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

ORDER P-1363

Appeal P_9600281

Ontario Native Affairs Secretariat

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

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

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

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 Ontario Native Affairs Secretariat (ONAS) under the Freedom of Information and Protection of Privacy Act (the Act) for "... the minutes of the Interministerial Committee of Aboriginal Emergencies that met at Ipperwash Provincial Park on September 5, 1995."

ONAS denied access to the record it identified as responsive, based on the following exemptions:

- advice or recommendations - section 13(1)
- right to fair trial - section 14(1)(f)
- solicitor-client privilege - section 19.

The requester appealed this decision, and raised the possible application of section 23 of the Act, sometimes called the "public interest override".

Mediation was not possible and a Notice of Inquiry was issued to ONAS and the appellant. Representations were received from both parties.

The record at issue in this appeal consists of the meeting notes of the Committee dated September 5, 1995.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

This exemption is set out in section 19 of the Act, which states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for Crown counsel for use in giving legal advice or in contemplation of or for use in litigation.

This section consists of two branches, which provide a head with the discretion to refuse to disclose:

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

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

ONAS claims that the entire record is exempt under both branches of section 19.

Branch 1

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

1. (a) there is a written or oral communication, **and**
   (b) the communication must be of a confidential nature, **and**
   (c) the communication must be between a client (or his agent) and a legal advisor, **and**
   (d) the communication must be directly related to seeking, formulating or giving legal advice;

   OR

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

These criteria for exemption under Branch 1 were first adopted in Order 49. They derive from a leading case at common law, Susan Hosiery Limited v. Minister of National Revenue [1969] 2 Ex. C.R. 27.

In its representations, ONAS indicates that its Branch 1 claim is based on Part 1 of Branch 1 (whose requirements are specified in items 1(a), (b), (c) and (d), above).

ONAS states that the record constitutes the official recorded minutes of the Committee's September 5 meeting, and that it reflects oral communications between the individuals who attended the meeting. I am satisfied that this is the case, and item (a) under Part 1 has been met.

As to whether this communication was of a confidential nature, ONAS submits that all Committee meetings are held on a highly confidential basis. According to ONAS, this allows participants to speak freely and fully explore a variety of available alternatives for alleviating emergency situations. Given the nature of the record and the circumstances in which it was created, I am satisfied that the communications it reflects were of a confidential nature, and item (b) under Part 1 has been met.

With respect to item (c), ONAS' representations indicate that several Ontario government lawyers (also known as Crown counsel) were in attendance at the meeting to provide legal advice. ONAS submits that the communications made during the meeting were between legal advisors and their client.

The appellant submits that the client cannot be anyone other than members of the institution (in this case, ONAS), and the presence of a non-client vitiates the privilege. The appellant states that there "... were allegedly several people in the room, including a member of the Premier's political staff who cannot be construed as a client of the lawyer".

In my view, the "client" of lawyers employed by the Ontario government as Crown counsel is the provincial Crown. Apart from government lawyers, those in attendance at the meeting were:

- Executive Assistants to various Ministers, and to the Premier;
- Parliamentary Assistant to a Minister;
- Executive and another assistant to a Parliamentary Assistant; and/or
- Members of the Ontario Public Service.

It is clear that all these individuals were either employees of the provincial Crown or were present in an official capacity to assist the government in formulating a response to the situation at the Park. In this circumstance, any privilege which might arise in connection with discussions that took place would not be lost because of the presence of these individuals at the meeting. Accordingly, I do not agree with the appellant's submission on this point and I find that item (c) under Part 1 has been satisfied. However, in reaching this conclusion, I do not accept that all communications made during the meeting, as reflected in the record at issue, were between a client and a legal advisor.

With respect to item (d), ONAS submits that the minutes are a record of communications during the meeting that were made and received for purposes relating to the seeking, formulation and giving of legal advice. In this regard, ONAS cites a number of cases to support its view that privilege should be broadly interpreted, and that the entire record is exempt under Branch 1. I will briefly summarize these submissions.

Citing Descoteaux v. Mierzwinski, [1982] 1 S.C.R. 860, ONAS quotes from the judgment of Lamer J., and emphasizes the following passage:

> ... all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys privilege. This confidentiality attaches to all communications made within the framework of the solicitor-client relationship.

ONAS then cites Balabel v. Air India, [1988] 2 W.L.R. 1036 (C.A., England), to support its view that solicitor-client privilege can extend to communications "on a fairly wide range of subjects". ONAS quotes from this decision as follows:

> ... the test is whether the communication or document was made confidentially for the purposes of legal advice. Those purposes have to be construed broadly. Privilege obviously attaches to a document conveying legal advice from solicitor to client and to a specific request from the client for such advice. But it does not follow that all other communications between them lack privilege. In most solicitor and client relationships, especially where a transaction involves protracted dealings, advice may be required or appropriate on matters great or small at various stages. There will be a continuum of communications and meetings between the solicitor and client. ... Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach. A letter from the client containing information may end with such words as "please advise me what I should do". But even if it does not, there will usually be implied in the relationship an expectation that the solicitor will at each stage, whether asked specifically or not, tender appropriate advice. Moreover, legal advice is not confined to telling the client the law; it must include advice as to what should prudently and sensibly be done in the relevant legal context.

ONAS also cites two cases which deal with the issue of minutes of meetings and solicitor-client privilege. The first of these, Nova Scotia Pharmaceutical Society v. R. (1988) 225 A.P.R. 70 (N.S.T.D.), involves the question of solicitor-client privilege and several classes of documents, including minutes of a number of meetings of the Nova Scotia Pharmaceutical Society. ONAS quotes from this decision (at page 73) as follows:

> Not only was the Society's solicitor present as a participant in the discussions but there were also other matters discussed at the meeting having legal implications so as to render impracticable any attempt to sift the legal from nonlegal subject matters.

However, I note that in this same decision, in the portion dealing with minutes, the Court states (at page 73):

> During the hearing I expressed the opinion that of itself the mere presence of the solicitor at the meeting would not spread an umbrella of privilege over all of the proceedings and I anticipated that in some instances it would be appropriate to recognize the claim as to some portions and disallow it as to others. To those previous comments I would add that it is necessary at the same time to bear in mind the dictum cited by Mr. Justice Lamer in the Descoteaux case (supra) that privilege ought not to be "frittered away".

The Court then dealt with the minutes on the basis of these principles. ONAS submits that one set of minutes were found to be privileged despite the fact that "it was not even clear that the

lawyer had attended the meeting". However, the Court indicates that these particular minutes refer to "... legal advice and the opinion of the Society's solicitor".

The second case cited by ONAS which deals with meeting minutes is British Columbia (Minister of the Environment, Lands & Parks) v. British Columbia (Information and Privacy Commissioner of British Columbia) (1995), 16 B.C.L.R. (3d) 64 (B.C.S.C.). This was a case in which the Commissioner had ordered the Ministry to disclose parts of meeting minutes where a solicitor had been in attendance. In particular, ONAS relies on the Court's statement in this case (at page 76) that "[s]everance is not a common law concept in solicitor-client privilege".

In my view, the principle of severance, as expressed in section 10(2) of the Act, does not play a role in determining which parts of a record are subject to solicitor-client privilege, and thus qualify for exemption under Branch 1 of section 19. Section 10(2) merely indicates that parts of a record requested under the Act which are not subject to an exemption are to be disclosed.

The question of what is exempt under Branch 1 must be determined in the context of the law of solicitor-client privilege. A number of court decisions support the view that at common law, solicitor-client privilege may attach to some parts of a document, but not to other parts.

This approach was taken by the Ontario Court (General Division) in Peaker v. Canada Post Corp., [1995] O.J. No. 2282, Court Files Q17571/87 and Q17571/87-1. This case dealt with minutes of a meeting attended by counsel. It was argued before the Court that the "continuum" referred to in the Balabel v. Air India case (cited above) ought to include these minutes in their entirety. However, the Court upheld the Master's finding that certain portions of the minutes were privileged, and others were not. Comments made by the solicitor which were reported in the minutes, and which "do not constitute legal advice", had been ordered disclosed by the Master.

Moreover, the Court in Peaker relied on Descoteaux (referred to above) as authority for the proposition that a document could be edited. In this regard, the Court in Descoteaux stated as follows (at page 894):

> It is alleged in the information laid that the communications made by Ledoux with respect to his financial means are criminal in themselves since they constitute the material element of the crime charged. This is an exception to the principle of confidentiality and these communications are accordingly not protected (this does not mean that we are expressing an opinion as to the validity of the allegations in the information). However, since the allegation concerns only the information dealing with the applicant's financial means, all other information on the form remains confidential.

In Law Society of Upper Canada v. Baker, [1997] O.J. No. 69, Court File 151/96 (Divisional Court), the Court found that a tribunal did not act unreasonably when it applied a "scissors and paste" approach to disclosure of a document of which only part was subject to privilege. The tribunal in that case had ruled that where

> ... part of the LSUC document was protected by solicitor-client privilege but part of the document had "facts" which should be disclosed ..., then a "cutting and pasting or masking job" would be done and the edited version would be given to counsel ...

A similar approach was adopted in Re Sokolov (1968), 70 D.L.R. (2d) 325 (Man. Q.B.). In that case, the Court rejected the view that, where part of a document is privileged, then the whole document will always be privileged, and found that parts of a letter which were not subject to solicitor-client privilege should be disclosed.

Having considered all these authorities, I have concluded that the following principles which flow from them are particularly applicable in the circumstances of this appeal:

- communications between a solicitor and client for the purpose of obtaining legal advice, broadly construed, attract solicitor-client privilege;
- the mere presence of the solicitor at a meeting does not automatically spread an "umbrella of privilege" over all of the proceedings and in some instances it would be appropriate to recognize the claim as to some portions and disallow it as to others;
- in some instances, it is appropriate to edit documents so that the non-privileged parts may be obtained or disclosed; and
- decisions about which parts of meeting minutes attract solicitor-client privilege and which parts do not should be made with great care, so that privilege may be preserved where appropriate, in order to permit frank exchanges between solicitor and client in relation to legal advice.

Turning to the record at issue, I accept that one of the purposes of the meeting was to obtain legal advice. It is equally clear, however, that the meeting had a broader purpose. This purpose involved information sharing, general discussion of what actions might be taken to resolve the issues presented by the occupation of the Park, and the formulation of recommendations in that regard. In my view, the aspect of the meeting relating to obtaining legal advice was a secondary purpose, while the broader objective described in the preceding sentence was the primary purpose of the meeting. Discussions aimed at this broader purpose are not privileged unless they are directly related to seeking, formulating or giving legal advice.

Moreover, in my view, this is a case where it is readily possible to determine which parts of the record relate to legal advice and which do not. The parts of the record which reveal communications directly related to seeking, formulating or giving legal advice, or which would reveal the nature of the advice sought, are subject to solicitor-client privilege.

In its representations, ONAS identifies four passages in the record which "clearly and necessarily pertain to the seeking, formulating and giving of legal advice". I agree that these four passages identified by ONAS, or portions of them, are the parts of the record which reveal communications directly related to seeking, formulating, or giving legal advice. In addition, the contents of one of these passages are repeated on the final page of the record. With two exceptions (one of which is the passage repeated on the final page), I find that these passages are exempt under Branch 1 of section 19.

The two exceptions apply as a result of references made to the subjects contained in the passages of the record by the Attorney General, Charles Harnick, in the Legislature on May 30 and June 4, 1996. In my view, these comments of the Attorney General, who clearly represents the provincial Crown, constitute waiver of the solicitor-client privilege and therefore these parts of the record are not exempt under Branch 1 of section 19. I have identified these passages with marginal notes on the copy of the record which is being sent to ONAS with a copy of this order. I have deliberately not described the subjects and the remarks of the Attorney General in more detail as I feel to do so would reveal the contents of the record.

In summary, I find that the parts of the record which are highlighted in blue on the copy of the record which is being sent to ONAS with this order are exempt under Branch 1 of section 19 of the Act.

In an additional argument under Branch 1, ONAS maintains that the record itself is a communication which was used to convey legal advice to, and seek instructions from, senior government officials and staff. I do not agree. Judging from the contents of the document, my assessment is that its primary purpose was to serve as a record of the discussions which took place at the meeting. Moreover, the only parts of the document which relate to legal advice (except the portions subject to waiver, referred to above) have already been exempted in the preceding analysis.

Branch 2

A record can be exempt under Branch 2 of section 19 regardless of whether the common law criteria relating to Branch 1 are satisfied. Two criteria must be satisfied in order for a record to qualify for exemption under Branch 2:

1. the record must have been prepared by or for Crown counsel; **and**

2. the record must have been prepared for use in giving legal advice, or in contemplation of litigation, or for use in litigation. (Order 210)

With respect to the first requirement, ONAS indicates that the record was prepared by an articling student with its Legal Services Branch. At that time, the Chair of the Committee was the acting Director of the Legal Services Branch at ONAS, and was responsible for supervising the articling student in her preparation of the minutes. ONAS submits that the articling student and the Chair were Crown Counsel at the time the record was created.

With respect to the second requirement, ONAS submits that the record was prepared for use in giving legal advice and in contemplation of litigation. ONAS states that the September 5, 1995 meeting focused on examining and pursuing legal remedies relating to the occupation of the Park, and resulted in the identification of several legal options. ONAS submits that the purpose for the preparation of the record was to provide Crown counsel with information and a factual basis which could be used in giving legal advice or in contemplation of litigation.

In this regard, ONAS refers to the decision of the Divisional Court in Attorney General for Ontario v. Donald Hale, Inquiry Officer (1995), 85 O.A.C. 229 as authority for the proposition

that the phrase "for use in giving legal advice" does not require that the record, or by extension the entire record, contain or reflect legal advice. I agree with this interpretation of the Divisional Court's decision.

In the circumstances of this appeal, I accept that the record was prepared by Crown counsel. However, as indicated above, Branch 2 requires that the purpose for the preparation of the record be "for use in giving legal advice, or in contemplation of litigation, or for use in litigation". As discussed under Branch 1, in my view the purpose for the preparation of the record was to serve as a record of the discussions which took place at the meeting. Moreover, the evidence provided by ONAS is not sufficient to demonstrate that the record was prepared for use in giving legal advice or in contemplation of litigation. Therefore, I find that Branch 2 does not apply.

RIGHT TO A FAIR TRIAL

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.

As I have already found that section 19 applies to certain parts of the record, section 14(1)(f) will be considered in relation to the remaining portions.
ONAS advises that 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. According to ONAS, fifteen charges involving five accused aboriginal people remain outstanding. The outstanding charges include those pertaining to mischief, assault of police officers, weapons offenses, dangerous driving, criminal negligence causing bodily harm and forcible entry. Preliminary hearings were held on December 11 and 23, 1996. An Ontario Provincial Police officer was also charged with criminal negligence causing death. The officer's criminal trial is scheduled to begin on April 1, 1997.

Due to the criminal charges outstanding, ONAS submits that section 14(1)(f) must be considered in light of the Canadian Charter of Rights and Freedoms (the Charter) right in section 11(d) and "... great care must be taken to ensure that disclosure of the information does not in any way impair the fair trial rights of the accused".

In Order P-948 Inquiry Officer John Higgins considered the relationship between section 11(d) of the Charter and section 14(1)(f) of the Act. In this regard, he stated:

> 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 concur with the analysis of Inquiry Officer Higgins, and will apply it in this appeal.

ONAS also cites several court decisions with respect to the interpretation of the words, "could reasonably be expected to". The first of these is Ontario (Workers' Compensation Board v.

Ontario (Assistant Information and Privacy Commissioner) (1995), 23 O.R. (3d) 31 (Ont. Div. Ct.), where the Court refers to (at page 40):

> ... evidence that "disclosure could reasonably be expected to" cause harm which of necessity involves some speculation.

In the same case, the Divisional Court also found that these words do not require "detailed and convincing" evidence.

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

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

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.

ONAS submits that the record represents evidence that confirms the identities of the attendees at the meeting, the background of the occupation of the Park from the government's point of view, the chronology of events, the legal options seen to be available and the next steps which may be taken. It submits that this is the factual material that would likely be heard in the up-coming criminal trials.

According to ONAS, it is self-evident that fair trial rights could be impaired if information directly related to a criminal trial were to be disclosed prior to the trial.

In my view, while the record refers in a general way to the occupation of the Park, and alludes in a very general way to possible criminal offences, it does not contain any information which would have a bearing on the issue to be decided at these trials (namely, whether any of the individuals charged are guilty of the alleged offences). Moreover, I note that this record consists of minutes of a meeting which occurred the day before the shooting which led to the charge against the officer. I am not persuaded that there is a sufficient link between this record and the upcoming trials to justify a conclusion that disclosure of the record, or any part of it, could reasonably be expected to interfere with the rights of these individuals to a fair trial.

As part of its representations on this exemption, ONAS also submits that this record should not be considered in isolation, and that other requests, some of which have already generated appeals, will deal with a greater number of records. ONAS indicates that "the cumulative impact of such a disclosure should also be considered". However, ONAS has not explained how any such "cumulative impact" could reasonably be expected to interfere with any person's right to a fair trial. For this reason, this submission does not substantiate the application of the exemption.

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

ADVICE OR RECOMMENDATIONS

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 records must relate to a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

Based on his knowledge, the appellant states that the meeting was not directed to any course of action, but rather that its purpose was to provide information about the status of events.

ONAS submits that disclosure of certain parts of the record would reveal advice and recommendations of public servants and employees of ONAS and other divisions of the Ontario government. ONAS describes these parts of the record as: (1) all information contained under the heading "Options" and (2) the third bullet point under the heading "Next Steps". As I have already upheld ONAS' application of section 19 to (2), the third bullet point under the heading "Next Steps", it is not necessary for me to consider the application of section 13(1) to this part. My discussion will be limited to the application of this exemption to the information contained under "Options" which I did not find to be exempt under section 19.

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.

ONAS states that one of the primary roles of the Committee was to provide advice and recommendations to the government of Ontario in regard to 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.

I find that section 13(1) applies to all of the remaining information contained under the heading "Options". This information is highlighted in yellow on the copy of the record which is being sent to ONAS with a copy of this order.

PUBLIC INTEREST OVERRIDE

As the public interest override cannot be applied to section 19, I will consider its application to the portions of the record which I have exempted under section 13(1).

Section 23 of the Act 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.

There are two requirements contained in section 23 which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure; and this compelling public interest must **clearly** outweigh the **purpose** of the exemption.

One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern. Accordingly, in my view, there is a basic public interest in knowing more about the operations of government.

"Compelling" is defined as "rousing strong interest or attention" (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the Act's central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has available to it to make effective use of the means of expressing public opinion or making political choices (Order P-984).

The appellant submits that there is an overriding public interest in disclosure as follows:

> The attached publications are merely a sample of the reportage on this long-standing controversy concerning the Native land claim to and occupation of Ipperwash. It is imperative that the public know both the information in the hands of the institution prior to the Ontario Provincial Police actions at Ipperwash and the credibility of public statements made on behalf of the Government of Ontario concerning its role in and knowledge of those subsequent actions.

Included in the appellant's representations is 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 sampling of press coverage raising various issues relating to the events which occurred at the Park.

ONAS submits that even if it is found that there is a compelling public interest in knowing the events that resulted in the death of the individual during the occupation of the Park, it would not be satisfied by the disclosure of this particular record. ONAS argues that allegations of wrongdoings of government officials in relation to the occupation of the Park will be addressed in the upcoming criminal trials and civil suit lodged by the family of the deceased, and that these

are the appropriate forums for these issues. ONAS finally states that the need or perceived need for public debate on an issue does not satisfy the test contained within section 23.

In Order P-984, Inquiry Officer Holly Big Canoe found that a compelling public interest existed amidst allegations that a security risk resulted from the hiring of a particular individual by an institution. In finding that issues of this nature rouse strong interest among members of the public, she stated:

> Whether there actually was a security risk and whether the Ministry's actions were appropriate is not the issue -- it is enough that serious questions have been raised.

In a similar vein, I find that there is a compelling public interest in disclosure of the part of the record which I have found to be exempt under section 13(1). In reaching my 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, including remarks made by the Attorney General in the Legislature on the very subject referred to in the portions of the record found to be exempt under section 13(1), and the comprehensive reporting of events in the news media. In my view, disclosure of the information contained in the part of the record to which section 13(1) applies would serve the purpose of informing the citizenry about the activities of government.

Once a compelling public interest is established, it must be balanced against the purpose of the exemption which has been found to apply. Section 23 recognizes that each of the exemptions listed therein, while serving to protect valid interests, must yield on occasion to the public interest in access to government information. 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.

ONAS submits that government employees need to be able to provide advice and recommendations freely in order to ensure that governments receive the fullest and best advice available. In addition, government employees need to have security in knowing that the advice and recommendations they provide to government will not necessarily be released to the public. With respect to the circumstances of this appeal, ONAS states:

> The Interministerial Committee met on September 5, 1995 to discuss and address the very serious and sensitive issue of the Aboriginal occupation of Ipperwash Provincial Park. Similar groups or committees of government will likely be called upon to meet and address other serious Aboriginal emergency situations as they occur in the future. It is submitted that if government representatives feared that their advice and recommendations to government would become public knowledge, and therefore fall under public scrutiny, government staff would be seriously inhibited from providing full, frank and well thought out advice and recommendations to government decision makers. This would necessarily and undoubtedly result in a serious negative impact on the government's ability to resolve serious Aboriginal emergency situations.

I agree with ONAS' analysis of the purpose behind the section 13(1) exemption. 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, this is one of those occasions.

Accordingly, balancing 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.

ORDER:

1. I uphold ONAS' decision to deny access to the parts of the record which are highlighted in blue on the copy of the record sent to ONAS' Freedom of Information and Protection of Privacy Co-ordinator (Co-ordinator) along with this order.

2. I order ONAS to disclose to the appellant the parts of the record which are **not** highlighted in blue on the copy of the record sent to ONAS' Co-ordinator by **March 25, 1997**. For greater certainty, all parts of the record which are **not** highlighted in blue, **including the parts highlighted in yellow**, are to be disclosed.

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

Original signed by: March 10, 1997
Tom Wright
Commissioner