INTERIM ORDER PO-2263-I

Appeal PA-000370-4

Ministry of Community Safety and Correctional Service

BACKGROUND:

Interim Order PO-2221-I is one in a series of orders involving the Ministry of Community Safety and Correctional Services (the Ministry) and an appellant who is seeking access to videotape and photographic records produced during the occupation of Ipperwash Provincial Park (Ipperwash) in September 1995.

Interim Order PO-2221-I included two provisions (Provisions 5 and 6) requiring Ontario Provincial Police (OPP) Superintendent Susan Dunn and other current and former officials of the OPP with knowledge of activities taking place at Ipperwash to provide affidavit evidence attesting to the steps taken to identify and locate all records responsive to the appellant's request. The process to be followed and the scope of the evidence to be provided were outlined in these order provisions. Interim Order PO-2221-I also included two different provisions (Provisions 3 and 4) requiring Superintendent Dunn to provide separate affidavits attesting to various possible discrepancies in certain identified records and outstanding issues relating to compliance with a previous related order, Interim Order PO-2033-I.

For ease of reference, I will refer to the affidavits relating to Provisions 5 and 6 as the "search affidavits" and the affidavit and supplementary affidavit from Superintendent Dunn relating to Provisions 3 and 4 as the "discrepancy affidavits".

After reviewing the first discrepancy affidavit from Superintendent Dunn, which was shared with the appellant, I determined that it was inadequate, for reasons outlined in Interim Order PO-2338-I. I determined it would be necessary for me to summon Superintendent Dunn and other OPP officials, pursuant to my authority under section 52(8) of the *Freedom of Information and Protection of Privacy Act* (the *Act*), and require them to attend before me to give sworn evidence relating to the various outstanding discrepancy issues. Before my scheduled oral inquiry on this matter took place, OPP Commissioner Gwen Boniface asked her RCMP counterpart for a review of the discrepancy issues. After receiving assurances that I would be provided with a copy of the report outlining the results of the RCMP review, I decided to adjourn my oral inquiry. I subsequently received a full copy of the RCMP report as well as a supplementary discrepancy affidavit from Superintendent Dunn. Issues regarding the extent to which the RCMP report can be shared with the appellant remain outstanding and will not be addressed in this interim order.

In response to Provisions 5 and 6 of Interim Order PO-2221-I, I received a search affidavit from Superintendent Dunn, one search affidavit from each of 23 current and/or former OPP officials, and one "will say" statement from a 24th official who is now residing outside Canada (I will refer to this "will say" statement as a "search affidavit" in this interim order). The Ministry is taking the position that these search affidavits may not be shared. The purpose of this interim order is to rule on this issue. Although the supplementary discrepancy affidavit from Superintendent Dunn was submitted in response to Provisions 3 and 4 of Interim Order PO-2221-I, the Ministry is taking the position that some of its content relates to the search issues, so I will deal with the search aspects of its content in this interim order as well.

SHARING OF REPRESENTATIONS PROCEDURE:

The processes and procedures followed by the Office of the Information and Privacy Commissioner (the IPC) in conducting inquiries under the *Act* are contained in the published *Code of Procedure* and accompanying *Practice Directions*. *Practice Direction 7* deals with sharing of representations provided by the parties during the course of an inquiry, and identifies the criteria for withholding representations. Sections 5 and 6 of *Practice Direction 7* reads as follows:

> 5.The Adjudicator may withhold information contained in a party's representations where:
>
> (a) disclosure of the information would reveal the substance of a record claimed to be exempt; or
>
> (b) the information would be exempt if contained in a record subject to the *Act;* or
>
> (c) the information should not be disclosed to the other party for another reason.
>
> 6.For the purposes of section 5(c), the Adjudicator will apply the following test:
>
> (i) the party communicated the information to the IPC in a confidence that it would not be disclosed to the other party;
>
> (ii) confidentiality is essential to the full and satisfactory maintenance of the relation between the IPC and the party;
>
> (iii) the relation must be one which in the opinion of the community ought to be diligently fostered; and
>
> (iv) the injury to the relation that would result from the disclosure of the information is greater than the benefit thereby gained for the correct disposal of the appeal.

The Divisional Court has upheld the application of the confidentiality criteria set out in *Practice Direction 7* as a proper means for the IPC to determine whether representations of one party can be withheld from another party during the course of an appeal (*Toronto District School Board v. Ontario (Information and Privacy Commissioner),* [2002] O.J. No. 4631.

DISCUSSION:

The Ministry identifies the following three alternative bases for its position that the search affidavits should not be shared with the appellant or her counsel (quoted directly from the Ministry's representations):

> (i) The Assistant Commissioner has no jurisdiction to disclose the affidavits to the appellant and her counsel. Indeed, the Assistant Commissioner is prohibited by law from disclosing the affidavits to the appellant and her counsel.
>
> (ii) In the alternative, if the Assistant Commissioner has jurisdiction to disclose the affidavits, then the affidavits ought not to be shared with the appellant and her counsel at this time.
>
> (iii) In the further alternative, if the affidavits are shared with the appellant and her counsel, then the affidavits ought to be disclosed only on the condition that they are not made public at this time, and subject to certain severances.

I will deal with each of these arguments in turn.

I HAVE NO JURIDICTION TO DISCLOSE THE SEARCH AFFIDAVITS AND AM PROHIBITED BY LAW FROM DOING SO

The Ministry's representations

The Ministry makes the following submissions in support of this position:

> Part IV of [the *Act*] deals with appeals to the Commissioner. Sections 52 to 56 govern inquiries. Subsection 52(13) of the *Act* has been interpreted to permit the Commissioner to share an institution's "representations" with an appellant, including any "other document" submitted together with the representations. This is the only jurisdiction the Commissioner has under Part IV to make disclosures.
>
> The Ministry respectfully disagrees with that interpretation of s. 52(13). However, it is not necessary to revisit that issue in this case, because in the Ministry's submission, the affidavits in question were not provided by the Ministry as part of its "representations" under s. 52(13) of the *Act*. The affidavits are "information" compelled by the Assistant Commissioner under s. 52(8) of the *Act*.
>
> Section 52 distinguishes between "representations" made by an institution and "information" compelled by the Commissioner. "Representations" are

submissions and arguably other documents voluntarily submitted by or on behalf of an institution for the purpose of an inquiry. In the case of representations, the institution has a choice with respect to whether to expose its submissions and other documents to the possibility of public scrutiny.

In this case, the Assistant Commissioner's authority to order that the affidavits be provided appears to derive from s. 52(8) of the *Act* which states:

> The Commissioner may summon and examine on oath any person who, in the Commissioner's opinion, may have **information** relating to the inquiry, and for that purpose the Commissioner may administer an oath." [Ministry's emphasis]

By definition, "information" compelled by the Commissioner under s. 52(8) for the purpose of an inquiry is not provided voluntarily. The *quid pro quo* for the Commissioner's power to compel information is that the Commissioner is not entitled to disclose it. [Ministry's emphasis]

The Assistant Commissioner appeared to recognize this distinction in a letter dated January 16, 2004 addressed to Ian Roland [counsel for the Ontario Provincial Police Association]. In that letter, the Assistant Commissioner stated that the affidavits constitute "evidence" at the oral inquiry and are entitled to the same protections as evidence under s. 52 of the *Act*.

Subsection 55(1) expressly prohibits the Commission from sharing "information" obtained by the Commission during the course of an inquiry. Subsection 55(1) states:

> The Commissioner or any person acting on behalf of or under the direction of the Commissioner shall not disclose any **information** that comes to their knowledge in the performance of their powers, duties and functions under this or any other *Act*. [Ministry's emphasis]

Accordingly, it is respectfully submitted that the Assistant Commissioner has no jurisdiction to disclose the affidavits to the appellant and her counsel. Indeed, it is submitted that the Assistant Commissioner is prohibited by law from disclosing the affidavits to the appellant and her counsel.

The Ministry's representations were shared with the appellant.

The Appellant's representations

The appellant takes the position that I have jurisdiction to disclose the affidavits to the appellant and her counsel. Like the Ministry, she points firstly to the powers of the Commissioner with respect to inquiries under the *Act* set out in section 52. However, she disagrees with the Ministry's interpretation of these provisions.

> Both s. 52(3) and (13) of [the *Act*] give the IPC discretion to decide whether or not to share the submissions and evidence submitted by one party to an inquiry with the other party. The appellant submits that "representations" in s. 52(13) include both legal submissions and evidence presented in the course of an inquiry. Indeed, the Ministry concedes [in] its submissions that s. 52(13) has been interpreted as permitting the IPC to share "other documents" submitted by an institution with the appellant.
>
> Reading s. 52 of [the *Act*] in its entirety, the appellant submits that the access referred to in s. 52(13) applies to all legal submissions or facts presented to the IPC under any of the preceding subsections, including s. 52(8). There is no basis in the statute for the *"quid pro quo"* advanced by the Ministry in … its submissions.
>
> If the legislature sought to deny natural justice by mandating that evidence summoned under s. 52(8) always be heard *ex parte*, it would need to do so in clear and explicit statutory language: *Kane* v. *Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105; *Grant v. Ontario (Information and Privacy Commissioner)* [2001] O.J. No. 749 (Div. Ct.). There is no such language in s. 52(8) of the *Act*.
>
> Instead, s. 52(3) of [the *Act*] clearly gives the Assistant Commissioner discretion either to hear evidence in private in appropriate circumstances or to open the inquiry to public scrutiny. Under s. 52(3), his inquiry may, or may not, be conducted in private, at his discretion. [appellant's emphasis]
>
> With respect to the Ministry's s. 55(1) argument, the same position has been repeatedly advanced by institutions and has unvaryingly been rejected by the courts and the IPC.
>
> For example, in Interim Order PO-2013-I (2 May 2002), the Ministry of Public Safety and Security took the position that sections 52(13) and 55(1) of the *Act* preclude sharing of representations in the context of an inquiry under section 52. The Assistant Commissioner rejected this argument, holding:
>
> > Taken to its logical conclusion, the Ministry's position appears to be that if it submits representations and asks that they be kept

> confidential, they cannot be shared unless the Ministry consents. I do not accept this position.
>
> In my opinion, this provision [s. 55(1)] cannot be read as imposing an absolute requirement of confidentiality. To do so would preclude the Commissioner from discharging other statutory and common law responsibilities, and that clearly cannot have been the intent of the legislature in establishing the appeal system in the Act. For example, how could the Commissioner issue orders disposing of the issues raised in an appeal (section 54), with the requisite degree of reasoning expected by the parties and the courts, without making reference to at least some information that came to her knowledge in performing the duties of an adjudicator under the *Act*? Or, at the earlier stage of the inquiry process, how could the Commissioner provide an institution with an adequate explanation of the basis of the appellant's appeal without, at least in some instances, including some information provided by an appellant, regardless of whether the appellant consents? [appellant's emphasis]

The Assistant Commissioner also gave an overview of several of the court and tribunal decisions that have held that s. 52(13) of [the *Act*] gives the IPC discretion regarding sharing of material submitted in an inquiry:

> As several court decisions have indicated, it [s. 52(13)] does not prohibit the Commissioner from deciding that representations, or portions of them, ought to be exchanged to ensure procedural fairness.
>
> …
>
> Similarly, in *Ontario (Attorney General)* v. *Ontario (Assistant Information and Privacy Commissioner),* [1998] O.J. No. 5015 (Div. Ct.), the Court denied a motion seeking to stay an oral hearing, stating that "the relevant parties have no right to be present during the representations of others but the Commissioner may choose to permit them or direct them to be present." In reaching this conclusion, the Court cited with approval the interpretation given to section 52(13) by former Commissioner Sidney B. Linden in Order 164.... [appellant's emphasis]

The Assistant Commissioner concluded:

> In my view, therefore, I have the power to decide whether and the extent to which representations should be shared among the parties, provided that the confidentiality criteria in *Practice Direction 7* are adequately considered and applied. My decision in this regard is not dependent on the consent of any party, including the Ministry in this appeal. [appellant's emphasis]

The Assistant Commissioner decided that the representations should be shared, subject to certain severances to address confidentiality considerations that met the criteria in the IPC's *Practice Direction 7*.

Commissioner Linden's Order 164 was also adopted by the Divisional Court in *Toronto District School Board v. Ontario (Information and Privacy Commissioner)* , [2002] O.J. No. 4631 (Div. Ct.):

> The respondent relies upon the interpretation articulated by former Commissioner Sidney B. Linden, Q.C. in Order 164, Ontario Human Rights Commission, IPC/O April 24, 1990 at pp. 24-26:
>
> > Counsel for the institution argues that these express grants of authority constitute the limits to the Commissioner's discretion, and that I may not arrogate to myself any power not explicitly given.
> >
> > ... I agree that the words "no person is entitled" to see and comment upon another person's representations means that no person has the right to do so. In my view, the word "entitled", while not providing a right to access to the representations of another party, does not prohibit me from ordering such an exchange in a proper case. Subsection 52(13) does not state that under no circumstances may I make such an order; it merely provides that no party may insist upon access to the representations.
> >
> > Counsel for the institution is correct when he states that the *Statutory Powers Procedure Act* does not apply to an inquiry under the *Freedom of Information and Protection of Privacy Act, 1987*. Thus, the only statutory procedural guidelines that govern inquiries under the *Freedom of Information*

> *and Protection of Privacy Act, 1987* are those which appear in that Act. However, while the Act does contain certain specific procedural rules, it does not in fact address all of the circumstances which arise in the conduct of inquiries, I must have the power to control the process. In my view, the authority to order the exchange of representations between the parties is included in the implied power to develop and implement rules and procedures for the parties to an appeal.
>
> …
>
> Clearly, procedural fairness requires some decree of mutual disclosure of the arguments and evidence of all parties. The procedures I have developed . . . allow the parties a considerable degree of such disclosure. However, in the context of this statutory scheme, disclosure must stop short of disclosing the contents of the record at issue, and institutions must be able to advert to the contents of the records in their representations in confidence that such representations will not be disclosed.

The decision of this court in *Gravenhurst v. Ontario (Information and Privacy Commissioner),* [1994] O.J. No. 2782 (Div. Ct.), is supportive of this approach as are the decisions of single judges of this Court in *Attorney-General v. Mitchinson,* [1998] O.J. No. 5015, (November 30, 1998) Toronto Doe. 383/98, 681/98, 698/98 at p. 3 (Div. Ct.) and *Solicitor General and Minister of Correctional Services et al, v. Information and Privacy Commissioner et al.* (June 3, Sept. 10, 1999) Toronto Doc. 103/98, 330/98, 331/98, 681/98, 698/98 at pp. 1-2 (Div. Ct.).

In our view, the approach articulated by Commissioner Linden is correct ... [appellant's emphasis]

Interim Order PO-1781-I (8 May 2000) is also instructive. In that appeal, the Ministry of Health and Long Term Care argued that an affidavit that it had filed in an inquiry could not be disclosed to the requester. Like [the Ministry] in this inquiry, the Ministry of Health submitted that s. 55(1) of [the *Act*] precludes such disclosure. Adjudicator [Laurel] Cropley ordered sharing of all parts of the affidavit that did not meet the IPC's guidelines for confidentiality, noting that the

Divisional Court had already rejected the Ministry's s. 55(1) jurisdictional argument:

> To the extent that the Ministry's position appears to be based on the Commissioner's lack of authority to make a decision to share the representations of one party with another, I would draw the Ministry's attention to the reasons of Mr. Justice Cosgrove in *Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, l999), Toronto Doc. 103/98 (Ont. Div. Ct.) in an order granting the Commissioner's sealing order as asked. In refusing to extend the sealing order to the Ministry's non-confidential representations in that case (and four others heard at the same time), Mr. Justice Cosgrove said:
>
> > I have engaged counsel in discussions on sections 52(13) and 55(1) of the Act. I am, with respect, unable to agree that these sections (in the context of the whole legislation) support the proposition that it was intended that representations be excluded. I have concluded that the Act does not warrant the sealing of the representations.
> >
> > ....
> >
> > This principle shall apply unless representations are otherwise ruled confidential by the Commissioner.
>
> It is clear that the Divisional Court does not consider that section 55(1) has the effect on the confidentiality of the representations in the matter before me as advanced in the Ministry's submissions, and that the court agreed that decisions on the confidentiality of representations should be made by the Commissioner. [appellant's emphasis]

The appellant's representations were shared with the Ministry.

The Ministry's reply representations

The Ministry made lengthy submissions on the jurisdictional issue in reply:

> The appellant's submissions with respect to this issue are irrelevant. The appellant argues … that the Commissioner has the jurisdiction to disclose "representations" under s. 52(13) of the *Act*. The appellant's submissions are not

> responsive to the Ministry's position that the affidavits in issue are not "representations" within the meaning of s. 52(13).
>
> The Ministry acknowledged that "representations" has been interpreted to include both legal submissions and other documents, but only those documents voluntarily submitted by a party as part of its representations. The Ministry's point is that the term "representations" has been interpreted to include only those documents which a party has chosen to submit to the Commissioner together with its legal submissions, for the purpose of supporting its position with respect to the disclosure of a record. Note that under s. 52(13), a party cannot be ordered to make representations. Rather, s. 52(13) affords a party "an opportunity to make representations to the Commissioner". If a party chooses to make representations which include affidavits or other documents, then there is authority for the proposition that the Commissioner may share the representations. [Ministry's emphasis]
>
> The Ministry's position is that the affidavits in question are "information" compelled by the Commissioner under s. 52(8) of the *Act*. The appellant argues … that "the access referred to in s. 52(13) applies to all legal submissions or facts presented to the IPC under any of the preceding subsections, including s. 52(8)". The Ministry submits that this is patently incorrect.
>
> For example, under s. 52(4), "[i]n any inquiry, the Commissioner may require to be produced to the Commissioner and may examine any record that is in the custody or under the control of an institution". However, under s. 52(4), "... **no appellant has ever been allowed to view records during the course of an inquiry, whether represented by counsel or otherwise**". (See Order P0-2175-F, dated September 4, 2003, at pp. 4-5.) [Ministry's emphasis]
>
> Section 52 makes a clear distinction between "representations" on the one hand, and "records" and "information" on the other. It is only "representations" which the Commissioner may share under s.52(13). Subsection 52(13) has no application to records or information.

The Ministry also addresses the "natural justice" submissions raised by the appellant, claiming that the requirements of natural justice are ousted by section 55(1) of the *Act* and, in any event, that sharing the affidavits with the appellant is not necessary to afford natural justice in the circumstances of this case:

> The appellant argues … that natural justice requires that the affidavits be shared. The Appellant states … that the access to the affidavits is necessary in order for her "to know the case she has to meet".

The Ministry reiterates its submissions … that there is no "case" advanced by the Ministry which the appellant has to meet. Rather, this is an "inquiry" by the Assistant Commissioner. Should the Assistant Commissioner determine that it is necessary for the oral inquiry to proceed, the issues to be addressed and the scope of the evidence to be called will be determined by the Assistant Commissioner.

The appellant concedes that a clear legislative provision can oust the requirements of natural justice. The Ministry submits that there is a clear legislative provision which prohibits the disclosure of information supplied to the Commissioner, that is, s. 55(1). Subsection 55(1) prohibits the Commissioner from disclosing the affidavits to the appellant or her counsel.

In any event, the Ministry submits that natural justice does not require the disclosure of the affidavits. The same argument has been made with respect to records required to be produced under s. 52(4), and repeatedly rejected by the Commissioner. In Order PO-2175-F, the Commissioner stated:

> I have considered the appellant's request and I find that **there is no need to allow him or his counsel to view the records at issue in this appeal in order to ensure procedural fairness**. In my view, the description of the records provided to the appellant in **the Notice of Inquiry and in the shared portions of the Ministry's representations is sufficient to permit him to make informed submissions** in this inquiry." (at pp. 4-5) [Ministry's emphasis added]

This practice has been followed by other IPCs in Canada, not only with respect to records, but also with respect to evidence at an inquiry. The [British Columbia Commissioner] has said:

> "I am satisfied that giving access — in relation to the *in camera* material alone or in conjunction with the unsevered disputed record — is not absolutely necessary to permit the applicant to argue its position. As well, it would, in my judgement, irretrievably and significantly compromise the interests that are at stake for the public body in this inquiry and therefore would be an unacceptable prejudice to the public body.
>
> In reaching this conclusion I have taken into account the desirability of making as much information as possible known to the applicant, or its counsel, to enable the argument for access to be made in an informed way. I have also taken into account the nature and content of the disputed information in this case, the nature of the disclosure exceptions the public body relies on, the

> degree to which critical content of the disputed records would be revealed even if only the public body's *in camera* evidence and arguments were made accessible to the applicant's counsel, and the degree to which access to that information by the applicant's counsel — even on an undertaking not to disclose it to her client — would necessarily compromise the interests for which the public body is arguing in this case.
>
> [Ruling of B.C. Information and Privacy Commissioner, dated December 12, 2001 (file no. 13317), at p.2]

In court proceedings, fairness to the requester is accorded by the ability of the Court to view the records, and by the Ministry or the IPC providing a description of the records sufficient to enable requester's counsel to make submissions. In Ontario, the Divisional Court has held as follows:

> **Availability of the documents in the "sealed record" is not necessary, in my opinion, either for preparation or presentation of argument to the Court** on that issue. I conclude, therefore, that the documents in the "sealed record" filed by the Commissioner should be sealed by the registrar and not disclosed to [the requester/appellant] for the purposes of the application for judicial review. [Ministry's emphasis]
>
> [*Rubin v. Ontario (Information and Privacy Commissioner)*, [1991] O.J. No. 3562 (Div. Ct.)]

Indeed, the Supreme Court of Canada has ruled that in some cases not even a description of the records should be provided. In *Ruby*, the Supreme Court of Canada recognized that it is appropriate in access to information cases for the government's evidence and submissions to be received in the absence of the requester and requester's counsel. The Court accepted as valid the need "to guard against the inadvertent disclosure of information the government institution may have legitimately refused to confirm exists, as well as information that may be found to be properly exempted." The Court rejected the requester's request for a judicial summary of the records and other confidential evidence, holding:

> The [federal] *Privacy Act* does not impose an obligation on a court to prepare a judicial summary of evidence in any circumstance. ... Where the existence of information is known to the appellant, the use of judicial summaries would not appreciably increase the amount of information already available to the appellant through the public affidavits. The public affidavits outline the purpose of the exemption, its importance and the risk associated with

> disclosure. The secret affidavit and the *ex parte* submissions directly involve the information exempted, if any exists. I accept the respondent's claim that a judicial summary could not provide any further detail without compromising the very integrity of the information. Furthermore, the use of judicial summaries would increase the risk of inadvertent disclosure of the information or its source.
>
> [*Ruby v. Canada (Solicitor General)* (2002), 219 D.L.R. (4th) 385 at 400-401 (S.C.C.)]

The Ministry submits that like records which are "required to be produced", access to information which is compelled by the Commissioner under s. 52(8) is not necessary to fulfill the requirements of natural justice.

In any event, the question is not whether disclosure of the affidavits is desirable. The Ministry submits that the law prohibits the Commissioner from disclosing information which has been compelled under s.52(8). The appellant has cited no authority for the proposition that the Commissioner may share "information" compelled under s.52(8) of the *Act*.

The Ministry submits that the Assistant Commissioner has first to decide the issue of whether the affidavits are "representations". It is only if the Assistant Commissioner concludes that the affidavits are representations that he needs to go on to consider application of *Practice Direction 7*.

Analysis and Conclusions

I do not accept the Ministry's position. I find that I have the authority to disclose the search affidavits to the appellant, subject to any severances resulting from the application of the confidentiality criteria in section 5 of *Practice Direction 7*.

The thrust of the Ministry's argument is that I only have authority to order the sharing of voluntary "representations" and not "information" compelled under section 52(8). It attempts to draw a parallel with the constraint on my authority to order disclosure of "records" produced to me for examination in an inquiry under compulsion of section 52(4). The Ministry argues that I am prohibited by the confidentiality requirements at section 55(1) of the *Act* from disclosing either "information" or "records" compelled to be produced in an inquiry. The Ministry cites no authority for this position, and I can find no basis in the *Act* or otherwise at law for the distinction the Ministry is asking me to make.

This office has consistently treated the reference to "representations" at section 52(13) of the *Act* to encompass both the legal submissions and the evidence or other information provided by a party in the course of an inquiry. In the *Toronto District School Board* case, cited in the

appellant's representations, the Divisional Court agreed with the approach first outlined by former Commissioner Linden in Order 164, that section 52(13) does not preclude the Commissioner ordering the exchange of representations in an inquiry - including "the arguments and evidence" - and that the decision maker has the authority to do so in the appropriate case "short of disclosing the contents of the records at issue". Section 52(13) provides me with the authority to give a party access to or be present during the representations of another party, subject to the limitations just described.

In addition, while section 52(3) allows me to conduct an inquiry under the *Act* in private, it does no require me to do so. The conduct of an inquiry under section 52 can be private, open to both parties (or even open to the public for that matter), and can involve both oral and documentary evidence compelled by summons and given under oath pursuant to section 52(8). The same is true for affidavit evidence required to be produced in an inquiry conducted wholly in writing. Collectively, sections 52(3) and 52(13) make it clear that compelled evidence in the form of both oral testimony and affidavits may be disclosed to another party, provided that the core confidences under section 55(1) of the *Act* - such as the contents of records at issue - are protected by the processes adopted (*Ontario (Attorney General)* v. *Ontario (Assistant Information and Privacy Commissioner),* [1998] O.J. No. 5015 (Div. Ct.); Interim Order PO-2013-I, Ministry of Public Safety and Security, IPC/O (2 May 2002)).

It is also clear that the determination of what representations, if any, are to be treated as confidential - whether consisting of evidence or legal argument and whether provided under compulsion or voluntarily - is for me to make, based on the application of the confidentiality criteria set out in the *Practice Direction 7* (*Ontario (Solicitor General and Minister of Correctional Services) v. Ontario (Information and Privacy Commissioner)* (June 3, l999), Toronto Doc. 103/98 (Ont. Div. Ct.); *Toronto District School Board*; and Interim Order PO1781-I, Ministry of Health and Long Term Care, IPC/O (8 May 2000)). It is only if the criteria set out in *Practice Direction 7* are misapplied that the Divisional Court may intervene and reverse a ruling on the sharing of representations.

Before leaving this point, I would like to comment on the Ministry's submission that the purported parallel use of the word "information" at sections 52(8) and 55(1) means that any "information" provided under compulsion of the first section is subject to the confidentiality requirements of the second. This cannot have been the legislature's intent.

The word "information" is a ubiquitous term used in a variety of contexts under the statute and having different meanings or connotations depending on the particular context in which it is found.

In section 52(8) the word "information" is used with reference to the Commissioner's authority to "summon and examine any person who, in the Commissioner's opinion, *may have information relating to the inquiry*". If a person is summonsed to give testimony under oath or is required to swear a deposition in an affidavit, the information is received as "evidence". This is made clear by section 54(1), which requires the Commissioner to make an order disposing of the issues

raised by an appeal "after all the *evidence* is received". Even where the same information is not received under compulsion or on oath (there is no requirement in the *Act* that the Commissioner may only consider and act on the basis of sworn testimony), it is still considered to be "evidence" in the Commissioner's inquiry.

If the legislature had intended to prohibit the Commissioner from disclosing "evidence" received in an inquiry - based on whether it was produced under compulsion or not - it would have been a simple matter to make a distinction of this nature explicitly in section 55(1) or elsewhere in the statute. It did not do so, and I am unable to infer from the generalized use of the word "information" at section 52(8) that the legislature intended to bring any and all information *compelled* to be produced under oath in an inquiry under a cloak of confidentiality. This would run contrary to the true meaning of section 55(1) and the interpretation of this section adopted by the IPC in numerous orders (e.g. Order PO-2013-I) and by the Courts in the several judgments previously referred to. It would also run contrary to the authority and discretion given to the Commissioner under section 52(3) to conduct inquiries in private or not in private, and under section 52(13) to permit or refuse to permit access to a party's representations, including evidence and argument that does not reveal the contents of the records at issue.

The Ministry also makes a number of submissions in response to the appellant's claim that she requires access to the affidavits for natural justice reasons in order to "know the case she has to meet." The thrust of the Ministry's submission here is that: (1) the appellant is not entitled to natural justice in the inquiry process where the Commissioner determines the issues and the scope of evidence to be called; and (2) section 55(1) of the *Act* ousts the requirements of natural justice.

This argument is entirely met and answered by the *Toronto District School Board* case, which adopted as correct the following statement of former Commissioner Linden in Order 164:

> Clearly, procedural fairness requires some decree of mutual disclosure of the arguments and evidence of all parties.

In the same case, the Divisional Court also adopted the reasoning of several of its earlier judgments, which it found to be "supportive of [Commissioner Linden's] approach."

The Ministry argues in the alternative "that natural justice does not require the disclosure of the affidavits", citing Order PO-2175-F. This case is clearly distinguishable from the issues in the current inquiry. In Order PO-2175-F, I denied an appellant and his counsel access to the record which was at issue in the appeal on the basis of confidentiality criterion 5(a) of *Practice Direction 7*, which states "[t]he Adjudicator may withhold information contained in a party's representations where disclosure of the information would reveal the substance of a record claimed to be exempt or excluded". I was satisfied that "the description of the records provided to the appellant in the Notice of Inquiry and in the shared portions of the Ministry's representations is sufficient to permit him to make informed submissions in this inquiry", without the need to have access to the actual record at issue.

The Ministry also cites:

1. a decision of the British Columbia Information and Privacy Commissioner refusing to share arguments presented by an institution in support of its position that a record was subject to an exemption;

2. the Divisional Court judgment in *Rubin v. Ontario (Information and Privacy Commissioner)*, [1991] O.J. No. 3562, refusing an appellant's request for access to the Commissioner's private record of proceedings filed in Court, which contained the record at issue in the appeal; and

3. the judgment of the Supreme Court of Canada in *Ruby v. Canada (Solicitor General)* (2002), 219 D.L.R. (4th) 385 at 400-401, refusing to provide a requester with a summary of evidence concerning an exempt record the existence of which the institution refused to confirm or deny claimed, on the basis that it "could not provide any further detail without compromising the very integrity of the information".

These authorities do not assist the Ministry. They all involve the question of providing a requester/appellant with access to *records at issue in an appeal*, which is not what I am dealing with in this inquiry.

Finally, the Ministry submits:

> It is only if the Assistant Commissioner concludes that the affidavits are representations that he needs to go on to consider the application of *Practice Direction 7*.

Although there is ample support for the view that the word "representations" appearing at section 52(13) encompasses evidence provided in an inquiry in whatever form, including affidavits, my jurisdiction to share the affidavits does not flow solely from section 52(13) and therefore does not depend exclusively on whether the affidavits are "representations".

As the Divisional Court has made clear on a number of occasions, the processes under the *Act* are subject to overriding concerns of natural justice (*Gravenhurst v. Ontario (Information and Privacy Commissioner)*, [1994] O.J. No. 2782 (Div. Ct.); *John Doe v. Ontario (Information & Privacy Commissioner)* (1993), 13 O.R. (3d) 767 at 781 (Div. Ct.)). Although section 52(3) permits private inquiries for obvious reasons, this does not oust all requirements of natural justice. The Commissioner has a duty to provide fairness to parties participating in an inquiry, and an obligation to establish procedures that do so. This is subsumed within the authority and discretion conferred by section 52(3). Section 52(13) is a complementary provision, which also speaks to fairness issues. This section was included in the statute so that a party cannot insist that representations be shared in every case, where it would be unfair to do so. In my view, if affording a party the opportunity to make meaningful representations during the course of an

inquiry warrants the disclosure of another party's *evidence* without breaching legitimate confidentiality concerns, the power to do so flows from the discretion available under section 52 and does not ultimately depend on a finding that the affidavits are "representations" within the meaning of section 52(13).

As a final statement on this issue, I note that the Courts have made it clear that the Commissioner has authority to control the procedures in an inquiry within the framework of the statutory scheme, and the duty and authority to afford natural justice to parties in designing and implementing inquiry procedures (*Baker v. Canada (Minister of Citizenship and Culture)* (1999), 174 D.L.R. (4th) 193 at 210-214 per L'Heureux-Dubé J. (S.C.C.)*; Knight v. Board of Education of Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489 at 512 per L'Heureux-Dubé J. (S.C.C.).

ASSUMING I HAVE JURISDICATION, THE SEARCH AFFIDAVITS SHOULD NOT BE SHARED FOR REASONS OF CONFIDENTIALITY

The Ministry argues, in the alternative, that the search affidavits fall within the scope of the confidentiality criteria in sections 5 and 6 of *Practice Direction 7*.

In its initial correspondence, the Ministry did not make specific reference to any of the confidentiality criteria, but stated:

> In respect to all of the affidavits and the will say statement that have been provided by the Ministry, the information contained within those affidavits is detailed in order to ensure the fullest compliance with the Order. However, the degree of detail contained within the affidavits makes them unsuitable for publication. For example, on February 12, 2004, you were provided with a copy of the affidavit of [a named OPP officer] sworn February 11, 2004. In that affidavit the affiant makes mention of an individual with the initials N.C. on pages 14, 16 and page 7 of the exhibit, who was a young person at the time the record was created. That information has been provided as part of these administrative law proceedings and not for the purpose of publication. While the Ministry and the appellant have obtained Consent to Disclosure from that individual, please be advised that the publication or use of that document should be restricted so it does not go beyond the consent that the parties had previously obtained in this matter. We request that the protection afforded under section 52 of the *Act* be interpreted to restrict dissemination of the officers' affidavits and will say statement.

The Ministry subsequently submitted representations identifying the application of confidentiality criteria 5(b) and 5(c).

The appellant makes a number of submissions not directly related to the application of either of these specific confidentiality criterion, which I will deal with first.

The appellant submits that my statutory discretion to order the sharing of the search affidavits must be exercised in accordance with the *Canadian Charter of Rights and Freedoms*, including the right to freedom of expression protected by section 2(b). She makes lengthy submissions in support of this position, citing a number of Court judgments dealing with the underpinnings and importance of the open court system for the proper functioning of a free and democratic society. While I do not discount the value of these authorities and their overall consistency with the broad principles underlying statutory freedom of information regimes, it is not necessary for me to rely on them in reaching my decision on the application of the confidentiality criteria in the circumstances of this inquiry.

The appellant also cites the Divisional Court judgment in *Toronto District School Board*, and relies on it for her position that "the policy of s. 52(13) of [the *Act*] is that an appellant should not be denied natural justice unnecessarily by withholding representations". The appellant correctly observes that the Court in that case approved the guidelines set out in *Practice Direction 7*, and she observes that "[t]he one limit recognized in [this case], that representations cannot be exchanged where to do so would render the inquiry moot by disclosing the very records whose disclosure is at issue, is inapplicable in the present circumstances". The appellant goes on to quote the following passage from the Court's judgment:

> If this court were to adopt the approach advanced by the applicant [Toronto District School Board], the Commissioner would have no discretion to release any submissions whatsoever. Accordingly, there could be an unnecessary denial of natural justice in circumstances where there was no information contained in the submissions which would expose the privacy interests at stake and which therefore were not in need of protection.
>
> On the other hand to interpret the s. 43(13) [of the *Municipal Freedom of Information Act;* s. 52(13) in the parallel FIPPA] in the manner advanced by Commissioner Linden [in Order 164, …] would preserve the policy that the section is meant to foster, namely, full and frank submissions in circumstances where the parties could more fully exercise their rights to natural justice. The Commissioner, as adjudicator, would reap the benefit of shared submissions, limited only by the exclusion of those submissions which would expose the privacy rights at issue. [appellant's emphasis]

I agree with this passage and with the proposition that I should exercise my discretion in favour of promoting the natural justice interests at stake and only withhold representations where I am satisfied, based on the material sought to be withheld and the representations provided, that disclosure would impinge upon one of the confidentiality interests recognized in *Practice Direction 7*.

Confidentiality criterion 5(b) - "exempt if contained in a record"

For confidentiality criterion (b) to apply, the information in the search affidavits must qualify for exemption if contained in a record subject to the *Act*.

The Ministry's representations

The Ministry submits that criterion 5(b) applies to three of the 26 search affidavits. The only representations submitted by the Ministry for criterion 5(b) consist of the following:

> The affidavits of Officers B. B. sworn January 29, 2004 (3 pages), D. H., sworn January 28, 2004 (2 pages) and C. M., sworn January 29, 2004 (3 pages), contain law enforcement information about OPP investigative techniques, which would be exempt under s.14 of the Act if contained in a record.

The appellant's representations

The appellant submits that the Ministry has not met its onus of establishing the application of criterion wet out in section 5(b):

> With respect to paragraph 5(b), [the Ministry] asserts that three of the 26 affidavits contain law enforcement information about OPP investigative techniques that would be exempt under s. 14 of the *Act*. [The Ministry] has presented no evidence or submissions in support of this position, only a bare assertion. Moreover, it does not specify which parts of the three affidavits contain this information.
>
> [The Ministry] has failed to establish that s. 14 applies. To do so would require "detailed and convincing" evidence of "a reasonable expectation of harm": Order PO-2188; Order PO-1772; Order P-373; *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe,* [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.).
>
> As the Assistant Commissioner recently held in Order PO-2189:
>
> > In order to meet the "investigative technique or procedure" test, the Ministry must establish that disclosing a technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally does not apply if the technique or procedure is generally known to the public [Orders P-170, P-1487]. The technique or procedure must be "investigative", and the exemption does not apply to

> "enforcement" techniques or procedures [Orders PO-2034, P-1340].
>
> In Order PO-2189, the Assistant Commissioner concluded that technical information explaining the operation of various types of equipment used by the police did not qualify for exemption under s. 14.
>
> The appellant submits that in considering whether [the Ministry] has established "that disclosing a technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization this issue" [sic], the Assistant Commissioner should be guided-by the Supreme Court of Canada's decision in *R. v. Mentuck* [2001] 3 S.C.R. 442, in which the Court refused to issue a publication ban with respect to RCMP investigative techniques. The Supreme Court of Canada recognized in *Mentuck* that the public interest is better served by accountability of the police and scrutiny of their methods than by undue secrecy.

The appellant goes on to quote at length from the judgment of Justice Iacobucci in the *Mentuck* case, which discusses the deleterious effects of a publication ban on the ability of the press and the Canadian public "to know of and be able to respond to police practices that, left unchecked, could erode the fabric of Canadian society and democracy."

The appellant's representations were shared with the Ministry, but the Ministry's reply representations do not respond to the appellant's position on criterion 5(b).

Analysis and Conclusions

The Ministry's representations on confidentiality criterion 5(b) are, to say the least, spare. They provide little if any basis for me to determine what specific information in the three affidavits should be withheld and the reason or reasons why criterion 5(b) should apply, as required by sections 3 and 4 of *Practice Direction 7*.

I have carefully reviewed the contents of each of the three affidavits and, based on the representations provided by the Ministry, I am not persuaded that disclosing them would reveal investigative techniques that are not already well known to be the subject of this inquiry, particularly in light of the fact that the actual photographs and video surveillance tapes under consideration have already been disclosed to the appellant.

In particular, I note the following:

1. Most of the content of the three affidavits relates exclusively to the various search activities undertaken by the three officers, as required by Provision 6 of Interim Order PO-2221-I. These search activities do not specifically address nor would they reveal any investigative techniques.

2. Small portions of the affidavits touch on matters relating to outstanding discrepancy issues. Although I specifically make no finding as to whether these portions would qualify for exemption under section 14(1)(g), I have decided not to provide them to the appellant at this time, and will address whether they can be shared in the context of my inquiry on the discrepancy issues.

3. The existence of interruptions, gaps or other anomalies on certain records, which the Ministry has previously attributed to "technical problems" with the surveillance equipment, has been identified by the appellant in her representations and by me in previous orders. Any information fitting this description that is contained in the three search affidavits would not qualify for exemption under section 14(1)(g).

4. I do not consider references to specific monitoring locations to constitute an investigative technique. In any event, I have not been provided with the detailed and convincing evidence necessary to satisfy me that disclosing locations or information concerning how video surveillance equipment operates in a generic sense would jeopardize any interest that the section 14(1)(g) exemption is designed to protect.

For all of these reasons, I find that the Ministry has failed to establish that disclosing any portion of the three identified search affidavits would reveal information that would qualify for exemption if contained in a record subject to the *Act*, and in particular, would not qualify for exemption under section 14(1)(g). Accordingly, confidentiality criterion 5(b) does not apply to any portions of the three search affidavits.

As far as the other search affidavits are concerned, the Ministry has provided no evidence or argument regarding the application of confidentiality criterion 5(b) and I find that, with certain exceptions I will now identify, none of the remaining information falls within the scope of this criterion.

Despite what I consider to be the absence of adequate submissions on this point, I am prepared to err on the side of caution and find that the identity of the young person referred to in one of the affidavits, as described in the Ministry's correspondence, should be withheld under criterion 5(b). This information qualifies as that individual's "personal information", and there may be some ambiguity as to whether the individual has consented to disclosure in the context of this inquiry.

Although not identified by the Ministry, consistent with my finding in Interim Order PO-2056-I, I find that the name of an individual that appears in one search affidavit should also be withheld under criterion 5(b). Similarly, although the Ministry makes no reference in its representations to the fact that I upheld its section 21 exemption in Interim Order PO-2033-I and Reconsideration Order PO-2063-R for certain photographs, I find that the description of these records contained in one search affidavit should also be withheld under criterion 5(b).

As noted earlier, for the time being I will also not provide the appellant with small portions of the three affidavits identified by the Ministry that touch on matters relating to outstanding discrepancy issues.

Confidentiality criterion at section 5(c) - the "Wigmore" test

Confidentiality criterion section 5(c) requires me to consider the factors set out at section 6 of *Practice Direction 7*, which are, in essence, a restatement of the so-called "Wigmore" test for determining whether communications are confidential and should be protected from disclosure.

The Ministry's representations

The Ministry makes the following representations on the application of this criterion:

> The first part of the Wigmore test is whether the information was communicated to the Commission in confidence. In this case, in a letter to the Assistant Commissioner, dated February 13, 2004, [Ministry counsel] Mr. Burnside stated with respect to "all of the affidavits and the will say statement" that "the degree of detail contained within the affidavits makes them unsuitable for publication". Superintendent Dunn's supplementary [discrepancy] affidavit was to have been provided together with the other affidavits provided on February 13th. Instead, a draft of the supplementary [discrepancy] affidavit was provided on that date. While Mr. Burnside did not expressly identify confidentiality concerns in his letter of February 18th to the Assistant Commissioner enclosing Superintendent Dunn's supplementary [discrepancy] affidavit, he referenced the Ministry's position on February 13th. In an earlier letter dated February 6th, Mr. Burnside expressly requested "an opportunity to provide submissions in respect to restrictions on the use and dissemination of affidavits by the appellant" at the relevant time.
>
> The second part of the Wigmore test is that confidentiality is essential to the maintenance of the relationship between the Commission and the party. It is submitted that confidentiality is necessary to promote meaningful responses to the Commission by ministries. In the absence of an expectation of confidentiality, the fear of premature disclosure of information or representations may in some cases operate as a disincentive to fulsome responses.
>
> With respect to the third part of the test, the Ministry submits that it is in the public interest that the relationship between the Commission and the ministries be fostered. The community has an interest in the proper administration of the *Act*, and the proper administration of the *Act* requires that there should be no disincentive to a full and frank exchange of information and representations with the Commission.

The final part of the test requires a consideration of the effect of disclosing the information on the "correct disposal of the appeal". It is submitted that there are a number of reasons why the affidavits ought not to be shared at this time. First, to disclose the affidavits at this time would give rise to the appearance that the Assistant Commissioner has prejudged the issues, for the following reasons.

The affidavits of the OPP officers deal mainly with the "reasonable search" issue. The supplementary affidavit of Superintendent Dunn deals with both the "reasonable search" issue and with what counsel for the appellant calls the "discrepancy issue".

The Assistant Commissioner has not yet decided whether an oral inquiry will be called with respect to the "reasonable search" issue. Indeed, the Assistant Commissioner has not yet decided whether it will be necessary to pursue the oral inquiry with respect to the "discrepancy issue". The Assistant Commissioner has postponed the oral inquiry into the "discrepancy issue" pending the delivery of the RCMP report.

To disclose the affidavits at this time would give rise to the appearance that the Assistant Commissioner has already decided that there will be an oral inquiry into the reasonable search issue and that the oral inquiry into the discrepancy issue will have to be pursued.

It is respectfully submitted that the appropriate time to consider access to the affidavits is after the delivery of the RCMP report. If the Assistant Commissioner's questions are answered based on the RCMP report, then presumably he will not hold an oral inquiry and there will be no need for access to the affidavits. Indeed, it appears that he would not have the authority to conduct a further inquiry.

However, if all of the Assistant Commissioner's questions are not answered by the RCMP report and if the Assistant Commissioner determines that the outstanding questions merit an oral inquiry, then the Assistant Commissioner will determine at that time whether the appellant will be permitted to be present at the oral inquiry, whether the oral inquiry will be public or private, whether the inquiry will deal with either or both of the reasonable search issue and the discrepancy issue, what information or evidence it will be necessary to examine at the inquiry and whether the information or evidence to be examined at the oral inquiry ought to be disclosed with or without terms and conditions.

Accordingly, to disclose the affidavits at this time would interfere with the "correct disposal of the appeal", because it would give rise to the appearance that the Assistant Commissioner has prejudged those issues. It would suggest that he has already concluded that the RCMP report will not satisfy him and that there

> will be an oral inquiry, that the appellant is entitled to be present, and that both of the issues and all of the evidence will be considered.
>
> Second, it is submitted that it would be unfair to the Ministry and the OPP officers and the former OPP officers to disclose the affidavits at this time. Even if an oral inquiry is ultimately convened, it may be the case that not all of the OPP officers and former OPP officers will be required. It would not be fair to subject all of the OPP officers and former OPP officers to public scrutiny at this time, when they may not in fact be required for the purpose of an oral inquiry. This is particularly the case where, as noted above, the affidavits were compelled by Order of the Assistant Commissioner, and where the affidavits have been provided not only by current OPP officers, but also by former OPP officers.
>
> Conversely, it is submitted that there would be no denial of fairness to the appellant if the affidavits are not disclosed at this time. The Ministry notes that the proceeding is not a "hearing". It is an "inquiry" by the Commissioner or his delegate. The scope of the inquiry is determined by the Commissioner and not by the appellant or by any of the parties. The *Statutory Powers Procedure Act* does not apply to an inquiry, and an "inquiry may be conducted in private". (s. 52(2) and (3)) In other words, the appellant is not entitled to be present during an inquiry, nor is the appellant entitled to cross-examine persons who are examined by the Commissioner at an oral inquiry.

The Ministry's representations were shared with the appellant, who responded with detailed submissions.

The appellant's representations

The appellant disagrees and makes the following submissions:

> With respect to the first part of that test, [the Ministry] knew at the time that it filed the affidavits that *Practice Direction 7* would apply, and that the Assistant Commissioner could order their disclosure and had done so with respect to all earlier affidavits submitted in this inquiry. Accordingly, the affidavits were not submitted in confidence, as [the Ministry] knew that they were likely to be shared.
>
> In particular, with respect to the supplementary [discrepancy] affidavit of Superintendent Dunn, it presumably contains the same type of information that was in her original affidavit, which was shared with the appellant; compare Interim Order PO-1961-I (24 October 2001). [The Ministry] did not even ask that the affidavit be kept confidential until after it had been filed, despite the clear direction in *Practice Direction 7* that "A party seeking to have the Adjudicator withhold information in its representations from the other party or parties shall

explain clearly and in detail the reasons for its request," at the time that the representations are filed.

Regarding the second branch of the Wigmore test, confidentiality is not essential to the maintenance of the relationship between the IPC and [the Ministry], particularly where the inquiry does not relate to access to a specific record that is described in the relevant representations. Where a government ministry has been ordered by the IPC to provide evidence on oath, as in this case, it has no option but to comply, and to provide "fulsome responses." The potential for the affidavit to be shared cannot have any effect on its contents, as [the Ministry] would be in contempt of the Assistant Commissioner's order if it withheld information from the IPC.

With respect to the third Wigmore factor, while the relationship between the IPC and [the Ministry] ought to be diligently fostered, confidentiality is not required for this to occur.

The final Wigmore criterion is that "the injury to the relation that would result from the disclosure of the information is greater than the benefit thereby gained for the correct disposal of the litigation." Clearly this requirement has not been met. [The Ministry] has not established any injury; whereas non-disclosure would leave the appellant without any means to make informed and effective submissions that would assist the Assistant Commissioner in correctly disposing of this litigation. The appellant has conducted significant investigative work with respect to Ipperwash, and is likely to have relevant information and insight that would assist in an appropriate resolution of this appeal, if she is permitted to know the case that she must meet.

[The Ministry] argues that the IPC would be "pre-judging" the issues in this proceeding if it grants the appellant access to the affidavits. In particular, [the Ministry] argues that if the Assistant Commissioner allows the appellant to see the evidence that the Ministry has submitted to him, he would give the appearance of having decided that there will be an oral inquiry into the reasonable search issue and that the oral inquiry into the "discrepancy issue" will have to be pursued.

First, the Assistant Commissioner must make an independent decision on the discrepancy issues. He cannot delegate that decision to the RCMP. He has never indicated that his inquiry will be determined by the RCMP's findings, only that he will want to consider the relevant facts in the RCMP report.

The assertion in … [the Ministry's] submissions that the Assistant Commissioner lacks authority to continue his inquiry if the RCMP report addresses all of the discrepancy issues is untenable. Even if the RCMP has obtained sworn *viva voce* evidence from every OPP officer who is summoned for the oral inquiry and has

asked them every question that the Assistant Commissioner would ask in that inquiry (which is highly doubtful), the Assistant Commissioner still has jurisdiction, and a statutory duty, to conduct his own inquiry and reach his own decision on whether the discrepancy issues have been resolved.

Second, [the Ministry's] position ignores the fact that fairness requires that the appellant be permitted to make submissions on whether the affidavits and the RCMP's report on technical issues adequately resolve all of the issues raised by Provisions 3 through 6 of Interim Order PO-2221-I or whether an oral inquiry is needed; compare Interim Order P0-1781-I (8 May 2000) at para. 29. There is no "pre-judgment" or appearance of bias in allowing the appellant to know the case she must meet and to have an opportunity to make meaningful and useful submissions on these issues. The Ministry is turning every principle of natural justice on its head in arguing that an *ex parte* inquiry is fairer than one in which both parties know the evidence that is before the adjudicator. "The correct disposal of the litigation" is better served by all parties making informed submissions on all of the issues, not a one-sided proceeding in which [the Ministry] knows all of the evidence while the appellant is kept in the dark.

Third, even if the Assistant Commissioner were to decide, without further submissions or an oral inquiry, that all outstanding issues have been satisfied by the 26 affidavits and the RCMP's report on technical issues (which the appellant submits should not be done), the appellant would still be entitled to know the basis for that decision. The outstanding issues in this proceeding relate to the propriety of the Ministry's response to the appellant's … request, including the comprehensiveness of its search and the completeness and authenticity of the records disclosed to her. The appellant has presented significant evidence to raise valid concerns about [the Ministry's] response to her request. She has been attempting for more than 7 months (since August 2003) to obtain answers to these concerns. It would be unfair to decide this inquiry without ever giving her access to the basis for that decision. Moreover, there is a compelling public interest in whether [the Ministry] has presented the IPC with a comprehensive and credible response to the concerns raised by the appellant and the IPC. Public accountability and confidence in both [the Ministry] and the IPC necessitate disclosure of the affidavits in these circumstances.

The Ministry's second submission is that it would be unfair to disclose the affidavits of OPP officers who may not ultimately be called to give *viva voce* evidence during the oral inquiry. There is no such unfairness. The affidavits are evidence in this inquiry that has already been submitted to the adjudicator. The status of the affiants as former or current police officers and the fact that the IPC ordered that the affidavits be provided are irrelevant to the evidentiary impact of the affidavits. The Assistant Commissioner must consider all of this evidence regardless of whether he also hears *viva voce* evidence from the affiants.

> Accordingly, the "correct disposal of this litigation" is better served if the appellant has access to both written and *viva voce* evidence and can make meaningful submissions thereon.
>
> With respect to the Ministry's argument that the Assistant Commissioner may conduct this inquiry in private, while this is true, the Assistant Commissioner's discretion to do so must be exercised in accordance with the appellant's and the public's *Charter* rights. Moreover, the issue under paragraph (c) of the criteria for withholding representations is whether the Ministry has established an injury to its relation with the IPC that would result from disclosure of the information and that is greater than the benefit thereby gained for the correct disposal of the litigation. [The Ministry] has not established any injury to its relation with the IPC. At the same time, the correct disposal of the inquiry is substantially enhanced if the appellant is able to make informed submissions on the issues raised by Provisions 3 through 6 of Order PO-2221-I.

The Ministry was provided with a copy of the appellant's representations and afforded an opportunity to reply, which it did.

The Ministry's Reply representations

The Ministry's reply representations state:

> ... With respect to the first part of that test, the appellant argues … that the Ministry "knew at the time that it filed the affidavits that *Practice Direction 7* would apply", and that therefore "the affidavits were not submitted in confidence". The Ministry's position is that these affidavits are not "representations", subject to *Practice Direction 7*. As the Ministry submitted …, the Assistant Commissioner advised counsel for the Ontario Provincial Police Association that the affidavits would be treated as "evidence" for the purpose of the inquiry.
>
> In any event, it simply does not follow that because the Commissioner may decide to apply *Practice Direction 7*, the party has not submitted the information to the Commissioner in confidence.
>
> The appellant's assertion with respect to Superintendent Dunn's supplementary [discrepancy] affidavit … is incorrect. Superintendent Dunn's supplementary [discrepancy] affidavit addresses not only the "discrepancy" issue, but also the "reasonable search" issue. The Ministry reiterates that it was submitted in confidence. …
>
> With respect to the second branch of the Wigmore test, the appellant states … that because the Ministry has been "ordered by the IPC to provide evidence on oath"

and "it has no option but to comply", therefore requiring the affidavits to be shared "cannot have any effect" on the relationship between the Ministry and the IPC.

This argument is inconsistent with the argument advanced by the appellant with respect to the jurisdiction of the Commissioner. If the affidavits are "representations", then there is a need to preserve confidentiality in order to foster the relationship, because parties have a choice with respect to how fulsome to be in their representations. If the affidavits are not "representations" then there is no jurisdiction to disclose them.

The appellant misconstrues the requirements of the third branch of the Wigmore test. … The focus of the third branch is on the nature of the relationship. The question of whether confidentiality is necessary to the maintenance of the relationship is addressed under branch two. The appellant concedes that the relationship between the Ministry and the IPC is one that ought to be "diligently fostered".

The appellant also misconstrues the Ministry's submissions with respect to the fourth part of the test. Contrary to the appellant's submission …, the Ministry does not suggest that the Assistant Commissioner "delegate" his decision to the RCMP. Rather, the Ministry submits that the Assistant Commissioner will make his own independent decision after reviewing the affidavits and the RCMP report as to whether his questions have been answered. He will then decide for himself whether an oral inquiry continues to be necessary, and if so, what the scope of the inquiry will be, and whether the oral inquiry or part of it will be conducted in private. It is for this reason that the Ministry submits that disclosing the affidavits at this time would constitute prejudgment of those issues.

The appellant argues that she ought to be given access to the affidavits even if the Assistant Commissioner decides that an oral inquiry is not necessary, because she "would still be entitled to know the basis for that decision". … It is submitted that she would know the basis for that decision in the usual way, that is, through reasons issued by the Assistant Commissioner. The appellant also argues in this connection that the "comprehensiveness" of the Ministry's search is at issue. This is not correct. The Assistant Commissioner has repeatedly noted that the affidavits relate to the reasonable search issue and that he has not yet decided whether it will be necessary to hold an oral inquiry into the reasonable search issue.

For these reasons, the Ministry submitted that if the affidavits are representations, that they ought not to be shared with the appellant and her counsel at this time.

Analysis and Conclusions

I have carefully reviewed the parties' representations on the application of this criterion and have considered these representations in the context of the specific information contained in the various search affidavits at issue in this inquiry. I have no difficulty concluding on the basis of the totality of information and submissions that the "Wigmore" test has not been satisfied and that, accordingly, section 5(c) does not apply to any of the search affidavits, either in whole or in part.

Part 1: submitted in confidence

The Ministry argues that the first part of the test is met because the information in the search affidavits was submitted in confidence that it would not be disclosed to the appellant. I do not accept this position, for a number of reasons.

First, the Ministry, like any other party submitting representations in an inquiry under the *Act*, would be aware that its representations - in the form of both evidence and legal submissions or argument - may be shared with the other party in the appeal based on the application of the confidentiality criteria in section 5 of *Practice Direction 7*. Clearly, the parties in the appeal, who have participated in a number of separate inquiries which followed this procedure are well aware of how representations are treated. Submitting representations with a mere assertion that they are being provided in confidence is not sufficient to establish confidentiality. Confidentiality is determined on the basis of the application of the criteria in section 5.

Second, any expectation of confidence in relation to representations made in the context of an inquiry must be reasonable. It would not be reasonable to expect that information previously communicated to a party during the course of an inquiry or made public through the publication of an order would be treated confidentially, regardless of whether an assertion of confidentially is made. A great deal of information has already been shared with the appellant during the course of this lengthy appeal, including correspondence, Notices of Inquiry, representations, six public orders, and even Superintendent Dunn's first discrepancy affidavit. Yet, in claiming confidentiality criteria section 5(c) to the entire content of all search affidavits, the Ministry is in effect asking me to treat previously-communication information as confidential. It does not identify specific portions of the affidavits that might contain confidential information, and I do not accept the sweeping confidentiality assertion as a reasonable basis for concluding that documents containing a great deal of non-confidential information should be treated as confidential without clear and convincing argument to support it.

This brings me to my third point. The Ministry relies on its earlier general references in correspondence to the effect that "the degree of detail contained in the affidavits makes them unsuitable for publication" and its request for "an opportunity to provide submissions in respect to restrictions on the use and dissemination of affidavits to the appellant." Quite apart from the fact that these earlier references do not conform to the requirements of sections 3 and 4 of *Practice Direction 7* (as the appellant points out), this blanket claim for confidence is not

sufficient. As far as publication-related issues are concerned, I will address them later in this order.

Fourth, and finally, the Ministry repeats its argument that the affidavits are "evidence" and not "representations", and that I only have jurisdiction under the *Act* and *Practice Direction 7* to share representations. The Ministry seems to be asking me to accept that I only have jurisdiction to share representations and that, by inference, any evidence provided must have been communicated in confidence. I have already determined that any sharing exercise contemplated by section 52(13) and *Practice Direction 7* would be meaningless if the evidentiary foundation of legal submissions and argument could never be shared, since a party would be deprived of the opportunity to make meaningful representations addressing the evidentiary underpinnings of the opposing party's position. Also, as stated earlier in this interim order, I consider my jurisdiction to share one party's evidence with another to flow from my authority to receive evidence tendered in an inquiry, or compel its production as the circumstances require, and to hold the inquiry either in private or in the presence or with the participation of another party, as section 52(3) of the *Act* provides.

Part 2: confidentiality is essential to the relationship between the Ministry and the IPC

The second part of the test cannot be addressed in the abstract; it must be considered in the context of the information being communicated. It is clear that the maintenance of confidentiality would be essential if, in its absence, institutions would be less than forthcoming with the type of evidence and argument because of concern that confidential information would be disclosed to an opposing party. In this respect, part two of the test is analogous to the section 5(a) and 5(b) criteria, with the exception that it does not link disclosure to the contents of a record or information exempt under the *Act*.

The information contained in the search affidavits at issue in this inquiry falls into five categories:

1. the name of the deponent;

2. information taken directly from the order provisions in Interim Order PO-2221-I with respect to the intended subject matter of the affidavits;

3. a description of activities undertaken by the deponents and others or events which they observed during the time period covered by the appellant's request;

4. a description of other activities undertaken by the deponents in response to my direction in Provision 6 of Interim Order PO-2221-I, including observations and factual conclusions based on those activities; and/or

5. in some cases, a description of the inquiries made of others, answers given or observations made, and factual conclusions on the issues.

In my view, it is not reasonable to consider any of the information contained in the search affidavits as highly sensitive or contentious. It is predominantly factual in nature, and relates directly to the questions I asked about the steps taken by the Ministry to search for and locate responsive records. I might add that a great deal of the information is also innocuous.

In applying the second part of the test in the context before me here, I am unable to discern how maintaining the confidentiality of the factual, non-sensitive and non-contentious information in the search affidavits is essential to the relationship between the IPC and the Ministry, and I do not accept that disclosing it could raise any reasonable concern that different information in other contexts that should be considered confidential would not be forthcoming in future.

That being said, I want to make it clear that I do not accept, as argued by the appellant, that the mere fact that I have compelled production of the affidavits eliminates any concerns regarding the confidential relationship between the Ministry and the IPC. In certain circumstances evidence compelled in affidavit form or in oral testimony might need to be held in confidence in order to better foster and maintain the relationship between an institution and this office, and to ensure fulsome evidence and representations are received. Indeed, that is precisely why the Commissioner is provided with discretion under sections 52(3) and 52(13) of the *Act* to structure an inquiry and to deal with sharing issues based on the context and circumstances of a particular fact situation. I am simply not persuaded, based on the nature of the information contained in the affidavits before me and the representations offered by the Ministry, that this is a case where holding the information in confidence is necessary to maintaining that relationship.

Part 3: the relation is one which ought to be diligently fostered

There would appear to be no disagreement that the relationship between the IPC and the Ministry is one that ought to be diligently fostered, as required in order to satisfy the third part of the "Wigmore" test. As set out in my discussion of the second part of the test (above) and the fourth part (below), I do not accept that maintaining the confidentiality of the search affidavits in this case is necessary to meet this objective.

Part 4: the injury that would result from disclosure is greater than the benefit gained

On the fourth and final part of the "Wigmore" test, I find myself largely in agreement with the appellant.

I do not accept the Ministry's submission that disclosing the search affidavits at this time would give rise to an appearance that I have prejudged any issues in this appeal, whether procedural or substantive. As the Ministry acknowledges in its representations, the affidavits provided by the various OPP officers deal primarily with search issues, as does the search affidavit submitted by Superintendent Dunn. That makes perfect sense, since these affidavits were submitted in response to very specific direction provided by me in Provisions 5 and 6 of Interim order PO-2221-I.

The Ministry states that Superintendent Dunn's second discrepancy affidavit also deals with the "search" issue. Having carefully reviewed the contents of this affidavit, I find that the vast majority of its content relates to "discrepancy issues", which, again, is not surprising since it is a supplementary affidavit provided to elaborate on information covered in Superintendent Dunn's first affidavit, which was provided in order to address the discrepancy issues raised in Provisions 3 and 4 of Interim Order PO-2221-I. The only portions of this second affidavit that touch upon search-related issues are references to Superintendent Dunn having reviewed the search affidavits of other OPP officers. None of this is relevant to any search activities undertaken by Superintendent Dunn, and these portions of her second discrepancy affidavit do not need to be shared in order for the appellant to respond to the search issues. As noted earlier, I will deal with any issues relating to Superintendent Dunn's second discrepancy affidavit in the separate inquiry that I have initiated to address the requirements of Provisions 3 and 4 of Interim Order PO-2221-I.

Although I have consistently made every effort to keep my two ongoing inquiries regarding Interim Order PO-2221-I separate, the Ministry continues to confuse the two, and in fact bases its "prejudging" allegation on inaccurate assumptions about how the two matters will unfold. The Ministry points out that I have adjourned my oral inquiry on the "discrepancy" issues (Provisions 3 and 4 of Interim Order PO-2221-I) pending receipt of the RCMP report and clarification of its status in my inquiry. However, as I made clear to the Ministry, most recently in my March 26, 2004 letter adjourning the oral inquiry, "I have called the oral inquiry to deal only with the issues identified in Provisions 3 and 4 of Interim Order PO-2221-I and have intended to deal with the search issues separately outside of that process". That continues to be my intent.

The search issues stemming from Provisions 5 and 6 of Interim Order PO-2221-I are proceeding by way of written review, in accordance with procedures outlined to the parties. I have received the various search affidavits from the Ministry, and the next stage of the process is to share the content of these affidavits with the appellant for her review and response. Once I receive the appellant's representations, I will consider whether they raise issues that should be addressed by the Ministry, in which case the appellant's representations will be shared (subject to any valid confidentiality concerns) and reply representations requested. In the normal course, I would then proceed to make my findings on the search issues and issue an order disposing of them. That order would either uphold the reasonableness of the searches or require further search activities that I would outline in my order. The parties are well aware of this process.

That being said, after receiving the appellant's representations on the search issues (or for that matter, after receiving any reply representations I request from the Ministry), I may decide that the matter should continue by way of an oral inquiry. However, that is not my present intent and I would only pursue that option if I determine, pursuant to my discretionary authority under section 52(3) of the *Act*, that it would be appropriate to do so in the circumstances.

The Ministry's position that disclosing the search affidavits at this time "would give rise to the appearance that [I] have already decided that there will be an oral inquiry into the reasonable

search issue and that the oral inquiry into the discrepancy issues will have to be pursued" is without foundation. The search issues are being addressed through a written review process and any decision to alter this process would only be made in response to argument and evidence yet to come.

As far as the oral inquiry is concerned, it is important to clarify that I have summoned the appropriate OPP officials to attend and to give oral evidence under oath on the various so-called "discrepancy" issues stemming from Provisions 3 and 4 of Interim Order PO-2221-I. I have adjourned this inquiry, but I have given the Ministry no indication that my review of the RCMP report on these issues would eliminate the need for me to proceed with my own independent inquiry. It is simply not accurate for the Ministry to argue, as it does, that disclosing the search affidavits "would interfere with the 'correct disposal of the appeal' because it would give rise to the appearance that [I] have prejudged" whether:

> …the appellant will be permitted to be present at the oral inquiry, whether the oral inquiry will be public or private, whether the inquiry will deal with either or both of the reasonable search issue and the discrepancy issue, what information or evidence it will be necessary to examine at the inquiry and whether the information or evidence to be examined at the oral inquiry ought to be disclosed with our without terms and conditions.

The Ministry is taking a straightforward issue and turning it into a complicated one, without justification. I am dealing here solely with search-related issues stemming from Provisions 5 and 6 of Interim Order PO-2221-I. The Ministry has provided its affidavit evidence and I intend to now proceed to the next stage of the process, in accordance with *Practice Direction 7*.

The sharing of the affidavits at this time will permit the appellant to examine them and consider whether the information and explanations offered are sufficient. While I cannot speculate on what the appellant's position might be, sharing the affidavits at this point in the proceedings may well assist in narrowing the scope of the inquiry, focusing it on remaining areas of difference or disposing of some or all of the issues entirely. I fail to see how this would result in any unfairness or prejudice to either party, or could be said to amount to prejudgment of any issue, including any issues that remain outstanding that relate to compliance with Provisions 3 and 4 of Interim Order PO-2221-I.

I should also state briefly that I agree with the appellant's submission that I have in no way delegated to the RCMP the authority to make any decision on the discrepancy issues. I have both the jurisdiction and statutory duty to conduct my own inquiry and reach my own conclusions, with the benefit of all relevant information, including that provided in the RCMP report.

I also see no merit in the Ministry's submission that disclosing the search affidavits to the appellant at this time would be unfair to current and former OPP officers, some of whom may be involved in my oral inquiry on the discrepancy issues. The search affidavits were produced in

response to specific direction outlined in Provisions 5 and 6 of Interim Order PO-2221-I. They relate to search activities and are relevant in that context. My oral inquiry, on the other hand, will deal with the discrepancy issues identified in Provisions 3 and 4 of that interim order. These are separate and distinct processes.

For all of these reasons, I have concluded that the benefit gained for the correct disposal of the appeal is greater than the injury to the relationship between the Ministry and the IPC that could result from the disclosure of the search affidavits to the appellant.

Summary

I am not satisfied that the Ministry has established the requirements of the "Wigmore" test for confidentiality and, accordingly, the confidentiality criterion in section 5(c) of *Practice Direction 7* does not apply to any of the search affidavits.

ASSUMING I HAVE JURISDICATION AND DECIDE TO SHARE THE SEARCH AFFIDAVITS, I SHOULD IMPOSE A CONDITION THAT THEY NOT BE MADE PUBLIC AT THIS TIME

The Ministry's representations

The Ministry submits that imposing what I would characterize as a "publication ban" would strike a balance between the interests of the appellant and her counsel, and fairness to the Ministry, the OPP officers and the former OPP officers. It offers the following representations in support of this position:

> With respect to the affidavits, it is submitted that the Commissioner ought to adopt the rule in court proceedings with respect to evidence obtained prior to trial, for the same reasons that the rule has been developed by the courts. It is noteworthy that the *Act* provides in s. 52(9) that:
>
> > Anything said or any information supplied or any document or thing produced by a person in the course of an inquiry by the Commissioner under this Act is privileged in the same manner as if the inquiry were a proceeding in a court.
>
> In court proceedings, where one party has obtained a document from another party in obedience to the Rules or to an order of the court, the party is subject to an "implied undertaking" not to make the information obtained public or to use it for any purpose other than the court proceeding.
>
> The leading case with respect to the implied undertaking rule is *Goodman v. Rossi* (1995), 24 O.R. (3d) 359, [1995] O. J. No. 1906 (C.A.). In *Goodman v. Rossi*, the Court of Appeal affirmed the existence of an implied undertaking rule in Ontario.

The Court of Appeal cited with approval the following quote with respect to the rationale for the implied undertaking rule:

> **The primary rationale for the imposition of the implied undertaking is the protection of privacy**. Discovery is an invasion of the right of the individual to keep his own documents to himself. It is a matter of public interest to safeguard that right. The purpose of the undertaking is to protect, so far as is consistent with the proper conduct of the action, the confidentiality of a party's documents. **It is in general wrong that one who is compelled by law to produce documents for the purpose of particular proceedings should be in peril of having those documents used by the other party for some purpose other than the purpose of the particular legal proceedings** and, in particular, that they should be made available to third parties who might use them to the detriment of the party who has produced them on discovery. **A further rational is the promotion of full discovery, as without such an undertaking the fear of collateral use may in some cases operate as a disincentive to proper discovery. The interests of proper administration of justice require that there should be no disincentive to full and frank discovery**. [Ministry's emphasis]

The Court of Appeal noted that the implied undertaking ceases when the document has been referred to in open court, unless the court orders otherwise.

The Court of Appeal concluded that a breach of the implied undertaking rule amounts to contempt of court, and that the court ought not to tolerate the use of its processes for collateral purposes.

It is submitted that for the same reasons, the Commission ought not to permit the premature publication of the information in the affidavits. It would be anomalous if the information were protected in a court proceeding and not in the context of a proceeding under [the *Act*].

In addition, to impose the condition that the affidavits not be made public would be consistent with what the appellant has previously requested and the Assistant Commissioner has previously ordered:

> … in the covering letter accompanying the appellant's representations, the appellant asked that the IPC order not be published until there has been a final determination of whether the records will be disclosed. The reasons offered for this request are that the appellant has discovered the existence of the records at

> issue in this appeal through research. Their existence is not generally known and she has a financial interest in their existence being confidential until there has been a final determination of whether they will be made public.

In addition to the name of the young offender and the three search affidavits which I have already discussed and disposed of in my discussion of the section 5(b) confidentiality criteria, the Ministry also submits that "the names of the deponents and any personal names in the body of the affidavits ought to be severed" before any search affidavits are disclosed to the appellant.

The appellant was given an opportunity to respond to the Ministry's arguments on this issue, and did so.

The Appellant's representations

The appellant disagrees with all of the Ministry's submissions on the publication issue:

> [The Ministry's] third submission is based upon an inapt analogy to the implied undertaking rule that applies in civil litigation to evidence that has been disclosed to the opposite party during the discovery process, but has not yet been submitted to the adjudicator. Once again, [the Ministry] ignores the fact that the affidavits constitute evidence that has already been submitted to the adjudicator for purposes of determining this inquiry. Their status as evidence is not dependant upon whether every affiant is called to also give *viva voce* evidence during the oral inquiry.
>
> The proper analogy is to affidavits filed with the court prior to an oral hearing. The implied undertaking rule does not prevent a party to litigation who is also a journalist from publishing material that is in the court file, nor does it prevent other media organizations or members of the public from having access to the court file. See, e.g. *Maclntyre, supra* (access granted to court records at pre-trial stage); *S.(P.) v. C.(D.)* (1987), 22 C.P.C. (2d) 225 (H.C.J.).
>
> Subsection 52(9) … does not support [the Ministry's] position. This provision extends the absolute privilege defence to a libel claim to IPC inquiries, regardless of whether the relevant statement is in an affidavit or other document, or is made during an oral inquiry. As in civil litigation, both written and oral statements are treated in the same manner.
>
> [The Ministry] is effectively seeking a publication ban, such that the appellant would have access to the affidavits for purposes of instructing counsel, but could not exercise her freedom of expression rights for purposes of enhancing public scrutiny and accountability of [the Ministry] and the OPP with respect to their

actions and decisions at Ipperwash and in this inquiry, and for purposes of heightening public knowledge about and confidence in the IPC's proceedings.

The appellant is not aware of any precedent for such an order in the history of this tribunal. Contrary to … [the Ministry's] submissions, such an order would also be inconsistent with the Assistant Commissioner's decision in Interim Order PO-2033-I, in which he held:

> notwithstanding that the *Act* permits hearings before the Commissioner to be conducted in private - see, for example, sections 52(3) and 52(13) - the rationale for publication of the Commissioner's orders relates to the public interest in open proceedings and public access to documents protected by sections 135(1) and 137(1) of the *Courts of Justice Act*. It is important for the public to be informed of decisions made by the Commissioner absent compelling reasons to support non-publication, for example, where publication would disclose the content of records at issue in the order, and nullify any meaningful opportunity for judicial review. [appellant's emphasis]

Similarly, notwithstanding s. 52(3) and (13) of [the *Act*], the public interest in open proceedings and public access to documents should [be] preserved with respect to the affidavits, unless there are compelling reasons supporting a publication ban/sealing order. [The Ministry] has not advanced sufficient evidence or reasons to justify such an order.

In Interim Order PO-2033-I, the Assistant Commissioner was guided by the Supreme Court of Canada's decision in *Sierra Club* v. *Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193 (S.C.C.), in which the Court held that discretion should only be exercised to seal evidence when:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and,
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Justice Iacobucci, writing on behalf of the Supreme Court, held that to satisfy the first branch of this test, "the risk in question must be real and substantial, in that the risk is well grounded in the evidence, and poses a serious threat."

[The Ministry] has not discharged its burden of meeting the *Sierra Club* test.

As Justice Lang noted in *Fuda v. Ontario (Information and Privacy Commissioner)* (2003), 65 O.R. (3d) 701 (Div. Ct.), sealing orders "will only be granted 'in the clearest of cases … where … the interests of justice would be subverted and/or the totally innocent would unduly suffer without any significant compensating public interest being served' : S.*(P.) v. C.(D.)*, (1987), 22 C.P.C. (2d) 225 (Ont. H.C.J.), at p. 229." See also *Nova Scotia (Attorney-General)* v. *Maclntyre*, [1982] 1 S.C.R. 175 at 185-189; *8875 74 Ontario Inc.* v. *Pizza Pizza Ltd.*, [1994] O.J. No. 3112 at para. 11 (Gen. Div.), leave to appeal refused [1995] O.J. No. 1645 (C.A.); *A.(J.)* v. *Canada Life Assurance Co.*, [1989] O.J. No. 636 at 2-3 (H.C.J.)

With respect to the severances requested [in the Ministry's] submissions, the appellant notes that the relevant young offender is presumably N.C., who has already consented to his young offender information being disclosed in this inquiry. Depending upon the context, the reference to his name in the affidavit of "Officer T.R." is likely to fall within the scope of that consent.

The names of the affiants and other personal names of police officers or of native protesters contained in the body of the affidavits ought not to be severed. The affidavits relate to the police officers in their professional capacity, and thus do not constitute "personal information" under [the *Act*]: see e.g. Interim Order PO-2033-I; Interim Order PO-2056-I; Order PO-2221-I; Interim Order PO-2054-I; Order P-289; Order P-1044. Most of the protesters have consented to their personal information being disclosed in this inquiry.

There is already a great deal of publicly available information about the identities of the police officers who served at Ipperwash; in fact, the appellant was able to use such sources to provide the Assistant Commissioner with a list of the officers who appeared to have personal knowledge relevant to this inquiry. The identities of the protesters are also known, due to court proceedings against them and the public interest and reporting on the tragedy that occurred at Ipperwash.

In any event, the Assistant Commissioner has already held that there is a compelling public interest in this inquiry that outweighs the personal information exception: Interim Order PO-2033-I; Interim Order PO-2056-I; Order PO-2221-I.

Finally, the appellant and her counsel cannot properly prepare submissions without knowing the identities of the affiants and the protesters referred to in the

> evidence, so that they can compare the evidence in the affidavits with other publicly available information and can obtain input from the relevant protesters.

The appellant's representations were shared with the Ministry for reply.

The Ministry's reply representations

The Ministry's reply representations are relatively brief:

> The appellant asserts … that s. 52(9) applies only to extend "the absolute privilege defence to a libel claim to IPC inquiries". The Ministry submits that s. 52(9) is not limited in its scope. Subsection 52(9) extends all of the privileges which apply to evidence in a court proceeding to "any information supplied or any document or thing produced by a person in the course of an inquiry".
>
> As the Ministry submitted …, the implied undertaking rule is one such privilege. The implied undertaking applies until the evidence or the document has been referred to in "open court". If it is never referred to in open court, then the privilege continues.
>
> Contrary to the submissions of the appellant …, the Ministry is not asking for a "sealing order" of evidence or documents referred to in open court. Rather, the Ministry submits that until the Assistant Commissioner decides that the oral inquiry will proceed, and that the oral inquiry will be held in public, and that the affidavits will form part of the oral inquiry, the affidavits can only be used by the appellant for the purpose of preparation and cannot be made public. It is only if the Ministry seeks to keep the affidavits confidential after that time that the test for a sealing order may apply.

Analysis and Conclusions

The Ministry is asking me to adopt the Court's "implied undertaking" rule applicable in the civil discovery context and apply it, by analogy, to the search affidavits in order to protect the "privilege" which attaches to evidence received in the course of an inquiry under section 52(9) of the *Act*. In my view, the analogy between the implied undertaking rule in civil proceedings and the privilege referred to at section 52(9) is wholly inapt.

As the appellant correctly points out, the implied undertaking rule is designed to protect information received by one party to litigation from another through discovery in the pre-adjudication stage of a trial from being made generally known or used by the discovering party for a purpose collateral to the litigation. It is not designed to afford continuing protection to information actually admitted into evidence at the adjudication stage which, in the context of a civil proceeding, usually occurs in open court. While it is the longstanding practice of this office to restrict the evidence and submissions made during the course of an oral or written inquiry to

the participating parties, the IPC has never imposed any restrictions or limitations on the further publication or use of any evidence or submissions received by a party from another party during the course of an inquiry.

I would point out that the absence of any such restriction has become an increasingly important and useful element of the Commissioner's processes. Adjudicators frequently reproduce written evidence and representations of the parties in orders as a means of explaining the facts and issues as presented and the decisions ultimately reached. Attaching a form or privilege or, as the appellant calls it, a "publication ban" to this material would introduce an unwarranted constraint on the ability of this office to perform its adjudicative and educative function of communicating meaningful reasons for decisions under the *Act* to both the parties and to the general public.

In addition, where a party is dissatisfied with the outcome of an order and seeks judicial review in Divisional Court, the Commissioner is obliged under section 10 of the *Judicial Review Procedure Act* to file the record of proceedings leading to that decision for use at the hearing and in the disposition of the application. The longstanding practice of the IPC and the Court is for our office to bring a motion pursuant to section 137(2) of the *Courts of Justice Act* to seal and remove the private record of those proceedings from the public court file. The private record typically consists of any records at issue and other material not shared among the parties in the course of the inquiry due to the application of the confidentiality criteria in section 5 of *Practice Direction 7*. All other material comprises the Commissioner's public record of proceedings and is placed in the Court's public file where it can be examined by anyone without restriction on its subsequent publication or other use.

Both the practice of this office in sharing representations among the parties without the imposition of restrictions on subsequent use and the practice before the Divisional Court with respect to filing the public and private record of proceedings are consistent with the principle that the administration of justice should take place in as open a fashion as possible, without jeopardizing legitimate confidentiality interests, such as those reflected in section 5 of *Practice Direction 7*. Having found that the confidentiality criteria in *Practice Direction 7* have no application to the vast majority of the information contained in the search affidavits in this inquiry, I can identify no rationale, based on the Ministry's representations or otherwise, for imposing a further restriction on the appellant's use or publication of the information contained in these documents.

The Ministry submits in both its main and reply representations that section 52(9) of the *Act* somehow requires that I impose such a restriction in order to protect the "privilege" that attaches under this provision to "anything said or any information supplied or any document produced by a person in the course of an inquiry". I do not accept that section 52(9) has this effect. The privilege referred to in that section is one that applies "in the same manner as if the inquiry were a proceeding in court." It is trite but important law that anything said or produced in evidence in Court enters the public domain and, subject to restrictions of the sort found in sections 52(10) of the *Act*, may subsequently be used or published by any person for any purpose. The privilege to which section 52(9) refers, as the appellant correctly points out, is one that protects against a

libel claim for things said or documents produced in court, regardless of whether the statement is oral or written, or in the form of an affidavit or other document. The Ministry has pointed me to no other form of privilege that is implicated by section 52(9). In any event, it is contrary to law and reason that statements introduced in open court would be cloaked in the confidentiality of some sort of privilege, and I am not prepared to interpret section 52(9) in a manner that would extend a blanket unlimited privilege to all information received by the IPC in the course of one of its inquiries.

To the extent that the Ministry's submission can be interpreted as a request for an order sealing evidence, I also agree with the appellant's position that the test for making such an order established by the Supreme Court of Canada in such cases as *Sierra Club* is not satisfied here. I have been provided with no evidence of a serious risk (i.e., one that is real, substantial and grounded in the evidence) to an important interest in the context of this inquiry that might result in the absence of a sealing order. I am also not satisfied that the salutary effects of such an order, including any impact it would have on the fair disposition of the issues raised in this inquiry, would outweigh its deleterious effect, including the effect on the appellant's right to free expression.

As far as the requested severances are concerned, I have already found that information that could identify a young offender and two other individuals will be severed from the search affidavits prior to disclosure. As far as the names of the deponents are concerned, I find no basis for withholding them. As the appellant points out, and as I found in my previous orders in this inquiry, the search affidavits relate to activities undertaken by the police officials in their professional capacities and thus do not constitute their "personal information" as defined in section 2(1) of the *Act*. Their identities and participation in the events in question are, for the most part, already known to the appellant and, in fact, the names of these individuals were provided to me by the appellant in the first place. I also accept that the officers' names in association with the contents of particular affidavits must be linked in order for the appellant to adequately respond to the search issue.

Turning to the names of the protesters included in the affidavits, in most cases these individuals have consented to their identities being shared with the appellant in these proceedings. In addition, as the appellant points out, I have already determined, pursuant to section 23 of the *Act*, that there is a compelling public interest in disclosing this identifying information that clearly outweighs the purpose of the privacy exemption as it relates to these affected individuals.

SUMMARY:

In summary, I find:

1. I have jurisdiction to disclose the search affidavits to the appellant in context of this inquiry and am not prohibited by law from doing so.

2. The only portions of the search affidavits that satisfy the requirements of confidentiality criterion 5(b) are the name of the individual whose identity was protected in Interim Order PO-2056-I, the identifying information of the young offender, and the identifying information of the individual withheld in Interim Order PO-2033-I and Reconsideration Order PO-2063-R.

3. None of the search affidavits satisfy the requirements of confidentiality criterion 5(c).

4. The supplementary discrepancy affidavit submitted by Superintendent Dunn and the identified portions of the search affidavits of the three OPP officers that deal with discrepancy issues will not be disclosed to the appellant at this time.

5. I will impose no conditions on the disclosure of the search affidavits and will sever no information other than the portions referred to in paragraphs 2 and 4, above.

PROCEDURE:

I intend to provide the appellant with a copy of Superintendent Dunn's search affidavit and the search affidavits and "will say" statement of the 24 OPP officers and/or former officers, as severed in accordance with this Interim Order, at **12:00 noon on May 7, 2004**. I have attached a copy of the severed affidavits with the copy of this Interim Order sent to the Ministry, highlighting the portions that will **not** be disclosed.

Original signed by: April 22, 2004
Tom Mitchinson
Assistant Commissioner