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

ORDER P-1410

Appeal P_9600343

Ministry of Transportation

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BACKGROUND:

On the evening of September 4, 1995, a group of aboriginal protesters began to occupy Ipperwash Provincial Park (the Park), claiming that the Park lands contained an aboriginal burial site. During the night of September 6, 1995, a shooting incident occurred between some of the occupiers and the Ontario Provincial Police. One person died and two others were injured.

The occupation of the Park resulted in meetings of the "Emergency Planning for Aboriginal Issues Interministerial Committee" (the Committee). This Committee formed part of a process formalized by the Ontario government in 1991 to assist it in responding to emergency situations of this nature.

The Committee has several roles and responsibilities in guiding and co-ordinating the government's response to an emergency situation. These include: acquiring and distributing information pertinent to the particular situation; developing recommendations, both legal and non-legal in nature, for the resolution of the emergency; and co-ordinating related activities such as communication with the public.

NATURE OF THE APPEAL:

The appellant, a member of a news organization, made a request to the Ministry of Natural Resources under the Freedom of Information and Protection of Privacy Act (the Act) for "minutes or notes of meetings on September 5, 6 and 7, 1995 of the interministerial committee on aboriginal emergencies regarding [the] situation at Ipperwash Provincial Park".

Pursuant to section 25 of the Act, the Ministry of Natural Resources forwarded the request to the Ontario Native Affairs Secretariat (ONAS) on the basis that ONAS would also have responsive records in its custody or under its control. The Ministry of Natural Resources then issued a decision on its responsive records. This decision is the subject of Appeal P-9600346, which is being dealt with in Order P-1413 (issued concurrently with this order).

ONAS subsequently transferred the request to several other institutions on the basis that they, too, would have additional responsive records. ONAS also issued a decision letter, jointly with the Ministry of the Attorney General. This decision is the subject of Appeal P-9600341, which is being dealt with in Order P-1409 (issued concurrently with this order).

The Ministry of Transportation (the Ministry) was one of the institutions to which ONAS transferred the request. This order pertains to the Ministry's decision in relation to the request. The other institutions that received transfers of the request from ONAS, and whose decisions were appealed to the Commissioner's office are the Ministry of Intergovernmental Affairs and the Ministry of the Solicitor General and Correctional Services. These decisions are the subject of Appeals P-9600344 and P-9600345, respectively, which are being dealt with in Orders P-1411 and P-1412 (issued concurrently with this order).

In its decision, the Ministry identified one responsive record, and denied access to it in its entirety pursuant to the exemptions found in sections 13(1), 14(1)(a), (b), (f) and (g), 18(1)(e) and 19 of the Act. The appellant appealed this denial of access. In his letter of appeal, the appellant also argued that the "public interest override" in section 23 of the Act applies to the record at issue.

During mediation, the Ministry issued a revised decision, advising the appellant that it is no longer relying on sections 14(1)(a), (b) and (g), 18(1)(e) and 19 of the Act to withhold the record at issue. The Ministry confirmed, however, that it continues to rely on the following exemptions in the Act:

- advice or recommendations - section 13(1)
- right to a fair trial - section 14(1)(f).

Further mediation was not possible and this office sent a Notice of Inquiry to the Ministry and the appellant. Both parties submitted representations.

The record which the Ministry has identified as responsive to the appellant's request consists of handwritten notes of the meeting of the Committee on September 7, 1995.

During mediation, the appellant confirmed that he is not interested in receiving personal information, subject to the proviso that he **is** pursuing access to all information relating to the views and/or activities of any government officials in the record, even if this qualifies as personal information. I have reviewed the record to determine whether it contains personal information, within the meaning of section 2(1) of the Act, of individuals who are not government officials.

I find that the reference on page 1 of the record, to an incident which led to the laying of criminal charges, contains the personal information of an identifiable individual who is not a government official. This passage is therefore not at issue in this appeal. I have highlighted this passage in yellow on the copy of the record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order. The highlighted information is **not** to be disclosed.

DISCUSSION:

RIGHT TO A FAIR TRIAL

The Ministry claims that this exemption applies to the record at issue in its entirety.

Section 14(1)(f) of the Act states as follows:

> A head may refuse to disclose a record where the disclosure could reasonably be expected to,
>
> deprive a person of the right to a fair trial or impartial adjudication.

The Ministry advises that the events related to the occupation of the Park have given rise to a number of criminal and civil actions in the courts. It therefore submits that disclosure of the

record at issue in this appeal could reasonably be expected to deprive persons who are or may become parties to those proceedings of their right to a fair trial or impartial adjudication.

A number of criminal charges were laid as a result of the September 6, 1995 shooting incident and other events relating to the occupation of the Park. An Ontario Provincial Police officer was charged with criminal negligence causing death. A conviction resulted from that trial and an appeal is expected.

Other charges laid include mischief, assault of police officers, weapons offences, dangerous driving, criminal negligence causing bodily harm and forcible entry. One aboriginal person, accused of being a young offender, has been acquitted, although an appeal is possible. Another individual has been found guilty of two offences and sentenced. A third individual has been found guilty and sentenced in connection with three charges. There are presently two individuals remaining to be tried on various assault charges. These trials are scheduled to begin in September 1997.

The Ministry submits that, because section 14(1)(f) has been held to be a "preventative [measure]", and because of the constitutionally protected rights involved under the Canadian Charter of Rights and Freedoms (the Charter) in section 11(d), the Ministry has the discretion to refuse to disclose the record pursuant to clause 14(1)(f) of the Act.

In Order P-948, I considered the relationship between section 11(d) of the Charter and section 14(1)(f) of the Act. In this regard, I stated as follows:

> I am prepared to accept that section 14(1)(f) of the Act should be interpreted in a way that affords no less protection to the right of an accused to a fair trial than do sections ... and 11(d) of the Charter.
> ...
>
> In my view, however, whether the standard being applied is found in the Act or Charter, sufficient information and reasoning are required to support the application of the provisions relied upon to justify non-publication or non-disclosure.
> ...
>
> In my view, the Supreme Court of Canada's decision in Dagenais v. Canadian Broadcasting Corp. [1994], 3 S.C.R. 835, 120 D.L.R. (4th) 12 (S.C.C.), relating to publication bans, provides useful guidance in this regard.
> The Dagenais case, which the Ministry cites in its representations, concerns a publication ban to prevent the television broadcast of a fictional dramatic program until the completion of four criminal charges, where there was a similarity between the subject matter of the television program and the charges faced by the accused individuals. The main issue addressed is whether the infringement of the Charter right to freedom of expression was justified in order to ensure that the accused individuals receive fair and impartial adjudication as contemplated in section 11(d) of the Charter. Speaking for the majority, Lamer C.J.C. said:

> The common law rule governing publication bans has always been traditionally understood as requiring those seeking a ban to demonstrate that there is a **real and substantial risk** of interference with the right to a fair trial. (emphasis added) (page 875)
>
> [P]ublication bans are not available as protections against remote and speculative dangers. (page 880)

In separate reasons, McLachlin J. said:

> What must be guarded against is the facile assumption that if there is any risk of prejudice to a fair trial, however speculative, the ban should be ordered.
> ...
>
> Rational connection between a broadcast ban and the requirement of a fair and impartial trial require demonstration of the following. ... [I]t must be shown that publication might confuse or predispose potential jurors ... (page 950).

In the circumstances of this appeal, I consider these comments as guidelines in deciding whether the information and reasoning provided by the Ministry are sufficient to substantiate the application of the exemption ...

I have carefully considered the Ministry's arguments in relation to the Charter and section 14(1)(f). In my view, the analysis I have just quoted from Order P-948 is correct, and I will apply the guidelines just quoted from that order.

The Ministry also cites Ontario (Attorney General) v. Fineberg (1994), 19 O.R. (3d) 197 (Ont. Div. Ct.), where Adams J. stated (at page 40):

> ... the exemptions are to be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context ...

In Order P-1363, former Commissioner Tom Wright dealt with essentially these same submissions on the comments of the Divisional Court in the Fineberg case I have just referred to. In that regard, he said:

> However, in my view, these comments by the Divisional Court do not relieve ONAS of the obligation to provide sufficient information and reasoning to substantiate the application of the exemption.

I agree with this view and will apply it in this order.

I have reviewed the record at issue to determine whether its disclosure could reasonably be expected to result in the harms mentioned in section 14(1)(f). In my view, the only part of this

record which could qualify for exemption under this section has already been removed from the scope of this appeal as the personal information of an individual who is not a government official.

The remaining parts of the record do not refer even in a general way to the events which led to criminal charges being laid. In my view, disclosure of this information would not pose a real and substantial risk to the right of those accused to a fair trial or impartial adjudication, nor would it confuse or predispose potential jurors. I am, therefore, not persuaded that disclosure of the parts of the record which are at issue could reasonably be expected to interfere with the rights of these individuals to a fair trial or impartial adjudication.

Further, the Ministry has not provided any evidence to explain how the disclosure of the record could reasonably be expected to deprive persons who are or may become parties to the civil proceedings of their right to a fair trial or impartial adjudication.

In another part of its submissions, the Ministry points out that, apart from the request related to this appeal, there are a number of other requests pertaining to the same meetings of the Committee, some of which have already generated appeals, which deal with a greater number of records. The Ministry indicates that "... it is the totality of the information which would be disclosed by the release of records from various institutions and pursuant to multiple requests that is relevant to the application of the exemptions claimed - not simply the information conveyed by the single record which is the subject of this particular appeal ...". However, the Ministry has not explained how this could reasonably be expected to interfere with any person's right to a fair trial. For this reason, I find that this submission does not substantiate the application of the exemption.

In my view, the Ministry has not provided me with sufficient information and reasoning to substantiate the application of section 14(1)(f) to the record, and therefore the Ministry has not discharged its onus under section 53 of the Act. I find that the exemption does not apply.

ADVICE OR RECOMMENDATIONS

The Ministry submits that this exemption applies to parts of the record at issue.

Section 13(1) of the Act states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant, any other person employed in the service of an institution or a consultant retained by an institution.

It has been established in a number of previous orders that advice and recommendations for the purpose of section 13(1) must contain more than mere information. To qualify as "advice" or "recommendations", the information contained in the record must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

Previous decisions have found that section 13(1) applies where options are accompanied by advice or recommended courses of action (Orders P-1081, P-1037 and P-529). I will adopt this reasoning for the purposes of this appeal.

The Ministry submits that disclosure of the record at issue, particularly when read in conjunction with other records requested of other institutions represented at the Committee meetings, would reveal advice and recommendations of public servants who attended the meetings. The Ministry also relies on the representations submitted by ONAS in Appeal P-9600341 (the subject of Order P-1409, issued concurrently with this order) with respect to the nature of the Committee and its functions.

In its representations on Appeal P-9600341, ONAS states that one of the primary roles of the Committee was to provide advice and recommendations to the government of Ontario regarding approaches for resolving aboriginal emergency situations. ONAS submits that the options listed for consideration are exempt as they include a recommended option. ONAS states:

> Although a recommendation was to be made by the Committee, by providing other options for consideration, Ministers and other senior government decision makers would be able to fully consider the available alternatives and reach an informed decision through the government deliberative process.

The appellant refers to remarks made by the Premier in the Legislature, as reflected in Hansard, describing the meeting of the Committee on September 5, to support his submission that this meeting, and the others, were not called for the purpose of developing advice or recommendations, but were for the purpose of information sharing. However, in my view, these sets of activities are not mutually exclusive, and I am not satisfied that a stated purpose of information sharing excludes *per se* the development of advice or recommendations.

I have reviewed and considered the submissions of the parties and the parts of the record for which this exemption has been claimed. In my view, these parts of the record essentially set out factual information, and decisions of an operational or strategic nature regarding the government's response to the situation at the Park, rather than advice or recommendations. I find that these parts of the record neither set out a recommended course of action developed by the Committee, nor do they reveal any advice or recommendations. Therefore I find that this information is not exempt under section 13(1).

PUBLIC INTEREST IN DISCLOSURE

As noted earlier, the appellant claims that the "public interest override" in section 23 of the Act applies in this case. This section states:

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

Because I have found that the parts of this record which are at issue should be released in their entirety, it is not necessary for me to consider the application of section 23 in this appeal.

However, for the sake of completeness, I will consider whether section 23 would apply if I had concluded that section 13(1) applied as claimed by the Ministry.

In Order P-241, former Commissioner Tom Wright commented on the burden of establishing the application of section 23. He stated as follows:

> The Act is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

I agree with these comments and I have followed the approach advocated by former Commissioner Wright by conducting an independent review of the record.

An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply. Section 23 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23.

In his representations in relation to section 23, the appellant states:

> The allegation that the government was involved in the killing of a political dissident could hardly be more serious. It has also prompted increased distrust by aboriginal people of the government. Questions about the province's role have repeatedly been raised in the media and in the legislature in the 18 months since the shooting, with no real resolution.

The appellant's representations include an excerpt from Hansard in which questions are raised about the extent to which political staff or politicians were involved in directing police actions during the occupation (Ontario, Legislative Assembly, Official Report of Debates (Hansard) at page 3149 [Wednesday 29 May 1996]). The appellant also supplied a story from the Toronto

Star edition of November 24, 1996, as a sample of press coverage concerning the events which occurred at the Park.

The Ministry submits that section 23 does not apply. The bulk of the Ministry's argument in this regard relates to section 14(1)(f). However, I note that section 14 is not one of the sections listed in section 23 as being subject to the "public interest override". The Ministry also disputes that a compelling public interest has been established in relation to the record at issue.

I do not agree with the Ministry's view that no public interest in the record has been established. On the contrary, I find that such a compelling public interest **has** been established. In reaching this conclusion, I have considered the following circumstances: the death of an aboriginal person at the hands of the police in a land-claims dispute, extensive discussion in the Legislature concerning the government's role in events at the Park, and the comprehensive reporting of events in the news media. In my view, this indicates that there is a public interest in the information for which the Ministry has claimed section 13(1), and that the events at the Park have "roused strong interest or attention" in this information.

Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Important considerations in this balance are the principle of severability and the extent to which withholding the information is consistent with the purpose of the exemption.

Order 24 established that the purpose of section 13(1) was to ensure that:

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

I agree with this analysis of the purpose behind the exemption, which is an important public policy consideration. However, in my opinion, the Legislature made section 13 subject to the public interest override in section 23 as a clear indication that on specific occasions the exemption must give way to the public interest. In my view, based on the considerations I have listed above in relation to my conclusion that there is a compelling public interest in disclosure, and based on the degree of public interest in this subject, I find that this is one of those occasions. Moreover, it is clear that the formulation of government policy on this subject will proceed, as necessary, even if the portions of the record for which the Ministry claimed section 13(1) are disclosed.

Accordingly, having balanced the compelling public interest as it exists in this appeal and the purpose of the exemption, I find that the public interest in disclosure clearly outweighs the purpose of the exemption, and if I had applied the section 13(1) exemption, I would have found that it did not apply to the information for which the Ministry claimed it, because of the application of section 23.

ORDER:

1. I order the Ministry to disclose the record to the appellant, except the passage which is highlighted in yellow on the copy of the record which is being sent to the Ministry's Freedom of Information and Privacy Co-ordinator with this order, by sending a copy of the record to the appellant by **July 28, 1997**. The highlighted information is **not** to be disclosed.

2. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the record which is disclosed to the appellant pursuant to Provision 1.

Original signed by: June 23, 1997
John Higgins
Inquiry Officer