (Attorney General) v. Fineberg*, [1996] O.J No. 67 (Div Ct.) in support of this position.

The appellant disagrees, and submits:

> The Ministry has … provided no reason to doubt that the individuals whom they believe to be media representatives are in fact members of the media … . It is reasonable to infer from the circumstances of the footage that the individuals whose depictions are at issue are media representatives. Individuals who are interviewing other people or giving news reports while holding a microphone with the name of a media organization on it, or who are holding a camera with the logo of a media organization, can reasonable be treated as media representatives. It is not necessary to have "factual confirmation" as the Ministry alleges; it is sufficient to have a reasonable basis to conclude that the individuals were acting in an employment or professional capacity at the time that the footage was taken.

The appellant also disputes the need to provide notice under section 50(3) to the various media representatives, pointing to the practical difficulty of identifying who they are, and also to a distinction she feels can be drawn between the facts in this case and the facts before the Court in *Ontario (Attorney General) v. Fineberg*. The appellant submits:

> [*Ontario (Attorney General) v. Fineberg*] dealt with a situation in which the records requested were solicitor's accounts for Peter Doe. The Court held that he was entitled to notice on the basis that "[t]his is not a case where the respondent Peter Doe is simply someone whose name is connected with the document, but he is, in fact, the individual for whom the services were being performed which are the subject of all the documentation to which access is sought." In this case, the

> media representatives were merely incidentally included in footage of the occupiers. The purpose of the records was not to conduct surveillance of them. They are analogous to "someone whose name is connected with the document," not someone like Peter Doe who is the primary subject of the records. [appellant's emphasis]

I concur with the appellant on both points.

Absent any evidence from the Ministry to suggest otherwise, it is simply not necessary to pause before concluding that the images of the various media representatives depicted in various photographs and videotapes are discharging their professional responsibilities. As such, the information is not about the media representatives in any personal sense, as required in order to fall within the scope of the definition of "personal information". The only reasonable conclusion to reach in these circumstances is that the media representatives are depicted in their professional capacities, gathering footage on behalf of their employers in the context of newsworthy events taking place at Ipperwash in September 1995 (Orders P-1412 P-1621 and R-980015).

I also find that notice to the various media representatives under section 50(3) is not necessary.

By its own terms, a notice under section 50(3) is required where there is some prospect that the interests of a person may be adversely "affected" by the outcome of an appeal. The potentially affected interest must also relate to one of the confidentiality concerns recognized by the exemptions under the *Act*. For example, before responding to a request, section 28(1) of the *Act* requires the head of an institution to give notice before granting access to a record in one of two circumstances:

> (a) where the head has reason to believe that the record might contain information referred to in subsection 17(1) that affects the interest of a person other than the person requesting information; or
>
> (b) where the record contains personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 21(1)(f).

The Ministry did not notify any "affected party" at the request stage of this appeal.

On appeal, this office must also take care to ensure that persons are notified where there is a reasonable prospect that their interests may be affected by disclosure. However, that duty does not arise on every occasion that an individual's name or other identifier is somehow associated with a record. It is not hard to envision how the processes of this office could quickly be brought to a standstill if every individual named or otherwise identified in a record, in whatever ever capacity, needed to be notified.

The longstanding practice of this office is not to notify individuals under section 50(3) where it is clear that their identities are associated with a record in a professional capacity and no personal privacy interest is implicated. That is the case here. To this extent, I agree with the appellant's

analogy of media representatives to "simply someone whose name is connected with the document" as stated by the Divisional Court in *Ontario (Attorney General) v. Fineberg*, and section 50(3) notice is therefore not required.

OPP Officers

The Ministry submits:

> The audio portion of [FOI] Videotape 6 (the latter portion of the videotape …) contains the voices of two OPP officers, one of whom has retired since the recording was made. These two officers are carrying on a personal conversation that was captured unintentionally by the audio portion of the tape. The Ministry submits that their voices and the conversation is their personal information, and that this is consistent with past [Commissioner's office] decisions on this subject.

The Ministry also takes the position that these individuals should be notified under section 50(3) for the same reasons as the media representatives.

The appellant points to a number of previous orders where it has been determined that information about police officers and others discharging professional responsibilities is not "personal information" for the purposes of section 2(1) (Orders P-289, P-1044, P-1113 as well as Interim Order PO-2054-I issued at an earlier stage of this appeal). The appellant also refers to Order PO-1843 where Adjudicator Sherry Liang found that records reflecting the substance of a discussion between a police officer and a school official contained "professional" rather than "personal" information, as that distinction has been described in previous orders. Although I made the Ministry aware of these orders, they were not referred to in the Ministry's representations.

As far as notice under section 50(3) is concerned, the appellant reiterates her arguments with respect to the media representatives, and also submits that the Ministry has already given the OPP officers notice of this proceeding and consulted them in reaching its decision to deny access to the relevant portions of the videotape.

It is clear from the content of the FOI Videotape 6 that the OPP officers were on duty at Ipperwash taking still photographs of activity in the park at the time that the audio portion of the tape was recorded. It would appear that the video function of the camera had been turned off, but not the audio, and that the officers were not aware that the audiotape was still running. The officers' conversation makes reference to activities taking place in the park at that time and to particular occupiers, and the sound of camera shutters is clearly present on the tape. Having listened carefully to the audiotape, in my view, the conversation taking place between the OPP officers consists of three types of information:

1. information that is not about any identifiable individual;
2. information about various occupiers, which is not the personal information of the OPP officers; and

3. information about the OPP officers and their colleagues and family members, which is the personal information of the OPP officers and others and not of the occupiers.

As far as the second type of information is concerned, although some specific occupiers are referred to in a descriptive way, in my view, no individual occupier can reasonably be personally identified on the basis of the information on the audiotape. Accordingly, I find that the portions of the tape containing type 1 and type 2 information do not contain "personal information" for the purposes of section 2(1); and the portions containing type 3 information contain the "personal information" of the OPP officers and other non-occupiers who may be identifiable on the basis of the information conveyed during the discussions.

FOI Videotape 6 is not time-coded, so I have identified the portions of the tape that contain type 3 information on the basis of the time elapsed since the beginning of the tape. The type 3 information begins approximately 17 minutes and 30 seconds into the tape, with the phrase "I saw John [] …", and ends at approximately 20 minutes and 43 seconds, the second time one officer says "talk to you later".

Turning to the notice requirements of section 50(3), I find that notice to the two OPP officers is not required. In Interim Order PO-2033-I, I dealt with a number of photographs and videotapes depicting OPP officers discharging professional responsibilities at Ipperwash. I made the following findings:

> **Category 2 photographs and videotapes**
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> …
>
> Photographs A1-A11 depict individual members of the OPP, or clothing that is identifiable as an OPP uniform. The appellant submits any such depictions of police officers in their employment, professional or official capacity does not constitute personal information under the *Act*. The Ministry also takes the position that the information of the police officers in the Category 2 photographs is not their personal information. The appellant is accurate when she points out that previous orders have established that information associated with individuals in their professional or official government capacity is not "about an individual" within the meaning of section 2(1) (see, for example, Orders P-1412, P-1621 and R-980015). I find that the reasoning in these orders applies to photographs A1-A11 depicting OPP officers or clothing identifiable to the OPP officers, and that these records do not contain "personal information", and should be disclosed.
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> As far as the undisclosed videotapes in Category 2 are concerned, I find that they contain some of the same types of information as the photographs, for the same reasons. Specifically, I find that some portions of the videotapes depict the activities of various occupiers at Ipperwash during the time period covered by the appellant's request, and that these portions contain the "personal information" of these individuals; other portions contain identifying objects sufficient to link them to the occupiers, thereby bringing these portions within the scope of the definition

of "personal information"; other portions of one videotape depict OPP officers and a health care professional discharging their professional responsibilities, which do not contain their personal information; and other portions that record activities at Ipperwash contain no "personal information".

Category 3 videotape

The only Category 3 record is a videotaped interview of an individual conducted by the OPP. It is apparent from the contents of this videotape that it was conducted in the context of the OPP's investigation into the events that took place at Ipperwash. The interviewee is identified by name and address on the tape, and her face and voice are clearly discernable. Throughout the interview, the individual describes events that took place at Ipperwash, including her "personal opinions or views" as the phrase is used in paragraph (e) of the definition of "personal information". Accordingly, I find that the one Category 3 videotape contains the interviewee's "personal information." The OPP officers and health care professional who appear on the videotape are discharging their professional responsibilities, and the videotape does not include their personal information. No individual, other than the interviewee, is identifiable from the contents of the videotape.

The Ministry asked me to reconsider my findings for Category 2 photographs A1-A11 on the basis that these records contained "personal information" of identifiable OPP officers who had not been notified. I dealt with this issue in Reconsideration Order PO-2063-R as follows:

During the course of the inquiry leading to Interim Order PO-2033-I, the Ministry did not identify any personal information considerations relating to OPP officers contained in the various Category 2 records at issue in this appeal. On the contrary, as the appellant points out, the Ministry specifically stated in its representations that information about police officers was not their personal information. Although the Ministry's representations on this issue are not detailed, in making my "personal information" findings for Category 2 records in Interim Order PO-2033-I, I had assumed from the Ministry's position that any required consultations with the various OPP officers depicted in the Category 2 photographs and videotapes had taken place.

As it turns out, the Ministry apparently had not consulted with these police officers prior to the issuance of Interim Order PO-2033-I. After the order was issued, the Ministry contacted these police officers and, as stated in the Ministry's reconsideration request, the officers objected to disclosure of information that would depict the injuries they sustained during altercations that took place at Ipperwash, on the basis that this was their "personal information" and that disclosure would represent an unjustified invasion of their privacy under section 21 of the *Act*.

> Section 21 is a mandatory exemption. If a record contains "personal information" as defined in section 2(1), an institution *must* deny access to this information under section 21, unless one of the exceptions to the mandatory exemption in section 21(1) are present. The fact that the Ministry did not raise the possible application of section 21 to records depicting injuries suffered by the various police officers is unfortunate but, in my view, not determinative of whether there has been a fundamental defect in the adjudication process as it relates to photographs A1-A11. I have an independent responsibility to properly consider the potential application of section 21 of the *Act* in all circumstances where this mandatory exemption could reasonably apply.
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> In my view, the circumstances of this case are similar, though not identical, to those that Adjudicator Hale faced in Reconsideration Order R-980023. In that case, Adjudicator Hale found that the failure to notify potential affected persons and to provide them with an opportunity to submit representations constituted a fundamental defect in the adjudication process. I have also determined that there was a fundamental defect in the adjudication process in this case, but for somewhat different reasons. As far as Category 2 photographs A1-A11 in this appeal are concerned, I find that my failure to independently consider whether these records contained "personal information", based on the long-standing personal/professional distinction established by this office in previous orders, and if so, how any such "personal information" should be treated under sections 21 and 23 of the *Act*, constitutes a fundamental defect in the adjudication process under paragraph (a) of the reconsideration policy.

Applying this approach here, I carefully considered whether the audio portion of FOI Videotape 6 contains "personal information" of the OPP officers, based on the long-standing personal/professional distinction established by this office, and find that some portions do contain "personal information". I will consider these portions under the mandatory section 21 exemption claimed by the Ministry. The rest of the audiotape does not contain "personal information" of any identifiable individual, and clearly not the OPP officers. In my view, the portions of the audio tape that do not contain the OPP officers' "personal information" is comparable to other records, including the audio tape disclosed by the Ministry in Interim Order PO-2056-I, which depicts OPP officers discharging professional responsibilities. The Ministry did not suggest that the OPP officers in Interim Order PO-2056-I needed to be notified, presumably because the Ministry accepted that no "personal information" of the officers was at issue. In my view, the same considerations apply to the audio tape at issue in this appeal. Once the "personal information" has been isolated, the portions that remain do not contain "personal information" and, for the same reasons set out above under my discussion of the media representatives, the notification requirement of section 50(3) of the *Act* do not apply.

In summary, I find that the following information qualifies as "personal information":

- photographs and videotapes depicting occupiers in Ipperwash
- the identified portions of FOI Videotape 6 that contain the personal information of the two OPP officers and others, but not any occupiers

And the following information does not qualify as "personal information":

- photographs and videotapes depicting unidentifiable individuals
- photographs and videotapes depicting media representatives
- the remaining portions of FOI videotape 6 that do not contain "personal information"

The only exemption claimed by the Ministry in this appeal is section 21. Therefore, any records that do not contain "personal information" cannot qualify for exemption and should be disclosed.

Before proceeding with my discussion of section 21, I should note that significant portions of various videotape records that remain at issue in this appeal contain personal information of occupiers who have consented to disclosure. Maintenance Tape 2 has been severed in an effort to disclose as much of the record as possible without disclosing the one portion where consent has not been obtained, but the other Category 4 videotapes have been withheld in their entirety despite the fact that significant portions of these records contain personal information of occupiers who have provided consents. In light of my findings under section 23 in this order, it is not necessary for me to identify the portions that should have already been disclosed on the basis of consent, but it is clear that other Maintenance Tapes and Gatehouse Tape 4 should also have been severed in the same manner as Maintenance Tape 2.

INVASION OF PRIVACY

The Ministry claims that disclosing personal information contained in the various records, without consent, would constitute an unjustified invasion of privacy.

Sections 21(2) and (3) of the *Act* provide guidance in determining whether disclosing personal information would result in an unjustified invasion of the privacy. Section 21(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of privacy; and section 21(2) provides some criteria for the institution to consider in making the determination as to whether disclosure would represent an unjustified invasion of privacy. The Divisional Court has stated that once a presumption against disclosure under section 21(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in section 21(2) (*John Doe v. Ontario (Information and Privacy Commissioner*) (1993), 13 O.R. (3d) 767).

In the earlier stages of this matter, records were divided into Categories 2 and 4, on the basis that Category 4 records were obtained under *Criminal Code* warrants and Category 2 records were not. Once the Ministry acknowledged that no warrants exist, Category 4 and Category 2 records became indistinguishable for the purposes of applying the provisions of section 21. The Ministry's actions in disclosing both Category 4 and new Category 2 records on the basis of consent confirms the absence of any distinction.

In Interim Order PO-2033-I, I made the following findings regarding Category 2 photographs and videotapes:

> Having reviewed the Category 2 records and considered the representations provided by the parties, I am satisfied that the Category 2 videotapes and photographs recorded or produced by the OPP were all compiled and are all identifiable as part of an investigation into a possible violation of law. Specifically, they form part of an investigation of events surrounding the occupation of Ipperwash in September 1995 and possible criminal activity taking place in that context. Accordingly, I find that disclosure of the personal information of the occupiers contained in these Category 2 records would result in a presumed unjustified invasion of their personal privacy pursuant to section 21(3)(b) of the *Act*. None of the exceptions at section 21(4) apply, and I find that the exception provided by section 21(1)(f) has no application in the circumstances of this appeal. Therefore, subject to my discussion of section 23, I have concluded that the personal information of the occupiers qualifies for exemption under section 21 of the *Act*.

I see no basis for a different finding here. The records that remain at issue were compiled by the OPP in the same context as the records at issue in Interim Order PO-2033-I. The appellant's representations in this appeal do not persuade me otherwise, and for the same reasons as the previous related order, I find that disclosing the personal information of the occupiers contained in the records at issue in this appeal would result in a presumed unjustified invasion of the personal privacy pursuant to section 21(3)(b) of the *Act*. Accordingly, the exception in section 21(1)(f) has no application with respect to this information and, subject to my discussion of section 23, I have concluded that the personal information of the occupiers qualifies for exemption under section 21 of the *Act*.

As far as the personal information of the OPP officers is concerned, the appellant's representations focus on her position that the relevant information is professional rather than personal, and not on whether disclosure of any "personal information" of these officers would constitute an unjustified invasion of privacy. I have already determined that significant portions of FOI Videotape 6 do not contain "personal information" and should be disclosed. The only portions qualifying as "personal information" consist of conversations between the officers about their colleagues and family members that have no connection to the activities taking place at the time in Ipperwash. In the absence of any argument or evidence as to why "personal information" of this nature should be disclosed, I find that to do so would constitute an unjustified invasion of the privacy of the officers and other identifiable individuals, and these portions of FOI Videotape 6 qualify for exemption under section 21 of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant submits that the "public interest override" in section 23 of the *Act* applies in this case. Section 23 reads as follows:

> An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, **21** and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

The only submissions provided by the Ministry on section 23 consist of the following statement:

> The Ministry submits that there is no compelling interest in disclosing the records that clearly outweighs the purpose of the section 21(1) exemption, particularly where individuals have not consented to the disclosure of their personal information.

The appellant disagrees, and submits:

> Frankly, the appellant is shocked that the Ministry is taking the position that there is no compelling public interest in disclosure of information about Ipperwash that can override privacy interests. The Government of Ontario has called a public inquiry into the events at Ipperwash, an inquiry which will inevitably lead to disclosure of a considerable amount of personal information about [a named occupier] and the other occupiers of Ipperwash Provincial Park. In doing so, the Government promised that "Ontarians will receive a full airing of the facts by an independent commissioner into what happened eight years ago at Ipperwash" …. The Government has clearly recognized by calling a public inquiry that the extreme public interest in the events surrounding the death of [the named occupier] supersedes privacy interests.
>
> …
>
> The Ministry had made nothing but a bald, unsupported statement that the public interest in Ipperwash is not sufficiently compelling to justify disclosure in this case. It has not responded at all to the detailed submissions made by the appellant … The appellant submits that the Ministry's position is inconsistent with the earlier decisions of the Assistant Commissioner in this appeal, in Orders PO-2033-I and PO-2056-I, and is completely untenable.

In order for section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption (see 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.)).

As the appellant points out, I considered section 23 of the *Act* in relation to the Category 2 records at issue in Interim Order PO-2033-I. After taking into account the representations of both parties that are outlined in detail in that order, I made the following findings on the two components of section 23:

> In my view, there is a clear and compelling public interest in disclosure of records that deal with events that took place at Ipperwash in September 1995. Records such as those qualifying for exemption under section 21 in this appeal, which were created during the course of the occupation itself, and were the subject of criminal investigations undertaken by the OPP, are closely and directly connected

to the activities that gave rise to the public's interest and, in my view, this lends support to my finding that there is a "compelling" public interest in disclosure of these records for the purposes of section 23 of the *Act*.

…

In weighing the compelling public interest in disclosure of the various Category 2 records against the purpose of the personal privacy exemption, I find that the public interest in disclosure outweighs the interests in privacy protection reflected in the section 21 exemption for most of the records, with certain exceptions.

[A discussion of the exceptions, which is not relevant in the context of this order.]

A number of other occupiers are depicted in the remaining photographs. In a few instances these occupiers are identified by name, but in most cases they are not. Some photographs include one individual only, while groups of occupiers are depicted in others. … In my view, the personal information of the various other occupiers in the undisclosed Category 2 photographs is not sensitive. While I accept that these photographs … are technically part of an OPP criminal investigation, the content of the photographs is apparently not the primary focus of any investigation itself and does not appear to depict criminal activity. The photographs depict passive scenes of occupiers in Ipperwash (or in some instances objects that are identifiable to occupiers), and as noted above, at the very least, a significant number of occupiers consented to having their personal information disclosed to the appellant. On balance, and taking into account all of the relevant considerations favouring both privacy protection and disclosure, I find that the compelling public interest in disclosure of [a number of listed photographs] is sufficient to outweigh the purpose of the section 21 exemption claim as it relates to these identifiable occupiers.

As far as the Category 2 videotapes are concerned, I have reached similar conclusions for the same reasons. While I accept that these videotapes were created by the OPP in the context of criminal investigation activity, the content of the videotapes is apparently not the primary focus of any investigation itself and does not appear to depict criminal activity. The portions of the videotapes that contain personal information consist primarily of passive scenes of occupiers in Ipperwash, and, as noted above, at the very least, a significant number of occupiers, including the individual who is the focus of the last described videotape, consented to having their information disclosed to the appellant. On balance, and taking into account all of the relevant considerations favouring both privacy protection and disclosure, I find that the compelling public interest in disclosure of all four remaining videotapes, in their entirety, is sufficient to outweigh the purpose of the section 21 exemption claim as it relates to these identifiable occupiers.

I subsequently found that most of the audio portion of the one Category 3 record also fell within the scope of section 23 (Interim Order PO-2056-I).

My reconsideration of Interim Order PO-2033-I (Reconsideration Order PO-2063-R) did not alter my section 23 findings as they relate to the type of personal information of occupiers at issue in this inquiry.

Again, I see no basis for any different finding for the Category 4 and new Category 2 records at issue in this inquiry. Since I issued Interim Order PO-2033-I, the appellant and others have made concerted efforts to identify and locate the various occupiers depicted in the records, and obtained many new consents. Although consents for some occupiers are still outstanding, I accept that reasonable efforts to obtain consent have been made. I have been provided with no evidence to suggest that any occupier denied consent once contacted and, given the actions of the vast majority of occupiers, it is reasonable to conclude that any occupier who could be contacted would not refuse consent.

In my view, the compelling public interest in disclosure that existed at the time of my previous orders has not abated. If anything, the Government's decision to proceed with a public inquiry into the events taking place at Ipperwash during the time period covered by the appellant's request would appear to add credence to my previous orders and support to my finding in this inquiry that there is a compelling public interest in disclosing the personal information of all occupiers contained in the various photographs and videotapes that is sufficient to outweigh the purpose of the section 21 privacy exemption. Therefore, section 23 of the *Act* applies, and the personal information of the various occupiers should be disclosed.

As far as the personal information of the OPP officers is concerned, different considerations apply. The appellant has provided no evidence or argument to suggest that there is a compelling public interest in disclosing personal information of these officers and their colleagues or family members that bear no connection to the activities taking place in Ipperwash. I find that the portions of FOI Videotape 6 containing this information do not fall within the scope of section 23 and should not be disclosed.

OUTSTANDING ISSUES RELATING TO VIDEOTAPE RECORDS

After reviewing the various videotape records in this inquiry, I wrote to the Ministry asking for answers to the following three questions:

1. Several videotapes include long sections where the screen is black. What is the explanation for this?

2. Several videotapes include sections where the video portion is interrupted by screens indicating that a phone line is being dialled and then connected. What is the explanation for this?

3. On Maintenance Tape 9, there is a section of approximately 20 seconds (18:32:20 to 18:32:40) where the audio portion of the tape is not audible. What is the explanation for this?

The Ministry answered question 1 as follows:

> With respect to the sections where there is no picture and the screen is black, this is because there is a loss of light in the room that is being recorded. This is most likely as a result of someone in the Maintenance Building turning the light switch off. The fact that the date/time numbers at the bottom of the screen are still moving means that only the recorder is still functioning. The fact that the numbers at the top right corner of the screen are also changing indicates that the phone line connection is present and a picture is being received. In this instance, because the lights are turned off the picture is black. The black squares on the screen are just a pixilation of the image that the camera is trying to see. The camera is working hard to try and see any image it can in the low light. …

The Ministry's answer to question 2 is:

> The video camera located in the buildings was connected to the recording device via telephone lines. When this signal would have been interrupted or disconnected, a redialling system would have reconnected the phone line.

Both of these answers are reasonable explanations for the absence of video footage on various Category 4 videotape records.

As far as question 3 is concerned, the Ministry's initial response was:

> This is a technical problem and the OPP are attempting to get the audio enhanced.

In a follow-up letter, the Ministry states:

> With respect to question three regarding the audibility of a section of the Maintenance Building Video 009, we are enclosing a floppy disk which contains the enhanced version of the portion of the video. The OPP have advised that this is the best quality of the audio that they were able to produce.

I reviewed the "enhanced version" provided by the Ministry, but the 20-second portion is still inaudible.

I gave the Ministry an opportunity to provide any additional explanation in response to question 3, but have received no further correspondence from the Ministry on this issue.

In my view, the answer provided by the Ministry to question 3 does not adequately explain the absence of audio for 20 seconds in the middle of a taped telephone conversation. Accordingly, I

will include a provision in this interim order requiring the Ministry to provide me with an affidavit explaining this audio gap in detail.

In order to satisfy myself that any outstanding issues regarding the various videotapes were not a function of the quality of the copies of these records provided to me by the Ministry, I arranged to view the original videotape records. In that context, I confirmed other issues:

- In addition to the audio gap identified in question 3, there are other instances where there is an apparent gap in the audio portion of the videotape, specifically:

  Maintenance Tape 8 from 13:45:05 to 13:45:33
  Maintenance Tape 8 from 13:54:06 to 13:54:23
  Maintenance Tape 9 from 18:08:55 to 18:09:15

- Certain Maintenance Tapes contain both audio and video footage (Maintenance Tape 9, most of Maintenance Tape 8 and some of Maintenance Tape 10), while others have only video (Maintenance Tapes 1-7 and Gatehouse Tapes 1-6). Even when the tapes contain audio, the audio footage is not constant (e.g., there is no audio on Maintenance Tape 8 from the beginning to 12:39:53, and on Maintenance Tape 10 from 2:05:43 to the end).

- Although the various videotapes were described as original copies, Maintenance Tape 9 begins with footage that is time-coded as 23:03:54 (the start time for Maintenance Tape 10), only to be interrupted and re-started at the correct time of 16:56:43.

- Maintenance Tape 7 ends with the time-code at 10:38:42 and Maintenance Tape 8 begins with the time-code at 10:46:33. Footage for the time period 10:38:43 to 10:46:32 is not contained on either of these videotapes.

In my view, these issues need to be addressed by the Ministry in order to satisfy me that I have been provided with access to all of the various responsive records identified to this point by the Ministry. Accordingly, I will include a provision in this interim order requiring the Ministry to provide me with affidavit evidence explaining these apparent discrepancies.

ADEQUACY OF SEARCH/COMPLIANCE WITH INTERIM ORDER PO-2033-I

Adequacy of Search

On September 10, 2003, I received an affidavit sworn by Superintendent Susan Dunn of the OPP outlining the various searches undertaken by the Ministry to identify all responsive records. This affidavit was provided to the appellant.

In her appeal documentation, the appellant pointed to a number of perceived deficiencies in the search activities outlined by Superintendent Dunn, and identified a number of reasons for her view that responsive records not yet identified by the Ministry should exist.

In my Notice of Inquiry sent to the Ministry, I required Superintendent Dunn to swear another affidavit addressing all of the evidence regarding potential additional records raised by the appellant in her appeal documentation and in correspondence sent by the appellant to the Ministry between August 25, 2003 and the due date for representations in this inquiry.

I also required affidavits from all OPP officers with personal knowledge of responsive photographic and videotape records of activities taking place at Ipperwash during the time period identified in the appellant's request attesting to various steps taken to identify and locate responsive records. I pointed to page 39 of the appellant's appeal documentation for a list of potential officers.

In addition to the various search efforts, I required the affidavits to address:

- whether the individual officer had reviewed relevant notes they may have taken;
- whether he/she had reviewed OPP logs that describe the taking of photographs or videotaping; and
- whether he/she had reviewed the photographs and videotapes themselves.

In this context, I asked the Ministry to provide each OPP officer with:

- a description of the records dealt with in the Ministry's decision letters to date, including the date, length and content of the videotapes; and
- the evidence set out at pages 33 to 38 of the appellant's appeal documentation and in the appellant's letters of August 29, 2003 and September 19, 2003 (referred to at pages 32 and 40 of the appellant's appeal documentation).

I pointed out that the officers' affidavits should attest to whether, based on the information provided by the Ministry and any other knowledge they possess, they are aware of the existence of any additional responsive records and the possible location of any such records.

Compliance with Interim Order PO-2033-I

On September 16, 2003, I received an affidavit sworn by Superintendent Susan Dunn of the OPP outlining the steps taken by the Ministry to comply with Provisions 1 and 2 of Interim Order PO-2033-1. This affidavit was provided to the appellant.

In her appeal documentation, the appellant pointed to a number of perceived deficiencies in the various steps outlined by Superintendent Dunn, and identified reasons for her view that the provisions of Interim Order PO-2033-I have not yet been fully complied with.

In my Notice of Inquiry, sent to the Ministry on October 30, I required Superintendent Dunn to swear another affidavit addressing all of the evidence on this issue provided by the appellant in her appeal documentation and in correspondence sent by the appellant to the Ministry between August 25, 2003 and the due date for representations in this inquiry.

The Ministry's response

On November 7, 2003, I received a letter from the Ministry asking for an extension of the due date for representations, including the various affidavits, to January 19, 2004. I responded on November 10, agreeing to an extension of the date for receipt of the various affidavits to December 5, 2004. On December 4 and December 5, 2003, I received two letters from the Ministry stating that affidavits would not be submitted by the extended due date, for reasons outlined in the December 5 letter. That letter closes by stating:

> While we remain anxious to expedite the Ministry's response to your Notice of Inquiry, we are not at this time in the position to provide an accurate estimation of the date by which the affidavits will be completed. We wish to assure you that we will make every effort to provide a response as expeditiously as possible. We will keep you informed promptly of any developments.

As of the date of this interim order, the Ministry has not provided me with a date by which the affidavits will be submitted.

It has now been almost 8 weeks since I issued my Notice of Inquiry in this appeal which, in my view, should be adequate for the Ministry and the OPP to obtain and submit the required affidavit evidence. Accordingly, I will include a provision ordering the Ministry to do so.

INTERIM ORDER:

1. I uphold the Ministry's decision not to disclose the portion of FOI Videotape 6 containing the personal information of the OPP officers and others. This portion begins approximately 17 minutes and 30 seconds into the tape, with the phrase "I saw John [] …", and ends at approximately 20 minutes and 43 seconds, the second time one officer says "talk to you later".

2. I order the Ministry to disclose all remaining undisclosed Category 2 and Category 4 videotapes and photographs, including the entire Maintenance Tape 10, to the appellant by **January 16, 2004**.

3. I order the Ministry to provide me with an affidavit sworn by Superintendent Dunn attesting to the following:

   - confirming that I have been provided with access to all original Category 2 and Category 4 videotape records

- explaining the following apparent gaps in the audio portion of various videotape records:

  - Maintenance Tape 8 from 13:45:05 to 13:45:33
  - Maintenance Tape 8 from 13:54:06 to 13:54:23
  - Maintenance Tape 9 from 18:08:55 to 18:09:15
  - Maintenance Tape 9 from 18:32:20 to 18:32:40

- explaining why some Maintenance Tapes contain both audio and video footage (Maintenance Tape 9, most of Maintenance Tape 8 and some of Maintenance Tape 10), while others have only video (Maintenance Tapes 1-7 and Gatehouse Tapes 1-6); and further explaining why even when the tapes contain audio, the audio footage is not constant (e.g., there is no audio on Maintenance Tape 8 from the beginning to 12:39:53, and on Maintenance Tape 10 from 2:05:43 to the end).

- explaining why, although the various videotapes were described as original copies, Maintenance Tape 9 begins with footage that is time-coded as 23:03:54 (the start time for Maintenance Tape 10), only to be interrupted and re-started at the correct time of 16:56:43.

- explaining why Maintenance Tape 7 ends with the time-code at 10:38:42 and Maintenance Tape 8 begins with the time-code at 10:46:33, and why footage for the time period 10:38:43 to 10:46:32 is not contained on either of these videotapes.

This affidavit must be submitted to me not later than **January 12, 2004**.

4. I order the Ministry to provide me with an affidavit sworn by Superintendent Dunn on the outstanding issue of whether the Ministry has fully complied with the provisions of Interim Order PO-2033-I, taking into account the evidence on this issue provided by the appellant in her appeal documentation and in correspondence sent by the appellant to the Ministry between August 25, 2003 and the date of this interim order. This affidavit must be submitted to me not later than **January 12, 2004**.

5. I order the Ministry to provide me with an affidavit sworn by Superintendent Dunn addressing all of the evidence regarding potential additional records raised by the appellant in her appeal documentation and in correspondence sent by the appellant to the Ministry between August 25, 2003 and the date of this interim order. This affidavit must be submitted to me not later than **January 23, 2004**.

6. I order the Ministry to provide me with affidavits from all OPP officers with personal knowledge or responsive photographic and videotape records of activities taking place at Ipperwash during the time period identified in the appellant's request (see page 39 of the appellant's appeal documentation for a list of potential officers), attesting to various steps

taken to identify and locate responsive records. In addition to the various search efforts, the affidavits should address:

- whether the officers have reviewed relevant notes they may have taken;
- whether the officers have reviewed OPP logs that describe the taking of photographs and videotapes; and
- whether the officers have reviewed the photographs and videotapes themselves.

In addition, the Ministry is asked to provide each OPP officer with:

- a description of the records dealt with in the Ministry's decision letters to date, including the date, length and content of the videotapes; and
- the evidence set out at pages 33 to 38 of the appellant's appeal documentation and in the appellant's letters of August 29, 2003 and September 19, 2003 (referred to at pages 32 and 40 of the appellant's appeal documentation).

The officers' affidavits should attest to whether, based on the information provided by the Ministry and any other knowledge they possess, they are aware of the existence of any additional responsive records and the possible location of any such records.

These affidavits must be submitted to me not later than **January 23, 2004**.

7. In order to verify compliance with Provision 2 of this interim order, I reserve the right to require the Ministry to provide me with a copy of the various records disclosed to the appellant, upon my request.

December 23, 2003

Tom Mitchinson
Assistant Commissioner